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The following constitutes the order of the court.  
Signed September 2, 2016

  
William J. Lafferty, III  
U.S. Bankruptcy Judge

Attorneys for Michael G. Kasolas, Trustee

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

**ORDER AUTHORIZING AND APPROVING  
SALE OF WINE FREE AND CLEAR OF  
LIENS**

Date: August 30, 2016  
Time: 10:00 a.m.  
Place: Courtroom 220  
1300 Clay Street  
Oakland, CA  
Judge: The Hon. William J. Lafferty, III

A hearing on the Trustee's 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 (Docket No. 359) ("Motion"), in the above-captioned Chapter 7 bankruptcy case of Fox Ortega Enterprises, Inc., dba Premier Cru ("Debtor") filed by Michael G. Kasolas ("Trustee") was held before this Court on August 30, 2016, at 10:00 a.m.; appearances were as noted on the record. Having considered the Motion and all related pleadings, any opposition thereto, and the arguments of counsel,

1 THE COURT FINDS THAT:

2 A. Notice of the Motion was proper and adequate.

3 B. The Motion was properly before the Court as a result of the Stipulation for  
4 Settlement (“Stipulation”) and order approving the Stipulation (Docket No. 365) in connection with  
5 that class action entitled *Michael D. Podolsky, on behalf of himself and all others similarly situated*  
6 *vs. Michael G. Kasolas, Trustee*, A.P. No. 16-04033 (“Class Action”).

7 C. The buyer Spectrum Wine Auctions (“Spectrum”) has acted in good faith and is  
8 entitled to the protections of Section 363(m) of the Bankruptcy Code.

9 D. The backup bidder Cellar Trading, LLC (“Cellar”) has acted in good faith and is  
10 entitled to the protections of Section 363(m) of the Bankruptcy Code should the backup offer close.

11 E. The Court has considered the objection filed by Amjad Munim, M.D. Ph.D. and for  
12 the reasons stated on the record, the objection is overruled. The Court notes for the record that the  
13 objection filed by Dr. Malik M. Hasan was withdrawn after the hearing.

14 F. Based on the foregoing and the findings and conclusions stated orally in the record,  
15 and good cause appearing therefore,

16 IT IS ORDERED THAT:

17 1. The Notice of the Motion and the Motion are approved as proper and adequate under  
18 the circumstances.

19 2. The Motion is granted and the sale to Spectrum is approved as the highest and best  
20 offer.

21 3. The Trustee’s sale of the Primary Wine Bottles<sup>1</sup> to Spectrum for the purchase price  
22 of \$3,550,000, is confirmed and approved in accordance with the terms and conditions that are set  
23 forth in the Second Amended Sale Agreement, which is attached hereto as **Exhibit A** (without  
24 exhibits).

25 4. The Trustee’s sale of the Unfettered Wine Bottles to Spectrum for the purchase  
26 price of \$126,000 is confirmed and approved in accordance with the terms and conditions that are

27 \_\_\_\_\_  
28 <sup>1</sup> All Capitalized terms used herein are as defined in the Motion.

1 set forth in the Second Amended Unfettered Sale Agreement, which is attached hereto as  
2 **Exhibit B** (without exhibits).

3 5. The Second Amended Sale Agreement and the Second Amended Unfettered Sale  
4 Agreement are collectively referred to as the “Agreements”.

5 6. Cellars’ bids are approved as a back-up bid in the sum of \$3,451,000, on the Primary  
6 Wine Bottles, and \$136,000, for the Unfettered Bottles, conditioned on its being the backup bid  
7 under both Agreements. Cellar will be deemed the winning bid and the Trustee is authorized to sell  
8 the Primary Wine Bottles and Unfettered Bottles to Cellar pursuant to the terms and conditions set  
9 forth in the Agreements in the event Spectrum fails to perform by failing to deliver the balance of  
10 the proceeds necessary to close the sale within seven days of the entry of this Order, or such other  
11 date as agreed to by the Trustee in writing.

12 7. If Cellar becomes the winning bid all references in this Order to Spectrum shall be  
13 deemed substituted with Cellar for purposes of all paragraphs commencing with paragraph 8 of this  
14 Order.

15 8. Pursuant to Section 363(f) of the Bankruptcy Code, effective upon closing, the sale  
16 of the Primary Wine Bottles and Unfettered Bottles all right, title and interest in the Primary Wine  
17 Bottles and Unfettered Bottles will vest in Spectrum, free and clear of the liens, claims or interests  
18 of Community Bank of the Bay and ARF Financial, LLC, assignee of Mission Valley Bank  
19 (collectively, the “Affected Interests”):

20 9. The Affected Interests shall attach to the Bankruptcy Estate’s share of the proceeds  
21 set forth in Paragraphs 18(a)(i), (b)(i), (c)(i), (d)(i) and (e) of the Stipulation. To the extent the  
22 Affected Interests attach to the estate’s share of the proceeds, it shall be with the same force, effect,  
23 validity and priority that previously existed at the commencement of this case.

24 10. The Affected Interests will not attach to the proceeds of sale that are to be distributed  
25 to Class Members or to Class Counsel as described in Paragraphs 18(a)(ii), (b)(ii), (c)(ii), (d)(ii),  
26 (d)(iii) and 20 of the Stipulation.

27 11. This Order is and shall be effective as a determination that, upon and subject to the  
28 occurrence of the closing of the sale, all Affected Interests have been and hereby are adjudged and

1 declared to be unconditionally released as to the Primary Wine Bottles and Unfettered Bottles.

2 12. Pursuant to the Stipulation the Primary Wine Bottles and the Unfettered Bottles are  
3 sold by the Trustee to Spectrum free and clear of any Class Members' interests.

4 13. The Class Members shall have no rights or interests in the proceeds of the sales  
5 except as set forth in the Stipulation.

6 14. Spectrum has not assumed any liabilities of the Debtor.

7 15. The Trustee is authorized to execute documents necessary or appropriate to  
8 effectuate or consummate the sale.

9 16. The Trustee is authorized to reduce the sale price to reflect the removal of the Opt  
10 Out and Redeemed Bottles pursuant to the terms of the Agreements.

11 17. The Trustee is authorized to make the following disbursements on or after the  
12 closing of the sales as required by the Second Amended Sale Agreement or Second Amended  
13 Unfettered Sale Agreement, or the Stipulation, including, but not limited to:

14 (a) The Trustee's Administrative Costs as provided in Paragraph 16 of the  
15 Stipulation, subject to further Court order.

16 (b) The Disposition of the Sale Proceeds into the Subfunds as provided by  
17 Paragraph 17 of the Stipulation.

18 (c) The Dispositions of the Subfunds as provided by Paragraph 18 of the  
19 Stipulation, subject to further Court order.

20 (d) The transfer of sales tax to Spectrum collected by the Trustee in connection  
21 with the Segregated Wine Holders who redeemed bottles for purposes of transferring the taxes to  
22 the taxing authorities; and

23 (e) Refund deposits sent to the Trustee by parties who were not entitled to  
24 redeem bottles of wine.

25 (f) Refund all deposits by potential buyers who were not determined to be the  
26 successful bidder at this hearing.

27 (g) Refund payments to Spectrum for rejected Bad Bottles and Excluded Bottles  
28 as defined in the Agreements.

18. The Trustee will provide a summary of all costs in Paragraph 17(a) above to the Class Counsel and Affected Interest holders by the 20<sup>th</sup> of the month following the removal of all the inventory from the Warehouse.

19. The following Class Members have effectively and timely redeemed certain bottles of wine and have paid the related sales tax. Upon payment of the shipping and handling fees as provided in the Stipulation, the Trustee is authorized to cause their bottles to be shipped.

Name	Quantity	Amount Paid	California Sales Tax <sup>2</sup>	Individual Totals
Lynn Cadwalader	8	\$181.99	\$17.29	\$199.28
David Jacobi	18	\$115.16	\$10.94	\$126.10
William Witte	140	\$3,499.75	\$332.48	\$3,832.23
Jeff Greenfield	53	\$288.12	\$27.37	\$315.49
Darryl K. Itow	9	\$61.18	\$5.81	\$66.99
Richard Schmidt	687	\$5,280.99	\$501.69	\$5,782.68
Michael Castro	12	\$119.98	\$11.40	\$131.38
Walter Baumgartner	4	\$37.60	\$3.57	\$41.17
<b>TOTAL</b>	<b>931</b>	<b>\$9,584.77</b>	<b>\$910.55</b>	<b>\$10,495.32</b>

20. The bottles Allocated to the following Class Members who opted out of the Class Action are not part of the sale: Ross Bott and Malik Hasan.

21. If either of the Class Members set forth in paragraph 20 agree to opt back into the Class Action, as approved by Class Action counsel and Trustee, their bottles will be included in the sales (said bottles having already been included in the sale price) without further Court Order.

22. The Trustee is authorized to execute the Second Amended Sale Agreement and the Second Amended Unfettered Sale Agreement, Bills of Sale and any other related documents that the Trustee deems reasonably necessary or appropriate to complete the sale, and to undertake such other actions as may be reasonably necessary or appropriate to perform or enforce the Agreements.

<sup>2</sup> Amount Spectrum is to transfer to California taxing authorities upon receipt from Trustee.

23. Except as otherwise provided in the Second Amended Sale Agreement and Second Amended Unfettered Sale Agreement and this Order, the Primary Wine Bottles and Unfettered Bottles shall be sold, transferred, and delivered to Spectrum on an “as is, where is” or “with all faults” basis.

24. Spectrum is approved as a buyer in good faith in accordance with Section 363(m) of the Bankruptcy Code, and Spectrum shall be entitled to all protections of Section 363(m) of the Bankruptcy Code.

25. Cellar, as a backup buyer, is approved as a buyer in good faith in accordance with Section 363(m) of the Bankruptcy Code, and shall be entitled to all protections of Section 363(m) of the Bankruptcy Code.

26. This Order shall be effective immediately upon entry. No automatic stay of execution, pursuant to Bankruptcy Rule 6004(h) applies with respect to this Order.

27. This Court retains jurisdiction to enforce and implement the terms and provisions of this Order and the Amended Sale Agreement, the Amended Unfettered Sale Agreement, all amendments thereto, any waivers and consents thereunder, and each of the documents executed in connection therewith in all respects, including retaining jurisdiction to (a) compel delivery of the Primary Wine Bottles and Unfettered Bottles to the Spectrum, (b) resolve any disputes arising under or related to the sale agreements, (c) resolve any disputes regarding liens, claims, or interests asserted against the Primary Wine Bottles and Unfettered Bottles, and (d) resolve any disputes by any Class Member related to this Order.

28. The sale agreements and any related documents or other instruments may be modified, amended or supplemented by the parties thereto, in a writing signed by both parties without further order of the Court, provided that any such modification, amendment or supplement does not have a material adverse effect on the Debtor’s bankruptcy estate.

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**Approved as to form:**

BUYER: SPECTRUM WINE AUCTIONS

MEYERS LAW GROUP

By: /s/ Jason Boland  
Jason Boland, President

By /s/ Merle C. Meyers  
Merle C. Meyers  
Counsel for Class Action

RAPSON LAW OFFICES

ELKINGTON SHEPHERD LLP

By: /s/ David J. Rapson  
David J. Rapson, Esq.  
Counsel for Secured Creditor,  
Community Bank of the Bay

By: /s/ James A. Shepherd  
James A. Shepherd, Esq.  
Counsel for Creditor Malik M. Hasan, M.D.

**\*\*END OF ORDER\*\***

**COURT SERVICE LIST**

ECF Recipients

ARF Financial, LLC/  
Advance Restaurant Financial, LLC  
c/o Angela A. Velen, Esq.  
3825 E. Thousand Oaks Blvd., #R-349  
Westlake Village, CA 91362

Jason Boland, President  
Spectrum Wine Auctions  
14201 Chambers Road  
Tustin, CA 92780

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Attorneys for Michael G. Kasolas, Trustee

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

Date: August 30, 2016  
Time: 10:00 a.m.  
Place: Courtroom 220  
1300 Clay Street  
Oakland, CA  
Judge: Hon. William J. Lafferty, III

**EXHIBITS A AND B TO ORDER AUTHORIZING AND  
APPROVING SALE OF WINE FREE AND CLEAR OF LIENS**

Attached hereto as Exhibit A is a fully executed copy of the Second Amended Sale Agreement. Attached hereto as Exhibit B is a fully executed copy of the Second Amended Sale Agreement.

DATED: September 1, 2016

WENDEL, ROSEN, BLACK & DEAN LLP

By: /s/ Tracy Green  
Tracy Green

# **EXHIBIT A**

## **SECOND AMENDED SALE AGREEMENT**

This Sale Agreement ("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 Property as hereinafter defined in paragraph 2.1.

1.2. Buyer desires to purchase the Property from Seller and Seller desires to sell the Property 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 Property, 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 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 Wine Inventory For Buyers (“List of Wines” or “Property”) as set forth in **Exhibit A** attached hereto. The Property does not include Excluded Property as defined below. If bottles of wine are found in the Warehouse which were inadvertently omitted from the 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 Property “As-Is”.** Buyer acknowledges and agrees that, except as otherwise provided in this Agreement, Buyer is purchasing the Property 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 Property.

### ARTICLE 3 EXCLUDED PROPERTY

3.1. Buyer acknowledges and agrees that pursuant to the terms of the Stipulation, Class Members had until July 5, 2016 to Opt-Out of the Class Action in which case the bottles of wine allocated to those Class Members (“Opt-Out Bottles”) are excluded from the sale of Property and will be disposed of as provided for in paragraph 10.1.4 below. The list of Opt-Out bottles that are not being sold is attached hereto as **Schedule 3.1**. The value of said bottles will be credited against the Purchase Price based on the per bottle itemized offer which was sent to the Trustee in the Price List Dated July 20, 2016 (the “Offered Per Bottle Price”). The Offered Per Bottle Price will remain confidential between the Parties, and counsel for the Class Action if requested. Unless otherwise agreed, any credits or refunds required under this Agreement shall refer to the Offered Per Bottle Price.

3.2. Buyer acknowledges and agrees that pursuant to the terms of the Stipulation, that any Class Member holding an interest in Segregated Bottles (as defined in the Stipulation) may redeem certain bottles of wine that are Segregated Bottles (“Redeemed Bottles”) by providing notice on or before July 5, 2016, and complying with additional requirements set forth in the Stipulation. Any such Redeemed Bottles are excluded from the sale of Property as provided in paragraph 10.1.3 below. Seller will notify Buyer of any bottles which are Redeemed Bottles and said bottles will be deducted from the sale and the Purchase Price based on the Offered Per Bottle Price. The list of Redeemed Bottles is attached hereto as **Schedule 3.2**. The Buyer’s duties with respect to the Redeemed Bottles, as provided in the Stipulation, are set forth in Article 10.1.3 below.

3.3. Any bottles of wine excluded by this Agreement which for any reason are subsequently determined not to be excluded will be included in this sale at the last price offered by Buyer pursuant to this Agreement or last overbid price.

3.4. Bottles which are set forth in the List of Wines that are past their drinking window such that they could not be sold or have low bottle fills below ninety-five percent (95%) of the volume of wine, wine seepage, capsule corrosion, or cork depressions or protrusions (collectively the "Negative Bottles" or "Bad Bottles") may be excluded and the value or partial value subtracted from the Purchase Price not to exceed \$100,000. Bottles which have Cosmetic Flaws are not excluded, which consist of label and/or capsule tears, stains, nicks, and/or scuffs ("Cosmetic Flaws"). Missing bottles or counterfeit bottles shall be excluded from the sale and be entitled to a refund as provided herein; however, no refund shall be provided for 28 bottles of 1964 Petrus previously excluded. Buyer will do its best to review the wines as they are packed for shipment and leave Bad 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. 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 Bad 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 Bad Bottles, the Parties will use their best efforts to reach a reasonable resolution.

3.5. Bottles not subject to any purchase order such that the Class Action has no interest in ("Unfettered Bottles") and which are not on the List of Wines are not part of this Agreement.

3.6. The Property subject to this Agreement only includes wine bottles 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 Property shall be the sum of three million five hundred fifty thousand dollars (\$3,550,000.00) ("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 one hundred fifty thousand (\$150,000.00) 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 Property as contemplated hereunder is consummated, the Deposit shall be credited towards the Purchase Price. In the event the sale of the Property 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. If the Buyer is in default under the terms of this Agreement as defined by Paragraph 8.4.2., the deposit shall be deemed forfeited. In the event of a default, the parties reserve all remedies as set forth in Paragraph 11.11.

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 and 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 PROPERTY**

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 Property, 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 Property 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 Property 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 one hundred and fifty thousand dollars (\$150,000.00) over the Purchase Price and must be accompanied by a deposit in the sum of two hundred-fifty thousand dollars (\$250,000.00), 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 twenty-five thousand dollars (\$25,000.00).

(d) The amount of any overbid, after deducting the Breakup Fee, in excess of the \$3,200,000 Purchase Price 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 \$800,000, then the percentage increase would be 25 percent per bottle because \$800,000 is 25 percent of the \$3,200,000 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 (\$50,000.00), 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 Property, 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.

8.4.2 Buyer shall be in default under this Agreement upon the failure of Buyer to perform any of Buyer's agreements herein contained, unless otherwise agreed in writing.

## 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 Property 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 is the subject of the pending approval of the Class Action and the approval of the Stipulation.

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 Property 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 Buyer agrees to ship the Redeemed Bottles to each Class Member within thirty (30) days of Closing, provided that each such Class Member has provided Buyer with all of the following: (i) the cost and expense of shipping; (ii) the amount of applicable sales taxes (which Buyer will send to the taxing authorities); and (iii) the reasonable handling fee requested by Buyer as set forth in more detail in paragraph 11 of the Stipulation. The Estate will agree to reimburse Buyer up to \$5,000.00 in total for attorneys' fees Buyer incurs related to disputes in connection with the allowed Redeemed Bottles, but not if such dispute relates to a breach of Buyer's performance. Buyer will inform counsel for the Trustee of any dispute before contacting an attorney.

10.1.4 Seller shall instruct Buyer as to the disposition of the Opt-Out Bottles. If Seller does not instruct Buyer as to any disposition, the Opt-Out Bottles shall remain in the Warehouse.

10.1.5 In the event Buyer does not remove the Property within thirty (30) days after Closing, Buyer shall be responsible for preservation of the Property 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)

and a courtesy copies to: Mark A. Chavez, Esq.  
Chavez & Gertler LLP  
42 Miller Ave.  
Mill Valley, CA 94941  
Email: [mark@chavezgertler.com](mailto:mark@chavezgertler.com)

Merle C. Meyers, Esq.  
Meyers Law Group, PC  
44 Montgomery Street, #1010  
San Francisco, CA 94104  
Email: [mmeyers@mlg-pc.com](mailto:mmeyers@mlg-pc.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 sixty-five thousand dollars (\$65,000.00). 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.

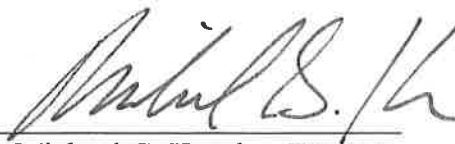
11.15. Severability. The invalidity or unenforceability of any one or more of the provisions of this Agreement shall not affect the validity or enforceability of any of the other provisions of this Agreement.

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

## **EXHIBIT B**

## **SECOND AMENDED 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 that are past their drinking window such that they could not be sold or have low bottle fills below ninety-five percent (95%) of the volume of wine, wine seepage, capsule corrosion, or cork depressions or protrusions (collectively the "Negative Bottles" or "Bad Bottles") may be excluded and the value or partial value subtracted from the Purchase Price not to exceed \$100,000. Bottles which have Cosmetic Flaws are not excluded, which consist of label and/or capsule tears, stains, nicks, and/or scuffs ("Cosmetic Flaws"). Missing bottles or counterfeit bottles shall be excluded from the sale and be entitled to a refund provided herein; however, no refund shall be provided for 28 bottles of 1964 Petrus previously excluded. Buyer will do its best to review the wines as they are packed for shipment and leave Bad 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. 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 Bad 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 Bad Bottles, 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 ten 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. If the Buyer is in default under the terms of this Agreement as defined by Paragraph 8.4.2, the deposit shall be deemed forfeited. In the event of a default, the parties reserve all remedies as set forth in Paragraph 11.11.

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 five 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.

8.4.2 Buyer shall be in default under this Agreement upon the failure of Buyer to perform any of Buyer's agreements herein contained, unless otherwise agreed in writing.

**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: <a href="mailto:trustee@kasolas.net">trustee@kasolas.net</a>
---------------	---

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