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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

In re

FOX ORTEGA ENTERPRISES, INC.,  
dba PREMIER CRU,

Debtor.

Case No. 16-40050-WJL

Chapter 7

**MOTION FOR ORDER AUTHORIZING  
BIDDING PROCEDURES AND BREAKUP  
FEE**

Date: August 3, 2016  
Time: 10:30 a.m.  
Place: Courtroom 220  
1300 Clay Street  
Oakland, CA  
Judge: Hon. William J. Lafferty, III

TO: THE HONORABLE WILLIAM J. LAFFERTY, III, UNITED STATES BANKRUPTCY  
JUDGE AT OAKLAND, CALIFORNIA:

Michael G. Kasolas, the duly appointed, qualified and acting chapter 7 trustee ("Trustee") of the above-captioned case, hereby moves the Court, on shortened notice as ordered by the Court on July 27, 2016, from the bench, to enter an order, pursuant to the provisions of Bankruptcy Code Section 363(b) approving the bidding procedures and breakup fees outlined below. This motion only asks for approval of the bidding procedures and the breakup fee. The motion to approve the sale of the wine is scheduled to be heard by the Court on August 30, 2016 at 10:00 a.m. This

1 motion is supported by the Declarations of Tracy Green (“Green Decl.”) ( Docket # 359), Jason  
2 Boland (“Boland Decl.”) (Docket # 359), Michael G. Kasolas (“Kasolas Decl.”) ( Docket # 360)  
3 and Brian Nishi (“Nishi Decl.”) (Docket #359) filed in support of the Motion for Orders (1)  
4 Authorizing Sale of Wine, (2) Authorizing Sale Free and Clear of Liens of Community Bank of The  
5 Bay and Advance Restaurant Finance LLC, and (3) Authorizing Trustee to Make Certain Payments  
6 Related to Redeemed Bottles (Docket # 359).

7 **I. MOTION FOR ORDER AUTHORIZING SALE OF PROPERTY**

8 **A. Background And Terms Of Sale**

9 The Trustee summarizes the background and terms of the sale for informational purposes.

10 1. Fox Ortega Enterprises, Inc., doing business as Premier Cru (“Debtor”), a  
11 wine retailer, ceased operations and filed a voluntary petition for relief under chapter 7 of the  
12 Bankruptcy Code on January 8, 2016 (“Petition Date”). Michael G. Kasolas, the movant herein,  
13 was appointed Trustee to liquidate the assets of the Debtor’s estate.

14 2. On the Petition Date, the estate included approximately 79,000 bottles of  
15 wine at the Debtor’s warehouse premises located at 1011 University Avenue in Berkeley, California  
16 (the “Premises”). Of those bottles, 5,007 bottles of wine, based on the Debtor’s records, have no  
17 sales orders associated with them and the Debtor’s books and records reflect that those wine bottles  
18 are not otherwise “allocated” to any customers (the “Unfettered Bottles”). A true and correct copy  
19 of the list of the Unfettered Bottles is attached as Exhibit A to the Unfettered Sale Agreement,  
20 which is attached as Exhibit B to the Kasolas Decl.

21 3. All of the bottles in the Premises, other than the Unfettered Bottles are  
22 subject to sale and distribution terms set forth in the Stipulation defined below (“Primary Wine  
23 Bottles”). A true and correct copy of the list of the Primary Wine Bottles is attached as Exhibit A to  
24 the Sale Agreement, which is attached as Exhibit A to the Kasolas Decl.

25 4. In an attempt to resolve the dispute over who held title to the wine bottles, the  
26 Trustee filed a motion seeking a title determination of select bottles with specific customers who  
27 had stipulated to a shortened process. Eight customers filed objections, and one of those customers  
28 also commenced a class action. On April 27, 2016, Michael Podolsky filed a class action complaint

1 (the “Complaint”) against the Trustee, initiating an adversary proceeding entitled Michael D.  
2 Podolsky, on behalf of himself and all others similarly situated vs. Michael G. Kasolas, Trustee,  
3 A.P. No. 16-04033 (“Class Action”).

4                 5.         After several Court hearings in which it became clear to all that the legal  
5 issues were complex, and the litigation would be lengthy, the parties to the Complaint agreed to  
6 mediate the dispute. After several weeks of pre-mediation discussions with the mediator, the  
7 Honorable Dennis Montali, and two days of mediation, the parties executed a Stipulation of  
8 Settlement dated May 23, 2106 (“Stipulation”), which authorized the Trustee to sell the remaining  
9 bottles of wine (excluding bottles allocated to class members that opted out of the Class Action and  
10 bottles redeemed pursuant to the terms of the Stipulation), and to distribute the proceeds according  
11 to a specific formula.

12                 6.         The Stipulation was approved by the Bankruptcy Court on July 27, 2016, but  
13 no order has been entered as of this writing.

14                 **B.         Property To Be Sold And Purchase Price**

15                 (i)         The Primary Wine Bottles are subject to that Sale Agreement dated July 21,  
16 2016 (“Sale Agreement”) attached as Exhibit A to the Kasolas Decl. and provides that the Primary  
17 Wine Bottles will be sold for the sum of \$3,200,000, subject to offset for bottles that have been  
18 opted out or redeemed, or that are damaged as set forth in more particularity in the Sale Agreement,  
19 and subject to overbid as discussed herein below.

20                 (ii)        The Unfettered Bottles are subject to that Sale Agreement dated July 21,  
21 2016 (“Unfettered Sale Agreement”), attached as Exhibit B to the Kasolas Decl. and provides that  
22 the Unfettered Wine Bottles will be sold for the sum of \$126,000, subject to offset for damaged  
23 bottles more particularly described in the Unfettered Sale Agreement and subject to overbid.

24                 **C.         Summary of Basic Terms:**

25                 (i)         SWA has paid a deposit in the sum of \$150,000 for the Sale Agreement, and  
26 a deposit in the sum of \$10,000 for the Unfettered Sale Agreement.

27                 (ii)        After the entry of an Order approving the sale, SWA will pay the balance  
28 owed, including any overbid sums, after deducting a credit for any bottle known to be excluded, and

close escrow within seven (7) days. All bottles will be removed by SWA from the Premises within 30 days. SWA will have sixty (60) days to advise the Trustee of any request for a refund for a damaged bottle.

(iii) Both sales are subject to overbid and a breakup fee as set forth hereinbelow.

**D. Sale Procedures**

The Trustee seeks approval of the following sale procedures and breakup fee, which are separately set forth in the Kasolas Decl. as Exhibit C.

**1. Sale of Primary Wine Bottles Pursuant to Sale Agreement:**

- (a) Price: Three Million Two Hundred Thousand Dollars (\$3,200,000);
- (b) Minimum Overbid: One Hundred Fifty Thousand Dollars (\$150,000);
- (c) Overbid Required Deposit: Two Hundred Fifty Thousand Dollars (\$250,000); and
- (d) Subsequent Incremental bids at auction: Twenty-five Thousand Dollars (\$25,000).

**2. Sale of Unfettered Bottles of Wine:**

- (e) Price: One Hundred Twenty-Six Thousand Dollars (\$126,000);
- (f) Minimum Overbid: Ten Thousand Dollars (\$10,000);
- (g) Overbid Required Deposit: Twenty Thousand Dollars (\$20,000); and
- (h) Subsequent Incremental bids at auction: Five Thousand Dollars (\$5,000).

Unless otherwise agreed by the Trustee, any overbid must be presented to the Trustee on or before seven (7) days prior to the hearing on the Trustee's Motion to Approve the Sale of the wine, and be accompanied by a cashier's check made payable to Wendel, Rosen, Black & Dean LLP, or wire transfer said proceeds after contacting Mark Bostick.

The overbid must state who is authorized to communicate with the Trustee and his counsel on behalf of the overbidder.

1                   5.       The overbid must be accompanied by such financial and other information  
2 that will allow the Trustee to make a reasonable determination as to the overbidder's financial and  
3 other capabilities to consummate the sale, and the Trustee will determine in his sole discretion  
4 whether any overbidder is a qualified overbidder ("Qualified Overbidder").

5                   6.       Qualified Overbidders will be given access to the Warehouse to review the  
6 wines for sale.

7                   7.       Any Qualified Overbidder will have to sign a duly authorized and executed  
8 statement that confirms the following:

9                   (a)       that he or she has read the Sale Agreement and/or the Unfettered Sale  
10 Agreement, and unless otherwise agreed by the Trustee, he or she agrees to be bound by all of the  
11 terms of said agreements, except that the overbidder would not be entitled to a breakup fee under  
12 any circumstances, and will execute a sale agreement prior to the hearing that is conditioned on  
13 being an Court approved overbidder;

14                   (b)       he or she understands that the Trustee will consider all overbids,  
15 including those that are in the form of a consignment agreement, and will use his sole discretion to  
16 determine which offer is the best interest of the estate;

17                   (c)       the overbid offer is irrevocable until a Court hearing in which it is  
18 determined that the overbidder is not the Court approved overbidder;

19                   (d)       the overbidder is not entitled to any breakup fee, transaction expense,  
20 expense reimbursement, or any payment related to the overbidder preparation or investigation  
21 related to the overbid;

22                   (e)       proof that the overbidder is authorized by the State of Alcoholic  
23 Beverage Commission and the Federal Bureau of Alcohol, Tobacco and Firearms in all necessary  
24 respect to purchase the wine, and return the Redeemed Bottles to customers;

25                   (f)       acknowledge that the Trustee makes no representations or warranties,  
26 express or implied, and he or she is not relying on any representations made by the Trustee or any  
27 of his agents in deciding to make an overbid; and  
28

(g) The Trustee may adopt additional rules for the bidding process that in his judgment will promote the best result.

8. The bidding will proceed in minimum increments of \$25,000, on the Sale Agreement and \$5,000, on the Unfettered Sale Agreement, but overbidders are free to bid any amount and may bid in the form of a consignment arrangement, subject to the discretion of the Trustee.

#### **E. Breakup Fee**

The Trustee seeks authority to pay SWA a breakup fee in the sum of \$50,000, on the Sale Agreement, and \$5,000, on the Unfettered Sale Agreement if another buyer is determined to have a better offer that is approved by the Court, and SWA is otherwise not in default, as set forth in the Sale Agreement and the Unfettered Sale Agreement.

### **II. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR APPROVAL OF THE BIDDING PROCEDURES AND BREAKUP FEE**

The Trustee has formulated a sales process and a bidding procedure to induce prospective purchasers to expend the time, energy and resources necessary to submit a qualified bid, and which the Trustee believes is fair and reasonable under the circumstances. The proposed procedures, including the proposed breakup fees in the event SWA is not the successful buyer, are reasonable and supported by applicable case law.

Historically, bankruptcy courts have approved bidding incentives, including breakup fees awarded to an initial bidder or “stalking horse,” in the event of a successful overbid. See, e.g., *In re 995 Fifth Ave. Associates, L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (bidding incentives may “be legitimately necessary to convince a ‘white knight’ to enter the bidding by providing some form of compensation for the risks it is undertaking”). See, e.g., *Cottle v. Storer Communication, Inc.*, 849 F.2d 570, 578-79 (11th Cir. 1988); *In re Integrated Resources, Inc.*, 147 B.R. 650 (S.D.N.Y. 1992); *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877, 879 (Bankr. S.D.N.Y. 1990).

In *Calpine Corporation v. O’Brien Environmental Energy, Inc. (In re O’Brien Environmental Energy, Inc.)*, 181 F.3d 527 (3d Cir. 1999), the Third Circuit Court of Appeals held that even though bidding incentives are measured against a business judgment standard in

1 nonbankruptcy transactions, the administrative expense provisions of Section 503(b) of the  
2 Bankruptcy Code govern bidding incentives in the bankruptcy context. Finding no “compelling  
3 justification” for treating an application for breakup fees and expenses under Section 503(b) any  
4 differently from other applications for administrative expenses, the court concluded that “the  
5 determination whether breakup fees or expenses are allowable under §503(b) must be made in  
6 reference to general administrative expense jurisprudence. In other words, the allowability of  
7 breakup fees, like that of other administrative expenses, depends upon the requesting party’s ability  
8 to show that the fees were actually necessary to preserve the value of the estate.” *Id.* at 181 F.3d at  
9 535.

10         In *O’Brien Environmental Energy, supra*, the Third Circuit Court of Appeals identified at  
11 least two circumstances in which bidding incentives may provide actual benefit to the estate,  
12 justifying administrative expense status. First, actual benefit may be found if “assurance of a  
13 breakup fee promoted more competitive bidding, such as by inducing a bid that otherwise would not  
14 have been made and without which bidding would have been limited.” *Id.* at 537. Second, where  
15 the availability of bidding incentives induces a prospective buyer to research the value of the debtor  
16 and submit a bid that serves as a minimum bid on which other bidders can rely, the initial “bidder  
17 may have provided a benefit to the estate by increasing the likelihood that the price at which the  
18 debtor is sold will reflect its true worth.” *Id.* In this case, the agreement to provide for the breakup  
19 fee was critical in persuading SWA to invest the time, effort and expense required in order to  
20 perform its due diligence and agree to enter into the Sale Agreement and Unfettered Sale  
21 Agreement that established the base line for the consideration to be paid for the purchase of the  
22 Wine.

23         Under the “administrative expense” standard enunciated in *O’Brien Environmental Energy*,  
24 as well as the “sound business judgment” standard, the bidding procedures proposed by the Trustee  
25 should be approved as fair and reasonable. The proposed breakup fee on the Sale Agreement is  
26 1.6%, and 4% on the Unfettered Sale Agreement of the value of the sale price. In the opinion of the  
27 Trustee, these amounts are reasonable. See, e.g., *In re AWC Liquidation Corp.*, 1997 WL 33446630  
28 (Bankr.D.Del., Mar 31, 1997) (4% breakup fee allowed); *In re Ernst Home Center, Inc.*, 209 B.R.

1 974, (Bankr.W.D.Wash. 1997) (3% breakup fee allowed); *Integrated Resources, Inc.*, 135 B.R. 746  
2 (S.D. New York 1992) (2% breakup fee allowed).

3 Rejecting a proposed \$4-8 million dollar breakup fee and the business judgment standard  
4 test in *O'Brien Environmental Energy*, the bankruptcy court in *In re America West Airlines, Inc.*,  
5 166 B.R. 908 (Bankr.D.Ariz. 1994), stated that:

6 [T]he standard is not whether a breakup fee is within the business  
7 judgment of the debtor, but whether the transaction will “further the  
8 diverse interests of the debtor, creditors and equity holders, alike.”  
9 The proposed breakup fee must be carefully scrutinized to insure that  
10 the Debtor’s estate is not unduly burdened and that the relative rights  
11 of the parties in interest are protected. The analysis conducted by the  
12 Court must therefore include a determination that all aspects of the  
13 transaction are in the best interests of all concerned. *Id.* at 912.

14 Even under the *America West* “best interest test,” the proposed payment of the breakup fee  
15 in this case is in the best interest of this estate and furthered the diverse interests of the estate by  
16 initiating the bidding process, which will lead to an auction to produce the best results for all.  
17 Furthermore, the proposed breakup fee will not unduly burden this estate given the amounts  
18 requested and the relative rights of the parties in interest will be protected.

19 Therefore, because the procedures and incentives formulated in the proposed sale process,  
20 including the proposed breakup fee, are fair and reasonable, are reasonably calculated to produce  
21 the best and highest offers for the wine, thereby conferring actual benefits upon the estate herein,  
22 and are within the range of incentives customarily approved by courts, they should be approved by  
23 the Court herein.

### 24 **III. CONCLUSION**

25 For the foregoing reasons, the Trustee prays for entry of an order as follows:

- 26 1. Authorizing and approving the Bidding Procedures and Breakup Fees as set forth  
27 herein; and
- 28 2. For such further relief as may be necessary.



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DATED: July 28, 2016

WENDEL, ROSEN, BLACK & DEAN LLP

By:           /s/ Tracy Green            
Tracy Green  
Attorneys for Michael G. Kasolas, Trustee