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UNITED STATES BANKRUPTCY COURT

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NORTHERN DISTRICT OF CALIFORNIA

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OAKLAND DIVISION

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In re

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FOX ORTEGA ENTERPRISES, INC.,
14 dba PREMIER CRU,

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Debtor.

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Case No. 16-40050-WJL
Chapter 7

STATUS CONFERENCE STATEMENT

Date: February 8, 2016

Time: 2:00 p.m.

Place: 1300 Clay Street

Courtroom 220

Oakland, CA

Judge: The Hon. William J. Lafferty

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Michael G. Kasolas, the duly appointed and acting chapter 7 trustee (“Trustee”) of the
20 bankruptcy estate of Fox Ortega Enterprises, Inc., dba Premier Cru (“Debtor”), hereby files this

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Status Conference Statement.

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BACKGROUND

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1. An Order for relief under Chapter 7 of Title 11 of the United States Code was
24 entered herein pursuant to voluntary petition filed by the debtor on January 8, 2016. Michael G.
25 Kasolas is the duly appointed, qualified and acting Trustee of the debtor’s estate.

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2. The Debtor, operating under the name of Premier Cru, has been a well-known
27 seller of top-quality wines in the Bay Area since it opened in 1980. The Debtor made its
28 reputation by selling top-tier wines at lower prices than competitors, but often selling them as

1 “pre-arrivals.” In return for “unbeatable” prices on sought-after wines offered as “pre-arrivals,”
2 the Debtor often took years to deliver orders. The Debtor also sold wine futures, wines which may
3 not have been bottled yet. The Trustee is continuing his investigation into the operations, and so it
4 is too early in the process to describe the Debtor’s business in detail. However, what is known,
5 and of public record, is that many people and entities purchased fine wine from the Debtor and
6 received those bottles. However, many people and entities purchased wine from the Debtor and
7 did not receive their orders for a variety of reasons ranging from not wanting to pay for the
8 shipping, wanting the Debtor to store the wine for free, waiting for the wine to arrive, or waiting
9 for the wine to be bottled by the winery and distributed.

10 3. When the Debtor commenced this bankruptcy case, the Debtor scheduled
11 \$6,800,000 in wine inventory, and \$70,000,000 in debts. The Trustee took immediate steps to
12 secure the wine and to commence a physical inventory to compare with the computerized
13 inventory. The Trustee is also working with the Debtor’s former IT Consultant to review the
14 Debtors records to enable the Trustee to understand the nature of the many issues that are unique
15 to this case. As set forth in detail below, there are some threshold issues that the Trustee needs to
16 resolve regarding the ownership of the bottles of the wine. Once that is resolved, the Trustee
17 intends to conduct an auction. To that end, the Trustee has begun his discussions with different
18 persons to gather information as to the best way to sell the wine. Once he has made that
19 determination, and once the title issues are resolved, the Trustee will file a motion for approval of
20 an auctioneer or other professional to assist the Trustee.

21 4. Although the Trustee is not operating the Debtor, the Trustee must spend money to
22 protect the assets. The Trustee obtained authority to use cash collateral to pay for insurance and
23 utilities. The Trustee believes that until the wine is sold, and the estate can vacate the premises, he
24 estimates that he will need approximately \$25,000 a month. This amount could increase if there
25 are specific issues that arise that would require additional expenses. Therefore, the Trustee is
26 looking at possible sources for additional sums and is in discussions with lenders, and others who
27 may provide additional financing, and such financing would be subject to a further order of this
28 Court.

1 5. The Trustee is in the process of choosing a claims agent to assist the estate in
2 establishing a website for posting all pleadings filed, and assisting with the claims process. After
3 selecting a company to provide that service, the Trustee will obtain court authority to retain said
4 company. Thereafter, the Trustee will file a motion seeking to limit notice, which will incorporate
5 the use of the website provided by the claims agent so creditors could review the docket easily at
6 any time, and an option to receive a hard copy of pleadings, or electronic email notification and
7 access to pleadings filed (already available on this Court's website). The service of a one-page
8 document will cost the estate approximately \$5,000 for postage; therefore, it is imperative to
9 reduce the number of pleadings that have to be served by U.S. Mail on all parties on the matrix.

10 6. The Trustee is also considering retaining the services of an auctioneer, or a
11 financial advisor to assist the Trustee in liquidating the inventory, and he has not determined at
12 this point the best approach. He is also discussing the possibility of retaining a wine consultant to
13 assist him in making his decision. If for example the Trustee concludes that it will be best to
14 conduct multiple auctions in different markets, the services of a wine consultant may be necessary
15 to assist the Trustee in analyzing the markets. However, if the Trustee decides to sell the wine in
16 bulk, or large lots, the services of a consultant may be useful in establishing the lots. In any event,
17 the Trustee cannot sell the wine until the title issues are resolved, and so he has not made a final
18 determination as to which method will generate the most money for the creditors of this estate, and
19 which professionals will be necessary.

20 7. There are other issues which the Trustee is investigating, the details of which
21 cannot be disclosed at this time, and continue to be a work in progress. The Trustee believes that
22 there are avoidance actions that may be recoverable. In addition the Trustee is looking into the
23 outstanding wine futures, and wine which has been purchased, but not delivered. The Trustee is
24 also analyzing the necessary scope of a forensic accounting. The FBI is investigating this matter,
25 and the Trustee is cooperating with the FBI.

26 8. The Debtor leases space from an entity in which the Debtor owns 60%. The
27 Trustee is negotiating with the entity to stay in the premises without paying rent for a specified
28 period of time. In addition, the primary secured creditor in this case, Community Bank of the Bay

1 has liens on the real property owned by the LLC, which provide additional collateral for loans to
2 the Debtor. The Trustee is also negotiating a sale of the Debtor's membership interest to the other
3 member. Any such agreement will be subject to Court approval.

4 9. As this Court is aware, some of the Debtor's wine buyers have asserted that some
5 of the wine that the Debtor is holding belongs to them. The Trustee has received many telephone
6 calls from some of the buyers, and has analyzed the Debtor's records and reviewed the premises
7 carefully to obtain a more complete understanding of the situation. As set forth below, the Trustee
8 is working on developing a strategy to resolve the title issues so that the wine inventory can be
9 sold. Time is of the essence, as there are approximately 35,000 bottles of wine, and the cost of
10 maintaining the inventory is substantial. In addition, the building that the Debtor leases is on the
11 market, and will be sold. Therefore, we must develop a method of resolving the title issues
12 quickly, so that the wine can be sold.

13 10. The Debtor maintained a sophisticated computerized inventory system and means
14 of communicating with buyers by email. Many buyers received emails providing information as to
15 the status of their wine, and such emails may or may not reflect the same information as is in the
16 Debtor's inventory.

17 11. What follows is a very general discussion to give the Court an overview of the legal
18 issues. It is not meant to be a complete legal analysis, and more analysis is necessary to allow the
19 Court to come to a conclusion.

20 12. Under California law where there is an agreement to sell goods and the buyer is to
21 pay for shipping, absent an agreement to the contrary, the transaction is a shipping contract under
22 Section 2401 of the California Commercial Code. That code section provides that title transfers at
23 the time and place when the seller has completed performance "with reference to the physical
24 delivery of the goods". Cal. Comm. Code Section 2401(2). Therefore, the Trustee contends that
25 the wine that is listed in the Debtor's computer system as being identified to a buyer, but not
26 segregated, is property of the estate and can be sold and there should be little debate on that issue.
27 Cases such as *In re Carolina Wine Company, Inc*, 2008 Bankr. LEXIS 2156 (Bankr. E.D.N.C.
28 2009) support this conclusion. There is no case that holds anything to the contrary that the Trustee

1 could locate, and in fact, in many commercial settings when a debtor files bankruptcy, there are
2 customer orders that have been paid for at the time the debtor files a bankruptcy, and those
3 customers do not have priority over any other creditor even though there is inventory in the
4 warehouse that could be used to satisfy that order. That is the situation here as to those customers.

5 13. A different legal analysis may apply to those claims of customers whose wine was
6 physically segregated, as was the case for approximately 120 customers of Premier Cru. The
7 levels and extent of segregation among customers vary, ranging from boxes getting ready to be
8 shipped or picked up with a packing slip with the customer's name on it, to wine stored in boxes
9 with the customer's name on it that has been so held for an indefinite period of time, to returns.
10 While such customers may argue that goods contracted to be sold that are separated and set apart
11 for the buyer may be recovered (by specific performance) under Commercial Code Section 2502,
12 a decision in the Northern District of California concluded that Section 2502 did not apply in the
13 context of a bankruptcy case because there is no express exception set forth in the Bankruptcy
14 Code for buyers to receive goods not delivered prior to the commencement of the case. See, *In re*
15 *Paoletti, Inc.*, 205 B.R. 251, 262 (Bankr. N.D. Cal. 1997). Such buyers were entitled only to a
16 general unsecured claim.

17 14. To the extent that the Court may determine that title transferred to any customer
18 within 90 days of the case commencement, the Trustee contends such transfer would be a
19 preference avoidable under Bankruptcy Code Section 547.

20 **PROPOSAL AS TO PROCESS TO RESOLVE TITLE DISPUTES**

21 15. In view of the rule that the Trustee may sell only property that is property of the
22 estate under Bankruptcy Code Section 363, as affirmed under *Warwick v. Yassian (In re Rodea*
23 *Canon Dev. Corp.)* 362 F.3d 603 (9th Cir. 2004) and *Darby v. Zimmerman (In re Popp, 323 B.R.*
24 *260 (9th BAP 2005)*, the court has asked the Trustee to propose a process that is fair yet
25 expeditious for it to determine who owns the wine held by the estate as between the Trustee and
26 parties, as yet unknown, who may claim that such wine belongs to them.

27 16. Because the evidence upon which title can be determined appears to be objective
28 and finite, the Trustee proposes to resolve title disputes by way of a motion for summary judgment

1 under a process containing the following protections:

2 **(a) Advanced Posting of Objective Evidence**

3 The Trustee proposes to post the evidence bearing on title online in a document
4 room prior to filing the motion. That evidence will include the debtor's stated inventory, the
5 physical inventory still in process of being prepared by West Auctioneers (the "West Inventory"),
6 all transaction forms the debtor used with customers, which were uniform and standardized,
7 reports of sale orders relative to inventory, a list of all customers whose wine was segregated
8 (either as ready to ship or held in a box with customer's name receivable by customer only),
9 among other records the Trustee believes are material to the issue of title. The documents to be
10 posted are summaries and may include the buyer's name and associated purchases, but no personal
11 information.

12 **(b) Notice to Creditors and Interested Parties.**

13 The Trustee proposes that he or the court serve notice of the order setting the title
14 resolution process and schedule, notice of the website as resource for the motion, notice of the
15 posting of the title evidence by the Trustee on the website, notice of the opportunity to object to or
16 supplement such evidence, notice of the appointment or opportunity for appointment of any class
17 representative or legal counsel for parties whose wine is segregated and whose wine is not, notice
18 of any order limiting notice relative to the case and any motion in connection with the title
19 resolution process (the "Notice of Order(s)").

20 **(c) Process: Motion for Summary Judgment under Motion to Sell Free
21 and Clear.**

22 Because, to the best of the Trustee's knowledge, the evidence bearing on title is
23 substantially objective and finite, and undisputed, title may be determined under a motion for
24 summary judgment. The Trustee proposes to bring such a motion under the rubric of a motion to
25 sell free and clear of liens and interests under Bankruptcy Code Section 363. As a contested
26 matter under Bankruptcy Rule 9014, most of the procedural safeguards that apply to adversary
27 proceedings under Part VII of the Bankruptcy Rules would apply to these motions. While title
28 disputes are ordinarily determined by adversary proceedings, here, given the exigencies and

1 economies of the case, an adversary proceeding to determine title as to 9000 potential claimants
2 would be unduly cumbersome, expensive and time-consuming. Given the similar procedural
3 safeguards and the nature of the dispute, it is hard to see that any prejudice would result if the
4 issue is determined as a contested matter rather than by an adversary proceeding.

5 **(d) Class Representatives**

6 There are two primary classes of potential customer title claimants: those whose
7 wine is segregated under their name and those whose wine is held in general inventory. The size
8 of the former class appears to be about 120 customers. (The Trustee proposes to post a list of
9 those customers and the wines held in their boxes as part of the initial posting in the document
10 room.) The size of the class of customers who may assert an interest in wine held in general
11 inventory is not yet determined but is likely to be so numerous that joinder of all members is
12 impractical.

13 In view of the exigencies of the case, a full class certification process under
14 Bankruptcy Rule 7023 is substantially impractical. However, having a class representative and
15 class counsel will expedite and promote fairness in the process. The court can streamline the
16 FRCP Rule 23 requirements under Bankruptcy Code Section 105 to find that the prerequisites
17 under FRCP Rule 23 (a) apply, that the conditions of FRCP Rule 23(b) (1)(A) or (B) or (2) apply
18 and based thereon select counsel who the court finds is competent and properly motivated to
19 represent the interests of the class.

20 At least some if not all of the customers whose wine is segregated also may claim
21 to own wine that is not segregated, and the Court may find that the appointment of counsel for two
22 classes is unnecessary: that a claim to title may be sufficiently based purely on documentation
23 rather than physical placement. Accordingly, one counsel may be sufficient to represent the
24 interests of both types of claimants.

25 **(e) Preference Action**

26 To the extent that the Court concludes that title passed to certain customers within
27 90 days of the case commencement date, i.e. January 8, 2016, the Trustee would claim that such
28 transfers are avoidable as preferential transfers under Bankruptcy Code Section 547. The Trustee

1 would thus bring an action to avoid those transfers once such transfers are determined, followed
2 by a motion for summary judgment set on an expedited basis.

3 **(f) Schedule for Motion for Summary Judgment.**

4 The West Inventory is not yet complete and Brian Nishi's employment application
5 is not yet approved, consequently the Trustee still does not have a complete record of
6 documentation pertaining to title. Therefore, the Trustee proposes the following schedule to
7 process the proposed motions to sell free and clear and for summary judgment:

- 8 Day 1: Set up document room with objective evidence related to title.
- 9 Day 1: Serve the Notice of Orders
- 10 Day 10: Deadline for customers to supplement objective evidence bearing on title.
- 11 Day 10: Hearing set to appoint class representative(s) and counsel, if any.
- 12 Day 14: Trustee to serve and file Motion to Sell Property of the Estate Free and
13 Clear of Liens and Interests and Motion for Summary Judgment on Title
Issues.
- 14 Day 28: Opposition to Motion for Summary and Cross-Motion for Summary
15 Judgment due.
- 16 Day 35: Trustee's Reply to Opposition and Opposition to Cross-Motion due.
- 17 Day 42; Customer's Reply to Opposition to Cross-Motion due.
- 18 Day 49: Hearing on Cross-Motions for Summary Judgment.

19 **OTHER ORDERS THE TRUSTEE NEEDS TO FULFILL DUTIES.**

20 17. The Trustee will request expedited orders to procure funds on limited notice. Such
21 funds may be procured from loans, sales of uncontested property of the estate or compromises.
22 These are necessary to preserve assets and evidence pending sale or other disposition of the
23 inventory.

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2 18. The Trustee needs the services of Brian Nishi to navigate the debtor's accounting
3 systems and to assist him in the understanding of the debtor's business and transactions. Nishi is a
4 recipient of apparent preferential transfers and the U.S. Trustee objects to his employment because
5 he is therefore not disinterested. If the Trustee is not allowed to employ him, the process proposed
6 above most likely will not be fair and will not work.

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8 DATED: February 5, 2016

WENDEL, ROSEN, BLACK & DEAN LLP

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By: /s/ Mark Bostick

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Mark Bostick

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Attorneys for Michael G. Kasolas

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