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13 Company

14 UNITED STATES BANKRUPTCY COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 OAKLAND DIVISION

17 In re  
18 FOX ORTEGA ENTERPRISES, INC. d/b/a  
PREMIER CRU,  
19 Debtor.

Case No. 16-40050-WJL

Chapter 7

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF MOTION  
OF CREDITOR AMERICAN EXPRESS  
TRAVEL RELATED SERVICES  
COMPANY, INC., PURSUANT TO FED. R.  
BANKR. P. 2004, FOR AN ORDER  
DIRECTING THE IMMEDIATE  
PRODUCTION OF CERTAIN  
DOCUMENTS BY THE CHAPTER 7  
TRUSTEE**

Date: March 30, 2016<sup>1</sup>

Time: 10:30 a.m.

Ctrm: 220

Judge: Hon. William J. Lafferty

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28 <sup>1</sup> AmEx has concurrently filed an *ex parte* application for an order shortening time to set the hearing on this motion for on or before March 3, 2016.

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1 Creditor American Express Travel Related Services Company, Inc. (“AmEx”) files this  
2 Emergency *Ex Parte* Motion (the “Motion”), pursuant to Rule 2004 of the Federal Rules of  
3 Bankruptcy Procedure and Local Bankruptcy Rule 2004-1(a), for entry of an Order, substantially  
4 in the form lodged concurrently-herewith, requiring the immediate production of certain  
5 documents by the Chapter 7 Trustee to AmEx.<sup>2</sup> In support of its Motion, AmEx respectfully  
6 shows the Court as follows:

7 **I. INTRODUCTION**

8 AmEx files the present Motion because it needs to obtain from the Trustee, on an urgent  
9 basis, information necessary to investigate and determine the validity of millions of dollars of  
10 credit card chargeback requests that have already been submitted to AmEx, and that are expected  
11 to be submitted in large numbers in the foreseeable future, by former customers who purchased  
12 goods from the Debtor using “American Express” credit cards, but now contend, among other  
13 things, that they never received the goods for which they paid.

14 Under the applicable regulations, AmEx generally has thirty (30) days from submission by  
15 cardholders to provide its initial response to a cardholder’s chargeback request. In order to  
16 investigate such requests, however, and to dispute any requests that appear on the facts to be  
17 unfounded, AmEx is required, and is expressly entitled under applicable regulations and its  
18 contract with the Debtor, to obtain information concerning the specifics of each challenged credit  
19 card transaction, such as, for example, what goods the customer purchased, to what extent the  
20 purchased goods were delivered to the customer, whether any goods were ever returned, and  
21 whether any refunds have already been provided to the customer in some form.

22 Obtaining this information, and as quickly as possible, is also critical to AmEx’s ability to  
23 mitigate the damages accruing to it from issuance of refunds to cardholders who made purchases  
24 from the Debtor, and in turn the magnitude of AmEx’s eventual claim for losses against the  
25 Chapter 7 estate. While many chargeback requests submitted by the Debtor’s customers may turn  
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28 <sup>2</sup> AmEx has previously conferred with the Trustee’s counsel, by telephone and e-mail  
correspondence, in an attempt to resolve the present dispute by agreement, in compliance with  
Local Bankruptcy Rule 1001-2(a) and Local Civil Rule 37-1.

1 out to be legitimate and worthy of a refund, some portion of those requests likely will not be  
2 submitted in good faith, or supported by the facts, and can be refuted and ultimately disallowed by  
3 AmEx if challenged within the applicable timeframe. Each such unfounded chargeback request  
4 that is ultimately disallowed by AmEx will reduce, on a dollar-for-dollar basis, the size of AmEx's  
5 eventual claim against the estate, not only mitigating AmEx's aggregate loss, but reducing the  
6 aggregate volume of all claims against the estate to the benefit of all unsecured creditors.

7 Through counsel and other agents, the Trustee has informed AmEx that he possesses the  
8 critical information that AmEx requires in order to investigate and determine the validity of  
9 chargeback requests, and that it is already collected, prepared and in a format that can be provided  
10 to AmEx immediately.<sup>3</sup> Nonetheless, the Trustee has refused to provide the information to AmEx  
11 to date, citing unspecific concerns that production of the information to AmEx voluntarily may  
12 expose the estate, the Trustees or his agents and professionals to claims by third parties under  
13 applicable privacy or consumer protection laws. Moreover, while the Trustee's counsel at one  
14 time indicated that the information could be provided to AmEx immediately if the Trustee were  
15 compelled to do so pursuant to an Order of this Court and accompanying subpoena that shields the  
16 estate, the Trustee and his agents and professionals from any liability to third parties as a  
17 consequence, he has since altered his position and demanded that AmEx execute an  
18 indemnification agreement as a condition to receipt of the information, perhaps among other  
19 conditions, notwithstanding that AmEx is already entitled to the information as a matter of  
20 contract. AmEx is thus compelled to file the present Motion on an emergency basis and without  
21 the Trustee's consent.

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23  
24 <sup>3</sup> In fact, the Trustee has already provided the bulk of the requested information to AmEx  
25 voluntarily, albeit in a format that AmEx requested to be refined somewhat by the Trustee's IT  
26 contractor, at AmEx's expense, for ease of use. In addition, AmEx understands -- via  
27 correspondence from the Trustee's IT contractor that was voluntarily shared with AmEx -- that  
28 the modified version of the information has already been prepared by a contractor of the Trustee  
and is ready to be produced to AmEx in 24 hours or less. After providing the information to  
AmEx initially, however, counsel for the Trustee changed position, citing ambiguous privacy  
concerns, and instructed AmEx not to refer to or use the information already in its possession.  
AmEx has complied with that request, and will continue to do so pending the Court's ruling on  
this Motion.

1 **II. BACKGROUND FACTS**

2 Under an Agreement For American Express Card Acceptance (the “Merchant  
3 Agreement”), and on the express terms and conditions provided for therein, the Debtor was  
4 authorized by AmEx to accept “American Express” credit cards, issued by AmEx and certain of its  
5 affiliates, as a form of payment for goods purchased by the Debtor’s customers. (Declaration of  
6 Angelo Impoco (“Impoco Decl.”), Exh. A.) After executing the Merchant Agreement, and  
7 continuously until the Debtor ceased operations and filed for bankruptcy protection in January of  
8 2016, customers charged millions of dollars of wine and related purchases from the Debtor on  
9 their “American Express” credit cards. (Impoco Decl. ¶ 3.)

10 With the cessation of the Debtor’s business and its bankruptcy filing, however, multitudes  
11 of “American Express” cardholders are now submitting chargeback requests to AmEx, seeking  
12 millions of dollars in refunds for purchases of goods that they contend they paid for but never  
13 received. (*Id.* at ¶ 4.)

14 The large volume of chargeback requests is no doubt attributable, in part, to the extensive  
15 press and Internet coverage of the Debtor’s demise. (*Id.* at ¶ 5.) For example, in an article posted  
16 on CSNBC’s website on February 17, 2016, the following appeared:

17 But Mark Bostick, trustee for the bankruptcy, said the largest creditor may turn  
18 out to be American Express. Several customers who purchased wine at Premier  
19 Cru used their AmEx card to do so, and the company has been issuing them  
refunds.

20 *See* <http://www.cnbc.com/2016/02/17/fbi-investigates-possible-wine-ponzi-scheme.html>. In  
21 addition, on at least one popular online forum for wine enthusiasts, WineBerserkers.com, posts in  
22 a “Premier Cru Chargeback Information” thread specifically instruct customers of the Debtor on  
23 how to submit chargeback requests to their credit card issuers. (Impoco Decl. ¶ 5; *see*  
24 <http://tinyurl.com/judxjme>.)

25 Moreover, while some portion of these chargeback requests is likely legitimate, and the  
26 cardholders will ultimately be justified in having credits back to their accounts issued by AmEx, a  
27 material portion of the requests may not be submitted in good faith or otherwise justified by the  
28 facts. (Impoco Decl. ¶ 6.) In some cases, it is likely that cardholders will submit chargeback

1 requests to AmEx for the full amounts of their purchases even though they received all or a  
2 substantial portion of the goods that they charged and paid for. (*Id.*) AmEx’s only means of  
3 mitigating the damages that it ultimately will be required to pay out to the Debtor’s former  
4 customers (and, therefore, also to mitigate damages for which the Estate would be liable) is to  
5 investigate each chargeback request in an attempt to weed out, challenge and ultimately deny any  
6 requests that do not appear to be justified on the facts. (*Id.* at ¶ 7.)

7 For precisely this reason, and so as to allow American Express to obtain information  
8 regarding specific transactions that may be necessary to investigate and dispute chargeback  
9 requests by cardholders, the American Express Merchant Regulations (the “Merchant  
10 Regulations”) that are incorporated by reference into the Debtor’s Merchant Agreement with  
11 AmEx set forth the documentation that a merchant is required to provide to AmEx for purposes of  
12 contesting a chargeback against that merchant for the reasons that are likely asserted by the  
13 Debtor’s customers – *i.e.*, either “goods/services cancelled” or “goods/services not received.” (*Id.*  
14 at ¶ 8.) Among the information that a merchant such as the Debtor is required to provide to permit  
15 investigation of a disputed charge are the transaction charge record, the merchant’s cancellation  
16 policy, written documentation of the goods/services purchased by the cardholder, detailed  
17 documentation relating to any deliveries or returns of the goods purchased, and proof of any  
18 refunds or credits on the goods that have already been issued to the cardholder.<sup>4</sup> (*Id.*)

19 Accordingly, once it began receiving chargeback requests from cardholders *en masse*  
20 following the Debtor’s bankruptcy filing, and pursuant to the Merchant Agreement and Merchant  
21 Regulations, AmEx requested, through contacts by AmEx business people and its in-house  
22 counsel with counsel for the Chapter 7 Trustee, that the Trustee provide certain transaction-related  
23 documents and information concerning customers who had made purchases from the Debtor using  
24 “American Express” credit cards. (*Id.* at ¶ 9.) Specifically, and for each transaction by a customer  
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27 <sup>4</sup> In addition to being extremely voluminous, the Merchant Regulations are proprietary and  
28 confidential, and accordingly are not attached to this public filing. Excerpts from the document  
relating to chargeback requests have already been provided by AmEx to the Trustee’s counsel,  
however, and can be provided to the Court upon request.

1 with the Debtor made with an “American Express” credit or charge card issued from 2008 through  
2 the present, AmEx needs to obtain:

3 (a) the transaction date, sales order number, customer name, customer address and  
4 customer AmEx card number;

5 (b) evidence of the purchase and detail of what was purchased (*i.e.*, wine futures to be  
6 delivered, with date to be delivered, cases that were was immediately shipped or provided at the  
7 store, etc.);

8 (c) evidence of any deliveries and delivery dates, addresses and records for goods  
9 delivered, itemized by shipment and/or tracking information; and

10 (d) evidence of any credits or refunds issued, whether on an “American Express”  
11 charge or credit card or by other means, where the original purchase was on an “American  
12 Express” credit or charge card.

13 (*Id.*)

14 It is AmEx’s intention to use the requested information solely for purposes of investigating  
15 chargeback requests submitted by the Debtor’s customers and contesting any such requests that  
16 appear not to be supported by the facts surrounding the disputed purchase. (*Id.* at ¶ 10.)

17 Nonetheless, as of the date of this Motion, the Trustee has refused to provide this critical  
18 information to AmEx unless AmEx accedes to certain additional conditions that it believes to be  
19 unreasonable and contrary to its existing rights. (*Id.* at ¶ 11.)

20 **III. ARGUMENT AND AUTHORITY**

21 Bankruptcy Rule 2004(a) provides that, upon motion of any party in interest, a court  
22 may order the examination of any entity. The scope of such examination may relate to:

23 the acts, conduct, or property or to the liabilities and financial  
24 condition of the debtor, or to any matter which may affect the  
25 administration of the debtor’s estate, or the debtors’ right to a  
26 discharge . . . [or] to . . . the source of any money or property  
27 acquired or to be acquired by the debtor for purposes of  
28 consummating a plan, and the consideration given or offered  
therefor, and any other matter relevant to the case or to the  
formulation of a plan.

FED. R. BANKR. P. 2004(b).



1 While the permissible scope of an examination under Rule 2004 is thus “unfettered  
2 and broad,” 9 COLLIER ON BANKRUPTCY ¶ 2004.02[1], p. 2004-6 (16th ed. Revised 2015)  
3 (citations omitted), the information that AmEx seeks to obtain from the Trustee here is narrow and  
4 intended solely for a specific purpose – the investigation and, where appropriate on the facts,  
5 reduction or denial of chargeback requests submitted to AmEx by the Debtor’s customers. Only  
6 with the benefit of this information, obtained on a timely basis, can AmEx seek to mitigate the  
7 damages accruing to it from issuance of refunds to cardholders who made purchases from the  
8 Debtor, and in turn the magnitude of AmEx’s eventual claim for losses against the Chapter 7  
9 Estate. Each unsupported chargeback request that is ultimately disallowed by AmEx will reduce,  
10 on a dollar-for-dollar basis, the size of AmEx’s eventual claim against the estate, not only  
11 mitigating AmEx’s aggregate loss, but reducing the aggregate volume of all claims against the  
12 estate to the benefit of all unsecured creditors slated to receive a *pro rata* distribution from  
13 available estate assets.

14 Finally, entry of a Rule 2004 Order by the Court in the form proposed by AmEx and  
15 service of a corresponding subpoena *duces tecum*, thus compelling the Trustee to provide the  
16 requested information to AmEx, will operate to shield the Trustee, his agents and the estate from  
17 the potential liabilities to third-parties with which the Trustee has purportedly been concerned to  
18 date, removing the Trustee’s stated justification for withholding the information from AmEx to  
19 date. *See, e.g., In re Williams*, 2009 WL 1609389, at \*3 (Bankr. E.D.N.C. June 8, 2009) (attorney  
20 was immunized from duty to maintain confidentiality as to former client because he produced  
21 information to Trustee only pursuant to court-ordered subpoena, with which he was required to  
22 comply) (citing *Higginbotham v. KCS Intern., Inc.*, 202 F.R.D. 444, 455 (D. Md. 2001) (“Even  
23 though subpoenas are issued by attorneys, they are issued on behalf of the Court and should be  
24 treated as orders of the Court.”). While AmEx submits that the Trustee’s concerns in this regard  
25 are unfounded in any event,<sup>5</sup> the Order granting AmEx’s Motion and subpoena compelling the  
26

27 <sup>5</sup> As noted above, the information at issue is already required, as a matter of contract, to be  
28 provided by the Debtor under its Merchant Agreement with AmEx and the governing Merchant  
Regulations. Moreover, and insofar as AmEx’s legal research has indicated to date, none of the  
information that AmEx has requested the Debtor to provide here is the sort of private,

1 Trustee to provide AmEx with the information necessary to investigate and (in appropriate  
2 instances) dispute customer chargeback requests will effectively moot the Trustee's stated  
3 concern, allowing AmEx to obtain, without further delay, critical and time-sensitive information to  
4 the ultimate benefit of the estate and creditor body as a whole.

5 WHEREFORE, AmEx respectfully requests that its Motion be granted on an emergency  
6 basis, that the Court enter an Order, substantially in the form lodged concurrently-herewith,  
7 directing the immediate production of the requested documents by the Chapter 7 Trustee to  
8 AmEx, and that AmEx have such other and further relief as the Court determines to be equitable,  
9 just and proper.

10 Dated: February 26, 2016

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13 By: /s/William W. Huckins

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16 Dated: February 26, 2016

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23 \_\_\_\_\_  
24 confidential or personally identifiable information that might give rise to a claim against the  
25 Trustee or estate under privacy or consumer protection laws. Account numbers on "American  
26 Express" credit cards cannot be confidential as to AmEx, because AmEx and its affiliates are  
27 the entities that issued those accounts and established those numbers. That information is thus  
28 already in AmEx's possession, and the information from the Trustee will simply allow  
chargeback requests submitted to AmEx by cardholders to be matched with the challenged  
purchases that were made with the Debtor and related transaction details. In addition, the  
personal information disclosure provided to "American Express" cardholders with their  
Cardmember Agreements provides that, as a matter of Federal law, personal information relating  
to use of their accounts can be shared for purposes of "respond[ing] to court orders" and "legal  
investigations."