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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

**DEFENDANTS' MOTION FOR
PROTECTIVE ORDER**

(Oral Argument Requested)

(Assigned to the Honorable Robert Miles)

24 Pursuant to Ariz. R. of Civ. P. 26(c), Defendants PlaneBusiness, L.L.C. and Holly
25 Hegeman (collectively "Defendants") move for an entry of a protective order against
26 Plaintiffs Mesa Air Group, Inc. ("Mesa Air") and Jonathan Ornstein (collectively
27 "Plaintiffs") limiting the scope and location of the deposition of Defendants. Despite
28 good faith efforts, counsel for Defendants and counsel for Plaintiffs have been unable to
resolve this issue. This motion is supported by the accompanying memorandum and the
declaration of Daniel C. Barr. If Ms. Hegeman is forced to be deposed under Plaintiffs'
30(b)(6) deposition notice, Defendants will suffer significant harm from undue burden and

1 expense concerning issues irrelevant to Defendants' pending case-dispositive Motion for
2 Summary Judgment.

3 Defendants further move for an award of their reasonable expenses incurred in
4 making this motion, including attorneys' fees.

5 MEMORANDUM IN SUPPORT OF MOTION

6 Factual Background

7 Plaintiffs filed this action alleging defamation and tortious interference with
8 business relations regarding certain statements posted on Defendants' website, including a
9 weekly airline industry subscription publication (the "contested statements"). On
10 February 7, 2008, Plaintiffs mailed a 30(b)(6) deposition notice of PlaneBusiness, L.L.C.,
11 along with eight other discovery requests, to Defendants. [See Exhibit A to Declaration
12 of Counsel ("Ex.")] Plaintiffs sought to take the deposition on February 28th, but
13 informed counsel for Defendants that the date could be rescheduled as needed. [See Ex. B
14 (Email from Shane Gosdis to Rhonda Barnes)] The parties agreed that the deposition
15 would not take place on that date, and then attempted to find a mutually agreeable date to
16 reschedule the deposition. Counsel spoke several times on the phone as well as
17 exchanged emails about the deposition date. Initially, the only date in March that
18 Plaintiffs offered for the deposition was the morning of March 28th. [See Ex. C (Emails
19 exchanged between Shane Gosdis and Rhonda Barnes)] Later they added the afternoon of
20 March 25th, but neither were available for Ms. Hegeman, who lives in Louisiana. [Id. at
21 3] Because Ms. Hegeman was in Arizona for other business reasons, counsel for
22 Defendants offered to make Ms. Hegeman available in Phoenix for her deposition on
23 March 17th or 18th, but those dates did not work for Plaintiffs' counsel, who said March
24 was a very busy month for them. Finally, Plaintiffs offered possible deposition dates of
25 March 31st, April 1st of April 14th. [Id. at 2] Ms. Hegeman was no longer in Phoenix on
26 any of those dates, and counsel for Defendants informed Plaintiffs of this. [Id.]

27 In reaction to this news, Plaintiffs' counsel expressed frustration with the
28 scheduling issues, asking for Defendants to provide new dates and threatening to notice

1 the deposition with a date of Plaintiffs' own choosing. [*Id.* at 1] Counsel for Plaintiffs
2 further asked for an extension to file their response to Defendants' Motion for Summary
3 Judgment, which was filed by March 3, 2008. [*Id.*] In response to these requests, counsel
4 for Defendants pointed out that Plaintiffs chose the forum for their claims knowing that
5 Ms. Hegeman worked and resided in Louisiana. Her distance from Plaintiffs' chosen
6 forum necessarily made scheduling the deposition more complicated. Defendants'
7 counsel offered to work with Plaintiffs' counsel to find an acceptable deposition date,
8 again raising the possibility of having the deposition in Louisiana. Finally, Defendants'
9 counsel suggested that the issues in the Motion for Summary Judgment were purely legal
10 and thus an extension of time past the 30(b)(6) deposition to respond was likely not
11 necessary, but invited counsel to provide any specific concerns. Plaintiffs' counsel reply
12 was terse and did not signal a willingness to work together to resolve the issues. [*Id.*]

13 The same day as Plaintiffs' counsel's brief response regarding the deposition
14 scheduling, Defendants' counsel received a hand-delivered 30(b)(6) deposition notice,
15 listing 26 topics and setting a date of March 25, 2008. [*See* Ex. D (30(b)(6) Deposition
16 Notice)] Those topics include the following lines of inquiry that are irrelevant to any
17 consideration of Defendants' liability or constitutional and common-law protections
18 therefrom:

- 19 • Planebusiness' computer systems;
- 20 • The identity of Planebusiness' IP Addresses and the
21 manner in which IP addresses are assigned;
- 22 • The identity of each and every IP Address from which an
23 Actionable Posting has been made;
- 24 • The identity of each and every computer, blackberry, PDA
25 or other electronic or computerized device that any
26 PlaneBusiness employee or former employee or other
27 person has used in the administration of Planebuzz.com,
28 Planebusiness.com, or PlaneBusiness Banter;
- The identity of each and every computer, blackberry, PDA
or other electronic or computerized device that any
PlaneBusiness employee or former employee has used to

1 draft, revise, or electronically upload any of the Actionable
2 Postings or any other statements pertaining to Plaintiffs
3 and/or this lawsuit to Planebuzz.com or any other Internet
4 website(s), Internet blog(s), or any other Internet
5 publication(s);

- 6 • The identity of each and every computer, blackberry, PDA
7 or other electronic or computerized device that any
8 PlaneBusiness employee or former employee has used
9 since September 2007 and the identify of each person
10 using such computer, blackberry, PDA or other electronic
11 or computerized device.

12 [*Id.* at 2-4]

13 Defendants' counsel immediately faxed a letter to Plaintiffs' counsel asking them
14 to withdraw the deposition notice because its only purpose "is to harass and impose undue
15 expense" on Defendants, and because the topics to be covered in the deposition were
16 irrelevant to the issues of law that were set forth in the Motion for Summary Judgment.
17 [*See* Ex. E (Letter from Dan Barr to Cynthia Ricketts)] The letter noted that if Plaintiffs
18 refused to withdraw their deposition notice, Defendants would have no choice but to file a
19 motion for protective order.

20 In the afternoon of March 17th, Plaintiffs' counsel emailed a letter to Defendants'
21 counsel claiming that he was "unable and unwilling to respond" Defendants' request and
22 that he would not respond until close of business on March 19th. [*See* Ex. F (Letter from
23 Shane Gosdis to Dan Barr)] In the evening of March 19th, counsel for Plaintiffs emailed
24 a letter to Defendants confirming that they would not withdraw their deposition notice.
25 [*See* Ex. G (Letter from Shane Gosdis to Dan Barr)] Because Plaintiffs refused to
26 withdraw their 30(b)(6) deposition notice, or even to engage Defendants regarding their
27 concerns, Defendants seek a protective order, shielding Ms. Hegeman and PlaneBusiness,
28 L.L.C. from Plaintiffs' deliberately oppressive and irrelevant deposition request.

Argument

When a party seeks irrelevant information or attempts to use discovery requests that annoy, embarrass, oppress or place an undue burden or expense on another party, the

1 court can issue a protective order to protect the receiving party, “including . . . that the
2 discovery not be had.” Ariz. R. Civ. P. 26(c)(1). As set forth below, this Court should
3 issue a protective order preventing the noticed deposition of PlaneBusiness, L.L.C. or Ms.
4 Hegeman at least until after this Court rules on the Motion for Summary Judgment. In the
5 alternative, this Court should issue an order limiting the scope of discovery to facts
6 relevant to Plaintiffs’ defamation claim and limiting the location of Ms. Hegeman’s
7 deposition to Louisiana. *See DeNardo v. Bax*, 147 P.3d 672, 677 (Alaska 2006)
8 (affirming trial court’s protective order limiting discovery to facts relevant to plaintiff’s
9 defamation claim).

10
11 **I. FURTHER DISCOVERY SHOULD BE STAYED UNTIL THIS COURT
RULES ON THE MOTION FOR SUMMARY JUDGMENT**

12 Summary judgment is the preferred method for disposing of defamation claims.
13 *See Khalifa v. Muslim Students’ Ass’n*, 131 Ariz. 328, 329, 641 P.2d 242, 243 (Ct. App.
14 1981). The Arizona Supreme Court has emphasized the need to resolve defamation cases
15 early in the litigation “because of ‘the public’s significant first amendment interest in
16 protecting the press from the chill of meritless libel actions.’” *Citizen Publ’g Co. v.*
17 *Miller*, 210 Ariz. 513, 516, 115 P.3d 107, 110 (2005) (quoting *Scottsdale Publ’g, Inc. v.*
18 *Superior Court (Romano)*, 159 Ariz. 72, 74, 764 P.2d 1131, 1133 (App. 1988)). The court
19 further encouraged lower courts to examine the pleadings in their cases to determine if
20 they have a First Amendment case-dispositive defense. *Id.* “Such a procedure ‘relieve[s]
21 the parties and the court of a prolonged, costly, and inevitably futile trial’ and protects
22 First Amendment rights.” *Id.* (quoting *Scottsdale Publ’g*, 159 Ariz. at 74, 764 P.2d at
23 1133). Here, Defendants filed a Motion for Summary Judgment on March 3rd, raising
24 purely legal issues and asserting that the contested statements are not actionable because
25 (1) they are not statements of fact that may be provable as false, (2) they are true or
26 substantially true, (3) all but one of the statements are fair reportings of court proceedings,
27 and (4) one of the statements is not “of and concerning” Plaintiffs. [*See Defendants’*
28

1 Motion for Summary Judgment at 8-14] Additional discovery is unnecessary and
2 wasteful until this Court rules on that motion.

3 It is appropriate for a court to “stay discovery when it is convinced that the
4 plaintiffs will be unable to state a claim for relief.” *Wenger v. Monroe*, 282 F.3d 1068,
5 1077 (9th Cir. 2002) (quoting *Wood v. McEwan*, 644 F.2d 797, 801 (9th Cir. 1981)).
6 Here, all of the contested statements are protected as a matter of law, and no amount of
7 additional discovery will affect those purely legal matters. Thus Plaintiffs’ attempt to
8 obtain 30(b)(6) deposition testimony on matters that are irrelevant to liability is
9 unnecessary and places an undue burden and expense on Defendants, and a stay of
10 discovery is appropriate until summary judgment is adjudicated.

11
12 **II. IN THE ALTERNATIVE, DISCOVERY SHOULD BE LIMITED IN SCOPE
AND LOCATION**

13 If this Court were to conclude that a stay of discovery is inappropriate at this time,
14 Defendants request a protective order limiting the scope of discovery and location of Ms.
15 Hegeman’s deposition. Plaintiffs are not entitled to obtain discovery regarding irrelevant
16 matters. Ariz. R. Civ. P. 26(b)(1)(A). The topics listed in Plaintiffs’ 30(b)(6) deposition
17 notice have no bearing on the issues to be determined by this Court, namely, whether the
18 contested statements (1) are false, (2) are of and concerning Plaintiffs, and (3) bring
19 Plaintiffs into disrepute, contempt or ridicule, or have impeached their honesty, integrity
20 or reputation. *See Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 341, 783 P.2d
21 781, 787 (1989). Plaintiffs, therefore, should be restricted in their discovery requests to
22 these narrow issues.

23 In contrast, Plaintiffs’ deposition notice provides an extensive and far-ranging list
24 of topics that reveal Plaintiffs’ intent to harass and place undue burden and expense on
25 Defendants. Among the 26 listed topics include such irrelevant issues as Defendants’
26 computer system (topic # 7), the manner in which “IP addresses” are assigned (topic
27 # 16), and the identity of every computer and blackberry used by Defendants (topic # 22).
28

1 These questions bear little relation to the claims asserted by Plaintiffs and are not
2 reasonably calculated to the lead to the discovery of admissible evidence.

3 Arizona courts are charged with protecting parties against discovery abuse, which
4 greatly increases the cost of civil litigation. *State Farm Mutual Automobile Ins. Co. v.*
5 *Superior Court*, 167 Ariz. 135, 138, 804 P.2d 1323, 1326 (App. 1991). “Discovery in
6 civil cases should be controlled and managed by the court from the onset, not
7 perfunctorily relegated to the parties for resolution.” *Id.* (rejecting plaintiff’s discovery
8 requests as irrelevant, overbroad, and unduly burdensome). Defendants here ask this
9 Court to step in and establish reasonable parameters for Plaintiffs’ discovery requests.

10 Defendants are not seeking this protective order to avoid their discovery and
11 disclosure obligations. To the contrary, Defendants have nearly completed their responses
12 to Plaintiffs’ eight other discovery requests, including requests for production,
13 interrogatories, and requests for admission. Many of these other written discovery
14 requests seek the identical information as sought in the 30(b)(6) deposition notice. Thus,
15 Defendants further seek a protective order to shield Defendants from duplicating their
16 efforts to answers these repetitive and irrelevant questions.

17 **Conclusion**

18 Because the issues in this case are purely legal and because it would be an undue
19 burden and expense for Ms. Hegeman to appear for the noticed 30(b)(6) deposition,
20 Defendants respectfully request that this Court enter a protective order preventing
21 Plaintiffs from taking Ms. Hegeman’s deposition until after this Court rules on the Motion
22 for Summary Judgment. In the alternative, Defendants seek an order limiting the scope of
23 discovery and the location of depositions. Defendants further seek an award of their
24 reasonable fees and expenses incurred in making this Motion.

1 Dated: March 20, 2008

PERKINS COIE BROWN & BAIN P.A.

2
3 By: /s/ Daniel C. Barr

Daniel C. Barr

Rhonda L. Barnes

2901 North Central Avenue, Suite 2000

Phoenix, Arizona 85012-2788

6 Attorneys for Defendants

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9 Copy of the foregoing hand delivered
10 on the 21st day of March, 2008, to:

11 Honorable Robert Miles
12 Maricopa County Superior Court
13 Old Courthouse #303
14 Phoenix, Arizona 85003

15 Copy of the foregoing mailed
16 this 20th day of March, 2008, to:

17 Cynthia A. Ricketts
18 Shane D. Gosdis
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22 Phoenix, Arizona 85016
23 Attorneys for Plaintiffs

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25
26
27
28 /s/ Kaye Leach