

1 MEYERS LAW GROUP, P.C.
2 MERLE C. MEYERS, ESQ., CA Bar #66849
3 MICHELE THOMPSON, ESQ., CA Bar #241676
4 44 Montgomery Street, Suite 1010
5 San Francisco, CA 94104
6 Telephone: (415) 362-7500
7 Facsimile: (415) 362-7515
8 Email: mmeyers@meyerslawgroup.com
9 mthompson@meyerslawgroup.com

6 CHAVEZ & GERTLER LLP
7 MARK A. CHAVEZ, ESQ., CA Bar #90858
8 DAN L. GILDOR, ESQ., CA Bar #223027
9 42 Miller Avenue
10 Mill Valley, CA 94941
11 Telephone: (415) 381-5599
12 Facsimile: (415) 381-5572
13 Email: mark@chavezgertler.com
14 dan@chavezgertler.com

11 Attorneys for Plaintiff and the Settlement Class

12 IN THE UNITED STATES BANKRUPTCY COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION

16 In re:
17 FOX ORTEGA ENTERPRISES, INC., dba
18 PREMIER CRU,
19 Debtor.

Case No. 16-40050-WJL
Chapter 7

19 MICHAEL D. PODOLSKY, on behalf of
20 himself and all others similarly situated,
21 Plaintiffs,

A.P. No. 16-04033

20 vs.

21 MICHAEL G. KASOLAS, Trustee,
22 Defendant.

Date: July 27, 2016
Time: 10:00 a.m.
Place: U.S. Bankruptcy Court
1300 Clay St., Ctrm. 220
Oakland, CA
Judge: Hon. William J. Lafferty, III

25 **SUPPLEMENTAL DECLARATION OF MERLE C. MEYERS IN SUPPORT**
26 **OF PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS**

26 I, MERLE C. MEYERS, declare:

27 1. I am an attorney licensed to practice law in all the courts of the State of California and
28 am the principal of the law firm of Meyers Law Group, P.C. (the "MLG"), co-counsel for plaintiff

1 MICHAEL D. PODOLSKY, in his representative capacity (“Plaintiff”), and the settlement class (the
2 “Settlement Class”) in this action. In such capacity, I am personally knowledgeable as to each of the
3 facts stated herein, to which I could competently testify if called upon to do so in a court of law.

4 2. I make this declaration in support of the *Plaintiff’s Motion For An Award of*
5 *Attorneys’ Fees And Costs*, filed herein by Plaintiff on June 15, 2016 (the “Fee Motion,” docket
6 no. 18), and in supplement to the *Declaration of Merle C. Meyers in Support of Motion For An*
7 *Award of Attorneys’ Fees And Costs*, also filed by Plaintiff on June 15, 2016 (the “MCM Dec.,”
8 docket no. 18-3). All capitalized terms used herein, unless otherwise defined, are intended to have
9 the meanings ascribed to them in the Fee Motion.

10 3. In the MCM Dec., I reported on the number of hours and lodestar fees generated by
11 our firm’s representation of the Class from April 1, 2016 to June 10, 2016, with the caution that
12 additional time was likely to be charged after June 10, 2016. I am now reporting as to the total hours
13 and lodestar fees through July 13, 2016 in this engagement, in order to update the MCM Dec.

14 4. In particular, in representing the Class from April 1, 2016 to July 13, 2016, MLG has
15 expended the following hours of service (after reductions for billing judgment):

- 16 (a) For my time, 322.4 hours;
- 17 (b) For Kathy Quon Bryant’s time, 10.2 hours; and
- 18 (c) For Michele Thompson’s time, 37.3 hours.

19 5. Using the same hourly rates as set forth in the MCM Dec., the hours charged by MLG
20 from April 1, 2016 to July 13, 2016 result in a lodestar of \$220,042. I estimate that additional hours
21 of services will be required of MLG and its co-counsel, Chavez & Gertler LLP, after July 13, 2016,
22 which at normal hourly rates will add another \$25,000 to the lodestar amount.

23 6. In addition, MLG has incurred out-of-pocket costs in its representation of the class, to
24 date, in the aggregate amount of \$4,163.54. Those costs consist, generally, of filing fees, transcript
25 fees, travel costs, postage, noticing costs and photocopying.

26 7. I believe that the services performed by MLG, for the hours stated above, were
27 reasonable, appropriate, and necessary, and that they ultimately allowed the parties to enter into a
28 Stipulation, as well seek Court approval for final settlement on behalf of the class. Moreover, the

1 number of hours expended by the attorneys, to date, to achieve the results in this case is reasonable,
2 and avoided duplication of effort.

3 8. When Plaintiff and I first appeared in the chapter 7 case, in late March 2016, I, as
4 Plaintiff's counsel, immediately contacted Mark Bostick, counsel for the Trustee, to explore means of
5 resolution. Mr. Bostick was very informative about the status of the case, but offered no solution
6 other than sale of all wine inventory by the Trustee.

7 9. I pointed out that Plaintiff, and others like him, had a right to ownership of bottles that
8 they had purchased, in light of notifications and assurances from the Debtor that they owned those
9 bottles. Mr. Bostick expressed his view that regardless of notifications and assurances, under
10 applicable law the estate owned the bottles and all ownership claims were either avoidable or
11 otherwise unenforceable in bankruptcy.

12 10. In that conversation, Mr. Bostick stated the Trustee's intention to seek Court authority
13 to sell all wine bottles in the Debtor's warehouse, without regard to claims of ownership. I urged him
14 to seek a consensual resolution instead.

15 11. I followed up that conversation with an emailed letter dated March 25, 2016, a copy of
16 which is attached hereto, without enclosures, as **Exhibit "A."**

17 12. In that letter, I asserted Plaintiff's ownership rights to bottles allocated to Plaintiff in
18 the Debtor's computer system, and made demand for the Trustee to turn those bottles over to
19 Plaintiff, and to refrain from selling them.

20 13. I received no response to my March 25, 2016 letter, and instead, the Trustee filed his
21 motion seeking authority to sell "segregated" bottles, with the admonition that such authority would
22 portend a right to sell all other bottles as well. The motion expressed the view, with supporting case
23 law, that any purported ownership rights had been vanquished by the bankruptcy filing.

24 14. Plaintiff therefore filed opposition to the Trustee's motion, and I spoke with Mr.
25 Bostick again in an effort to initiate settlement discussions. In our conversation, I pointed out the
26 many substantive and procedural impediments that the Trustee faced in attempting to pursue a sale of
27 the inventory without consent. However, neither Mr. Bostick nor any other representative of the
28 Trustee responded to my invitation to settlement discussions.

1 15. After we filed Plaintiff's opposition to the Trustee's motion, I was contacted by
2 multiple former customers of the Debtor seeking legal representation in order to pursue their own
3 bottles left in the warehouse. In each case, however, the limited number of bottles and value
4 involved could not warrant separate legal representation. These calls, together with concern about
5 the cost of pursuing his rights on an individual basis, prompted Plaintiff and me to consider, and
6 ultimately commence, a class action to resolve ownership rights.

7 16. We filed the class action complaint shortly before the May 2, 2016 hearing of the
8 Trustee's motion, in order to induce conversation at the hearing regarding a class approach. Even at
9 the hearing itself, prior to its start, I again raised the concept of class settlement discussions with Mr.
10 Bostick again, but I was again rebuffed in favor of waiting for the Court's ruling on the pending
11 motion.

12 17. Finally, only after the Trustee was unable to prevail on his motion, and after the Court
13 urged the parties to pursue judicial mediation, did the Trustee and his counsel accede to my
14 suggestion of class settlement discussions.

15 18. Even once mediation began, settlement was not an assured outcome. Many counsel
16 initially attended, each with differing and competing advocated positions. Progress was in fact made
17 in the mediation only when Class Counsel corralled various parties and counsel through several
18 iterations of terms sheets and proposals.

19 19. Once a tentative settlement was reached in mediation, Class Counsel labored
20 extensively to document the settlement with the Trustee, through complicated practical and legal
21 issues. Objectors' counsel played no role whatsoever in that process, other than to continuously push
22 for payment of their fees.

23 20. To the best of my knowledge, at no time prior to the conclusion of the May 2, 2016
24 hearing did any party or counsel, including either of the Objectors, suggest any resolution of the
25 chapter 7 case or of the Trustee's contested right to sell bottles, other than to advocate for their own
26 position. Most importantly, at the time that MLG and our co-counsel agreed to, and did, file the class
27 action complaint in this adversary proceeding, every party in interest was pursuing his or her own
28 litigation agenda and no prospect for settlement on a global basis was in apparent contemplation.

EXHIBIT A



Meyers Law Group

44 Montgomery Street, Suite 1010, San Francisco, California 94104 Tel (415) 362-7500 Fax (415) 362-7515

mmeyers@meyerslawgroup.com

March 25, 2016

BY ELECTRONIC MAIL ONLY, mbostick@wendel.com

Mark S. Bostick, Esq.
Wendel, Rosen, Black & Dean LLP
1111 Broadway, 24th Floor
Oakland, CA 94607-4036

Re: In re: Fox Ortega Enterprises, Inc., dba Premier Cru, Debtor; Case

Dear Mark:

Following up on our conversation earlier this week, please be advised that our firm represents Michael D. Podolsky as a creditor in the above-referenced chapter 7 case, in which you represent the trustee, Michael G. Kasolas (the "Trustee"). Attached for your records is our notice of appearance as Mr. Podolsky's counsel, filed this week. Mr. Podolsky purchased hundreds of bottles of wine from the debtor, Fox Ortega Enterprises, Inc. (the "Debtor"), at a cost, net of bottles shipped to Mr. Podolsky, in excess of \$380,000. He is likely one of the largest customer-creditors of the Debtor's estate.

You have been kind enough to provide to me a spreadsheet prepared by the Trustee and sorted as to bottles ordered by Mr. Podolsky. We have further sorted that spreadsheet to group orders by inventory status, a copy of which is attached here. As you will see from that listing, \$93,391.08 of Mr. Podolsky's purchases are identified by the Trustee as "general inventory," which we understand to mean bottles within the Debtor's inventory that fit the description of Mr. Podolsky's purchases, without any conflicting claims thereto. In addition, there is another \$152,165.75 of Mr. Podolsky's purchases that are identified by the Trustee as "oversubscribed," which we understand to mean bottles within the Debtor's inventory that fit the description of Mr. Podolsky's purchases but which are encumbered by other claims that, together with Mr. Podolsky's claims, exceed the bottles held.

We believe that Mr. Podolsky is entitled to ownership and possession of all bottles identified as "general inventory" on the attached spreadsheet. We also believe that Mr. Podolsky is entitled to ownership and possession of all bottles identified as "oversubscribed," subject to allocation among any customers with conflicting claims to those bottles, assuming that they assert such claims. Mr. Podolsky's ownership is based on each of several alternative legal theories:

First, we believe that all such bottles are the *res* of a resulting trust in Mr. Podolsky's favor, under applicable California law. As you know, a resulting trust is imposed by operation of law in order to enforce the inferred intention of the parties, where a transfer of property is made

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Mark S. Bostick, Esq.
March 25, 2016
Page 2

to one person and consideration for the property is paid by another. *Martin v. Kehl*, 145 Cal.App.3d 228, 238 (1983); *In re Shinn*, 2008 WL 2531443, at *6 (Bankr. E.D.CA June 20, 2008). Here, it is our understanding that the bottles were purchased by the Debtor on Mr. Podolsky's behalf, using Mr. Podolsky's paid purchase price, and the inferred (if not expressed) intention of the parties was that Mr. Podolsky would own the bottles and that they would be shipped to him upon request. A resulting trust clearly follows from those facts.

Second, in the alternative, we believe that all such bottles are the *res* of a constructive trust in Mr. Podolsky's favor. The Debtor's conduct in purchasing the bottles, taking title to them and failing to segregate them as Mr. Podolsky's property, amounted to mistake or fraud, and the imposition of a constructive trust is warranted under applicable law in order to prevent an injustice to Mr. Podolsky and unjust enrichment to the Debtor and its estate. See, for example, *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga*, 175 Cal.App.4th 1306, 1332 (2009). Applicable law imposes a constructive trust in Mr. Podolsky's favor in light of those facts.

Third and fourth, we believe that the bottles in question are either Mr. Podolsky's "special property" or the subject of an equitable lien in his favor. See, for example, *In re Surplus Furniture Liquidators, Inc. of High Point*, 199 B.R. 136 (Bankr. N.D.N.C. 1995).

Under each of the foregoing theories, Mr. Podolsky is entitled to delivery of the "general inventory" and "oversubscribed" bottles at his direction, and we demand that arrangements be made to do so. If you agree, we will make arrangements for such delivery immediately. At the same time, your client may not sell or otherwise dispose of any of the bottles in question, given Mr. Podolsky's claim of ownership, lien or other interest. From our conversation last Monday, I understand that you are preparing a motion to sell those and all other non-segregated bottles of wine, and we urge you to either set Mr. Podolsky's bottles aside or to make mutually acceptable arrangements with us to protect Mr. Podolsky's interests in the bottles or their proceeds in some other manner. Please let me know at your earliest convenience how you intend to proceed in this matter.

Sincerely,

MEYERS LAW GROUP, P.C.

By


Merle C. Meyers, Esq.

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EXHIBIT B

Who Owns Bankrupt Retailer Premier Cru's Wine?

A trustee plans to sell off the California store's 6,000 cases of wine stocks, but some customers argue their property is being taken

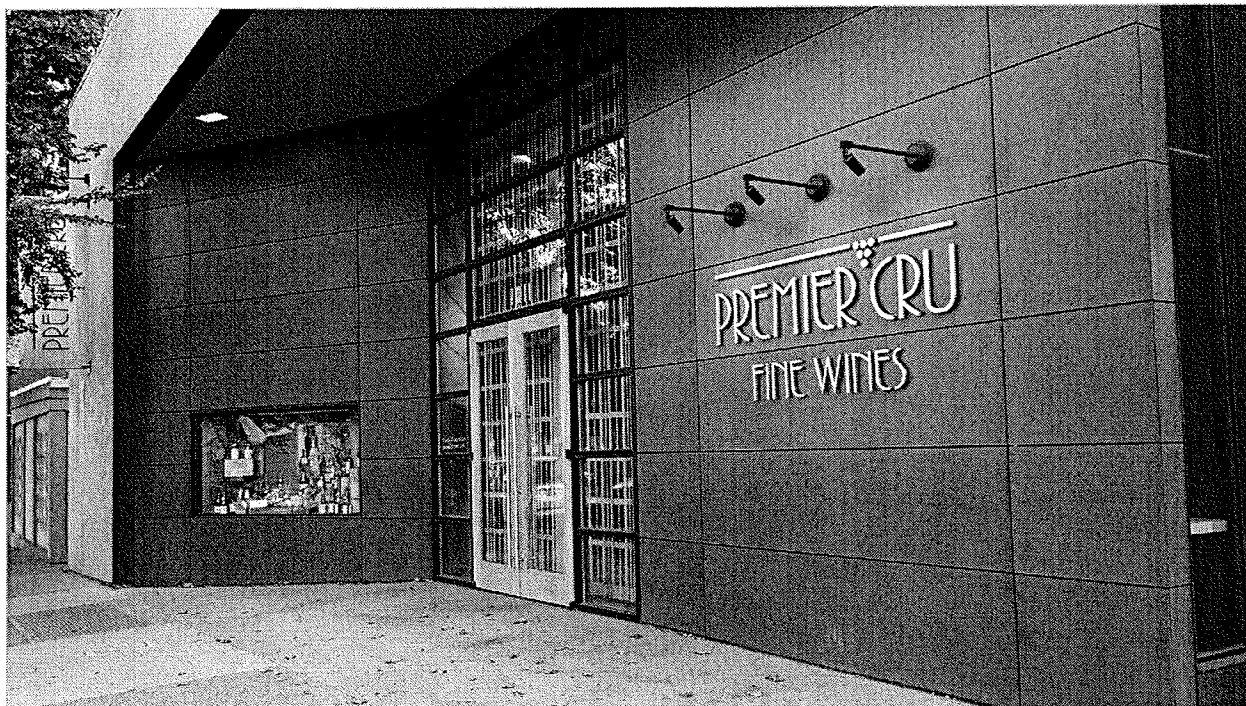


Photo by: Tim Pinault

Two lawsuits have been filed against Premier Cru's court-appointed Chapter 7 trustee.

Peter Hellman

Posted: April 29, 2016

Updated on May 10.

The bankruptcy proceedings of wine retailer Premier Cru have become further complicated this month: Eight former customers have filed objections to the court-appointed trustee's plan to sell off the retailer's entire remaining wine stocks and divide the proceeds among its creditors. The objecting customers insist that some of that wine is theirs, having already been paid for but yet to be delivered.

This week, in a highly unusual legal maneuver, one of those customers also filed a class-action lawsuit against the trustee, asking the judge in the case to stop the sale.

The suit threatens to complicate and delay what has already turned into a messy proceeding, involving thousands of irate customers who paid for wine that Premier Cru never delivered. Premier Cru, founded in 1980, built a reputation for unbeatable prices on sought-after wines. The caveat was that

the wines were mainly promised for future delivery. In its final years, Premier Cru had trouble making good on those promises. In 2015, at least 10 lawsuits were filed by clients who had waited years for undelivered wine.

Premier Cru filed for bankruptcy Jan. 8, and proprietor John Fox declared personal bankruptcy one month later. The FBI has announced it is "investigating claims of a Ponzi scheme" involving Premier Cru and Fox. In court appearances, Fox has pleaded the Fifth Amendment. At a hearing earlier this month, a lawyer for Fox told bankruptcy Judge William Lafferty that discussions with the F.B.I. and U.S. Justice Department are "creeping toward a resolution" and that, "if either through pleas or a trial, there is agreement or conviction, there is going to be a restitution component and it will be large."

In its bankruptcy filing, Premier Cru listed \$6.8 million in wine inventory and \$70 million in debts. The court-appointed Chapter 7 trustee, Michael Kasolas, has told Judge Lafferty he plans to sell all 6,000 cases in the warehouse, to raise money for the creditors.

Whose wine is it?

Eight former customers argue that wine they've already paid for is sitting in storage at the Premier Cru warehouse. On April 27, one of those creditors, Michael Podolsky of Fairfield, Ill., filed a class-action lawsuit against Kasolas. Podolsky, who claims ownership of \$245,000 worth of wine that still remains in the warehouse, filed a personal lawsuit against the trustee earlier this month.

"Once we filed our opposition to the trustee's sale motion, my counsel heard from many other former customers wondering how they too could protect their ownership rights," Podolsky told *Wine Spectator* through his attorney. "This seemed like the most efficient way for everyone to protect their interests."

Kasolas argues, in a filing earlier this week, that title to the disputed wine, even if paid for, did not pass to the purchasers until delivery. He cites a 2009 decision in the case of another bankrupt retailer, Carolina Wine Company. In that ruling, the court held that wine kept in the warehouse while the firm was in business could be returned by the customer for a refund, and that the cost of any damage to the wine would be borne by Carolina, therefore title did not pass to the purchaser until the wine was shipped. That is called a "shipping contract," and Kasolas argues its terms also govern the wine held in Premier Cru's warehouse.

Not so, Podolsky argues. "The purchased bottles were held in the debtor's warehouse free of charge, one of the debtor's points in its selling pitch, and the debtor never claimed to own those bottles which it stored for my benefit," reads his complaint. As evidence, Podolsky refers to "banter" in a 2011 e-mail to him from a salesperson, James Gillerman, who quips, "Can I take just one of your bottles to Brazil with me? Just the Romanée-Conti?"

Kasolas is grappling with numerous dilemmas as he tries to sort through the vast trove of wine in the warehouse. Some is in "general inventory," without customers' names attached. More than 5,000 other bottles, boxed up and bearing the customers' names, is in a segregated space. Some wine in both spaces has been paid for by multiple customers, with not enough to go around.

Kasolas hoped to persuade Judge Lafferty at a May 2 hearing to declare that the segregated wine belongs to the debtor, not the customers. That should clear the way to sell all of the wine, Kasolas says. The proceeds from such a sale would be used not only for restitution to Premier Cru customers but also to pay costs of the bankruptcy, ranging from electric bills keeping the warehouse at cellar temperature to lawyers' and administrative fees.

Podolsky's class-action suit threw a wild card into the hearing. After the judge heard arguments from both sides, he issued a motion ordering both sides to meet and try to negotiate a solution.

Kasolas' plan could be the fairest outcome, according to John Kozyak, a fellow of the American

College of Bankruptcy uninvolved with the case. "Bankruptcy law exists to make sure everybody in the class gets treated in the same way rather than having the squeaky wheel get more," Kozyak said. "The people who have wine in the segregated room have the best argument, but for the rest of them, the wine should be sold and the funds distributed on a pro-rated basis. It appears the debtor defrauded or tried to defraud everyone. It is most fair to treat all victims alike."

See Also 

Monday, June 6, 2016

Roasting Meat, Fevered Bidding and Kate Upton: Auction Napa Valley Raises \$14.3 Million for Charity

Wednesday, May 25, 2016

Napa Valley Vintners to Host Hong Kong Wine Auction

Tuesday, May 24, 2016

Firm Alleges Rudy Kurniawan Sold It \$2.45 Million in Fake Burgundy, and Wine Merchants Helped

Tuesday, May 24, 2016

Sotheby's Scores Big with Bill Koch's \$21.9 Million Wine Auction

Thursday, May 19, 2016

Recent Wine Auctions Show Why Hart Davis Hart Is Top U.S. House

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