

MORGAN, LEWIS & BOCKIUS LLP

Douglas T. Schwarz
Timothy J. Stephens
Matthew C. Ziegler
101 Park Avenue
New York, New York 10178-0060
Telephone: (212) 309-6000

Counsel for Non-Party Travana, Inc.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

AIRFASTTICKETS, INC., *et al.*,

Debtor.

Chapter 11

Case No. 15-11951 (SHL)

**TRAVANA, INC.’S OBJECTION TO *EX PARTE* MOTION FOR ORDER
AUTHORIZING FAREPORTAL INC. TO (A) CONDUCT A 2004 EXAMINATION
OF AIRFASTTICKETS, INC. AND (B) SEEK RELATED DOCUMENT PRODUCTION**

Travana, Inc. (“Travana”), by and through its undersigned counsel, hereby files this objection to the *Ex Parte* Motion for Order Authorizing Fareportal Inc. to (A) Conduct a 2004 Examination of Airfasttickets, Inc. and (B) Seek Related Document Production [Docket No. 196] (the “2004 Motion”), joins in the Debtor’s¹ objection thereto [Docket No. 200] (the “Debtor’s Objection”), and respectfully states as follows:

PRELIMINARY STATEMENT

1. Travana adopts and incorporates each of the arguments set forth in the Debtor’s Objection, and files this objection to supplement certain of the points raised therein.

¹ Capitalized terms not otherwise defined herein have the meaning ascribed in the 2004 Motion.

2. Fareportal's 2004 Motion is a bald and impermissible attempt by Fareportal to circumvent the discovery process that is currently underway in a New York state court lawsuit brought by Fareportal against Travana, with the object of depriving Travana of the protections afforded by applicable New York discovery rules. It is respectfully submitted that the Court should not countenance Fareportal's effort to use Rule 2004 as an end-run to gain advantage in that litigation.

3. Neither this Court nor the Debtor's unsecured creditors should be burdened further by this plainly improper effort to secure leverage in third-party litigation to which neither the Debtor nor any of its creditors are party. The New York Supreme Court is already overseeing discovery in the state court litigation and its role as arbiter over that dispute should not be usurped.

BACKGROUND

4. On November 24, 2015, after notice and a hearing, this Court entered an Order Authorizing the Sale of Property Free and Clear of Liens, Claims, and Encumbrances and Other Interests (the "Sale Order") [Docket No. 65], which approved the sale of substantially all of the Debtor's intellectual property and software to purchaser AirTourist, Inc., now known as Travana. That sale closed on November 25, 2015, and Travana took rightful possession of the sale property.

5. On August 6, 2016, Fareportal commenced an action against Travana in the Supreme Court of New York, New York County, Index No. 653995/2016 (the "State Court Action"), alleging without foundation that Travana had misappropriated Fareportal's trade secrets and proprietary information. Fareportal bases its claims not on Travana's purchase of the

Debtor's assets, but rather on Travana's recent hire of a former Fareportal employee named Jason Ware.

6. Fareportal is a serial, vexatious litigant against its competitors. As set forth in the Debtor's Objection, in 2013 Fareportal filed a nearly-identical New York State court lawsuit against the Debtor, with the same overwrought allegations that the Debtor misappropriated Fareportal's trade secrets and proprietary information. Fareportal voluntarily dismissed that action a few months later, making not a peep in the Debtor's bankruptcy proceeding until after having filed its cookie-cutter State Court Action against Travana.

7. Fareportal has already moved for expedited discovery in the State Court Action, including, among other things, an "attorney-supervised inspection of all computers, including hard drives and mobile storage devices in [Travana's] possession, custody or control, including but not limited to . . . Travana's computer network and systems" *See* State Court Action Mot. Seq. No. 1 at 2 ("Order to Show Cause"). In other words, Fareportal has already moved the New York State Court for leave to inspect the same items it seeks to inspect here. The New York State Court has scheduled a hearing to address this request on October 5, 2016. 2004 Mot. at 13. Travana contests Fareportal's claims and will defend against those claims in the State Court Action.

8. Fareportal's instant Rule 2004 application is an attempt to perpetrate what it has serially and falsely alleged against its competitors -- improper access to intellectual property, source code and software. Travana, having acquired these materials from the Debtor pursuant to the authority granted by this Court, has every right and interest in protecting these materials from unwarranted examination by Fareportal. The New York State Court is the proper forum for this determination.

ARGUMENT

9. Fareportal's 2004 Motion purports to challenge the Debtor's asset sale, but its timing tells a different story. The sale happened ten months ago. And yet, less than three weeks after commencing the State Court Action and asking the state court to authorize a plenary examination of Travana's computer networks with the ostensible purpose of determining whether its trade secrets have been misappropriated, Fareportal seeks authority from this Court to conduct a fishing expedition covering the same subject matter. 2004 Mot. at 15. Notably, the allegations elaborated in Fareportal's 2004 Motion rest on events that allegedly occurred in June of 2016 (*i.e.*, the hiring of a former Fareportal employee, Jason Ware) – eight months *after* the asset sale. *Id.* at 11.

10. Contrary to its contentions in the 2004 Motion, Fareportal has no interest in determining the “nature and extent of the bankruptcy estate.” *Id.* Rather, it seeks a shortcut to the discovery it has already requested in the State Court Action – a matter scheduled to be heard by the New York Supreme Court in October. *Id.* at 13.

11. The “pending proceeding rule” prevents just this type of gamesmanship, reflecting “a concern that a party to litigation could circumvent his adversary's rights by using Rule 2004 rather than civil discovery to obtain documents or information relevant” to another lawsuit. *In re Glitnir banki hf*, No. 08-14757, 2011 Bankr. LEXIS 3296 *14 (Bankr. S.D.N.Y. Aug. 19, 2011) (Bernstein, J.). This principle applies to pending state court litigation as well as adversary proceedings and contested matters in the bankruptcy court. *Id.* at *13; *see also In re MF Global Inc.*, No. 11-02790, 2013 Bankr. LEXIS 129 *4 (Bankr. S.D.N.Y. Jan. 8, 2013) (non-creditor third party's Rule 2004 request denied where movant “is asking this Court to allow it to take a Rule 2004 examination in furtherance of its own interests, not those of the estate”).

12. Here, Fareportal unabashedly seeks evidence in support of its claim in the State Court Action that its trade secrets were misappropriated. *See* 2004 Mot. at 11-13. The New York Supreme Court has indicated that it will adjudicate Fareportal's sweeping request to examine Travana's entire "computer network and systems" next month in conjunction with its request for a preliminary injunction. *See* Order to Show Cause at 1-2. Fareportal should not be permitted to circumvent the discovery process in the State Court Action through the use of Rule 2004. This is particularly true where Fareportal is not a creditor and can express no reason why the discovery it seeks is relevant to the resolution of the bankruptcy case. *In re Wash. Mut., Inc.*, 408 B.R. 45, 51 (Bankr. D. Del. 2009) ("Where a party requests a Rule 2004 examination and an adversary proceeding or other litigation in another forum is pending between the parties, the relevant inquiry is whether the Rule 2004 examination will lead to discovery of evidence related to the pending proceeding or whether the requested examination seeks to discover evidence unrelated to the pending proceeding.").

13. The fact that Fareportal's motion is solely aimed at gaining an impermissible advantage in the State Court Action is evidenced by Fareportal's request for expedited treatment. Fareportal has expressed no legitimate reason why shortened notice would be necessary with respect to the bankruptcy case. The request is no doubt linked to the timing in the State Court Action and the October 5 hearing date there.

14. Travana should not be robbed of the protections to which it is entitled under New York discovery procedure by the improper application of Rule 2004. *Glitnir banki* at *14 ("The reason for the 'pending proceeding' rule is to avoid Rule 2004 usurping the narrower rules for discovery in a pending adversary proceeding.") (quoting *In re Int'l Fibercom, Inc.*, 283 B.R. 290, 292 (Bankr. D. Ariz. 2002)); *cf. Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572,

582 (2d Cir. 2011) (“[P]rinciples of comity . . . presume that a state court will operate efficiently and effectively.”).

15. Travana and Fareportal are competitors. The extent to which Fareportal is entitled to discovery into Travana’s proprietary information and trade secrets is a matter that will be contested in the State Court Action. If Fareportal were permitted to take Rule 2004 discovery in this case, Travana would be compelled to move for a protective order and the parties would have to litigate those issues here. It would be a waste of estate and judicial resources for the parties to have to litigate those issues in this case, particularly where (1) they are also being litigated in the State Court Action and (2) resolution of the discovery dispute is in no way related to the bankruptcy case.

16. Accordingly, Travana requests respectfully that the Court deny the 2004 Motion and grant such other and further relief as it deems proper.

Dated: New York, New York
September 2, 2016

Respectfully submitted,

By: /s/ Douglas T. Schwarz

Douglas T. Schwarz

Timothy J. Stephens

Matthew C. Ziegler

MORGAN, LEWIS & BOCKIUS LLP

101 Park Avenue

New York, New York 10178-0060

Tel: (212) 309-6800

douglas.schwarz@morganlewis.com

timothy.stephens@morganlewis.com

matthew.ziegler@morganlewis.com

Counsel for Non-Party Travana, Inc.