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10 UNITED STATES BANKRUPTCY COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 In re

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

16 Debtor.

Case No. 16-40050-WJL
Chapter 7

**SECOND STATUS CONFERENCE
STATEMENT**

17 Date: February 22, 2016
Time: 2:00 p.m.
18 Place: 1300 Clay Street
Courtroom 220
Oakland, CA
19 Judge: The Hon. William J. Lafferty

20 TO THE HONORABLE WILLIAM J. LAFFERTY, UNITED STATES BANKRUPTCY
21 JUDGE, OAKLAND, CALIFORNIA; THE UNITED STATES TRUSTEE; AND OTHER
22 PARTIES IN INTEREST:

23 Michael G. Kasolas, the duly appointed and acting chapter 7 trustee ("Trustee") of the
24 bankruptcy estate of Fox Ortega Enterprises, Inc., dba Premier Cru ("Debtor"), hereby files this
25 Second Status Conference Statement to advise the court of developments in the case and to submit
26 the Trustee's proposal for resolving title disputes in a fair and efficient manner.

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1 **I. PRELIMINARY STATEMENT**

2 The Trustee incorporates by reference the Background section of his initial Status
3 Conference Statement filed herein on February 5, 2016 [Docket No. 59]. This Statement updates
4 the court on procedural and factual developments occurring since the first status conference held
5 on February 8, 2016; and sets forth another proposal for fixing a fair and speedy process to resolve
6 potential title claims to the wine inventory held by the Trustee.

7 **II. DEVELOPMENTS IN CASE**

8 1. The physical inventories to be prepared by West Auctioneers (“West”) were
9 completed on February 10, 2016. The wine inventories reflect that as of the case commencement
10 date, the Debtor held 71,833 bottles at 1011 University Ave. Berkeley, California (the “Facility”).
11 In addition, we now know that there are approximately 120 persons who have their name
12 physically written on boxes containing wine, and all of the remaining bottles of wine are held in
13 general inventory at the Facility.

14 2. The Trustee is in process of reconciling the West physical inventories with the
15 Debtor’s internal inventory reports to confirm, among other things, identification of all wine that
16 is not subject to any sale order (i.e. “Available Wines”) and the extent of inaccuracy of the
17 Debtor’s internal reports. Based on the reconciliation so far, the Trustee has confirmed that the
18 cost value of Available Wines in the physical inventory is \$108,823.00, not \$252,685.00 as
19 previously indicated under the Debtor’s internal inventory records.

20 3. The Trustee is continuing to investigate the status of overseas contracts, purchase
21 orders, payments and deposits, and he continues to make progress.

22 4. The Trustee’s motion to employ BMC to serve as a claims agent and to provide
23 website notification services was filed on February 11, 2016, and the US Trustee has approved the
24 form of Order that was uploaded, and we await the Court’s approval of that motion.

25 5. The Trustee’s motion for authority to limit certain notices was filed on February
26 11, 2016, and the office of the US Trustee approved the form of Order that was uploaded, and we
27 await the Court’s approval of that motion. The Trustee hopes that there is an order entered on this
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1 motion prior to the 341 hearing which is scheduled for February 24, 2016, so he can make an
2 announcement at the 341 hearing.

3 7. The Trustee's motion for authority to operate in a limited way to allow the Trustee
4 to pay certain expenses as set forth in a budget without further hearing or court order pursuant to
5 11 U.S.C. §§721 and 363 (c)(1) was filed on February 17, 2016.

6 8. After the proposed Order Limiting Notice is entered, the Trustee intends to file a
7 motion for an order approving a compromise with Saul Gevertz that will allow the Trustee to
8 continue to occupy the Facility rent free for six months, among other benefits, but will set the end
9 of that period as a hard date for the Trustee to vacate the Facility.

10 9. John Fox, the co-founder and president of the Debtor, filed a personal chapter 7
11 bankruptcy petition on February 8, 2016, Case No. 16-40340 WJL; his summary of schedules lists
12 assets with a total value of \$50,000.00 or less. No schedules or statement of financial affairs have
13 been filed at this time. All parties listed as creditors in the Debtor's bankruptcy filing appear to
14 have been listed as creditors in Mr. Fox's personal filing. Marlene Weinstein is the chapter 7
15 trustee appointed in Mr. Fox's personal bankruptcy case.

16 10. The Trustee's application to employ Arent Fox LLP as conflicts counsel is in
17 process.

18 **III. PROPOSAL AS TO PROCESS TO RESOLVE TITLE DISPUTES**

19 The court is requiring that title disputes to the wine be resolved before the wine can be sold
20 or otherwise disposed of. Due to the estate's lack of funds and its consequent inability to pay rent
21 and other obligations, all interested parties have a common interest to resolve any title disputes as
22 soon as possible. Ordinarily, title disputes require determination by adversary proceeding, which
23 often take years to resolve. However, due the number of potential claimants, estimated over
24 6,000, and due to the limited time that storage at the Facility can be maintained, resolution by way
25 of adversary proceeding will take too long to allow for an optimal or orderly disposition to occur.
26 Therefore, some expedited procedure is required. The Trustee proposes to have the court apply
27 such expedited procedures by consent of the interested parties; and through this process to obtain
28 determinations as to each potential claim of title that could be made. Following those

1 determinations, the Trustee will serve notice of a proposed disposition of the wine consistent with
2 those orders and give all interested parties the opportunity to object and assert their claims of title
3 or be forever barred from doing so.

4 Based on the manner in which the wine is held in physical inventory, there appear to be
5 only three types of claims to title that can be made. The first is by those who have unfulfilled sale
6 orders but no corresponding wine at the Facility ["Type 1 Claims"]. Those parties may assert a
7 claim based on constructive trust to the extent that their funds were fraudulently used to buy wine
8 now held at the Facility. However, such claims require strict tracing under *In re Advent*
9 *Management Corp.* 104 F 3d 293 (9th Cir. 1997). It appears that the Debtor had only one or two
10 bank accounts at any given time through which all its funds came and went so it will be
11 impossible to prove tracing.

12 The second type of title claim is that held by customers whose sale orders relate to wine
13 held in general inventory ["Type 2 Claims"]. Those claimants may argue that title to their wine
14 passed to them when the Debtor took possession of it. This argument runs counter to the general
15 rule under the California Commercial Code that in the absence of a contract to the contrary, title to
16 goods does not pass until they are shipped to the customer. This category of claimants comprises
17 the largest number of customers, as many as 6000, possibly more.

18 The third type of title claim is that potentially asserted by those customers whose wine was
19 segregated under their name, either getting ready to be shipped or picked up or stored in boxes
20 under their name [Type 3 Claims]. This group is comprised of about 120 customers, most of
21 whom had wines getting ready to be shipped or picked up.

22 The Trustee proposes to obtain prompt title determinations as to each type of claim
23 according to the following processes.

24 As to Type 1 and Type 2 claims, he will solicit from among the 100 largest creditors and
25 among the 10 parties with lawsuits pending against the Debtor before the filing date, 2-10 parties
26 with Type 1 and Type 2 claims willing to stipulate that: (1) they consent to the entry of a final
27 order by the Bankruptcy Court determining title; (2) they waive any requirement that title be
28 determined under an adversary proceeding; (3) they agree to a 10 day period for exchange of

1 documents, followed by a 28 day briefing schedule commencing with the filing of the Trustee's
2 Motion to Determine Title, followed by a preliminary hearing to determine if an evidentiary
3 hearing is necessary, followed by a final hearing that may be either an evidentiary hearing or
4 closing argument or both.¹

5 As to Type 3 Claims, the Trustee would solicit from among the 120 parties whose wine is
6 segregated at least 2 parties whose wines were in process of being shipped or picked up and at
7 least 2 parties whose wine was held under their name in storage to stipulate to the foregoing
8 procedure. To the extent any other sub-class of claimants emerge from this group, the Trustee will
9 seek to include them as well.

10 The Trustee will submit a stipulation which sets forth the details of this procedure, after
11 reaching such an arrangement with the parties. This will allow the parties to have some input into
12 the initial process.

13 The aim of this proposal is to obtain title determinations on each type of claim as soon as
14 possible. Following those determinations, the Trustee will move to dispose of the wine consistent
15 with those determinations giving all parties an opportunity to assert their rights. All parties' rights
16 to seek further relief will be preserved. Should there be unresolved title issues at the time of
17 proposed disposition, the Trustee will decide how to handle those claims at that time.

18 If the Trustee is unable to reach process stipulations with any parties in the near future, he
19 will consider other options.

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24 ¹ The Trustee believes that this matter can be resolved as a legal issue. However, if the Court
25 concludes that there are facts that would impact its decision, an evidentiary hearing could be used
26 to present those facts. As a practical matter, most if not all of the wine was purchased on-line, and
27 There are a limited number of email confirmations or account reports which were automatically
28 generated in response to the placement of the orders. If some creditors have additional evidence
such as, for example, personal emails from John Fox they could present it to the Court. Assuming
the hearing could be set one week after the briefing schedule is complete, a title determination on
this type of claim could be obtained as soon as eight weeks from the initial disclosures.

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RESPECTFULLY SUBMITTED,

DATED: February 18, 2016

WENDEL, ROSEN, BLACK & DEAN LLP

By: /s/ Mark S. Bostick
Mark S. Bostick
Attorneys for Michael G. Kasolas