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

In re:
FOX ORTEGA ENTERPRISES, INC., dba
PREMIER CRU,
Debtor.

Case No. 16-40050-WJL

Chapter 7

MICHAEL D. PODOLSKY, on behalf of
himself and all others similarly situated,

A.P. No. 16-04033

Plaintiff,
vs.
MICHAEL G. KASOLAS, Trustee,
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

**PLAINTIFF'S STATUS REPORT AND
RESPONSE TO OBJECTION TO CLASS SETTLEMENT**

MICHAEL D. PODOLSKY, the plaintiff ("Plaintiff") and representative of the class preliminarily approved herein (the "Class"), submits this memorandum in order to (a) provide updated information regarding the pending class settlement of this adversary proceeding, and (b)

1 respond to the one filed objection (the “Objection,” docket no. 322 in the general chapter 7 case) to
2 the settlement, submitted by Raymond Kloth and filed with the Court on June 15, 2016.¹

3 Plaintiff is pleased to report that the settlement has been well received by the Class, with only
4 four Class members choosing to exclude themselves and only one objection having been filed. Even
5 as to that one objection, Mr. Kloth, as objector, fails to demonstrate that the settlement is not fair,
6 reasonable and adequate, and has stated that he does not intend to appear at the hearing to argue his
7 point.

8 Accordingly, Plaintiff submits that the Court should grant the pending motion and finally
9 approve the settlement, inasmuch as the settlement has been accepted by the vast majority of Class
10 members and provides substantial value to the Class in a case with hotly contested issues and great
11 risks. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (finding a
12 favorable reaction of the class where of 376,301 putative class members who received notice, 54
13 submitted objections); *In re Mego Fin. Corp. Sec. Litigation*, 213 F.3d 454, 459 (9th Cir. 2000) (low
14 number of objections supports fairness finding).

15 **I. STATUS REPORT ON CLASS SETTLEMENT**

16 On June 1, 2016, the Court entered its *Order Granting Preliminary Approval of Settlement*
17 (the “Preliminary Approval Order,” docket no. 15), preliminarily approving a *Stipulation of*
18 *Settlement* (the “Settlement”) entered into by Plaintiff, as representative of the Class, and defendant
19 Michael G. Kasolas, as trustee (the “Trustee”) of the chapter 7 estate of Fox Ortega Enterprises, Inc.,
20 formerly doing business as Premier Cru (the “Debtor”). In the Preliminary Approval Order, the
21 Court, *inter alia* –

- 22 (a) Preliminarily approved the Settlement;
23 (b) Certified the Class;
24 (c) Approved the appointment of Plaintiff’s counsel as class counsel;
25 (d) Approved a form of notice to Class members; and
26

27
28 ¹ It is not clear whether the Objection is intended to respond to Plaintiff’s motion for final approval of the class settlement, or the Trustee’s motion for approval under Bankruptcy Rule 9019, but because the Objection was filed by the deadline for objections to Plaintiff’s motion, Plaintiff responds here on the assumption that it is the former, not the latter.

- 1 (e) Established various deadlines related to the Settlement, including a deadline of July 5,
2 2016, for the filing of (i) all notices by Class members electing to exclude themselves
3 from the Class treatment; (ii) all elections by eligible Class members to redeem
4 Segregated Bottles; and (iii) objections to final approval of the Settlement. The order
5 also set July 15, 2016 as the deadline for Plaintiff's responses to any such objections.

6 On June 15, 2016, Plaintiff filed his *Plaintiff's Motion for Final Approval of Class Action*
7 *Settlement* and related documents (the "Final Approval Motion," docket nos. 20 *et seq.*), as
8 contemplated in the Preliminary Approval Order. The Final Approval Motion set forth the legal
9 points and authorities supporting final approval of the Settlement.

10 By the July 5, 2016 deadline, as stated by Brian Nishi in his declaration filed on July 12, 2016
11 (docket no. 40), only the following responses were received (excluding issues as to class counsel's
12 fees, which are addressed by separate filings):

- 13 (a) Out of approximately 4,450 Class members and 80,201 bottles, only 4 members
14 notified the Trustee that they wished to be excluded from the Class: Ross Bott, Malik
15 Hasan, Brent Young and Michael Jacobs. Those exclusions affect 10,150 bottles,
16 having original purchase prices, in the aggregate, of \$474,491 (out of original sale
17 order prices, in the aggregate, of \$6,238,553).
- 18 (b) Out of approximately 2,674 Segregated Bottles, only 931 bottles, having original
19 purchase prices, in the aggregate, of \$48,084, have been claimed for redemption by
20 qualified Class members. Notices of redemption were received from only nine
21 qualified Class members.²
- 22 (c) The only objection filed with respect to the Settlement is the Objection, filed by Mr.
23 Kloth, who states in the Objection that he does not intend to appear at the July 27,
24 2016 hearing of the Final Approval Motion.

25 Mr. Nishi, the Debtor's former IT technician who is assisting the Trustee in administering the
26 Settlement, has made updated estimates of recoveries by Class members that are contained in his
27 declaration filed concurrently herewith, based on stated assumptions as to prices, costs and the like.
28 As a matter of approximated estimations only, Mr. Nishi calculates that, assuming a gross purchase
price for all bottles of \$4,300,000, after reduction by excluded and redeemed bottles, and after
permitted administrative costs, roughly \$1,071,692 will be available for the Class, net of payments to
class counsel (assuming that class counsel's request of a 25% contingency fee is approved).

This amount, even with the reduced expected sale price, still constitutes substantial and

² As a point of information, no Segregated Bottles were redeemed by either T. Szen Low or Robert P. Morris, who now
seek their counsel's attorneys' fees for having advocated for such redemptions.

1 valuable relief to the Class, keeping the settlement within the range of reasonableness for settlements
2 routinely approved by courts in the Ninth Circuit. Moreover, the fact that only one objection has
3 been filed and only four members have opted out, out of roughly 4,450 Class members, in and of
4 itself constitutes strong evidence of the fairness of the Settlement. *See Rodriguez v. West Publishing,*
5 *supra*, 563 F.3d at 967; *In re Mego Fin. Corp. Sec. Litigation*, *supra*, 213 F.3d at 459; *Hanlon v.*
6 *Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (“the fact that the overwhelming majority of the
7 class willingly approved the offer and stayed in the class presents at least some objective positive
8 commentary as to its fairness”). *See also, Churchill Vill., LLC v. General Electric*, 361 F.3d 566, 577
9 (9th Cir. 2004) (finding a favorable reaction of the class where 45 class members submitted
10 objections, out of 90,000 putative class members).

11 For the reasons set forth in the Final Approval Motion, coupled with the absence of any
12 meaningful opposition, it is evident that the Settlement is favorable to the Class and should be
13 approved on a final basis.

14 **II. KLOTH OBJECTION**

15 The Objection, the only opposition filed, asserts that the Settlement is unfair because Mr.
16 Kloth owns identified bottles, by virtue of having received notification in 2015 from the Debtor that
17 his bottles were in the warehouse. Mr. Kloth argues that rather than be liquidated under the terms of
18 the Settlement, those bottles belong to Mr. Kloth and should be turned over to him.

19 According to the Debtor’s records, Mr. Kloth is a Class member, having been allocated 124
20 Purchased Bottles and 59 Oversubscribed Bottles. Mr. Kloth did not choose to exclude himself from
21 the Class, and thus will receive Class distributions in both bottle categories.

22 Mr. Kloth’s argument for ownership of his allocated bottles is, of course, one of the core
23 arguments made by Plaintiff on behalf of all similarly situated customers with allocated bottles – that
24 notification from the Debtor adequately identified the bottles and effectively transferred ownership to
25 the customers under the California Commercial Code. However, as the Court is well aware, that
26 argument met with opposition from the Trustee and relies upon contested legal theories that would
27 have required significant and lengthy litigation to prove, and a successful outcome would not have
28 been assured in that litigation. Meanwhile, the wine that was at stake might have been lost due to the

1 Trustee's limited funds and warehouse resources. Moreover, as to Oversubscribed Bottles, even if
2 ownership were confirmed, it would be shared by, or contested among, multiple former customers.
3 Those bottles could not be simply turned over to one of those competing customers.

4 For these reasons, the Settlement, in which the value of the bottles will be shared equitably
5 among the Debtor's estate and competing customers, is a fair and valuable resolution of an otherwise
6 intractable problem. Whereas it is true that Mr. Kloth and other Class members will not receive the
7 bottles that they claim (based on contested legal theories) to own, Class members, including Mr.
8 Kloth, will receive a meaningful portion of the value of those bottles.

9 A settlement is not unreasonable simply because it does not provide 100% relief to class
10 members. *In re Warfarin Sodium Antitrust Litigation*, 212 F.R.D. 231, 258 (D. Del. 2002) ("To the
11 extent that objectors argue the settlement is not high enough because it does not allow 100% recovery
12 of claimants' losses, the court finds these objections without merit."). Settlement is a compromise
13 that takes into account the strengths of the opposing party's position, the significant trial risks, the
14 difficulties of proof, and the delay and costs of continued litigation. Here, the risks were substantial,
15 not only in light of the complicated legal issues entailed in customers' ownership claims but also in
16 light of the mere passage of time, during which the bottles might have become worthless due to a lack
17 of resources to maintain them.

18 The Objection filed by Mr. Kloth, which effectively argues that no compromise should be
19 approved other than a full recognition of his asserted ownership rights, is therefore without merit and
20 should be overruled.

21 **III. CONCLUSION**

22 Based upon the foregoing and the discussion contained in the Final Approval Motion,
23 Plaintiff respectfully urges the Court to grant the motion and approve the Settlement on a final basis.

24 DATED: July 15, 2016

MEYERS LAW GROUP, P.C.

CHAVEZ & GERTLER LLP

27 By /s/ Merle C. Meyers
28 Merle C. Meyers, Esq.
Attorneys for Plaintiff and Class Representative