

**In re Fox Ortega Enterprises, Inc., dba Premier Cru, Debtor  
Case No. 16-40050-WJL**

**EXHIBIT B**

**TO**

**DECLARATION OF MICHAEL G. KASOLAS**

## UNFETTERED SALE AGREEMENT

This Unfettered Sale Agreement (“Unfettered Agreement”) is made and entered into as of July 21, 2016, between Spectrum Wine Auctions (“Buyer”), as Buyer, and Michael G. Kasolas, Trustee (“Trustee” or “Seller”) of the chapter 7 bankruptcy estate of Fox Ortega Enterprises, Inc., doing business as Premier Cru, the Debtor (“Debtor”), as Seller, (together the parties to this Agreement are sometimes referred to individually as “Party” and collectively as “Parties”), with reference to the following facts:

### ARTICLE 1 RECITALS

1.1. Pursuant to further Court orders, Seller shall have the authority to sell the Unfettered Wine as hereinafter defined in paragraph 2.1.

1.2. Buyer desires to purchase the Unfettered Wine from Seller and Seller desires to sell the Unfettered Wine to Buyer on the terms and conditions set forth herein.

1.3. On January 8, 2016, the Debtor filed a Chapter 7 Bankruptcy in the United States Bankruptcy Court for the Northern District of California, Oakland Division, Case No. 16-40050 (the “Estate”), and thereafter, the Trustee was appointed.

1.4. On April 27, 2016, Michael Podolsky filed a class action complaint (the “Complaint”) against the Trustee, initiating an adversary proceeding entitled *Michael D. Podolsky, on behalf of himself and all others similarly situated vs. Michael G. Kasolas, Trustee*, A.P. No. 16-04033 (“Class Action”).

1.5. By that Stipulation of Settlement dated May 23, 2016 (“Stipulation”), between the Class Action and the Trustee, the members of the Class Action and the Trustee agree that the Trustee may sell all of the Unfettered Wine, except as otherwise set forth herein. The Stipulation is subject to Bankruptcy Court Approval. The Trustee filed a *Notice of Opportunity for Hearing on Trustee’s Motion for Order Approving Compromise with Michael Podolsky, Class Representative of Parties Claiming Ownership Rights in Wine Held by the Trustee* on June 10, 2016, and a hearing to approve the compromise is set for July 27, 2016.

NOW, THEREFORE, IN CONSIDERATION of the foregoing and the mutual covenants and agreements herein set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Buyer agree as follows:

### ARTICLE 2 INCLUDED PROPERTY

2.1. Sale of Property. Seller hereby agrees to sell and convey to Buyer, and Buyer hereby agrees to purchase from Seller, subject to the terms and conditions set forth herein, all of Seller’s right, title and interest in and to the unfettered bottles of wine located at the Debtor’s

former business premises, 1011 University Avenue, Berkeley, California ("Warehouse"), the bottles of wine are more particularly described on the Premier Cru Unfettered Wine Inventory For Buyers ("Unfettered Wine") as set forth in Exhibit A attached hereto. The Unfettered Wine does not include Excluded Property as defined below. If bottles of wine are found in the Warehouse which were inadvertently omitted from the Unfettered List of Wines, the Parties will negotiate a reasonable price for said bottles, and if no agreement can be reached, the bottles will be left at the Warehouse. The Seller is not aware that there are any such bottles, but includes this provision as a matter of caution.

**2.2. Acceptance of Unfettered Wine "As-Is".** Buyer acknowledges and agrees that, except as otherwise provided in this Agreement, Buyer is purchasing the Unfettered Wine on an "As Is, Where Is" basis, with all faults, latent and patent. Without limiting the generality of the foregoing, Buyer acknowledges and agrees that Seller has not made, is not hereby making, and Seller hereby expressly disclaims and negates any representations or warranties of any kind whatsoever, either express or implied, except those expressly contained in paragraph 9.1.2 of this Agreement, on which Buyer is relying as to any matters concerning the Unfettered Wine.

### **ARTICLE 3 EXCLUDED PROPERTY**

3.1. Bottles of wine which are subject to the Class Action settlement, and which have not been designated by the Trustee as "unfettered" are not part of this Agreement.

3.2. Bottles which are set forth in the Unfettered List of Wines but are not located, physically broken, are past their drinking window such that they could not be sold, are missing labels, vintage tags, or capsules, or have low bottle fills below ninety-five percent (95%) of the volume of wine, wine seepage, capsule corrosion, or cork depressions or protrusions, or do not appear to be authentic (collectively the "Negative Bottles") may be excluded and the value or partial value subtracted from the Purchase Price. Buyer will do its best to review the wines as they are packed for shipment and leave Negative Bottles in the Warehouse. Bottles which appear to be unsellable for the reasons stated herein that are observed during packing and before shipping will be set aside in the Warehouse for review, and the Trustee will be provided with a written explanation as to why they are being rejected. Bottles which are sellable, but at a reduced price due to the condition of the bottle, will be set aside for inspection by the Trustee and a reduced price agreed upon. Once bottles have left the Warehouse, there will be no reduction for damaged labels. No refund will be provided for any damage that occurs during packing, shipping, transit, unloading, or any occurrence once in Buyer's possession. Buyer will have sixty (60) days from the Closing to request a refund. If such damage is observed once the bottles are in Buyer's warehouse, Buyer will photograph each bottle excluded from the sale and provide a written explanation as to why it is being excluded. All Negative Bottles will be set aside for the Trustee's inspection for a period of thirty (30) days after Buyer makes its last request for a refund, or longer if the Trustee notifies Buyer that he disputes the request for a refund with respect to a specifically named bottle. At the Trustee's direction, Buyer will package said bottles and deliver them as directed by Seller, Seller to pay reasonable packing and

shipping costs. If there is a dispute as to whether Buyer is entitled to a refund for any Negative Bottle, the Parties will use their best efforts to reach a reasonable resolution.

3.3. The property subject to this Agreement only includes the Unfettered Wine and the sale does not include any intellectual property, trade names, customer lists or emails, software, hardware, racking, or other personal property.

#### **ARTICLE 4 PURCHASE PRICE**

4.1. Purchase Price. The total purchase price for the Unfettered Wine shall be the sum of one hundred and twenty six dollars (\$126,000) ("Purchase Price") based on the itemized per bottle price as set forth in the Price List dated July 20, 2016

4.2. Payment of Purchase Price. The Purchase Price shall be paid as follows:

4.2.1 Deposit. Upon execution of this Agreement, Buyer shall deposit the sum of five thousand (\$10,000.00) with counsel for the Trustee, Wendel, Rosen, Black & Dean LLP ("Deposit Holder"), by wire transfer or cashiers' check (the "Deposit"). In the event the sale of the Unfettered Wine as contemplated hereunder is consummated, the Deposit shall be credited towards the Purchase Price. In the event the sale of the Unfettered Wine is not consummated because of the failure of any condition or any other reason other than a default under this Agreement on the part of Buyer, the Deposit shall be returned to Buyer. The Deposit shall not accrue interest.

4.2.2 Balance of Purchase Price. The Purchase Price less the sum of the Deposit (the "Purchase Price Balance"), plus any sums added at an overbid hearing shall be paid to Seller by Buyer in immediately available funds at the Closing as provided in Paragraph 8.4.1 below.

4.3. Buyer shall be responsible for moving the wine to its warehouse, and shall use refrigerated trucks. Buyer is responsible for and will handle all packing, logistics and transit responsibility and expenses. Buyer will provide proof of sufficient workers' compensation insurance, liability insurance, and commercial automobile/truck insurance and shall insure the wine in transit for the sum of at least the Purchase Price (including overbid amounts).

#### **ARTICLE 5 TITLE TO UNFETTERED WINE**

5.1. At Closing as described in Paragraph 8.3 below, Seller shall transfer all of his rights, title and interest in and to any and all of the Unfettered Wine, by duly executed Bill of Sale in substantially the form of **Exhibit B** attached hereto ("Bill of Sale").

**ARTICLE 6  
FINANCIAL PROOF OF ABILITY**

6.1. Financial Proof of Ability to Perform. Prior to the filing of a motion to approve the sale to Buyer and no later than five (5) days after the execution of this Agreement, Buyer shall provide Seller such financial and other information that will allow the Seller to make a reasonable determination as to the Buyer's financial and other capabilities to consummate the transaction contemplated by this Agreement. Seller may terminate this Agreement at his sole discretion if it does not appear that Buyer is qualified to perform this Agreement.

**ARTICLE 7  
MOTION FOR APPROVAL AND OVERBID PROCEDURES AND BREAKUP FEE**

7.1. Motion for Approval. This Agreement is subject to Bankruptcy Court approval. As soon as possible after the execution of this Agreement, Seller shall file a motion seeking an order from the Bankruptcy Court pursuant to Bankruptcy Code § 363(b) and 363(f), approving the sale of the Unfettered Wine free and clear of all liens, claims, interests and encumbrances ("Sale Motion"). The order to be sought shall be in form and substance reasonably acceptable to Buyer and Seller ("Sale Order"). The Sale Motion shall request a waiver of the 14-day stay provided by Fed. R. Bank. P. 6004(h).

7.2. Good Faith Buyer. The Trustee will request that said Sale Order contain a provision that Buyer or such other purchaser as a result of an overbid is a "good faith purchaser" pursuant to Bankruptcy Code § 363(m), but Buyer is responsible for timely providing sufficient evidence to the Trustee to submit to the Court. This sale is not conditioned on the Court agreeing that the Buyer is a good faith purchaser.

7.3. This Sale is Subject to Overbid and Breakup Fee.

7.3.1 Unless otherwise agreed by Seller, any interested overbidder must submit an overbid to the Seller for the purchase of the Unfettered Wine seven (7) days prior to the hearing on the Seller's Sale Motion;

(a) Any overbid must be accompanied by such financial and other information that will allow the Seller to make a reasonable determination as to the overbidder's financial and other capabilities to consummate the transaction contemplated by this Agreement;

(b) Any overbid must be for an amount which is at least ten thousand dollars (\$10,000.00) over the Purchase Price and must be accompanied by a deposit in the sum of twenty thousand dollars (\$20,000.00), which will be refunded if the overbidder is not the Court approved successful overbidder;

(c) Subsequent overbids must thereafter be in increments of no less than five thousand dollars (\$5,000.00).

(d) The amount of any overbid in excess of the \$126,000 Purchase Price, after deducting the breakup fee, will be deemed a "Premium". The Premium will be allocated to the price of each Negative Bottle based on the percentage that the Premium is of the Purchase Price. Thus, for example, if the Premium is \$31,500 then the percentage increase would be 25 percent per bottle because \$31,500 is 25 percent of the \$126,000 Purchase Price.

(e) **Breakup Fee.** In the event the Court approves a final bid from an entity other than Buyer after an overbidding auction, Buyer shall be entitled to a breakup fee in the sum of fifty thousand dollars (\$5,000.00), which fee will be paid when the Trustee determines that he has obtained sufficient sale proceeds to make such payment.

7.3.2 The Seller in his sole discretion shall determine whether a bid is a qualified overbid and whether a bidder is qualified to overbid. Should the Seller determine that he has received one or more qualified overbids, the Seller shall notify the Buyer, and all qualified overbidders that an auction will be held at the date and time of the hearing on the Seller's Sale Motion at the United States Bankruptcy Court for the Northern District of California, Oakland Division, 1300 Clay Street, Courtroom 220, Oakland, California, the Honorable William J. Lafferty, presiding.

7.3.3 In the event that: (1) the Bankruptcy Court approves a sale offer of a purchaser other than Buyer (an "Overbidder"); (2) such sale to an Overbidder closes; and (3) Buyer shall have performed all of Buyer's obligations under this Agreement, (i) the Deposit shall be returned to Buyer; and (iii) neither of the Parties hereto shall have any further rights or obligations.

7.4. This Agreement is subject to Bankruptcy Court approval, and is conditioned on the Bankruptcy Court approving the Stipulation for Settlement between the Trustee and the Class Action.

7.5. If an overbid is presented, the Trustee may consider all overbids, including an overbid which is a consignment sale, and will use his sole discretion to determine in his best business judgment which offer is in the best interest of the Estate.

## **ARTICLE 8 CLOSING**

8.1. **Closing Date.** The closing hereunder (the "Closing") shall take place seven (7) days after entry of the Sale Order issued by the bankruptcy court confirming the sale to Buyer (the "Closing Date"), unless otherwise agreed to in writing by the Parties. It is agreed that if either party has complied with the terms and conditions of this Agreement as of the Closing Date and the other party is not in a position to close, the party not in a position to close shall be in material breach of this Agreement and this Agreement may be terminated by the non-defaulting party, provided, however, the defaulting party shall have five (5) business days to cure such default from written notice to perform/default from the non-defaulting party.

8.2. **Closing Location.** Closing and delivery shall be at the Warehouse.

8.3. Delivery by Seller.

8.3.1 A final Bankruptcy Court order authorizing and approving the Agreement.

8.3.2 A duly executed Bill of Sale.

8.3.3 Seller will use his best effort to provide Buyer with purchase and provenance documentation for the Unfettered Wine, if requested, but Seller makes no representations or warranties as to any documentation that may be presented, or whether he has provenance for all bottles being sold.

8.3.4 Seller will make the Warehouse available for Buyer to pick up and deliver wines to its facility and to customers whose wine was redeemed.

8.3.5 Seller may inspect all bottles leaving the Warehouse.

8.3.6 Seller will make reasonable efforts to either obtain insurance for Buyer at Buyer's expense or take steps as are reasonable to assist Buyer in obtaining insurance for the bottles between the time escrow closes and the bottles are shipped by Buyer.

8.4. Delivery by Buyer.

8.4.1 The balance of the Purchase Price and any sums agreed to pursuant to an accepted and Court approved overbid.

**ARTICLE 9  
REPRESENTATIONS AND WARRANTIES**

9.1. Seller's Representations and Warranties. As a material inducement to Buyer to enter into this Agreement, Seller hereby represents and warrants to and agrees with Buyer as follows:

9.1.1 Seller is the Chapter 7 Trustee of the Estate of Fox Ortega, Inc., Case No. 16-40050 (WJL).

9.1.2 Seller represents that all wines have been properly stored since they have been in Seller's control and to the best of Seller's knowledge are in a condition suitable for resale and are genuine.

9.1.3 To Seller's actual knowledge, without investigation, there are no actions, suits, proceedings, judgments, orders, decrees, defaults, delinquencies or deficiencies pending, outstanding or threatened against Seller or the Unfettered Wine which would materially and adversely affect Seller's ability to perform its obligations under the Agreement or the documents to be executed in connection, other than the action pending *Michael D. Podolsky v. Michael G. Kasolas*, Trustee, Adversary Proceeding No. 16-04033, pending before the United States Bankruptcy Court for the Northern District of California, Judge William J. Lafferty Presiding, which does not directly impact the sale of the Unfettered Wine.

9.2. Buyer's Representations and Warranties. As a material inducement to Seller to enter into this Agreement, Buyer hereby represents and warrants to and agrees with Seller as follows:

9.2.1 Buyer warrants it is licensed by the State of California Alcoholic Beverage Commission and the Federal Bureau of Alcohol, Tobacco and Firearms in all necessary respects to purchase and sell wine and to deliver the Redeemed Bottles to customers.

9.2.2 This Agreement and all documents executed by Buyer which are to be delivered to Seller at or prior to the Closing are or at the time of Closing will be duly authorized, executed, and delivered by Buyer, are or at the time of Closing, will be legal, valid and binding obligations of Buyer enforceable in accordance with their terms, and do not and at the time of Closing will not violate any provisions of any agreement or judicial order to which Buyer is a party or to which Buyer is subject.

9.2.3 To Buyer's actual knowledge, there are no actions, suits, proceedings, judgments, orders, decrees, defaults, delinquencies or deficiencies pending, outstanding or threatened against Buyer which would materially and adversely affect Buyer's ability to perform its obligations under the Agreement or the documents to be executed in connection herewith.

9.2.4 Buyer has the financial ability to perform the contract.

9.2.5 Buyer has the requisite authority to execute this Agreement, and to close this sale.

## **ARTICLE 10 DISTRIBUTION OF BOTTLES**

### 10.1. After Closing.

10.1.1 As soon as practical after Closing, Buyer shall send sufficient personnel and employees to the Warehouse and begin pulling, packing and removing the Unfettered Wine and will remove it within thirty (30) days under Seller's supervision.

10.1.2 Buyer will be given a refund for the Negative Bottles as set forth in Paragraph 3.4.

10.1.3 In the event Buyer does not remove the Unfettered Wine within thirty (30) days after Closing, Buyer shall be responsible for preservation of the Unfettered Wine and related expenses, including, but not limited to, rent, utilities and security.

## **ARTICLE 11 MISCELLANEOUS**

11.1. Notices. Any notice or other communication required or permitted to be given under this Agreement related to a default or a Negative Bottle shall be in writing and sent by



electronic mail and followed by United States mail, registered or certified mail, postage prepaid, return receipt requested, or by facsimile, or by personal delivery (by overnight courier or otherwise), and addressed as set forth below. If applicable, the date of the electronic mail shall control:

If to Seller: Michael G. Kasolas, Trustee  
P.O. Box 26650  
San Francisco, CA 94126  
Email: [trustee@kasolas.net](mailto:trustee@kasolas.net)

With a copy to: Mark S. Bostick, Esq.  
Wendel, Rosen, Black & Dean LLP  
1111 Broadway, 24<sup>th</sup> Floor  
Oakland, CA 94607  
Email: [mbostick@wendel.com](mailto:mbostick@wendel.com)

If to Buyer: Jason Boland, President  
Spectrum Wine Auctions  
14201 Chambers Road  
Tustin, CA 92780  
Email: [JBoland@spectrumwine.com](mailto:JBoland@spectrumwine.com)

With a copy to: Molly Froshauer  
CMA Adjustments  
111 North Maryland Ave., Ste. 300  
Glendale, CA 91206  
Email: [Molly@CMAadjustments.com](mailto:Molly@CMAadjustments.com)

or such other address as either party may from time to time specify in writing to the other in the manner aforesaid. If sent by facsimile or personally delivered (by overnight courier or otherwise), such notices or other communications shall be deemed delivered upon delivery. If sent by United States mail, registered or certified mail, postage prepaid, return receipt requested, such notices or other communications shall be deemed delivered upon delivery or refusal to accept delivery as indicated on the return receipt.

11.2. Brokers and Finders. Buyer represents and warrants that it shall not seek compensation from the Estate for any obligation to any third party for the payment of any broker's fee, finder's fee, commission or other similar compensation. Buyer has agreed to pay a fee to CMA Adjustments and Glass Ratner Advisory and Capital Management, LLC. In the event of a claim for broker's fee, finder's fee, commission or other similar compensation in connection herewith from Seller, Buyer, if such claim is based upon any agreement alleged to have been made by Buyer, hereby agrees to indemnify and hold Seller harmless from and against any and all liability, loss, cost, damage and/or expense (including, without limitation, reasonable attorneys' fees and expenses) which Seller may sustain or incur by reason of such claim. Seller has not agreed to pay any broker or finder commission to any party, and has not obtained Court

authority for any such payment and will not seek such authority. This Section shall survive the execution and delivery (or termination) of this Agreement.

11.3. Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the Parties hereto and their respective successors, heirs, administrators and assigns, except that neither Buyer's nor Seller's interests under this Agreement may be assigned, encumbered or otherwise transferred whether voluntarily, involuntarily, by operation of law or otherwise, without the prior written consent of the other party.

11.4. Amendments. This Agreement may be amended or modified only by a written instrument executed by all of the parties hereto.

11.5. Continuation and Survival of Representations and Warranties. All representations and warranties by the respective parties contained herein or made in writing pursuant to this Agreement are intended to and shall remain true and correct as of the time of Closing, shall be deemed to be material, and shall survive the execution and delivery of this Agreement, the delivery of the Bill of Sale and transfer of title for a period of three (3) months following the Closing Date. Any claim, if any, by Buyer or Seller for the breach of any representation or warranty hereunder by the other party must be made in writing, if at all, on or prior to the date which is three (3) months following the Closing Date or such claims shall thereafter be forever barred and any such claim timely made in accordance herewith shall survive notwithstanding the fact that the representations and warranties which are the subject of such claim do not survive beyond the three (3) month period following the Closing Date.

11.6. Interpretation. Whenever used herein, the term "including" shall be deemed to be followed by the words "without limitation." Words used in the singular number shall include the plural, and vice-versa, and any gender shall be deemed to include each other gender. The captions and headings of the Articles and Sections of this Agreement are for convenience of reference only, and shall not be deemed to define or limit the provisions hereof.

11.7. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California, with venue in the Bankruptcy Court (as defined above). The Bankruptcy Court for the Northern District of California will retain jurisdiction to enforce the terms of this Agreement.

11.8. Merger of Prior Agreements. This Agreement, including the exhibits hereto, constitutes the entire agreement between the parties with respect to the transaction contemplated hereby and supersedes all prior agreements and understandings between the parties hereto relating to the subject matter hereof.

11.9. Attorneys' Fees. In the event either Buyer or Seller brings any suit or other proceeding with respect to the subject matter or enforcement of this Agreement, the prevailing party (as determined by the court, agency, or other authority before which such suit or proceeding is commenced) shall, in addition to such other relief as may be awarded, be entitled to recover reasonable attorneys' fees, expenses and costs of investigation (including, without limitation, reasonable attorneys' fees, expenses and costs of investigation incurred in appellate

proceedings, costs incurred in establishing the right to indemnification, or in any action or participation in, or in connection with, any case or proceeding under Chapter 7, 11, or 13 of the Bankruptcy Code, 11 United States Code Sections 101 et seq., or any successor statutes) not to exceed \$30,000 thousand dollars (\$30,000.00). Each party is to pay their own legal fees and expenses incurred in connection with the negotiation, preparation, execution, and delivery of this Agreement, and any and all agreements, including due diligence and expenses incurred at and after Closing.

11.10. Time of the Essence. Time is of the essence of this Agreement.

11.11. Election of Remedies. Except as otherwise provided in this Agreement, no right or remedy conferred upon Buyer or Seller in this Agreement is intended to be exclusive of any other right or remedy contained herein or now or hereafter available to Buyer or Seller at law or in equity, and every such right and remedy shall be cumulative and shall be in addition to every other right or remedy contained in this Agreement or now or hereafter available to Buyer or Seller at law or in equity.

11.12. Authority. The parties signing below represent and warrant that they have the requisite authority to bind the entities on whose behalf they are signing.

11.13. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute one and the same instrument.

11.14. No Third Parties Benefited. This Agreement is made and entered into for the benefit of Seller and Buyer, their successors and permitted assigns, and no other person or entity shall have any rights hereunder.

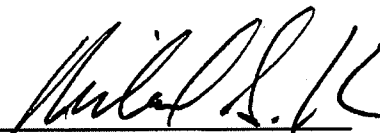
11.15. Severability. The invalidity or unenforceability of any one or more of the provisions of this Agreement shall not affect the validity or enforceability of any of the other provisions of this Agreement.

11.16. Exhibits and Schedules. The exhibits and schedules attached hereto are hereby incorporated by reference herein.

Spectrum Wine Auctions



Jason Boland, President  
BUYER



Michael G. Kasolas, Trustee  
Fox Ortega, Inc. dba Premier Cru  
SELLER