

Malani J. Cademartori, Esq.  
Michael Driscoll, Esq.  
Eric Raphan, Esq.  
**SHEPPARD MULLIN RICHTER & HAMPTON, LLP**  
30 Rockefeller Plaza  
New York, NY 10112  
Tel: (212) 653-8700  
Fax: (212) 653-8701

*Counsel to Fareportal Inc.*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re:

AIRFASTTICKETS, INC.,

Debtor.

Chapter 11

Case No. 15-11951 (SHL)

**REPLY TO THE OBJECTIONS OF AIRFASTTICKETS, INC.  
AND TRAVANA, INC. 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**

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Fareportal Inc. ("Fareportal"), by and through its undersigned counsel, Sheppard Mullin Richter & Hampton, LLP files this reply (the "Reply") to the objections (each an "Objection" and together, the "Objections") of Airfasttickets, Inc. (the "Debtor") (Dk. No. 200) and Travana, Inc. ("Travana") (Dk. No. 209) to the *Ex Parte Motion for Order Authorizing Fareportal Inc. to (A) Conduct 2004 Examination of Airfasttickets, Inc. and (B) Seek Related Document Production* (the "2004 Motion") (Dk. No. 196).<sup>1</sup> In further support of this Reply, Fareportal respectfully states as follows:

### **Preliminary Statement**

At best, the Debtor and Travana have shown a basic misunderstanding of both the identity of the information that Fareportal is seeking in the 2004 Motion and the operation of the Sale Order that transferred the subject Property to Travana.

In an attempt to divert the Court's attention from the actual subject matter of the 2004 Motion, Travana and the Debtor convert Fareportal's efforts to provide a fulsome recitation of the history between the various parties to a basis for making the unfounded assertion that Fareportal is seeking to somehow "improperly" use Rule 2004 to circumvent the discovery procedures in connection with the State Court Action.<sup>2</sup> While Fareportal does believe it is important to highlight the continuing involvement of certain key actors first with the Debtor, and now with Travana, the information that Fareportal is seeking by and through the 2004 Motion is factually distinct from that which Fareportal is seeking in connection with the separate litigation brought by Fareportal against Travana.

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<sup>1</sup> Capitalized terms used herein without definition shall have the meaning given to them in the 2004 Motion.

<sup>2</sup> As defined in Travana's Objection.

The issues and discovery attendant to the State Court Action pertain to the misappropriation of Trade Secrets by Travana, separate from the transfer of the Debtor's Property to Travana. More specifically, the 2016 Complaint focuses on issues relating to the employment and actions of Ware by, and for the benefit of, Travana almost seven (7) months after the consummation of the sale of the Property pursuant to the Sale Order. In contrast, the 2004 Motion focuses on the interests and rights of Fareportal to confirm whether or not the Debtor continued to utilize and ultimately sell any of Fareportal's Trade Secrets in contravention of the [REDACTED] and improperly employing the protections of the Bankruptcy Code.

More importantly, however, by their Objections, the Debtor and Travana blatantly ignore the fact that the Sale Order *requires* that Fareportal bring any request concerning the identity of the Transferred Source Code and Transferred Software to this Court. Among other things, this Court retained exclusive jurisdiction to hear all matters arising from or related to the implementation, interpretation and/or enforcement of the Sale Order. The identity of the transferred Property is clearly within the ambit of the jurisdiction of this Court and the implementation of the Sale Order.

Accordingly, while Travana (and the Debtor) attempt to argue that the correct forum for these matters is the Supreme Court of New York, New York County in connection with the State Court Action, each of the parties knows, that Fareportal could only seek appropriate relief from the Sale Order with respect to the Property in this Court.

For each of the reasons provided in the 2004 Motion and in this Reply, the Court should set aside the Objections and grant the relief sought by Fareportal in the 2004 Motion.

### Argument

1. The Debtor's Objection purports to set forth "seven cogent reasons" for why the Fareportal Motions<sup>3</sup> should be denied. Debtor Obj. ¶1. Because the Court has already entered its *Order Authorizing Fareportal to File Under Seal Certain Portions of the Ex Parte Motion for Order Authorizing Fareportal Inc. to (A) Conduct a 2004 Examination of Airfasttickets, Inc. and (B) Seek Related Document Production* (Dk. No. 205) and *Order on Fareportal's Motion to Shorten Time for Notice of the Hearing to Consider Fareportal's Ex Parte Motion for Order Authorizing Fareportal Inc. to (A) Conduct a 2004 Examination of Airfasttickets, Inc. and (B) Seek Related Document Production* (Dk. No. 202), the "fourth" and "seventh" reasons set forth in the Debtor's Objection are moot. *Id.* ¶¶ 5 and 8.

2. The remaining five "cogent reasons" can be summarized into three general categories as follows: (i) that the information sought is related to and more appropriately sought in connection with the State Court Action, such that the 2004 Motion is, among other things, an unnecessary burden on the estate (*Id.* ¶¶ 2, 4 and 7); (ii) that Fareportal is not a "party in interest" (*Id.* ¶ 3); and (iii) that *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 2013 Complaint which was ultimately discontinued (*Id.* ¶ 6).<sup>4</sup> Travana's Objection joins in the Debtor's Objection and simply expands on the misguided position that the correct forum for Fareportal's inquiries and

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<sup>3</sup> As such term is defined in the Debtor's Objection.

<sup>4</sup> In its "Introduction" statement, the Debtor also claims to have "attempted to contact Fareportal's counsel to meet and confer in an effort to resolve Fareportal's Motions" prior to filing the Debtor's Objection. Debtor's counsel left a message with the receptionist for counsel to Fareportal sometime between 9:00 and 9:20 a.m. on August 26, 2016, approximately one hour before filing the Debtor's Objection which included this misleading statement. After reviewing the Debtor's Objection, counsel to Fareportal returned the call to counsel to the Debtor that same afternoon and left a message. To date, Debtor's counsel and counsel to Fareportal have not had any further communications. Fareportal remains open to a discussion with the Debtor to narrow the issues prior to the September 14, 2016 hearing on the 2004 Motion.

requests for relief is the State Court based on the assertion that the information sought in the 2004 Motion somehow pertains to the State Court Action.

3. Ultimately, each of the positions asserted in the Objections for denying the relief sought in the 2004 Motion are wrong on history, wrong on applicable law and/or wrong on the actual relief sought by Fareportal in the 2004 Motion (and, apparently, in the simultaneous, but factually distinct State Court Action).

***Fareportal is a Party in Interest Under the Bankruptcy Code***

4. Section 1109(b) of the Bankruptcy Code makes clear that “[a] party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, an equity holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.” 11 U.S.C. §1109(b). While the Debtor, in its Objection, attempts to limit the definition of “party in interest” to creditors only, applicable case law makes clear that a party in interest is not limited to those parties referred to in section 1109(b). *See* Debtor’s Obj. ¶ 19; *In re Johns-Manville Corp.*, 36 B.R. 743, 748 (Bankr. S.D.N.Y. 1984).

5. The Bankruptcy Code does not define “party in interest.” *In re Reyes*, No. 14-13233 (SMB), 2015 WL 4624156, at \*3 (Bankr. S.D.N.Y. Aug. 4, 2015). Rather, whether a party is a “party in interest” must be determined on an ad hoc basis. *Johns-Manville Corp.*, 36 B.R. at 747 (noting that the term party in interest must be construed broadly so that all parties affected by the case have an opportunity to be heard); *see also Reyes*, 2015 WL 4624156, at \*3 (“[T]he phrase must be interpreted on an *ad hoc* basis, to ensure that ‘anyone who has a legally protected interest that could be affected by a bankruptcy proceeding is entitled to assert that interest with respect to any issue to which it pertains . . . .’”) (internal and quotation omitted).

6. “Although a party-in-interest typically has a financial stake in the outcome of the bankruptcy case, courts have recognized in limited circumstances that someone with a legal

rather than a financial interest in the case may appear.” *Id.* at \*4; *In re Pulp Finish 1 Co.*, No. 12-13774, 2014 WL 201482, at \*5 (Bankr. S.D.N.Y. Jan. 16, 2014) (stating that section 1109(b) typically refers to someone with a financial or legal stake in the outcome of the case); *see also In re Innkeepers USA Trust*, 448 B.R. 131, 141 (Bankr. S.D.N.Y. 2011) (“[A] party in interest is one that has a sufficient interest in the outcome of the case that would require representation, or a pecuniary interest that will be directly affected by the case.”). Here, Fareportal clearly has both a legal and financial interest.

7. [REDACTED]

[REDACTED]



8. As is clear from the [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]. Accordingly, the Debtor's assertion that Fareportal is not a party in interest is disingenuous.

9. [REDACTED]  
[REDACTED], Fareportal has a clear legal interest in the business and assets of the Debtor and the protection of its own business vis a vis the Debtor. In fact, those legal interests and rights to protection are [REDACTED]

[REDACTED]. Moreover, to the extent that Fareportal discovers that the Debtor did, in fact, continue to misappropriate or otherwise infringe its Trade Secrets, it is possible that Fareportal would end up being the Debtor's largest creditor.<sup>5</sup>

10. Therefore, and despite the Debtor's attempt to so narrowly define "party in interest" to a creditor (who has been scheduled or filed a proof of claim), Fareportal respectfully asserts that applicable law and the facts of the relationship and history between the Debtor and Fareportal, place Fareportal firmly within the position of a "party in interest" under section 1109(b) of the Bankruptcy Code as that term is interpreted by the Second Circuit, as applicable to Rule 2004.

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<sup>5</sup> The Debtor seems to be arguing that because Fareportal was not given notice and an opportunity to appear in the case and protect its rights, including by filing an unliquidated and contingent claim, this Court should continue to [REDACTED] and vis a vis the Debtor. It is exactly this sort of [REDACTED], coupled with the emerging pattern of misappropriation and other violations of Fareportal's proprietary information and business operations, that makes the limited discovery requested in the 2004 Motion all the more necessary.

***The Debtor's Res Judicata Argument is a Red Herring***

11. The Debtor argues that Fareportal is not entitled to discovery under Rule 2004 based on the doctrine of *res judicata*. As with most of the Objections, this basis for objecting to the relief sought by Fareportal in the 2004 Motion, belies either a vast misunderstanding of the facts or seeks to twist and confuse the facts in a way that cannot be supported. Ultimately, the doctrine is simply not applicable to the facts and the basis under which Fareportal seeks relief.

12. Fareportal is not seeking to reopen the 2013 action against the Debtor as embodied in the 2013 Complaint. Fareportal is instead exercising its clear rights to ensure that there was [REDACTED], including as may have been affected under the Sale Order and with respect to the sale of the Property to Travana. If [REDACTED] and the Debtor continued its misappropriation of Trade Secrets, [REDACTED], to bring claims and otherwise exercise any remedies it may have against the Debtor.

13. In fact, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].<sup>6</sup>

14. By asserting this position, the Debtor seems to be arguing that after the discontinuance of the 2013 action against the Debtor, the Debtor would have been free to

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<sup>6</sup> [REDACTED]

continue to misappropriate or possibly infringe on Fareportal's Trade Secrets. This argument defies logic and the law.<sup>7</sup>

***The Discovery Sought by the 2004 Motion is Unrelated to the Travana Litigation and is Clearly Within the Jurisdiction of This Court***

15. The Debtor and Travana spend a lot of time trying to argue (i) that the subject matter of the Rule 2004 Motion is the subject matter of the litigation currently pending against Travana and would or should be the subject of discovery in that action; and (ii) that the Property sold pursuant to the Sale Order is not property of the estate and would somehow be outside of this Court's jurisdiction.

16. As outlined in the 2004 Motion, the litigation currently pending against Travana is based on facts that occurred almost 7 months after the consummation of sale of the Property to Travana and, by Fareportal's own admission, in connection with a former Fareportal employee (or employees) that, at least to Fareportal's knowledge at this time, never worked for the Debtor nor had any involvement in the sale of the Property to Travana. The recitation of the facts underlying the State Court Action against Travana were provided to frame the *basis* for Fareportal's legitimate concern that the Debtor [REDACTED] may have sold misappropriated Trade Secrets to an entity that is now, and otherwise, seeking to poach key employees and misappropriate other Fareportal Trade Secrets.<sup>8</sup> Accordingly, any allegation that the 2004 Motion seeks discovery in connection with the State Court Action is

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<sup>7</sup> The Debtor also states, in Paragraph 27 of the Debtor's Objection, that Fareportal has "admitted" that the litigation currently pending against Travana, and brought against the Debtor, prior to the chapter 11 case is "almost identical." Although the causes of action are eerily similar in each of those actions, the facts underlying each of those actions are distinct, involving different defendants, distinct time periods, different source code, and (at least in name) different competitors. The "operative nucleus" is not at all the same, although the *types* of behaviors and offenses are and there has been no admission that the actions are related as to subject matter.

<sup>8</sup> The fact that Travana itself does not recognize the difference or understand the facts underlying the State Court Action is somewhat startling.

incorrect and should not be considered in determining whether Fareportal is entitled to limited discovery against the Debtor as outlined in the 2004 Motion.

17. More surprising, however, is the fact that neither the Debtor nor Travana appear to understand the very subject matter of the 2004 Motion or the clear application of the Sale Order to the subject matter of the information sought in the 2004 Motion.

18. First, any assertion that the 2004 Motion does not concern estate property must be flatly rejected. It is beyond peradventure that the identity of the Transferred Source Code and Transferred Software pertains to property of the Debtor's estate. This Property is the core of what was transferred from the Debtor, as its main and most valuable assets, to Travana. Accordingly, the information requested in the 2004 Motion fits squarely within the scope of examinations authorized under Rule 2004. The Sale Motion itself exemplifies and confirms this fact. *See* Sale Order ¶ Q (“The Debtor is the sole and rightful owner of the Property, and no other person has any ownership right, title, or interests therein. The Debtor has all title, interest, and/or rights in the Property required to transfer and to convey the Property to the Buyer, as required by the Purchase and Sale Agreement.”)

19. Second, Fareportal is cognizant of the terms and application of the Sale Order to the subject matter and relief it is seeking. Section 363 of the Bankruptcy Code and the Sale Order would currently insulate Travana<sup>9</sup> from any liability or culpability in connection with the Property transferred to it by the Debtor, by virtue of the free and clear nature of such transfer.<sup>10</sup>

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<sup>9</sup> Fareportal reserves any and all rights it may have with respect to the Sale Order and each of the Debtor and Travana in the event that misappropriated Trade Secrets were part of the Property transferred to Travana by the Debtor.

<sup>10</sup> The Sale Order includes, among other things, language that states as follows:  
(a) “The Debtor may sell the Property free and clear of all liens, claims (including those that constitute a claim as defined in section 101(5) of the Bankruptcy Code), interests, and encumbrances, including without limitation, any transferee or successor liability claims . . . All persons having claims of any kind or nature whatsoever against the  
(footnote continued)

Moreover, the Sale Order provides that the “Court shall retain exclusive jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation and/or enforcement of this Order and to enforce the injunctions set forth herein.” Sale Order ¶ 24.

Accordingly, at this time, this forum is the appropriate forum for Fareportal to bring the discovery requests; if it is found that either misappropriated, or otherwise infringing Trade Secrets have been transferred by the Debtor to Travana utilizing the protections of the Bankruptcy Code, then this Court, is the only forum in which Fareportal could seek remedies against the Debtor for such abuses and unlawful behavior.

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Debtor or the Property shall be forever barred, estopped and permanently enjoined from pursuing or asserting such claims against Buyer or any of its assets, affiliates, successors, assigns or the Property.” Sale Order ¶ L; *See also* Sale Order ¶¶ M-O, 10

(b) Any claim “against the Debtor, the Property, or the Debtor’s business . . . , arising under or out of, in connection with, or in any way relating to the Debtor, the Property or the Debtor’s business prior to the Closing Date or the transfer of the Property to the Buyer, are hereby forever barred, estopped and permanently enjoined from asserting or pursuing such claims against the Buyer . . . , including without limitation . . . (a) commencing in any manner any action or proceeding against the Buyer...” Sale Order ¶ 11; and

(c) “Buyer will not be a successor to the Debtor by reason of any theory of law or equity.” Sale Order ¶ 14.

WHEREFORE, Fareportal respectfully requests that (i) the Objections to the 2004 Motion be overruled (ii) the Court enter the Proposed Order granting the relief requested in the 2004 Motion and (iii) such other and further relief as is just and proper.

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New York, New York

**SHEPPARD MULLIN RICHTER & HAMPTON LLP**

By: */s/Malani Cademartori*  
Malani J. Cademartori, Esq.  
Michael Driscoll, Esq.  
Eric Raphan, Esq.  
30 Rockefeller Plaza  
New York, New York 10112  
Tel: (212) 653-8700  
Fax: (212) 653-8701  
E-mail: [mcademartori@sheppardmullin.com](mailto:mcademartori@sheppardmullin.com)  
[eraphan@sheppardmullin.com](mailto:eraphan@sheppardmullin.com)

*Counsel to Fareportal Inc.*