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7 **UNITED STATES BANKRUPTCY COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**

9 In re:
10 FOX ORTEGA ENTERPRISES, INC. dba
11 PREMIER CRU
12
13
14

Debtor(s)

Case No. 16-40050 WJL

Chapter 7

Time: HEARING REQUESTED

Date:

Place: Room 220, 1300 Clay St.,
Oakland, Ca. 94612

15 **U.S. TRUSTEE'S OJECTION TO APPLICATION FOR ORDER AUTHORIZING**
16 **EMPLOYMENT OF BRIAN NISHI**

17 Tracy Hope Davis, the U.S. Trustee for Region 17 ("United States Trustee"), by and
18 through her undersigned counsel, hereby files this Objection to the Application for Order
19 Authorizing Employment of Brian Nishi ("Nishi Application") filed by Michael G. Kasolas, the
20 Chapter 7 trustee ("Trustee"), on the grounds that Brian Nishi holds an impermissible conflict of
21 interest and may not be employed by the estate.

22 **I. INTRODUCTION**

23 The United States Trustee objects to the Nishi Application because Brian Nishi received
24 a preferential transfer under 11 U.S.C. § 547 within the 90 day period preceding the
25

1 commencement of the case and therefore holds an impermissible conflict of interest and may not
2 be employed by the estate.

3 **II. STATEMENT OF FACTS**

4 An order for relief under Chapter 7 of Title 11 of the United States Code was entered
5 pursuant to a voluntary petition filed by the Debtor on January 8, 2016. Michael G. Kosolas is
6 the duly appointed, qualified and acting trustee of the Debtor's estate. *See* Dkt #1 and 9.

7 The Debtor is a wine merchant and has scheduled \$6.8 million in wine inventory and
8 \$70 million in debts. *See* Dkt #1 and 9.

9 The Trustee seeks to employ Brian Nishi, a computer specialist who has worked for the
10 Debtor for approximately 20 years. Mr. Nishi holds a priority wage claim in the amount of
11 \$2,500. Mr. Nishi has agreed to waive his claim in order to be employed in the case. Mr. Nishi
12 was also paid the equivalent of \$25,000 in wine by the Debtor in satisfaction of the extension of
13 credit by Mr. Nishi via the Debtor's use of his personal credit card.

14 **III. ARGUMENT**

15 **A. Mr. Nishi Must Waive His Pre-Petition Claim Prior To Being Employed By**
16 **the Trustee.**

17 Mr. Nishi has agreed to waive his claim for \$2,500 as a priority wage claim. This is
18 required under 11 U.S.C. § 327. 11 U.S.C. § 327(a) states as follows:

19 (a) Except as otherwise provided in this section, the trustee, with
20 the court's approval, may employ one or more attorneys,
21 accountants, appraisers, auctioneers, or other professional persons,
22 that do not hold or represent an interest adverse to the estate, and
that are disinterested persons, to represent or assist the trustee in
carrying out the trustee's duties under this title.

23 Pursuant 11 U.S.C. § 101(14) the term 'disinterested person' means a person that—

24 (A) is not a creditor, an equity security holder, or an insider;

25 (B) is not and was not, within 2 years before the date of the filing
of the petition, a director, officer, or employee of the debtor; and

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1 (C) does not have an interest materially adverse to the interest of
2 the estate or of any class of creditors or equity security holders, by
3 reason of any direct or indirect relationship to, connection with, or
interest in, the debtor, or a for any other reason.

4 11 U.S.C. § 101(5) defines claim as:

5 (A) right to payment, whether or not such right is reduced to
6 judgment, liquidated, unliquidated, fixed, contingent, matured,
unmatured, disputed, undisputed, legal, equitable, secured, or
7 unsecured.

8 The term “claim” and thus the classification of who is a “creditor” is broadly construed.

9 *See In re Jensen*, 995 F.2d 925, 928 (9th Cir. 1993). By the plain language of the statutes recited
10 above, a professional who holds a claim against the debtor is not disinterested and is not eligible
11 for employment and compensation from the estate. 11 U.S.C. §§ 327(a), 101(14) and 101(5).

12 Hence, the claim must be waived if the professional is to be employed. *In re Princeton Medical*
13 *Management, Inc.*, 249 B.R. 813, 816 (Bankr. M.D. Fla. 2000).

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15 **B. Mr. Nishi’s Receipt of a Preferential Payment Must Be Resolved Prior To
His Employment By The Trustee.**

16 Whether a party holds an interest that is materially adverse to the bankruptcy estate so as
17 not to qualify as disinterested under the Bankruptcy Code, necessarily requires an objective and
18 fact-driven inquiry based on a totality of circumstances. *In re AFI Holding, Inc.*, 530 F.3d 832,
19 848 (9th Cir. 2008). Included in the facts considered in determining disinterestedness are: 1)
20 likelihood that a potential conflict of interest might turn into an actual one; 2) the influence
21 which the conflict might have in subsequent decision making; and 3) how the matter is perceived
22 by creditors and other parties in interest. *Id.* at 847.

23
24 The Third Circuit, applying the same test cited above adopted by the Ninth Circuit in *AFI*
25 *Holdings* in determining whether a material adverse interest exists, has held that receipt of a

1 facially plausible claim of a substantial preference constitutes a material adverse interest to other
2 creditors, and in such cases, the professional may not be retained. *In re Pillowtex, Inc.*, 304 F.3d
3 246, 254-255 (3rd Cir. 2002). In so holding the Third Circuit stated;

4 Although a bankruptcy court enjoys considerable discretion in
5 evaluation of whether professionals suffer from conflicts, that
6 discretion is not limitless, a bankruptcy court does not enjoy the
7 discretion to bypass the requirements of the Bankruptcy Code.

8 *In re Pillowtex, Inc.*, 304 F.3d at 254.

9 The Third Circuit further held:

10 [W]hen there has been a facially plausible claim of a substantial
11 preference, the district court and/or bankruptcy court cannot avoid
12 the clear mandate of the statute by the mere expedient of approving
13 retention conditional on a later determination of the preference
14 issue.

15 *In re Pillowtex, Inc.*, 304 F.3d at 255.

16 Pursuant to the holding of *In re AFI Holding, Inc.*, 530 F.3d 832, 848 and *In re*
17 *Pillowtex, Inc.*, 304 F.3d at 255 the preference must be resolved before the professional may be
18 employed. The Ninth Circuit Appellate Panel so held in *In re Triple Star Welding, Inc.*, 324
19 B.R. 778, 794 (Bankr. 9th Cir. 2005), partially abrogated on other grounds by *In re AFI Holding,*
20 *Inc.*, 530 F.3d 832, 848 (holding that an attorney who received an avoidable preference would be
21 ineligible to be paid from the estate unless the preference was returned). Since Mr. Nishi
22 received a preferential payment (see discussion below) he must either resolve the preference
23 prior to his employment or he cannot be employed.

24 **C. Mr. Nishi Received A Facially Plausible Claim of a Substantial Preference**
25 **and May Not Be Employed Until The Preference Is Resolved.**

 An avoidable preference is defined in section 547(b) of the Bankruptcy Code as

1 any transfer of an interest of the debtor in property “(1) to or for the benefit of a creditor; (2) for
2 or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made
3 while the debtor was insolvent; (4) made (A) on or within 90 days before the date of the filing of
4 the petition; ... (5) that enables such creditor to receive more than such creditor would receive [in
5 a Chapter 7 distribution].” 11 U.S.C. § 547(b).

6 The preference rule prevents debtors from depleting the estate to pay favored creditors
7 with assets that otherwise would have been apportioned among creditors according to the
8 prioritization scheme of the Bankruptcy Code. *See, e.g.,* George M. Treister et al., *Fundamentals*
9 *of Bankruptcy Law* § 4.03(c), at 169 (noting that § 547 “is designed to achieve the policy of
10 fostering equality of distribution among the creditors of an insolvent debtor”). When the debtor
11 becomes insolvent, a payment to one creditor from the estate's limited assets is necessarily paid
12 at the expense of another creditor. The receipt of a preference by a creditor thus creates a conflict
13 with unpaid creditors, whose share of the remaining assets is diminished by the payment.
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15 In this case, Mr. Nishi received a facially plausible substantial preference the facts of
16 which are not in dispute. All of the elements of a preference are met in this case since: 1) at the
17 time of the transfer Mr. Nishi was a creditor; 2) at the time of the transfer Mr. Nishi was owed
18 \$25,000; 3) the transfer occurred within 90 days preceding the commencement of the case; and
19 4) the transfer likely allowed Mr. Nishi to receive more than he would receive in a chapter 7
20 liquidation. Under these circumstance, Mr. Nishi may not be employed in this case unless and
21 until the preference is resolved.

22 **IV. CONCLUSION**

23 For the foregoing reasons, the U.S. Trustee requests the Nishi Application be denied
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1 unless and until the above objections are addressed and for such other and further relief as the
2 Court deems just and proper.

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6 Date: February 3, 2016

7 TRACY HOPE DAVIS
8 UNITED STATES TRUSTEE

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