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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
In re: :
: Chapter 11
AIRFASTTICKETS, INC., :
: Case No. 15-11951 (SHL)
Debtor. :
-----X

THE DEBTOR’S OBJECTION TO FAREPORTAL’S (I) EX PARTE MOTION FOR ORDER AUTHORIZING FAREPORTAL INC. TO (A) CONDUCT A 2004 EXAMINATION OF AIRFASTTICKETS, INC. AND (B) SEEK RELATED DOCUMENT PRODUCTION; (II) MOTION TO SHORTEN TIME; AND (III) MOTION TO SEAL

TO: THE HONORABLE SEAN H. LANE,
UNITED STATES BANKRUPTCY JUDGE:

Airfasttickets, Inc., the above-referenced debtor (the “Debtor”), respectfully submits this objection (the “Objection”) to (I) the *Ex Parte* Motion for an Order Authorizing Fareportal Inc. (“Fareportal”) to (A) Conduct a 2004 Examination of AirFastTickets, Inc. and (B) Seek Related Document Production [Docket No. 196] (the “Fareportal 2004 Motion”); (II) Fareportal’s Motion to

Shorten Time for Notice of the Hearing on the Fareportal 2004 Motion [Docket No. 198] (the “Motion to Shorten Time”); and (III) Fareportal’s Motion to Seal Certain Information [Docket No. 197] (the “Motion to Seal” and, collectively with the Fareportal 2004 Motion and Motion to Shorten Time, the “Fareportal Motions”), and respectfully represents as follows:

INTRODUCTION

1. The Fareportal Motions should be summarily denied for the following seven cogent reasons.

2. First, there is no justification for burdening this Debtor’s estate to inquire about non-estate property. This Debtor and its bankruptcy estate have no reason or interest in wasting the estate’s limited resources on a litigation between two non-debtors, Fareportal and Travana Inc. (“Travana”) – who do not have scheduled or filed claims against this Debtor’s estate, are not creditors of this Debtor’s estate, and have an alternative forum for resolving their disputes – that is not related to the Debtor, its assets, the administration of the estate, or the Receiver appointed for the Debtor by the Delaware Chancery Court.

3. Second, Fareportal is not a “party in interest” and lacks standing to seek relief under Bankruptcy Rule 2004. Fareportal is not a creditor in this case and, impermissibly, is asking this Court to allow it to take the Debtor’s Rule 2004 examination in furtherance of its own interests, not those of the estate.

4. Third, there is no justification for an examination under Bankruptcy Rule 2004 when Fareportal has a pending litigation against Travana in an alternative forum, the Supreme Court of New York, New York County, for conducting any discovery and resolving their disputes.

5. Fourth, there is no justification for the Motion to Shorten Time. There is no emergency, nor is there any merit to the Fareportal Motions. Fareportal offered no justification

whatsoever for waiting until August 24, 2016, to file the Fareportal Motions and doing so without conferring in advance with the Debtor's counsel. The breathless prose and alleged emergent nature of the Fareportal Motions is belied by the record in the pre-bankruptcy litigation between Fareportal and the Debtor, which was amicably discontinued in April 2013, and admissions in the Fareportal Motions.

6. Fifth, the doctrine of *res judicata* bars any of the alleged claims Fareportal may have against the Debtor because Fareportal was required to raise any and all issues in the pre-bankruptcy litigation between Fareportal and the Debtor, which was discontinued in April 2013. Moreover, Fareportal's alleged claims, if any, are barred by this Court's Order Establishing the Claims Bar Date [Docket No. 109].

7. Sixth, non-party Fareportal should not be permitted to do an end run around the bankruptcy automatic stay and obtain from the Debtor pretrial discovery documents and depositions for Fareportal's own use in some other litigation – the allegedly “almost identical” civil litigation that “Fareportal now finds itself in” against another non-party Travana, Inc. (“Travana”). *See* Fareportal 2004 Motion at 1. The Debtor is operated by the Receiver, who is hard at work bringing this bankruptcy case to proper resolution, with a confirmation hearing on October 13, 2016. Fareportal should not be permitted to divert the Receiver's attention at this crucial time and force the Receiver to chase around preparing for pretrial discovery and protecting the Debtor's legitimate interests in the scope and conduct of deposition testimony at the service of non-party Fareportal in its litigation against non-party Travana. Fareportal also should not be indulged in the imposition on the Court's time and waste of the estate's assets in responding to the Fareportal Motions – especially not on an expedited basis – because no exigency exists. Fareportal's impatience in conducting discovery in civil litigation against Travana is no reason to burden this Court and the Debtor, at the expense of the

Debtor's unsecured creditors, and Fareportal may consult the disclosure statement and other filings in this bankruptcy case for any other pertinent information.

8. Seventh, the Motion to Seal is wholly without merit and also is a waste of resources of the Court and this Debtor's estate. The redacted material is of no moment and does not even belong in the Fareportal Motions.

9. Prior to filing this Objection, the Debtor's counsel attempted to contact Fareportal's counsel to meet and confer in an effort to resolve the Fareportal Motions, but were unable to reach Fareportal's counsel, and thus the Debtor is filing this Objection in the interest of time. For all of the foregoing reasons, and as further set forth below, this Court should deny each of the Fareportal Motions.

BACKGROUND

10. On July 21, 2015, the Delaware Court of Chancery appointed Adam Meislik as receiver for the Debtor (the "Receiver").

11. On July 27, 2015, certain of the Debtor's creditors filed an involuntary petition against the Debtor seeking an order for relief under chapter 7 of the Bankruptcy Code.

12. On September 21, 2015, the Debtor filed an answer, consenting to the entry of an order for relief under the Bankruptcy Code. The Debtor also filed its *Motion to Convert Chapter 7 Case to Chapter 11 Pursuant to 11 U.S.C. § 706(a)*, seeking to convert the Debtor's case to one under chapter 11 of the Bankruptcy Code.

13. On October 27, 2015 the Court signed an order converting the Debtor's case to one under chapter 11 of the Bankruptcy Code, establishing October 27, 2015 as the date of the order for relief. No trustee or examiner has been requested in this chapter 11 case.

14. On November 13, 2015, a creditors committee formation meeting was convened by the United States Trustee, but no committee was formed.

15. On November 24, 2015, the Court approved the sale of substantially all of the Debtor's intellectual property and software and certain related assets under section 363 of the Bankruptcy Code.

16. On December 2, 2015, the Court approved the retention of Arent Fox, LLP as general bankruptcy and restructuring counsel to the Debtor and Richards, Layton & Finger, P.A. as special counsel to the Debtor in its chapter 11 case.

DISCUSSION

No Justification for Burdening the Estate to Inquire Concerning Non-Estate Property

17. There is no justification for burdening this Debtor's estate with a non-debtor's inquiries concerning non-estate property. *See In re Hilsen*, No. 87-11261(JMP), 2008 WL 2945996, at *4 (Bankr. S.D.N.Y. July 25, 2008) ("Rule 2004 may be used to discover information about estate property, but it is not a proper means to inquire with respect to non-estate property."). *See also In re MF Glob. Inc.*, No. 11-02790 MG, 2013 WL 74580, at *1 (Bankr. S.D.N.Y. Jan. 8, 2013) ("Rule 2004 is intended to permit the debtor and other estate fiduciaries and court-appointed officers, as needed, to determine the extent of the estate's assets and recover those assets for the benefit of creditors. . . . It does not permit parties in interest to investigate their private (non-estate) claims.") (citing *In re Lufkin*, 255 B.R. 204, 208–09 (Bankr. E.D. Tenn. 2000) ("Rule 2004 examinations should not be designed to discover information for use in an unrelated case or proceeding")).

18. The Fareportal Motions are related to a litigation between two non-debtors, Fareportal and Travana. That litigation is not related to the Debtor, its assets, the administration of the estate, or the Receiver appointed for the Debtor by the Delaware Chancery Court. Thus, this Debtor and its bankruptcy estate have no reason or interest in wasting the estate's limited resources on unrelated litigation. For that reason alone, the Fareportal Motions should be denied.

Fareportal Is Not a “Party in Interest” and Has No Standing to Proceed under Rule 2004

19. Fareportal has no scheduled or filed claims against this Debtor’s estate and therefore is not a creditor of this Debtor’s estate. As such, Fareportal has no stake in this Debtor’s estate and is not a “party in interest” for seeking a relief under Bankruptcy Rule 2004. Rather, Fareportal, impermissibly, is asking this Court to allow it to take a Rule 2004 examination of the Debtor in furtherance of its own interests, not those of the estate. *In re MF Glob. Inc.*, No. 11-02790 MG, 2013 WL 74580, at *1 (Bankr. S.D.N.Y. Jan. 8, 2013) (“As an initial matter, the CCC is not a party in interest within the meaning of the Bankruptcy Code and therefore has no standing to proceed. It is not a creditor in this case, but rather a self-described “watchdog” entity with its own independent goals. Further, and impermissibly, the CCC is asking this Court to allow it to take a Rule 2004 examination in furtherance of its own interests, not those of the estate.”). Thus, the Fareportal Motions should be denied.

No Justification for Rule 2004 Discovery When Fareportal Has Pending Litigation in an Alternative Forum for Discovery and Dispute Resolution

20. Fareportal has a pending litigation against Travana in an alternative forum, the Supreme Court of New York, New York Country, for conducting any discovery and resolving their disputes. As such, Fareportal’s request for relief under Bankruptcy Rule 2004 should be denied. *See In re MF Glob. Inc.*, No. 11-02790 MG, 2013 WL 74580, at *2 (Bankr. S.D.N.Y. Jan. 8, 2013) (“Even if the CCC had standing, the so-called “pending proceeding rule” does not permit Rule 2004 examinations when proceedings are pending in another forum.”); *In re Bd. of Directors of Hopewell Int’l Ins. Ltd.*, 258 B.R. 580, 587 (Bankr. S.D.N.Y. 2001) (“[C]ourts rarely permit Rule 2004 to be used for discovery in connection with pending adversary proceedings or contested matters. . . . Although the cited cases involved adversary proceedings and contested

matters, their reasoning is applicable to a case where the separate proceeding is an arbitration pending in a foreign country.”).

No Justification for Waiting; No Emergency

21. The Fareportal Motions are both distinctly tardy and premature.

22. Fareportal’s motion papers set forth no justification whatsoever for waiting until August 24, 2016, to file the Fareportal Motions. The Debtor’s bankruptcy case is a matter of public record and could have been easily discovered through a Google search by Fareportal, “a high-tech, high-touch travel technology company”. *See* Declaration of Werner G. Kunz at ¶ 5. Fareportal seems to imply that some sort of notice expressly to Fareportal was required, but Fareportal offered no support for any such requirement and no such requirement exists. Fareportal never explained how it completely missed the filing of this bankruptcy case given, among other things, the 2013 litigation between the parties. In any event, no notice was given to Fareportal as no notice was required.

23. As to the Fareportal Motions – especially if one were to credit Fareportal’s statements – it is simply bizarre that Fareportal would file these allegedly emergency motions without placing even a telephone call to the Debtor’s counsel.

24. In fact, there is no emergency, nor is there any merit to the Fareportal Motions. Had Fareportal performed minimal diligence (or simply contacted the Debtor’s counsel to discuss Fareportal’s position) before filing Fareportal Motions, Fareportal would have known that this Debtor’s estate has had no operations, has no employees, and thus cannot misappropriate or continue to misappropriate Fareportal’s trade secrets.

Res Judicata Bars Alleged Claims of Fareportal Against the Debtor

25. Fareportal admitted that the prior civil action between Fareportal and the Debtor was settled and discontinued in April 2013 (Fareportal 2004 Motion ¶ 9) – that is, that action was pending

for two months, was settled and discontinued more than three years ago, and resulted in no finding of any kind against the Debtor.

26. Whatever claims Fareportal allegedly had against the Debtor could and should have been resolved at that time. It is well settled that “[r]es judicata applies ‘not only as to what was pleaded, but also as to what could have been pleaded.’” *In re Residential Capital, LLC*, 507 B.R. 477, 492 (Bankr. S.D.N.Y. 2014) (quoting *In re Teltronics Servs., Inc.*, 762 F.2d 185, 193 (2d Cir. 1985)). Thus, *res judicata* bars a subsequent case that arises from the same “operative nucleus of fact” as the prior case. *In re Residential Capital, LLC*, 507 B.R. at 492 (quoting *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir. 1984)).

27. Fareportal admitted that its current civil litigation against Travana is “almost identical” (Fareportal 2004 Motion at 1) to its prior action against the Debtor and there is no question that the alleged claims against the Debtor then and now arise from the same operative nucleus of factual allegations.

28. Fareportal offered nothing in the Fareportal Motions to overcome its admission (Fareportal 2004 Motion ¶ 9) that the prior civil action between Fareportal and the Debtor was discontinued. For this independent reason, the Fareportal 2004 Motion should be denied.

Fareportal Improperly Seeks Civil Discovery to Support Its Claims Against Travana

29. As noted, the litigation between Fareportal and the Debtor was discontinued more than three years ago and resulted in no finding whatsoever against the Debtor. The Fareportal Motions are not really about that ancient case anyway.

30. It is apparent that the Fareportal Motions actually seek from this Debtor pretrial discovery documents and depositions for Fareportal’s own use in Fareportal’s action against non-party Travana. *See* Fareportal 2004 Motion at 1.

31. Judge Brieant affirmed the decision of Judge Lifland, which rejected a similar attempt to evade the bankruptcy stay and obtain from a debtor discovery for the moving party's own use in civil litigation against another non-party. *In re Johns-Manville Corp.* 40 B.R. 219, 222-23 (S.D.N.Y. 1984). The *Johns-Manville* Court noted that the debtor's officers would be diverted from their duties regarding the bankruptcy case to attend depositions and provide documents for the moving party's use in other litigation. *Id.* at 224.

32. The same is true here. The Debtor's estate is administered by the Receiver, who would be forced to chase around for documents to produce and answer questions in the service of Fareportal's pursuit of non-party Travana. Just as Judge Brieant and Judge Lifland held in *Johns-Manville*, the request by Fareportal also should be rejected on the merits for this reason as well.

Motion to Shorten Time Lacks Merit

33. As noted, the prior civil action between Fareportal and the Debtor, which action was pending for two months, was discontinued more than three years ago. *See* Fareportal 2004 Motion ¶ 9. Fareportal, which bills itself as a "high-tech, high-touch travel technology company" (Fareportal 2004 Motion ¶ 3) – admitted that it was unaware of the highly-publicized bankruptcy filing regarding the Debtor and was apparently unaware of Google alert too. In any event, Fareportal allegedly was, for whatever reason, unaware of the Debtor's bankruptcy case. Be that as it may, that is no sort of emergency justifying the Motion to Shorten Time. Fareportal only now got around to filing the Fareportal 2004 Motion. Fareportal alleged that the information sought would be useful to Fareportal, but that is hardly a compelling reason to shorten time. Fareportal burdened this Court and the estate with unnecessary administrative burden and cost. The Motion to Shorten Time should be denied. *See In re Adler*, 329 B.R. 406, 411 (Bankr. S.D.N.Y. 2005) (denying motion to shorten time).

Motion to Seal Lacks Merit

34. The information and document that is allegedly so secret as to require – according to Fareportal – this Court to enter an order sealing the information is as irrelevant to the Fareportal Motions as it is obvious. Perhaps, Fareportal is seeking to prevent Travana from obtaining the information.

35. “There is a strong presumption and public policy in favor of public access to court records.” *In re Food Mgmt. Group, LLC*, 359 B.R. 543, 553 (Bankr. S.D.N.Y. 2007); *see also Video Software Dealers Ass’n v. Orion Pictures Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 27 (2d Cir. 1994) (“[T]he right of public access to court records is firmly entrenched and well supported by policy and practical considerations....”); *In re Hemple*, 295 B.R. 200, 201 (Bankr. D.Vt. 2003) (“The Bankruptcy Code creates the presumption that all documents in bankruptcy cases are public documents.”).

36. There is nothing in Fareportal’s Motion to Seal that overcomes the strong presumption in favor of public access. The Motion to Seal is just one more way in which Fareportal has wasted the time and attention of this Court and the estate’s resources. Accordingly, the Motion to Seal lacks merit and should be denied as well.

RELIEF REQUESTED

37. By this Objection, the Debtor seeks an Order of this Court denying the Fareportal Motions in their entirety.

RESERVATION OF RIGHTS

38. The Debtor hereby reserves the right to amend, modify and/or supplement this Objection.

NOTICE

39. The Debtor has provided notice of this Objection to the Office of the United States Trustee for the Southern District of New York; counsel for Fareportal; and on all parties entitled to such notice in accordance with Bankruptcy Rule 2002. The Debtor submits that no further notice is necessary. No prior application for the relief requested herein has been made to this or any other court.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court enter an Order denying the Fareportal Motions in their entirety; and granting such other and further relief as the Court deems just and proper.

Dated: August 26, 2016
New York, New York

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