

1 Mark S. Bostick (Bar No. 111241)  
Elizabeth Berke-Dreyfuss (Bar No. 114651)  
2 Tracy Green (Bar No. 114876)  
**WENDEL, ROSEN, BLACK & DEAN LLP**  
3 1111 Broadway, 24<sup>th</sup> Floor  
Oakland, California 94607-4036  
4 Telephone: (510) 834-6600  
Fax: (510) 834-1928  
5 Email: mbostick@wendel.com;  
edreyfuss@wendel.com;  
6 tgreen@wendel.com

7 Attorneys for Michael G. Kasolas, Trustee

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

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

Case No. 16-40050-WJL  
Chapter 7

**TRUSTEE’S RESPONSE TO AMERICAN  
EXPRESS TRAVEL RELATED SERVICES  
COMPANY, INC.’S MOTION FOR ORDER  
DIRECTING IMMEDIATE PRODUCTION  
OF CERTAIN DOCUMENTS**

Date: March 3, 2016  
Time: 2:00 p.m.  
Place: 1300 Clay Street  
Courtroom 220  
Oakland, CA  
Judge: The Hon. William J. Lafferty

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TO THE HONORABLE WILLIAM J. LAFFERTY, UNITED STATES BANKRUPTCY  
JUDGE, OAKLAND, CALIFORNIA:

The trustee, Michael G. Kasolas (“Trustee”), responds to the motion of American Express  
Travel Related Services Company, Inc. (“AMTRC”) for immediate production of certain  
documents as follows.

1           **1. The Trustee's Position.**

2           The Trustee is able and willing to provide the processed data as requested by AMTRC but  
3 has requested that he (the estate) be reimbursed for the cost of doing so and be indemnified from  
4 any claims that may be brought by parties whose personal information is released. The cost  
5 includes the expense of Brian Nishi's time and the cost of the program service he uses to extract  
6 the information (by Sage, which charges \$1137.01 per month). AMTRC agrees to pay for Brian  
7 Nishi's time, but not for the Sage bill. It also refuses to indemnify the Trustee from any privacy  
8 claims by affected parties.

9           **2. The Trustee's Concerns.**

10           Subject to confirmation from AMTRC, the Trustee believes that documents it requestS  
11 affect over 7,250 consumers: 2,813 from California, and the others from all 50 states, plus Puerto  
12 Rico and Washington D.C. and 29 countries. The Trustee is uncertain what privacy or consumer-  
13 protection laws apply to this production. California law requires that consumers receive advance  
14 notice of and opportunity to object to production of their personal records under Cal. Code of Civil  
15 Procedure Section 1785.3. The Trustee is unaware of what laws may apply in other states,  
16 territories or countries. The Trustee Handbook requires that affected parties receive advance  
17 notice of the intent to produce personally identifiable information before it can be released. U.S.  
18 DOJ Exec. Office for U.S. Trustees Handbook for Chapter 7 Trustees at 5-22 (2012). The Trustee  
19 does not know if the data in question may fall within the definition of personally identifiable  
20 information.

21           AMTRC contends that the consumer and privacy rights of its customers are not implicated  
22 by the production because it already holds such information. However, the Trustee believes that  
23 among the data it seeks are addresses to which wine was delivered, which AMTRC may not have.

24           AMTRC has not shown the Trustee where in its contracts with the debtor's customers  
25 where they have waived or released any consumer or privacy rights or claims against third parties.

26           The Trustee is concerned that the production request is overbroad and may include data  
27 relating to (A) persons who are not requesting charge reversals and (B) persons who are no longer  
28 creditors of the debtor.

1 The Trustee questions whether the need for production is urgent. AMTRC may have only  
2 30 days to respond to customer charge reversal claims, but the Trustee assumes that all its  
3 remedies to reverse any credit given due to fraud or mistake is preserved under its contracts and  
4 applicable law.

5 The Trustee is unconvinced by the cases cited by AMTRC that the Trustee and the estate  
6 will be protected from claims if the production is made pursuant to a subpoena or a bankruptcy  
7 court order without notice to the affected parties; i.e. *Higgenbotham v. KCS Intern, Inc.* 202  
8 F.R.D. 444 (D. Md. 2001) and *In re Williams*, 2009 WL 1609389 (Bankr. E.D.N.C. June 8, 2009).  
9 Those cases are not binding and appear to be inapplicable.

10 The Trustee believes that his demand for indemnification is reasonable and should be  
11 required before any expedited production is made.

### 12 **3. Conclusion**

13 The Trustee opposes the motion on the grounds that:

- 14 1. The request is overbroad in that it appears to include AMTRC customers who are  
15 not requesting reimbursement and who may not be creditors of the estate.
- 16 2. There is no evidence that customers waived privacy and consumer protections.
- 17 3. The privacy and consumer protection laws of 50 states and 29 countries are  
18 implicated.
- 19 4. The authorities cited by AMTRC do not support its conclusion that a subpoena will  
20 immunize the estate from claims.
- 21 5. The demand for production does not appear to be urgent.
- 22 5. AMTRC should be required to pay all costs of production, including the cost for  
23 the software that enables the Trustee to perform the production efficiently.
- 24 6. AMTRC should be required to indemnify the estate from all claims that may arise  
25 as a result of the data production.
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The Trustee has pending written questions to AMTRC seeking to confirm the scope of its request and the history of credit reversal claims with the estate’s creditors. The Trustee hopes that such information will be made available prior to the hearing on March 3, 2016.

RESPECTFULLY SUBMITTED,

WENDEL, ROSEN, BLACK & DEAN LLP

DATED: March 2, 2016

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

1 Mark S. Bostick (Bar No. 111241)  
Elizabeth Berke-Dreyfuss (Bar No. 114651)  
2 Tracy Green (Bar No. 114876)  
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13 In re

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

15  
16 Debtor.

Case No. 16-40050-WJL

Chapter 7

**CERTIFICATE OF SERVICE**

17 Date: March 3, 2016  
18 Time: 2:00 p.m.  
Place: 1300 Clay Street  
Courtroom 220  
Oakland, CA  
19 Judge: The Hon. William J. Lafferty

20 I, Jeanne Rose, declare:

21 I am a citizen of the United States and am employed in the County of Alameda. I am over  
22 the age of 18 years and not a party to the within-entitled action. My business address is 1111  
23 Broadway, 24th Floor, Oakland, California, 94607-4036.

24 On the date set forth below, I caused to be served the following document(s):

25 **TRUSTEE'S RESPONSE TO AMERICAN EXPRESS TRAVEL RELATED SERVICES**  
26 **COMPANY, INC.'S MOTION FOR ORDER DIRECTING IMMEDIATE PRODUCTION**  
27 **OF CERTAIN DOCUMENTS**

28 to those parties requesting special notice and other interested parties by:

1 [X] by ECF

2

3 AND

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[X] by e-mail transmission on the parties whose names and email addresses are listed below.

5

Scott A. Smylie, Creditor, Email: esqsas@aol.com

6

Marlene Weinstein, on behalf of Debtor John Fox, Email: mgwtrustee@mgwtrustee.com

7

Cheryl Williams, Agent, BK Servicing, LLC, on behalf of Daimler Trust,  
Email: notices@bkservicing.com

8

Larry S. Zeman, Fitzgerald Yap Kreditor LLP, on behalf of William Witte  
Email: lzeman@fyklaw.com

9

10 Josiah M. Daniel, III, Vinson & elkins LLP, on behalf of Michael D. Thomson  
Email: jdaniel@velaw.com

11

Albert Kennedy, Tonkon Torp LLP, on behalf of Raj Garg  
Email: albert.kennedy@tonkon.com

12

13 Komal Chokshi, Cooper & Scully, on behalf of MSI Electronic Payments  
Email: komal.chokshi@cooperscully.com

14

15 I declare under penalty of perjury under the laws of the United States of America that the  
16 foregoing is true and correct.

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Executed on March 2, 2016, at Oakland, California.

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/s/ Jeanne Rose  
JEANNE ROSE

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