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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.
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23
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25
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Case No. 16-40050-WJL

Chapter 7

**EX PARTE APPLICATION FOR ORDER
SHORTENING TIME TO HEAR:**

**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**

Judge: Hon. William J. Lafferty

1 **I. INTRODUCTION**

2 Creditor American Express Travel Related Services Company, Inc. ("AmEx") hereby
3 submits this *Ex Parte* Application ("Application") for an order shortening time to hear its
4 concurrently-filed Motion, Pursuant To Fed. R. Bankr. P. 2004, for An Order Directing the
5 Immediate Production of Certain Documents By the Chapter 7 Trustee (the "Motion") on the
6 Chapter 13 calendar on March 3, 2016 at 1:30 p.m., or such other date as soon thereafter as is
7 possible.¹

8 AmEx has filed the Motion because it needs to obtain from the Trustee, on an urgent basis,
9 information necessary to investigate and determine the validity of millions of dollars of credit card
10 chargeback requests that have already been submitted to AmEx, and that are expected to be
11 submitted in large numbers in the foreseeable future, by former customers who purchased goods
12 from the Debtor using "American Express" credit cards, but now contend, among other things,
13 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
26 out to be legitimate and worthy of a refund, some portion of those requests likely will not be
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28 ¹ AmEx's counsel, Darryl Laddin, will be traveling from Atlanta, GA for the hearing. Out of an
abundance of caution, the Motion was self-calendared for March 30, 2016.

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

6 Through counsel and other agents, the Trustee has informed AmEx that he possesses the
7 critical information that AmEx requires in order to investigate and determine the validity of
8 chargeback requests, and that it is already collected, prepared and in a format that can be provided
9 to AmEx immediately.² Nonetheless, the Trustee has refused to provide the information to AmEx
10 to date, citing unspecific concerns that production of the information to AmEx voluntarily may
11 expose the estate, the Trustees or his agents and professionals to claims by third parties under
12 applicable privacy or consumer protection laws. Moreover, while the Trustee's counsel at one
13 time indicated that the information could be provided to AmEx immediately if the Trustee were
14 compelled to do so pursuant to an Order of this Court and accompanying subpoena that shields the
15 estate, the Trustee and his agents and professionals from any liability to third parties as a
16 consequence, he has since altered his position and demanded that AmEx execute an
17 indemnification agreement as a condition to receipt of the information, perhaps among other
18 conditions, notwithstanding that AmEx is already entitled to the information as a matter of
19 contract. AmEx was thus compelled to file the Motion on an emergency basis and without the
20 Trustee's consent.

21 If heard on regular notice, based on the Court's open calendaring system, the Motion would
22 be heard on March 30, 2016, by which time deadlines for investigating and responding to
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24 ² 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 chargeback requests submitted by many of the Debtor's customers will have expired, inhibiting
2 AmEx from challenging any such requests that may not be supported by the facts, and possibly
3 resulting in significant liability to AmEx that could have been prevented and, in turn, additional
4 and unnecessary claims against the estate to the detriment of all unsecured creditors.

5 By this Application, AmEx requests to advance the hearing date on the Motion and have
6 the matter heard on shortened notice.

7 **II. RELEVANT FACTUAL BACKGROUND**

8 The relevant facts are set forth fully in the Motion.

9 Under an Agreement For American Express Card Acceptance (the "Merchant
10 Agreement"), and on the express terms and conditions provided for therein, the Debtor was
11 authorized by AmEx to accept "American Express" credit cards, issued by AmEx and certain of its
12 affiliates, as a form of payment for goods purchased by the Debtor's customers. After executing
13 the Merchant Agreement, and continuously until the Debtor ceased operations and filed for
14 bankruptcy protection in January of 2016, customers charged millions of dollars of wine and
15 related purchases from the Debtor on their "American Express" credit cards.

16 With the cessation of the Debtor's business and its bankruptcy filing, however, multitudes
17 of "American Express" cardholders are now submitting chargeback requests to AmEx, seeking
18 millions of dollars in refunds for purchases of goods that they contend they paid for but never
19 received.

20 The large volume of chargeback requests is no doubt attributable, in part, to the extensive
21 press and Internet coverage of the Debtor's demise. For example, in an article posted on
22 CSNBC's website on February 17, 2016, the following appeared:

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

27 See <http://www.cnbc.com/2016/02/17/fbi-investigates-possible-wine-ponzi-scheme.html>. In
28 addition, on at least one popular online forum for wine enthusiasts, WineBerserkers.com, posts in

1 a “Premier Cru Chargeback Information” thread specifically instruct customers of the Debtor on
2 how to submit chargeback requests to their credit card issuers. (*See* <http://tinyurl.com/judxjme>.)

3 Moreover, while some portion of these chargeback requests is likely legitimate, and the
4 cardholders will ultimately be justified in having credits back to their accounts issued by AmEx, a
5 material portion of the requests may not be submitted in good faith or otherwise justified by the
6 facts. In some cases, it is likely that cardholders will submit chargeback requests to AmEx for the
7 full amounts of their purchases even though they received all or a substantial portion of the goods
8 that they charged and paid for. AmEx’s only means of mitigating the damages that it ultimately
9 will be required to pay out to the Debtor’s former customers (and, therefore, also to mitigate
10 damages for which the Estate would be liable) is to investigate each chargeback request in an
11 attempt to weed out, challenge and ultimately deny any requests that do not appear to be justified
12 on the facts.

13 For precisely this reason, and so as to allow American Express to obtain information
14 regarding specific transactions that may be necessary to investigate and dispute chargeback
15 requests by cardholders, the American Express Merchant Regulations (the “Merchant
16 Regulations”) that are incorporated by reference into the Debtor’s Merchant Agreement with
17 AmEx set forth the documentation that a merchant is required to provide to AmEx for purposes of
18 contesting a chargeback against that merchant for the reasons that are likely asserted by the
19 Debtor’s customers – *i.e.*, either “goods/services cancelled” or “goods/services not
20 received.” Among the information that a merchant such as the Debtor is required to provide to
21 permit investigation of a disputed charge are the transaction charge record, the merchant’s
22 cancellation policy, written documentation of the goods/services purchased by the cardholder,
23 detailed documentation relating to any deliveries or returns of the goods purchased, and proof of
24 any refunds or credits on the goods that have already been issued to the cardholder.³

27 ³ 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 Accordingly, once it began receiving chargeback requests from cardholders *en masse*
2 following the Debtor's bankruptcy filing, and pursuant to the Merchant Agreement and Merchant
3 Regulations, AmEx requested, through contacts by AmEx business people and its in-house
4 counsel with counsel for the Chapter 7 Trustee, that the Trustee provide certain transaction-
5 related documents and information concerning customers who had made purchases from the
6 Debtor using "American Express" credit cards. Specifically, and for each transaction by a
7 customer with the Debtor made with an "American Express" credit or charge card issued from
8 2008 through the present, AmEx needs to obtain:

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

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

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

16 (d) evidence of any credits or refunds issued, whether on an "American Express"
17 charge or credit card or by other means, where the original purchase was on an "American
18 Express" credit or charge card.

19 It is AmEx's intention to use the requested information solely for purposes of investigating
20 chargeback requests submitted by the Debtor's customers and contesting any such requests that
21 appear not to be supported by the facts surrounding the disputed purchase. Nonetheless, as of the
22 date of this Application, the Trustee has refused to provide this critical information to AmEx
23 unless AmEx accedes to certain additional conditions that it believes to be unreasonable and
24 contrary to its existing rights.

25 While the permissible scope of an examination under Rule 2004 is "unfettered and
26 broad," (9 COLLIER ON BANKRUPTCY ¶ 2004.02[1], p. 2004-6 (16th ed. Revised 2015) (citations
27 omitted)), the information that AmEx seeks to obtain from the Trustee here is narrow and intended
28 solely for a specific purpose – the investigation and, where appropriate on the facts, reduction or

1 denial of chargeback requests submitted to AmEx by the Debtor's customers. Only with the
2 benefit of this information, obtained on a timely basis, can AmEx seek to mitigate the damages
3 accruing to it from issuance of refunds to cardholders who made purchases from the Debtor, and
4 in turn the magnitude of AmEx's eventual claim for losses against the Chapter 7 Estate. Each
5 unsupported chargeback request that is ultimately disallowed by AmEx will reduce, on a dollar-
6 for-dollar basis, the size of AmEx's eventual claim against the estate, not only mitigating AmEx's
7 aggregate loss, but reducing the aggregate volume of all claims against the estate to the benefit of
8 all unsecured creditors slated to receive a *pro rata* distribution from available estate assets.

9 Finally, entry of a Rule 2004 Order by the Court in the form proposed by AmEx and
10 service of a corresponding subpoena *duces tecum*, thus compelling the Trustee to provide the
11 requested information to AmEx, will operate to shield the Trustee, his agents and the estate from
12 the potential liabilities to third-parties with which the Trustee has purportedly been concerned to
13 date, removing the Trustee's stated justification for withholding the information from AmEx to
14 date. *See, e.g., In re Williams*, 2009 WL 1609389, at *3 (Bankr. E.D.N.C. June 8, 2009) (attorney
15 was immunized from duty to maintain confidentiality as to former client because he produced
16 information to Trustee only pursuant to court-ordered subpoena, with which he was required to
17 comply) (citing *Higginbotham v. KCS Intern., Inc.*, 202 F.R.D. 444, 455 (D. Md. 2001) ("Even
18 though subpoenas are issued by attorneys, they are issued on behalf of the Court and should be
19 treated as orders of the Court."). While AmEx submits that the Trustee's concerns in this regard
20 are unfounded in any event,⁴ the Order granting AmEx's Motion and subpoena compelling the
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22 ⁴ As noted above, the information at issue is already required, as a matter of contract, to be
23 provided by the Debtor under its Merchant Agreement with AmEx and the governing Merchant
24 Regulations. Moreover, and insofar as AmEx's legal research has indicated to date, none of the
25 information that AmEx has requested the Debtor to provide here is the sort of private,
26 confidential or personally identifiable information that might give rise to a claim against the
27 Trustee or estate under privacy or consumer protection laws. Account numbers on "American
28 Express" credit cards cannot be confidential as to AmEx, because AmEx and its affiliates are
the entities that issued those accounts and established those numbers. That information is thus
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

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 **III. GOOD CAUSE EXISTS TO HAVE THE MOTION HEARD ON SHORTENED**
6 **NOTICE**

7 *Ex parte* relief may be granted when a party will be prejudiced by hearing a matter on full
8 notice. *Mission Power Engineering Co. v. Continental Cas. Co.*, 883 F.Supp. 488, 492 (C.D. Cal.
9 1985). Moreover, the Court has authority to enter an order shortening time to hear the Motion
10 pursuant to Federal Rule of Bankruptcy Procedure 9006(c)(1), which provides,

11 [W]hen an action is required or allowed to be done at or within a
12 specified time by these rules or by a notice given thereunder or by
13 order of court, the court for cause shown may in its discretion with
or without motion or notice order the period reduced.

14 Further, Local Bankruptcy Rule 9006-1 provides that parties may seek court approval to enlarge or
15 shorten time.

16 If heard on regular notice, the Motion here would be heard until March 30, 2016, by which
17 time deadlines for investigating and responding to chargeback requests submitted by many of the
18 Debtor's customers will have expired, inhibiting AmEx from challenging any such requests that
19 may not be supported by the facts. The possible result will be significant liability to AmEx that
20 could have been prevented and, in turn, additional and unnecessary claims against the estate that
21 will diminish *pro rata* distributions to other unsecured creditors.

22 **IV. CONCLUSION**

23 For the above discussed reasons, AmEx respectfully requests that this Court enter the
24 order, concurrently uploaded herewith, setting the hearing date on the Motion for March 3, 2016 at
25 1:30 p.m., and allowing the Motion to be heard on shortened notice.

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investigations.”

1 Dated: February 26, 2016

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7 Dated: February 26, 2016

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