

1 Mark S. Bostick (Bar No. 111241)
Elizabeth Berke-Dreyfuss (Bar No. 114651)
2 Tracy Green (Bar No. 114876)
WENDEL, ROSEN, BLACK & DEAN LLP
3 1111 Broadway, 24th Floor
Oakland, California 94607-4036
4 Telephone: (510) 834-6600
Fax: (510) 834-1928
5 Email: mbostick@wendel.com;
edreyfuss@wendel.com;
6 tgreen@wendel.com

7 Attorneys for Michael G. Kasolas, Trustee

8

9

UNITED STATES BANKRUPTCY COURT

10

NORTHERN DISTRICT OF CALIFORNIA

11

OAKLAND DIVISION

12

13 In re

Case No. 16-40050-WJL

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

Chapter 7

15

16

Debtor.

**MOTION FOR ORDERS (1) AUTHORIZING
SALE OF WINE, (2) AUTHORIZING SALE
FREE AND CLEAR OF LIENS OF
COMMUNITY BANK OF THE BAY AND
ADVANCE RESTAURANT FINANCE LLC,
AND (3) AUTHORIZING TRUSTEE TO
MAKE CERTAIN PAYMENTS RELATED
TO REDEEMED BOTTLES**

17

18

19

20

Date: August 30, 2016

Time: 10:00 a.m.

21

Place: Courtroom 220
1300 Clay Street
Oakland, CA

22

Judge: Hon. William J. Lafferty, III

23

24

**Lienholders Affected: COMMUNITY BANK
OF THE BAY and ARF FINANCIAL LLC**

25

26

27

28

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

3 Michael G. Kasolas, the duly appointed, qualified and acting chapter 7 trustee (“Trustee”) of
4 the above-captioned case, hereby moves the Court to enter an order, pursuant to the provisions of
5 Bankruptcy Code Section 363(b and Federal Rule of Bankruptcy Procedure 2002(a)(2 and 6004(a),
6 and authorizing and approving the sale of the 73,785 bottles of wine that are the subject of the Class
7 Action for the sum of \$3,200,000, and the 5,007 bottles of unfettered wine for the sum of \$126,000,
8 subject to adjustment, to Spectrum Wine Auctions (“SWA”) as a good faith buyer. The Trustee
9 also requests an order pursuant to Bankruptcy Code § 363(f)(2) and (3), and Federal Rule of
10 Bankruptcy Procedure 6004(c), authorizing sale of the wine free and clear of the liens of
11 Community Bank of the Bay and ARF Financial, LLC, with such liens transferring to the proceeds
12 of sale to the same nature, extent, validity and priority that the liens had against the wine, and asks
13 that Rule 6004(h) be waived. The motion is supported by the Declarations of Michael G. Kasolas
14 (“Kasolas Decl.”), Jason Boland (“Boland Decl.”), Tracy Green (“Green Decl.”), and Brian Nishi
15 (“Nishi Decl.”) filed concurrently herewith.

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

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

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

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

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

5 4. In an attempt to resolve the dispute over who held title to the wine bottles, the
6 Trustee filed a motion seeking a title determination of select bottles with specific customers who
7 had stipulated to a shortened process. Eight customers filed objections, and one of those customers
8 also commenced a class action. On April 27, 2016, Michael Podolsky filed a class action complaint
9 (the “Complaint”) against the Trustee, initiating an adversary proceeding entitled *Michael D.*
10 *Podolsky, on behalf of himself and all others similarly situated vs. Michael G. Kasolas, Trustee,*
11 *A.P. No. 16-04033* (“Class Action”).

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

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

22 **B. Property To Be Sold and Purchase Price**

23 (i) The Primary Wine Bottles are subject to that Sale Agreement dated July 21,
24 2016 (“Sale Agreement”) attached as Exhibit A to the Kasolas Decl. and provides that the Primary
25 Wine Bottles will be sold for the sum of \$3,200,000, subject to offset for bottles that have been
26 opted out or redeemed, or that are damaged as set forth in more particularity in the Sale Agreement,
27 and subject to overbid as discussed herein below. Kasolas Decl. ¶ 3.
28

1 (ii) The Unfettered Bottles are subject to that Sale Agreement dated July 21,
2 2016 (“Unfettered Sale Agreement”), attached as Exhibit B to the Kasolas Decl. and provides that
3 the Unfettered Wine Bottles will be sold for the sum of \$126,000, subject to offset for damaged
4 bottles more particularly described in the Unfettered Sale Agreement and subject to overbid.
5 Kasolas Decl. ¶ 5.

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

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

9 (ii) After the entry of an Order approving the sale, SWA will pay the balance
10 owed, including any overbid sums, after deducting a credit for any bottle known to be excluded, and
11 close escrow within seven (7) days. All bottles will be removed by SWA from the Premises within
12 30 days. SWA will have sixty (60) days to advise the Trustee of any request for a refund for a
13 damaged bottle.

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

15 (iv) Under the terms of the agreements, the initial overbid will exceed the amount
16 of the breakup fee; therefore, there will be sufficient proceeds to pay the breakup fee. Subsequent
17 bidding will be in increments of \$25,000 for the Sale Agreement and \$5,000 for the Unfettered Sale
18 Agreement.

19 **D. Best Interests of Estate**

20 The Trustee believes that the proposed Sale Agreement and Unfettered Sale Agreement are
21 in the best interest of the estate and its creditors. The sales are in the best interest of the estate
22 taking into consideration many factors including, but not limited to sale price, the time it will take to
23 close the sale and receive total payment, the time it will take the buyer to remove the wine from the
24 warehouse, and the Buyers financial resources to close the sales. Kasolas Decl. ¶ 7.

25 The Trustee contacted all of the companies that he could find who purchase wine in these
26 quantities, and also contacted companies who knew such companies to ask about additional referral
27 sources. Kasolas Decl. ¶¶ 8-10. More than 11 companies asked for further information and signed
28 a nondisclosure agreement to obtain detailed information about the wines that were for sale.

1 Thereafter, five of those companies indicated that they were interested in presenting an offer, and
2 the Trustee considered all of the terms of the offers presented. Since the initial stalking horse
3 bidder had to submit a per bottle price list, some of the potential purchasers indicated that they did
4 not have time to submit a bid, but would be interested in overbidding. Kasolas Decl. ¶ 10.

5 After receiving the bids, the Trustee communicated with most of the bidders and asked if
6 they wanted to increase or clarify certain portions of the offers. After thoroughly vetting all of the
7 offers, and speaking to the bidders at length, the Trustee concluded that the Spectrum Wine Auction
8 offer was the best offer to proceed with because it was an all-cash offer, the terms were clear, and
9 the bottles would be removed from the premises the soonest of the leading bids. Kasolas Decl. ¶ 11.

10 The Trustee has been looking for a buyer since the beginning of this case, and increased his
11 efforts in May of 2016, after reaching a settlement in the Class Action, by reaching out to the most
12 interested buyers and setting a deadline for them to submit bids. He extended the deadline for
13 several of those interested in bidding upon their request to insure that he would receive the most
14 number of bids. After receiving the bids, he spent approximately 3 weeks negotiating terms to
15 make sure that the stalking horse bid was the highest and best offer that could be obtained. The
16 Trustee also marketed the unfettered wine separately in the hopes that sale could close earlier.
17 Kasolas Decl. ¶ 12.

18 **E. Good Faith Purchaser Finding**

19 SWA has no relationship with the Debtor, Trustee, his counsel, or the major creditors.
20 Boland Decl. ¶ 2. SWA has no plans to have any relationship with the Debtor's officers, agents, or
21 former employees after the sale, and in fact is located in Southern California. Boland Decl. ¶ 6.
22 SWA did use the services of GlassRatner Advisory and Capital, LLC and CMA Adjustment in
23 connection with these sales, and SWA intends to pay them a percentage of its profits; however, this
24 estate has no agreement to pay them any sum. Boland Decl. ¶ 5. To the best of the Trustee's
25 knowledge, SWA has not colluded with any other bidders, or the Debtor's officers, directors, agents
26 or employees. The Sale Agreement and the Unfettered Sale Agreement were negotiated, proposed
27 and agreed to by the Trustee and SWA without collusion, in good faith and at arm's length.
28

1 Kasolas Decl. ¶ 17; Boland Decl. ¶ 2. Therefore, SWA is a good faith purchaser pursuant to the
2 provisions of Section 363(m) of the Bankruptcy Code.

3 **F. Sale Procedures and Breakup Fee**

4 The Trustee has asked the Court to approve the following sale procedures and breakup fee,
5 and said matter is set for hearing on August 3, 2016. Kasolas Decl. ¶ 16.

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

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

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

- 11 (a) Price: One Hundred Twenty-Six Thousand Dollars (\$126,000);
12 (b) Minimum Overbid: Ten Thousand Dollars (\$10,000);
13 (c) Overbid Required Deposit: Twenty Thousand Dollars (\$20,000); and
14 (d) Subsequent Incremental bids at auction: Five Thousand Dollars (\$5,000).

15 3. Unless otherwise agreed by the Trustee, any overbid must be presented to the
16 Trustee on or before seven (7) days prior to the hearing on the Trustee's Motion to Approve the
17 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.

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

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

24 6. Qualified Overbidders will be given access to the Warehouse to review the wines.

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

27 (a) that he or she has read the Sale Agreement and/or the Unfettered Sale
28 Agreement, and unless otherwise agreed by the Trustee, he or she agrees to be bound by all of the

1 terms of said agreements, except that the overbidder would not be entitled to a breakup fee under
2 any circumstances, and will execute a sale agreement prior to the hearing that is conditioned on
3 being an Court approved overbidder;

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

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

9 (d) the overbidder is not entitled to any breakup fee, transaction expense,
10 expense reimbursement, or any payment related to the overbidder preparation or investigation
11 related to the overbid;

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

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

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

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

23 **9. Breakup Fee**

24 SWA will receive a breakup fee in the sum of \$50,000, on the Sale Agreement or \$5,000, on
25 the Unfettered Sale Agreement if another buyer is determined to have a better offer that is approved
26 by the Court, and SWA is otherwise not in default, as set forth in the Sale Agreement and the
27 Unfettered Sale Agreement.

28

1 **II. MOTION FOR SALE FREE AND CLEAR OF LIENS OF COMMUNITY BANK OF**
2 **THE BAY AND ARF FINANCE, LLC**

3 The Trustee seeks authority to sell the wine free and clear of the liens or interests of
4 Community Bank of the Bay (“CBB”) and ARF Finance, LLC (“ARF”), pursuant to Bankruptcy
5 Code § 363(f)(2) and (3), and Rule 6004(c) of the Federal Rules of Bankruptcy Procedure with their
6 liens to attach to the proceeds.

7 The lien of CBB, according to its Proof of Claim No. 1954, filed herein on May 20, 2016, is
8 based upon a commercial line of credit reflected by loan documents including but not limited to (1)
9 a Promissory Note, dated May 9, 2008, in the principal amount of \$1,250,000; (2) Commercial
10 Security Agreement, dated May 4, 2009; (3) UCC filings on May 4, 2009, July 4, 2011, and
11 November 12, 2013, and (4) Change in Terms Agreement, dated February 25, 2015. CBB contends
12 that the current amount of its outstanding debt is approximately \$1,475,000. In addition to its
13 security interest in the assets of this Estate, CBB has a security interest in the Premises which is
14 owned by an entity other than the Debtor. Between the equity in the Premises that attaches to the
15 CBB lien, and CBB’s security interest in the assets of this estate, CBB has sufficient collateral, and
16 it has consented to the sale of the wine free and clear of its lien pursuant to Section 363(f)(2), with
17 the lien transferring to the estate’s share of the proceeds of sale to the same nature, extent and
18 validity and priority as the lien had against the wine. Green Decl. ¶ 2.

19 The lien of ARF Financial, LLC,¹ according to its Proof of Claim No. 371, filed on January
20 26, 2016, is based upon a Merchant Agreement in the principal amount of \$150,000, dated
21 September 24, 2014. On the Petition Date, the balance owing was \$145,423.04. Accordingly, the
22 price at which the wine is to be sold is greater than the ARF Financial, LLC secured lien, and “sale
23 free and clear” of the ARF Financial, LLC lien is warranted under Bankruptcy Code § 363(f)(3).
24 ARF Financial, LLC has also consented to the sale of the wine “free and clear” of its lien pursuant
25 to Section 363(f)(2) with its lien transferring to the estate’s share of the proceeds of sale to the same
26 nature, extent, validity and priority as the lien had against the wine. Green Decl. ¶ 3.

27 _____
28 ¹ ARF Financial, LLC is the assignee or transferee of Mission Valley Bank.

1 **III. SECTION 363(b) AUTHORIZES THE PROPOSED SALE AND SALE PROCESS**

2 Section 363(b) of the Bankruptcy Code authorizes a trustee to sell property of the estate
3 other than in the ordinary course of business after notice and a hearing. 11 U.S.C. §363(b). The
4 Second Circuit established the leading authority for approving a sale, which is the business
5 judgment test. *In re Lionel*, 722 F.2d 1063 (2nd Cir. 1983). This standard has been adopted by the
6 majority of courts. *In re Gulf States Steel, Inc. of Alabama*, 285 B.R. 497, 514 (N.D. Ala. 2002).
7 “In determining whether to approve a sale proposed by a trustee under [§ 363(b)(1)], courts
8 generally apply a business judgment test. Although the Trustee’s business judgment is to be given
9 “great judicial deference,” the Court must scrutinize whether the Trustee has fulfilled his duty to
10 “maximize the value obtained from a sale, particularly in liquidation cases.” *In re Childers*, 526
11 B.R. 608, 612 (Bankr. D.S.C. 2015). The courts consider the following factors in deciding to
12 approve a sale: (1) any improper or bad faith motive; (2) the sale price is fair and negotiations were
13 at arm’s length; and (3) the trustee has provided adequate and reasonable notice and proper
14 exposure to the market. *In re Gulf States Steel, Inc., supra*, 285 B.R. at 514 (Bankr. N.D. Ala.
15 2002). A trustee’s decision in executing a sale “is entitled to respect and great deference from the
16 court, so long as the burden of giving sound business reasons is met.” *Id.*

17 Here, the Trustee has more than satisfied his “business judgment.” The Trustee must
18 liquidate the Debtor’s wine inventory quickly since the estate is compelled to leave the Premises in
19 November 2016, and liquidation and monetization of the Debtor’s wine inventory is the Trustee’s
20 primary duty under Bankruptcy Code § 704(a)(1). The sale was negotiated at arm’s length and the
21 price is fair, and subject to overbid, the wine was extensively marketed, and notice is adequate.
22 Thus, the sales should be approved.

23 The Trustee believes the price is fair, and was negotiated in an arm’s length transaction
24 between the Trustee and SWA. The Trustee has provided or will provide notice of the proposed
25 sale to all known and potential interested bidders in an attempt to sell the assets at a competitive
26 auction at the sale hearing. In the event of an overbid and auction the estate will have received the
27 highest and best price for the wine. In the absence of any such offers, the consideration to be
28

1 received under the terms of the agreements presented by SWA is reasonable and fair under the
2 circumstances.

3 Accordingly, the Trustee submits that the sales process satisfies the requirements of Section
4 363(b) of the Bankruptcy Code. Therefore, the sale of the wine pursuant to section 363(b) of the
5 Bankruptcy Code is appropriate under the circumstances of this case.

6 **IV. SECTION 363(f) AUTHORIZES THE SALE FREE AND CLEAR OF LIENS AND
7 OTHER CLAIMS**

8 As stated above, the Trustee requests that the Court approve the sale of the wine, free and
9 clear of all liens, claims, encumbrances and other interests of the CBB and ARF Financial, LLC.
10 Such relief is consistent with the provisions of Section 363(f)(3) and (2) in that the Trustee believes
11 that there is sufficient value in all of the collateral and the price of the sale that combined exceeds
12 the value of each of the secured creditors liens, and each of the secured creditors have consented.

13 Section 363(f) provides that debtor in possession may sell property free and clear of any
14 lien, claim or interest of another entity in such property if any of the following circumstances
15 pertain:

- 16 (1) applicable non bankruptcy law permits sale of such property free
and clear of such interest;
- 17 (2) such entity consents;
- 18 (3) such interest is a lien and the price at which such property is sold is
greater than the aggregate value of all liens on such property;
- 19 (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding,
to accept a money satisfaction or such interest.

20 11 U.S.C. §363(f).

21 As indicated by the use of the disjunctive term “or,” satisfaction of any one of the five
22 requirements listed in Section 363(f) is sufficient to permit the sale of assets free and clear of liens,
23 claims, encumbrances, pledges, mortgages, security interests, charges, options and other interests.

24 In this case, CBB and Advance Restaurant Finance, LLC are the only entities holding liens
25 on the wine, and they have consented. Therefore, the Trustee requests that the liens of CBB and
26 Advance Restaurant Finance, LLC be transferred to the Estate’s proceeds of sale to the same nature,
27 extent, validity and priority as their respective liens had against the Property pursuant to Section
28 363(f)(3).

1 **V. MISCELLANEOUS RELIEF**

2 The Trustee received payments from creditors who were eligible to redeem bottles. In
3 addition to paying for the redeemed bottles, the customers were required to include sales tax, if the
4 bottles were to be mailed to an address in the State of California. The Trustee seeks authority to
5 pay all collected sales tax to SWA, who shall pay the taxing authorities. Also, the Trustee seeks
6 authority to refund creditors' deposits who sent funds but were not eligible to redeem bottles.

7 **VI. CONCLUSION**

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

- 9 1. Authorizing and approving the Sale Agreement and the Unfettered Sale Agreement
10 to SWA, or such other qualified third party purchaser that may submit a higher and better bid at the
11 sale hearing;
- 12 2. Authorizing and approving the sale of the wine, free and clear of the security
13 interests, liens, claims, encumbrances or other interests in favor of the Community Bank of the Bay
14 and ARF Financial, LLC, with their respective interests, liens, claims, or other interests attaching to
15 the proceeds of sale in same, nature, extent, validity, and priority as the interests, liens, claims or
16 other interests had against the wine;
- 17 3. Finding SWA to be a good faith purchaser as that term is used pursuant to
18 Bankruptcy Code § 363(m) and entitled to all of the protections afforded by that section;
- 19 4. Authorizing and approving the Bidding Procedures set forth in the Motion, including
20 the breakup fees to SWA in the event that SWA is not the successful bidder at the sale hearing;
- 21 5. Authorizing the Trustee to execute any and all documents reasonably necessary and
22 proper to conclude and effectuate the sale of the primary wine as set forth herein.
- 23 6. Authorizing the Trustee to refund payments to creditors who paid to redeem bottles
24 who were not qualified to redeem bottles.
- 25 7. Authorizing the Trustee to forward taxes collected related to the redeemed bottles to
26 SWA to be paid to the taxing authorities.

27 DATED: July 27, 2016

WENDEL, ROSEN, BLACK & DEAN LLP

28 By: /s/ Tracy Green
Tracy Green