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11
12 ARIZONA SUPERIOR COURT
13 MARICOPA COUNTY

14 MESA AIR GROUP, INC., a Nevada
15 corporation; JONATHAN ORNSTEIN,
16 an individual,

17 Plaintiff,

18 v.

19 PLANE BUSINESS, L.L.C., an
20 Louisiana corporation; HOLLY
21 HEGEMAN, an individual; JOHN DOE
22 HEGEMAN, an individual,

23 Defendants.

No. CV2007-019041

**INITIAL DISCLOSURE OF
PLANE BUSINESS, LLC AND HOLLY
HEGEMAN**

(Assigned to the Hon. Robert Miles)

24 Pursuant to Rule 26.1 of the Arizona Rules of Civil Procedure, Defendants
25 PlaneBusiness, L.L.C. and Holly Hegeman (collectively "Defendants"), make the
26 following disclosures concerning their claims and defenses. These disclosures are based
27 on the information in Defendants' possession, custody and control as well as that which
28 could be ascertained, learned or acquired by reasonable inquiry and investigation.
Defendants reserve their right and recognize their duty to supplement this disclosure upon
learning new or different information.

1 **I. FACTUAL BASIS OF CLAIMS AND DEFENSES**

2 This lawsuit emanates from statements posted on Defendants' website in
3 September and October of 2007. The statements focused on Mesa Air Group, Inc.'s
4 ("Mesa Air") litigation with Hawaiian Airlines in Hawaii state court, a lawsuit that Mesa
5 Air lost and resulted in a judgment of approximately \$80 million against it.

6 Plaintiffs Mesa Air and Jonathan Ornstein (collectively "Plaintiffs"), however,
7 claim that they were defamed by these website statements. The statements that Plaintiffs
8 claim are injurious and unfounded include:

9 (1) A September 25, 2007 posting on the Plane Buzz website describing a claim
10 filed by Hawaiian Airlines against former Mesa Air Chief Financial Officer Peter
11 Murnane alleging that Mr. Murnane had deleted his hard drives and a server, "allegedly
12 purg[ing them] of information pertinent to Hawaiian's complaint." Defendants' posting
13 noted that Hawaiian Airlines' filings indicated that it had proof that Mr. Murnane
14 attempted to clean the hard drives "in a way that it would not appear they had been
15 tampered with," which Defendants characterized as "obstruction of justice" and "Just
16 Plain Stupid."

17 (2) A September 26, 2007 posting on the Plane Buzz website describing Mesa
18 Air's defense of the wiped-hard-drive claim, which was that Mr. Murnane had been
19 viewing pornography on the computers and that they had become infected with a virus.
20 The posting queried whether Mr. Murnane was going to be Mesa Air's "Sacrificial Lamb"
21 and quoted one reader's comment that Mr. Murnane "knows where the skeletons are at
22 Mesa [Air]" and that he will not "be left out in the cold – penniless." The posting also
23 questioned its readers if they knew whether rumors were true that Mr. Ornstein was part
24 owner of a "gentleman's club" in Phoenix.

25 (3) A September 27, 2007 posting on the Plane Buzz website quoted an eye
26 witness account of the day's court proceedings in the case of Hawaiian Airlines against
27 Mesa Air. In between the eye-witness' quotes, the posting also noted that the author
28 "thought Hawaiian [Airlines] attorneys were right in making the point that there were

1 potential Sarbanes-Oxley issues involving a recent Mesa [Air] press release.” This
2 statement was made in connection with Mesa Air’s failure to disclose that Mr. Murnane
3 was facing allegations of destruction of evidence related to the Hawaiian Airlines lawsuit.
4 During the trial, Mr. Ornstein testified that he approved the press release, which stated
5 that Mesa Air “maintains the ‘highest ethical standards.’”

6 (4) An October 3, 2007 posting on the Plane Buzz website that quoted the
7 *Arizona Republic*, which reported that Mr. Murnane was nominated for “Idiot of the Year
8 in the Washington Post’s blog on offbeat news.” The posting went on to note that Mr.
9 Ornstein was “the front-runner for this year’s PlaneBusiness Ron Allen Airline (Mis)
10 Management Award.”

11 When making these statements, Defendants relied on information that (1) was
12 available from the records of the lawsuit between Hawaiian Airlines and Mesa Air and
13 provided by eye witnesses to the trial, and (2) that is readily available to the public
14 through various media outlets, including the *Washington Post*, the *Honolulu Star Bulletin*,
15 and the *Arizona Republic*. Moreover, the statements made in the website postings are true
16 or substantially true, and Defendants have no reason to believe that any portion of the
17 statements are false.

18 **II. LEGAL THEORIES UNDERLYING CLAIMS AND DEFENSES**

19 Defendants are not liable to Plaintiffs based on the legal defenses below, as well as
20 the affirmative defenses set forth in Defendants’ Answer, incorporated herein by
21 reference.

22 **A. Defamation *Per Se***

23 To be defamatory, the statements published by Defendants must be false, must be
24 about Plaintiffs and must have brought Plaintiffs into disrepute, contempt or ridicule, or
25 have impeached their honesty, integrity, virtue or reputation. *Godbehere v. Phoenix*
26 *Newspapers, Inc.*, 162 Ariz. 335, 341, 783 P.2d 781, 787 (1989). As a threshold matter,
27 the statement “must be capable of being reasonably interpreted as stating actual facts”
28 about Plaintiffs. *Turner v. Devlin*, 174 Ariz. 201, 207, 848 P.2d 286, 292 (1993) (citing

1 *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990)). To the extent that the
2 statements are true or substantially true, they are absolutely privileged. *Read v. Phoenix*
3 *Newspapers, Inc.*, 169 Ariz. 353, 355, 819 P.2d 939, 941 (1991). To the extent that the
4 statements complained of are not about Plaintiffs or are not “provable as false,” they are
5 not actionable in defamation. *Turner*, 174 Ariz. at 206, 848 P.2d at 291 (quoting
6 *Milkovich*, 497 U.S. at 19-20). Likewise, “[a] statement regarding matters of public
7 concern must be provable as false” in order to sustain a defamation action. *Id.* at 205, 848
8 P.2d at 290. Here, all of the statements claimed by Plaintiffs to be defamatory are true or
9 substantially true, or they are not capable as being interpreted as factual statements, and
10 thus they are not actionable.

11 **1. The statements at issue relate to a matter of public concern.**

12 The statements of which Plaintiffs complain relate to a matter of public concern:
13 the business dealings of a publicly held airline company and its use of private information
14 about a competitor to gain an unfair advantage in the airline industry in a very public trial
15 that was covered widely in local and national news media. Because the statements
16 Plaintiffs complain of relate to matters of public concern, Plaintiffs bears the burden of
17 proving that the statements at issue are false. *See Philadelphia Newspapers, Inc. v.*
18 *Hepps*, 475 U.S. 767, 775 (1986); *Turner*, 174 Ariz. at 204, 848 P.2d at 289 (quoting
19 *Yetman v. English*, 168 Ariz. 71, 75-76, 811 P.2d 323, 327-28 (1991)). Defendants are
20 not aware of any evidence that the statements printed on the Plane Buzz website are false.

21
22 **2. Plaintiffs are public figures involved in a matter of public concern.**

23 A person becomes a “public figure” for purposes of defamation law when he
24 “*assumes* a role of special prominence in the resolution of a public issue, *relinquishes* a
25 degree of privacy, *invites* attention and comment, and *runs the risk* of closer public
26 scrutiny.” *Scottsdale Publ’g Inc. v. Superior Court*, 159 Ariz. 72, 79, 764 P.2d 1131,
27 1138 (Ct. App. 1988). Moreover, “[w]hether . . . speech addresses a matter of public
28 concern must be determine by [the expression’s] content, form, and context . . . as

1 revealed by the whole record.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472
2 U.S. 749, 761 (1985) (plurality opinion). Plaintiffs here are public figures who were
3 involved in a matter of public concerns, and thus to recover damages, Plaintiffs bear the
4 burden of proving by clear and convincing evidence that Defendants published the
5 statements complained of with actual malice as defined by *New York Times Co. v.*
6 *Sullivan*, 376 U.S. 254 (1964). See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974);
7 *Scottsdale Publ’g*, 159 Ariz. at 75, 764 P.2d at 1134; *Tuner*, 174 Ariz. at 205 n.8, 848
8 P.2d at 290 n.4. That is, Plaintiffs must show that Defendants either knew the statements
9 were false or that they consciously disregarded their falsity. *New York Times*, 376 U.S. at
10 279-80; accord *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 487, 724 P.2d 562,
11 573 (1986). Moreover “[t]he *New York Times* rule is not rendered inapplicable merely
12 because an official’s private reputation, as well as his public reputation, is harmed.”
13 *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 273 (1971). In any event, there is no evidence
14 that in publishing the statements complained of Defendants acted with actual malice (e.g.,
15 that Defendants knew the article was untrue or in fact entertained serious doubts as to its
16 truth).

17
18 **3. The statements are privileged as a fair report of court proceedings**

19 The majority of the statements of which Plaintiffs complain were merely reports
20 from eye witnesses at the Hawaiian Airlines trial. As such, they are privileged and cannot
21 be the basis for a claim of defamation. See *Ronwin v. Shapiro*, 657 F.2d 1071, 1075 (9th
22 Cir. 1981) (upholding privileged publication of court proceeding and denying defamation
23 claim); *Phoenix Newspapers, Inc. v. Choisser*, 82 Ariz. 271, 312 P.2d 150 (1957)
24 (applying a qualified privilege to statements made in a public meeting); Restatement
25 (Second) of Torts § 611; accord *Green Acres Trust v. London*, 141 Ariz. 609, 618, 688
26 P.2d 617, 626 (1984).

1 **B. False Light Invasion of Privacy**

2 Plaintiffs must prove that (1) the postings on Defendants' Plane Buzz website
3 placed them before the public in a false light, (2) such false light would be highly
4 offensive to a reasonable person, and (3) that Defendants had knowledge or acted in
5 reckless disregard as to the falsity of the statements. *Godbehere*, 167 Ariz. at 340, 783
6 P.2d at 786; Restatement (Second) of Torts § 652E. Furthermore, "to qualify as a false
7 light invasion of privacy, the publication must involve 'a major misrepresentation of [the
8 plaintiff's] character, history, activities or beliefs,' not merely minor or unimportant
9 inaccuracies." *Godbehere*, 162 Ariz. at 341, 783 P.2d at 787 (quoting Restatement
10 (Second) of Torts § 652E comment c) (alterations in original). A claim for false light
11 invasion of privacy cannot stand "where the plaintiff has become a public character."
12 *Id.* at 343, 783 P.2d at 789. Here, Plaintiffs cannot prove their allegation of false light
13 invasion of privacy because the statements complained of are true or substantially true and
14 thus did not place the Plaintiffs in a false light, let alone one that would be highly
15 offensive to a reasonable person.

16 **C. Tortious Interference with Business Relations**

17 Plaintiffs' claim of tortious interference with business relations is based on the
18 same website postings that they claim to be defamatory. However, to prevail on the
19 tortious interference claim, Plaintiffs must show that Defendants' actions were wrongful,
20 and that claim rests on the defamation claim. Because the defamation claim has no merit,
21 the tortious interference claim likewise must fail. *See Med. Lab. Mgmt. Consultants v.*
22 *Am. Broad. Cos., Inc.*, 306 F.3d 806, 821 (9th Cir. 2002) (concluding that plaintiff cannot
23 recover on a claim of tortious interference with contractual relations based on statements
24 broadcast on television show without showing falsity of statements and defendants' fault);
25 *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990) (finding that claim of
26 tortious interference with business relationship is "subject to the same first amendment
27 requirements that govern actions for defamation"); *see also Hustler Magazine v. Falwell*,
28 485 U.S. 46, 56 (1988) (holding that public figures cannot recover for tort of intentional

1 infliction of emotional distress based on non-defamatory cartoons); *Beverly Hills*
2 *Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191,
3 196 (8th Cir. 1994) (applying defamation standards to claim of tortious interference based
4 on statements made in labor dispute); *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 973 (3rd
5 Cir. 1985) (finding that intentional interference with contractual relations was not
6 actionable because defendants could not be found liable for defamation).

7 Based on the foregoing and the facts as alleged by Plaintiffs, the Complaint fails to
8 state facts sufficient to constitute a cause of action upon which relief may be granted.
9 Moreover, even assuming a cause of action does exist (which it does not), Plaintiffs' claim
10 for Defamation *Per Se* is barred by the defense of truth or substantial truth, thus the
11 statements are absolutely privileged.

12 **III. EXPECTED TRIAL WITNESSES**

13 Due to the early stage of this case, Defendants have not yet fully determined who
14 they will call as witnesses to testify at trial. Defendants reserve the right to supplement
15 this portion of their disclosure statement. In the meantime, Defendants may call some or
16 all of the following witnesses:

- 17 1. Holly Hegeman
18 c/o Daniel Barr
19 Perkins Coie Brown & Bain P.A.
20 2901 N. Central Ave.
21 Suite 2000
22 Phoenix, Arizona 85012
23 (602) 351-8000

24 Ms. Hegeman is the owner of PlaneBusiness, L.L.C., and she is expected to testify
25 about her Plane Buzz website postings that form the basis of Plaintiffs' claims.

- 26 2. Any witness or individual identified by Plaintiffs in conjunction with this
27 matter, or any event related to this matter, including but not limited to those individuals
28 with knowledge regarding the litigation between Plaintiffs and Hawaiian Airlines.

1 **IV. OTHER KNOWLEDGEABLE PERSONS**

2 Based on the information available to them at this date, Defendants believe that, in
3 addition to the individuals listed above as potential witnesses for trial, other individuals
4 may have knowledge or information relevant to the matters at issue. Defendants reserve
5 the right to call any individuals with such knowledge as a witness at trial, and to
6 supplement this disclosure accordingly.

- 7 1. Mark Dunkerly
8 Chief Executive Officer
9 Hawaiian Airlines
10 3375 Koapaka Street, G-350
11 Honolulu, HI 96819

12 Mr. Dunkerly is believed to have knowledge about what occurred during the trial
13 between Hawaiian Airlines and Mesa Air.

- 14 2. Sidney Levinson
15 Hennigan, Bennett and Dorman, LLP
16 865 S. Figueroa Street, Suite 2900
17 Los Angeles, CA 90071

18 Mr. Levinson was the attorney for Hawaiian Airlines in their lawsuit against Mesa
19 Air and is believed to have knowledge about that lawsuit.

- 20 3. Dave Segal
21 *Hawaiian Star-Telegram*
22 Restaurant Row
23 7 Waterfront Plaza, Suite 210
24 500 Ala Moana
25 Honolulu, HI 96813

26 Mr. Segal is a reporter for the *Hawaiian Star-Telegram* and is believed to have
27 knowledge of the lawsuit between Hawaiian Airlines and Mesa Air.

- 28 4. Rick Daysog
Hawaiian Advertiser
605 Kapiolani Blvd.
Honolulu, HI 96813

Mr. Daysog is a reporter for the *Hawaiian Advertiser* and is believed to have
knowledge of the lawsuit between Hawaiian Airlines and Mesa Air.

1 5. Mike Uslan
2 98-1060 D Komo
3 Mai Drive
4 Aiea, HI 96701

5 Mr. Uslan is an Aloha Airlines pilot who is believed to have knowledge regarding
6 what occurred in the courtroom during the trial between Hawaiian Airlines and Mesa Air.

7 6. Benet Wilson
8 *Aviation Daily*
9 1514 Roundhill Road
10 Baltimore, MD 21218

11 Ms. Wilson is a reporter for *Aviation Daily* and is believed to have knowledge
12 about Mr. Ornstein's proprietary interests in the Phoenix area.

13 7. Emil Steiner
14 *The Washington Post*
15 1150 15th Street, NW
16 Washington, DC 20071

17 Mr. Steiner is a columnist for the *Washington Post* who writes the nationally
18 syndicated "Off/Beat" column and is believed to have knowledge regarding the column
19 featuring Mr. Murnane.

20 **V. WITNESS STATEMENTS**

21 At this time, Defendants are not aware of any person who has given a written or
22 recorded statement pertaining to the matter. Defendants reserve the right to supplement
23 this disclosure with such written or recorded statements if they become available.

24 **VI. EXPERT WITNESSES**

25 At this time, Defendants have not retained or identified any expert witnesses that
26 they intend to call at trial, although they do reserve their right to do so hereafter.

27 **VII. COMPUTATION AND MEASURE OF DAMAGES**

28 At this time, Defendants have not asserted any claim for damages against Plaintiffs,
other than their claim for whatever relief this Court deems just. Defendants dispute, as a
matter of law and based on the anticipated evidence at trial, that Plaintiffs are or will be
entitled in this action to recover any of the alleged damages or costs.

1 **VIII. TANGIBLE THINGS**

2 Defendants have not yet determined which tangible evidence, if any, they will use
3 at trial, but all such evidence of which they are aware at this time is included among the
4 documents that are being identified and/or produced with this disclosure statement,
5 described in section IX below.

6 **IX. RELEVANT DOCUMENTS**

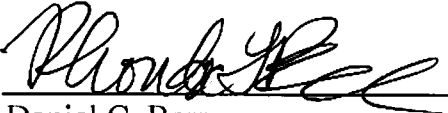
7 The following documents are those in the possession of Defendants that may be
8 relevant to the subject matter of this litigation and that Defendants are producing with this
9 disclosure statement:

Bates No.	Date	Description
Hegeman00001-7	09/27/07	Email to Holly Hegeman
Hegeman00008-10	09/27/07	Email to Holly Hegeman
Hegeman00011-15	09/29/07	Email to Holly Hegeman
Hegeman00016-21	09/25/07	<i>Honolulu Star Bulletin</i> Article
Hegeman00022-24	09/26/07	<i>Honolulu Star Bulletin</i> Article
Hegeman00025-27	09/27/07	<i>Honolulu Star Bulletin</i> Article
Hegeman00028-32	09/28/07	<i>Honolulu Star Bulletin</i> Article
Hegeman00033-36	09/29/07	<i>Honolulu Star Bulletin</i> Article
Hegeman00037-43	10/01/07	<i>The Washington Post</i> Article

20
21 Defendants also believe relevant information is available online at
22 www.dontflygo.com, following the link to "Lawsuits" and then clicking on "Hawaiian
23 Airlines Trial against Mesa – Trial Notes" Days 1 through 6. Relevant information is also
24 available in the trial transcripts from the litigation between Mesa Air and Hawaiian
25 Airlines in Hawaii state court.

1 Dated: January 22, 2008

PERKINS COIE BROWN & BAIN P.A.

2
3 By: 

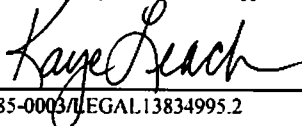
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5 Rhonda L. Barnes
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8
9 Copy of the foregoing mailed
10 this 22nd day of January, 2008, to:

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