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

In re:

AIRFASTTICKETS, INC.,

Debtor.

Chapter 11

Case No. 15-11951 (SHL)

**LIMITED OBJECTION OF FAREPORTAL INC. TO THE
DEBTOR'S FIRST AMENDED CHAPTER 11 PLAN OF LIQUIDATION**

Fareportal Inc. ("Fareportal"), by and through its undersigned counsel, Sheppard Mullin Richter & Hampton, LLP, files this limited objection (the "Objection") to the *First Amended Chapter 11 Plan of Liquidation* [Dk. No. 179] (the "Plan") of Airfasttickets, Inc. (the "Debtor").

In support of this Objection, Fareportal respectfully states as follows:

PRELIMINARY STATEMENT

At a hearing held on September 14, 2016, the Court reasoned that the discovery related to the property sold by the Debtor pursuant to the Sale Order (defined below) and sought in Fareportal's 2004 Motion (defined below) would be more practically sought by and provided to Fareportal by Travana, Inc. ("Travana") in the ongoing New York state action commenced by Fareportal against Travana in August 2016. Moreover, it was the Debtor's and Travana's position in opposition to the 2004 Motion, and at the hearing, that such discovery was related to and more properly sought in such action. In light of the Court's ruling and the positions taken by

each of Travana and the Debtor in connection with the 2004 Motion, Fareportal now files this limited objection to the Plan to the extent it could be considered to supplant or supersede the Court's statements at that hearing, or otherwise cut off Fareportal's rights as a result of the Court's ruling on the 2004 Motion.

Specifically, Fareportal objects to the Plan to the extent that it can be construed to impair or preclude Fareportal from pursuing discovery related to the property sold to Travana under the Sale Order or from pursuing any and all of its rights to relief, including without limitation, to pursue a revocation of the Sale Order in the event that Fareportal discovers that its misappropriated property or property otherwise infringing on Fareportal's trade secrets were sold through an improper employment of the bankruptcy process. Given Fareportal's allegations in the 2004 Motion and potential causes of action against all parties, including as asserted and outlined in the Fareportal Claim (defined below), Fareportal requests that its rights be preserved.

Accordingly, and as further detailed below, Fareportal seeks protective language in the confirmation order that (1) retains Fareportal's rights vis a vis the Debtor and the Sale Order, (2) clarifies that nothing in the Plan shall impair Fareportal's pending and future litigation against Travana on causes of action that may or may not be related to the bankruptcy case – i.e., including based on property that may have been transferred under the Sale Order, and (3) clarifies that the exculpation and third-party release provisions of the Plan do not apply to bind Fareportal.

To resolve these issues, and in light of the September 14 hearing, Fareportal respectfully requests that the Court include the following protective language in the confirmation order:

Nothing in this Order or in the Plan shall operate to preclude, impair, or in any way restrict the rights of Fareportal to conduct discovery or seek related relief

in the New York state court or other court of competent jurisdiction, including without limitation, in connection with the potential that Fareportal's misappropriated property or otherwise infringed property was sold by the Debtor to Travana, in any action or other process commenced outside of the bankruptcy case. Any and all rights of Fareportal to seek relief and other remedies with respect to the Sale Order and the Fareportal Claim are expressly preserved and reserved with this Court. Without limiting the generality of the foregoing, and for the avoidance of doubt, the exculpations and the releases under Article 10.6 and 10.9 of the Plan, respectively, shall not preclude, impair, or restrict the rights of Fareportal.

To the extent that this language is not included in the confirmation order, Fareportal objects to the confirmation of the Plan, as set forth in greater detail below.

BACKGROUND

A. General Background

1. On July 27, 2015, certain of the Debtor's creditors filed an involuntary petition against the Debtor in the United States Bankruptcy Court for the Southern District of New York, seeking an order for relief under chapter 7 of title 11 of the United States Code (the "Bankruptcy Code"). Dk. No. 1.

2. On September 21, 2015, the Debtor filed its *Motion to Convert Chapter 7 Case to Chapter 11 Pursuant to 11 U.S.C. § 706(a)*. Dk. No. 10.

3. On October 28, 2015, the Bankruptcy Court entered an order converting the case to chapter 11 of the Bankruptcy Code. Dk. No. 28.

4. Thereafter, the Debtor has been managing its affairs as a debtor in possession under sections 1107(a) and 1108 of the Bankruptcy Code.

B. Sale Process

5. On October 26, 2015, the Debtor filed the *Debtor's Motion (i) for Authorization to (A) Sell Substantially All of Its Property Free and Clear of All Liens, Claims, Encumbrances, and Other Interests and (B) Assume and Assign Contracts and (ii) for Approval of Procedures for Determining Cure Amounts* (the "Sale Motion"). Dk. No. 27.

6. As set forth in the Sale Motion, the Debtor sought approval of the sale of substantially all of its intellectual property and software and certain related assets (the "Property") to Travana, formerly known as AirTourist, Inc., pursuant to a certain *Purchase and Sale Agreement* (the "Sale Agreement"). The Property included "[a]ll source code and rights to source code-past, present and future-that is compiled and installed on machines that run the AirFastTickets Website, including all Amazon infrastructure and hosted data contained in or associated with it, and all configuration data necessary in order for the systems to operate properly." Sale Agreement, Exhibit A, at ¶ 1. A full description of the Property was attached as Exhibit A to the Sale Agreement.

7. On November 24, 2015, the Bankruptcy Court entered an order approving the Sale Motion (the "Sale Order"). Dk. No. 65.

C. The Disclosure Statement and the Plan

8. On July 11, 2016, the Debtor filed the *Motion of the Debtor for an Order (i) Approving its Disclosure Statement, (ii) Establishing Plan Solicitation and Voting Procedures, (iii) Scheduling a Confirmation Hearing, and (iv) Establishing Notice and Objection Procedures for Confirmation of the Debtor's Chapter 11 Plan of Liquidation*, which sought among other forms of relief, approval of a disclosure statement (the "Disclosure Statement") and the Plan. Dk. No. 159.

9. On August 8, 2016, the Debtor filed the amended Disclosure Statement and Plan. Dk. No. 178. Among other things, the Disclosure Statement provides that the distributions and other payments on claims to be made under the Plan are based in part, on the proceeds from the sale of substantially all of the Debtor's assets to Travana. *See* Disclosure Statement at Art. V.A.

10. On August 12, 2016, the Court entered an order approving the Disclosure Statement. Dk. No. 184.

D. Fareportal's 2004 Motion

11. On August 24, 2016, Fareportal filed a motion pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "2004 Motion"). Dk. No. 196. The 2004 Motion sought the authority to conduct an examination of the Debtor and the production of certain documentation related to the Property sold to Travana under the Sale Order. *Id.*

12. On September 14, 2016, the Court held a hearing on the 2004 Motion (the "September 14 Hearing"). At the September 14 Hearing, with respect to discovery related to the potential sale of Fareportal's property, the Court stated:

Well, if they need to – if you reach the point where someone says you have our – it's our source code, some judge says it is their source code, now we have to understand whether the sale order changes the game. I fully expect that I will see all you nice people again because that's the way it works. To understand the sale order in a bankruptcy case, to understand the plan in a bankruptcy case, people come back here. That's the way it works.

Hr'g Tr. 30: 4-14.

...

I will reiterate if there is any issue about the sale order, it comes down to whether the sale order is the case cracker, to quote my cousin Vinny, then we'll be back here. But I'm not hearing anything that says that that's the first place you're going in that litigation. That sounds like far off in the distance. If it comes up, you're going to be back here . . .

Hr'g Tr. 45: 11-22.

13. On September 23, 2016, the Court entered the order denying the 2004 Motion. Dk. No. 229.

14. On October 3, 2016, Fareportal filed a proof of claim in the amount of not less than \$10 million which has been assigned Claim No. 86 (the "Fareportal Claim").

ARGUMENT

A. The Court Should Clarify That Confirmation Does Not Preclude Fareportal from Pursuing Discovery Related to the Property Sold to Travana Under the Sale Order or from Pursuing Other Appropriate Relief

At the September 14 Hearing, the Court denied Fareportal's 2004 Motion based, in large part, on the proposal, which was asserted by both the Debtor and Travana, that Fareportal could, more practically and successfully, pursue the requested discovery against Travana, even though that discovery related to the possible infringement and misappropriation of Fareportal's trade secrets, including without limitation, by transferring such source code to Travana under the Sale Order. Specifically, the Court stated:

But you have a receiver for a party that sold something. You don't have an ongoing operating business where you can call up the person in system support and say what would it take for you to do X, Y, and Z. The receiver is going to have to say okay, we now have to figure out with what we have -- basically we've tried to get rid of everything and monetize it for the estate. That they are not well suited to do it. And you have a company that has it and is well suited to do that.

Hr'g Tr. 41: 12-21; *See also* Hr'g Tr. 30: 4-14, 45: 11-22.

Fareportal objects to the Plan to the extent that it operates to supersede the Court's statements at the September 14 Hearing or impair the right of Fareportal to return to the Court on issues in connection with the Sale Order, including without limitation, the nature and validity of the Property (as defined in the Sale Order) sold and, as a result, the sale process itself. Accordingly, the confirmation order should state that nothing in the Plan will preclude or restrict Fareportal from pursuing discovery in current or future litigation related to the Property sold to

Travana and that Fareportal's rights to pursue other remedies, including without limitation, a revocation of the Sale Order, are reserved in the event that Fareportal discovers that its Property was improperly sold to Travana. In short, the confirmation order should simply include language that facilitates the bankruptcy court's intent at the September 14 Hearing.

B. The Court Should Clarify That Confirmation Does Not Preclude Fareportal from Pursuing Current and Future Litigation Against Travana That Is Unrelated to the Bankruptcy Case

Fareportal objects to the confirmation of the Plan to the extent that it may serve as a basis for the Debtor or Travana to assert that the pending litigation (and imminent future litigation) against Travana in New York state court is precluded on the effective date of the Plan. Fareportal is currently pursuing litigation against its former employee Jason Ware ("Ware") and Travana in the Supreme Court of New York, New York County (the "State Court Action"), alleging, *inter alia*, that Travana misappropriated Fareportal's trade secrets and confidential and proprietary information by improperly soliciting and hiring Fareportal's employees, including Ware, in order to obtain Fareportal's trade secrets and on facts unrelated to these bankruptcy proceedings.

Also, in connection with the State Court Action, at the request of Fareportal, the Supreme Court of New York, New York County entered a temporary restraining order that enjoined Ware and Travana from "using, referencing, or relying on any of Fareportal's trade secrets and confidential and proprietary information" This litigation is wholly independent of the bankruptcy case and the Property purchased by Travana pursuant to the Sale Order. Further, and based on the Court's statements on the record at the September 14 Hearing and denial of the 2004 Motion, Fareportal is considering all alternative legal avenues to protect any and all rights arising from or after the entry of the Sale Order.

As these claims against Travana are not “arising in” or “related to” the bankruptcy case, the Plan cannot establish jurisdiction over these claims. *See* 11 U.S.C. § 157(a). Nevertheless, Fareportal is concerned that Travana will attempt to use the Sale Order’s broad “free and clear” language¹ coupled with the injunction and retention of jurisdiction provisions of the Plan to attempt to bar Fareportal’s litigation against Travana. Although Fareportal is confident that the Plan cannot preclude such claims against Travana, Fareportal wants to avoid this issue arising in the future. *See In re Motors Liquidation Co. (Elliott v. Gen. Motors LLC)*, 829 F.3d 135, 157 (2d Cir. 2016) (holding that the “free and clear” provision of a sale order did not protect the purchaser from claims that arose after the closing of the sale). Accordingly, Fareportal requests that the Court include language in the confirmation order that clarifies that nothing in the Plan creates jurisdiction over or precludes claims against Travana unrelated to the bankruptcy case.

C. The Court Should Limit or Modify the Exculpations and Third Party Releases Under the Plan

Pursuant to the Plan, the “Released Parties,” subject to certain exceptions,² are exculpated from “any liability to any Holder of any Claim or Interest for any act or omission in connection with, relating to, or arising out of the Chapter 11 Case and related proceedings” (the

¹ Paragraph L of the Sale Order states:

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 because, in each case, one or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code have been satisfied. All Persons having Claims of any kind or nature whatsoever against the 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, property, affiliates, successors, assigns, or the Property.

Sale Order, ¶ L.

² The exceptions to the Exculpations are “bad faith, willful misconduct, reckless disregard of duty, criminal conduct, gross negligence, fraud, self-dealing, or, in the case of an attorney . . . malpractice” Plan, Art. 10.6(a). Fareportal notes that, to the extent that it is later determined that the sale process was not properly undertaken or solicited, the exceptions to the Exculpations may be triggered. Fareportal reserves its rights to assert all remedies against the Released Parties for damages sustained by Fareportal.

“Exculpations”). Plan, Art. 10.6(a). The Released Parties are defined as including the following:

(i) the Debtor; (ii) Adam Meislik, as the duly appointed receiver of Airfasttickets, Inc. by the Court of Chancery of the State of Delaware under Order dated July 21, 2015 (the “Receiver”); or (iii) attorneys, financial advisors, accountants, and other professionals retained by the Debtor or the Debtor’s Estate, and each of their respective members, officers, directors, employees, advisors, professionals, counsel, agents, and other affiliated Persons, including, without limitation, (a) Arent Fox LLP, the Debtor’s general bankruptcy and restructuring counsel, (b) Richards, Layton & Finger, P.A., the Debtor’s special counsel, (c) BSW & Associates, the Debtor’s financial advisor, (d) Wright Ford Young & Co., the Debtor’s tax accountants, (e) U Turn Business Recovery Consultants Ltd., the Debtor’s financial advisor in the country of Greece, (f) BMC Group, Inc., the Debtor’s claims and noticing agent

Id.

Further, if a creditor votes in favor of (or is deemed to accept) the Plan and receives distributions under the Plan, that creditor releases its claims against the Released Parties, subject to exceptions where any of the Released Parties engaged in gross negligence, willful misconduct, or fraud (the “Third-Party Releases”). *See* Plan, Art. 10.10.

As Fareportal was not provided with the opportunity to vote on the Plan nor was it deemed to accept the Plan, the Exculpations and Third Party Releases cannot apply to Fareportal. *See, e.g., In re Chassix Holdings, Inc.*, 533 B.R. 64, 81 (Bankr. S.D.N.Y. 2015) (“As to creditors and interest holders who were deemed to reject the Plan (and therefore were given no opportunity to vote or to ‘opt in’ to the releases): it would defy common sense to conclude that those parties had “consented” to releases.”); *In re Chemtura Corp.*, 439 B.R. 561, 609-613 (Bankr. S.D.N.Y. 2010) (refusing to enforce third party releases against creditors who were provided with no mechanism by which they could express their desires to grant or to withhold such releases); *In re DBSD N. Am., Inc.*, 419 B.R. 179, 218 (Bankr. S.D.N.Y. 2009) (“[T]he only

parties who will be bound by the exculpation provisions will be those who assented to them, or who may be deemed to have done so.”).

Nevertheless, Fareportal is concerned that potential targets of litigation by Fareportal could assert that the term “Persons,” which is not defined under the Plan, but used in the Exculpation and Third Party Releases provisions, includes former officers, directors, or employees of the Debtor and Travana and its former officers, directors, or employees. If the definition included such parties, those parties could improperly use the Exculpation and Third Party Releases provisions as a defense against Fareportal. Although Fareportal believes that such parties would be unsuccessful with such a defense, litigating the issue in the future could be costly and lead to unnecessary delays. Therefore, Fareportal requests that the Court include language in the confirmation order that clarifies that the Exculpations and Third Party Releases do not apply to Fareportal.

WHEREFORE, Fareportal respectfully requests that the Court grant relief consistent with the foregoing and such other and further relief as it deems just and proper.

Dated: October 6, 2016
New York, New York

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