IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

SMOLINSKI AND ASSOCIATES, INC.
d/b/a PALM COAST TRAVEL,

Plaintiff,

Case No.: 50-2009-CA-043673
GENERAL DIVISION

v.

CHRISTOPHER J. ELLIOTT and PETER LAY

Defendants.

_____/

DEFENDANT CHRISTOPHER J. ELLIOTT'S
MOTION TO DISMISS

Defendant, Christopher J. Elliott ("Elliott"), by and through undersigned counsel and pursuant to Fla. R. Civ. P. 1.140(b), hereby requests this Court dismiss the Complaint in its entirety filed by Plaintiff Smolinski and Associates, Inc. d/b/a Palm Coast Travel ("Plaintiff"), with prejudice, and in support thereof, states as follows:

Summary of Argument

This lawsuit is a classic example of a corporation attempting to use the burden and expense of litigation to silence a consumer advocate and stifle free speech. Count I and Count II of Plaintiff's Complaint must be dismissed because Plaintiff fails to state a cause of action for either defamation or tortious interference against Elliott. To state a valid claim for defamation under Florida law, a plaintiff must plead actual damages. By failing to identify a single customer affected as a result of Elliott's alleged defamatory statements, Plaintiff fails to state a cause of action for defamation. Plaintiff also improperly alleges that Elliott's reporting depicted it in a "false light," a tort that has been abandoned by Florida courts. Similarly, Plaintiff also fails to

state a cause of action for tortious interference. It is well established under Florida law that a plaintiff claiming tortious interference must identify the agreement or the specific customers allegedly interfered with. Plaintiff does not specify a single customer or agreement allegedly interfered with. Furthermore, the alleged defamatory statements at issue in this case are simply nonactionable, protected as privileged under basic Florida defamation law. This Court should put an immediate halt to Plaintiff's attempts to use expensive litigation to silence a renowned consumer advocate, and should readily dismiss this baseless action.

Summary of Allegations of Complaint

The Complaint, filed December 29, 2009, pleads two counts against Elliott: defamation (Count I) and tortious interference (Count II). Plaintiff is in the business of selling travel services. Elliott is a nationally-syndicated columnist and consumer advocate for the travel industry. Plaintiff alleges that Elliott defamed it by making certain false statements about a state investigation into Plaintiff's business that was posted on Elliott's website, Elliott.org, for less than twenty-four hours. The Complaint fails to quote the precise words alleged to be defamatory. Rather, the Complaint generally alleges that Elliot published "false information regarding [Plaintiff]." Complaint, ¶44. The Complaint singles out only one particular statement as false, at ¶45: "Among the statements Elliott published were falsehoods that stated that Palm Coast had been ordered to cease doing business by the State of Florida. No such order exists, and therefore that report was false."

In addition, Plaintiff alleges that by disseminating the false statements, Elliott "interfered with" Plaintiff's existing and prospective business relationships (*id.*, ¶58), and "depicted [Plaintiff] in a false light" (*id.*, ¶¶46, 52).

Argument

I. Applicable Standard and Role of the Court on Motion to Dismiss Defamation Claim

Although truth is a complete defense to a libel action, it is the *plaintiff* who bears the burden of proving that the challenged statement is both defamatory and false, essential elements of any libel claim. *Hammond v. Times Publishing Co.*, 162 So.2d 681, 682 (Fla. 2nd DCA 1964), *citing*, *McCormick v. Miami Herald Publishing Co.*, 139 So.2d 197, 200 (Fla. 2d DCA 1962). A defamatory statement is not actionable if the plaintiff cannot allege and prove it is false and thus not even "substantially true." *McCormick v. Miami Herald Publishing Co.*, 139 So.2d at 200-201 (affirming dismissal of complaint); *Linafelt v. Beverly Enterprises-Fl., Inc.*, 745 So.2d 386, 389 (Fla. 1st DCA 1999). Minor inaccuracies in reports of public records or statements are not actionable as defamation. *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1107-1108 (Fla. 2008)(minor inaccuracies that do not affect the substance of a statement should be disregarded in determining whether a statement is defamatory).

Further, words are "defamatory" only if "they charge a person with an infamous crime or tend to subject one to hatred, distrust, ridicule, contempt or disgrace or tend to injure one in one's business or profession." *Seropian v. Forman*, 652 So.2d 490, 495 (Fla. 4th DCA 1995); *Cooper v. Miami Herald Pub. Co.*, 31 So.2d 382, 384 (Fla. 1947) (accord). The trial court performs a "prominent function" in determining whether or not an allegedly false statement is defamatory. *Byrd v. Hustler Magazine, Inc.*, 433 So.2d 593, 595 (Fla. 4th DCA 1983). The court is to closely review the allegedly false statement in the context in which it was published to decide whether a factfinder could reasonably determine the statement to be defamatory. *Id.* The statement is to be viewed in context and "not by extremes, but as the common mind would naturally understand it." *Id.* The trial court should dismiss the libel claim if the challenged statement "is not susceptible to

a defamatory meaning." *Smith v. Cuban American Nat. Foundation*, 731 So.2d 702, 707 (Fla. 3rd DCA 1999); *Keller v. Miami Herald*, 778 F.2d 711, 714-15 (11th Cir. 1985).

II. Plaintiff Fails to State a Cause of Action for Defamation Because Plaintiff Failed to Plead Actual Damages

Proof of "actual damage" is an essential element of a defamation action under Florida law. *Edelstein v. WFTV, Inc.*, 798 So. 2d 797, 798 (Fla. 4th DCA 2001)(affirming trial court's dismissal of defamation action where plaintiff failed to plead actual injury); *Anheuser-Busch, Inc. v. Philpot*, 317 F.3d 1264, 1266 (11th Cir. 2003)(citing *Miami Herald Publ'g Co. v. Ane*, 423 So. 2d 376, 388 (Fla. 3d DCA 1982). Elliott's actions caused no actual damage to Plaintiff. Plaintiff simply cannot plead nor prove otherwise. Plaintiff has not shown - and cannot show - any specific business arrangement that was negatively impacted as a result of Elliott's actions. In addition, Plaintiff cannot show that it lost any specific customers as a result of the alleged defamatory statements. Plaintiff did not suffer any damage or injury whatsoever from Elliott's alleged minor inaccuracy that was fleetingly posted. The erroneous information was removed from Elliott's website less than 24 hours after it was originally posted. Plaintiff's failure to plead actual damages as required by Florida law is plainly due to the fact that no damage actually occurred. Therefore, the defamation claim cannot stand as a matter of law and Count I of Plaintiff's Complaint must be dismissed.

III. The Complaint Fails to Plead the Alleged Defamatory Statements With Specificity

Plaintiff's Complaint must be dismissed because it fails to plead the actual defamatory statements at issue verbatim or with sufficient particularity as required by Florida law. *See, e.g., Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So.2d 607, 610 (Fla. 4th DCA 1975); *Gannett Florida Corp. v. Montesano*, 308 So.2d 599 (Fla. 1st DCA 1975); *Cooper v. Miami*

Herald Publishing Co., 31 So.2d 382 (Fla. 1947)(alleged defamatory words should be set out in the complaint for the purpose of fixing the character of the alleged libelous publication in context). The Complaint generally summarizes only one statement alleged to be defamatory with any particularity, at ¶45, but claims that this one statement is one "among" other statements at issue. Plaintiff's Complaint thus violates the pleading requirements for defamation actions under Florida law, and fails to properly provide Elliott with notice of which statements are sued upon. Accordingly, Count I must be dismissed.

IV. Elliott Cannot Be Liable Under Florida Law for Defamation Because His Statements Were Privileged

The sole statement Plaintiff alleges was defamatory, that the State of Florida ordered Plaintiff to cease doing business in the State of Florida, was privileged and cannot serve as the basis for a defamation action. Under Florida law, there is qualified privilege to report accurately on information received from government officials, even if the information provided by the government contains inaccuracies. *Stewart v. Sun Sentinel Co.*, 695 So. 2d 360, 362 (Fla. 4th DCA 1997)(citing *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 502 (Fla. 3d DCA 1993)); *Ortega v. Post-Newsweek Stations, Fla., Inc.*, 510 So. 2d 972 (Fla. 3d DCA 1987). In *Woodard*, the plaintiff, a school bus driver, sued defendants for erroneously reporting that she served four years in jail for murder when in fact, the plaintiff had been convicted of attempted murder and sentenced to four years, but only served two years. 616 So. 2d at 502. The defendants - a television station and an individual reporter - obtained the information regarding the bus driver from the Attorney General's office and a Florida Department of Law Enforcement report. *Id.* In upholding the trial court's entry of summary of judgment in favor of the defendants, the court explicitly stated that:

> The news media has been given a qualified privilege to accurately report on the information they receive from government officials. This privilege includes the broadcast of the contents "of an official document, as long as their account is reasonably accurate and fair," even if the official documents contain erroneous information. (citations omitted)

Id. Interestingly, the court in *Woodard* also noted that the reporter had no duty to determine the accuracy of the information before broadcasting it in his report. *Id.* (citing *Ortega,* 510 So. 2d at 976).

Elliott received the information concerning Plaintiff from a Florida Department of Financial Services (DFS) spokesperson. Although Elliott initially reported on his website that Plaintiff had been ordered by the State of Florida to "stop transacting business immediately," the State of Florida actually filed a cease and desist notice ordering Plaintiff and other Florida travel companies to stop transacting a particular line of their business, selling unlicensed travel insurance on behalf of Prime Travel Protections Services, Inc. ("Prime Travel"). Although Elliott's reporting may have briefly contained a minor error as to the precise scope of business Plaintiff was to stop transacting pursuant to the order, his report was a substantially accurate report of the information received directly from the government, the spokesperson for DFS, as part of DFS' ongoing investigation. Elliott promptly clarified the report within less than 24 hours after the initial statement was posted his website. In fact, Elliott had already clarified the statement prior to Plaintiff's counsel's demand for removal and retraction.

The qualified privilege to report on information received from government officials is designed to protect members of the press, such as Elliott, from liability based on the reporting of minor inaccuracies. It strains credibility to believe Plaintiff's allegation that it somehow suffered damages as the result of the publication of a minor inaccuracy that was corrected in less that 24

hours. Because Elliott's statements were privileged, Plaintiff's defamation claim fails as a matter of law and must be dismissed.

V. Plaintiff Failed to State a Claim for Tortious Interference Because Plaintiff Failed to Identify the Specific Customers Who Were the Subject of the Alleged Interference.

To state a claim for tortious interference under Florida law, a plaintiff must identify the specific customers who were the subject of the alleged interference. *Sarkis v. Pafford Oil Co.*, 697 So. 2d 524, 526 (Fla. 1st DCA 1997)(holding that trial court properly dismissed claim for tortious interference because plaintiffs failed to identity the customers who were the subject of the interference). In *Bortell v. White Mountain Ins. Group, Ltd.*, 2 So. 3d 1041, 1048 (Fla. 4th DCA 2009), the Fourth District Court of Appeal held that the plaintiff failed to state a cause of action for tortious interference because the plaintiff failed to identify with any specificity the parties who were the subject of the alleged interference. In *Bortell*, the plaintiff alleged only that the defendant interfered with plaintiff's advantageous business relationship with a group of "finite marine clients," but failed to either define the group or name a single individual with whom he claimed an advantageous relationship. *Id.* The courts in both *Sarkis* and *Bortell* relied upon the Florida Supreme Court's ruling in *Ethan Allen Inc., v. Georgetown Manor, Inc.*, 647 So. 2d 812, 815 (Fla. 1994) in which the Court stated that an action for tortious interference with a business relationship requires "a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered." *See also Bayley Products, Inc. v. Cole*, 720 So. 2d 550, 551 (Fla. 4th DCA 1998)(reversing trial court and remanding for a directed verdict on tortious interference claim based on plaintiff's failure to present any evidence connecting loss of business to the alleged tortious conduct).

Plaintiff failed to identify any understanding or agreement with which Elliott allegedly interfered nor did Plaintiff provide any specific customers it lost as a result of Elliott's actions. Here, Plaintiff only alleges that "Elliott interfered with [Plaintiff]'s existing and prospective business relationships, with intent to harm [Plaintiff]'s business" and that "Elliott acted with malice, and without privilege, in furtherance of an intent to damage and interfere with [Plaintiff]'s business." Complaint, ¶¶ 58, 60. Plaintiff fails to identify the specific understanding or agreement interfered with as well as any specific customers - existing or prospective - lost by Plaintiff as a result of Elliott's actions. Plaintiff cannot properly bring an action for tortious interference against Elliott based on the speculative and conjectural claim that Elliott's actions somehow harmed Plaintiff's relationship with an unidentifiable group of customers, particularly those with which Plaintiff had never conducted business. As the case law clearly demonstrates, a plaintiff cannot recover damages under a theory of tortious interference without identifying the specific customers adversely affected. Therefore, Plaintiff's claim for tortious interference must be dismissed.

VI. The State of Florida Does Not Recognize the Tort of False Light

Plaintiff's Complaint improperly seeks to plead a claim for "false light" defamation, despite the fact that the tort of "false light" defamation is not recognized as viable cause of action in the State of Florida. *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1115 (Fla. 2008)("[i]n conclusion, we decline to recognize false light as a viable cause of action in this state"). Paragraph 46 of Plaintiff's Complaint states: "Elliott depicted Palm Coast in a false light, by stating and/or suggesting that Palm Coast had failed to properly investigate Prime Travel Protection." Further, in Paragraph 52 of the Complaint, as part of Count I for defamation, Plaintiff alleges: "Further, Elliott depicted Palm Coast in a false light." To the extent Plaintiff is

arguing in support of the tort of false light, Plaintiff is arguing a position that is not supported by the application of existing law to the material facts. In fact, Plaintiff refers to a tort that has been unequivocally rejected recently by the highest court in the state, the Florida Supreme Court. Based on the Florida Supreme Court's ruling in *Jews for Jesus, Inc.*, Plaintiff cannot do an "end around" the established requirements for a defamation claim by arguing the tort of false light.

VII. The Complaint Should Also Be Dismissed Because The Complaint Improperly Seeks to Enjoin Speech - A Prior Restraint.

Plaintiff's Complaint specifically requests an injunction preventing Elliott from further reporting on Plaintiff. At the end of Count I for defamation, Plaintiff requests the following relief: "Wherefore, Palm Coast respectfully requests, the Court ... enjoin further false publication regarding Palm Coast." Complaint, at 11. The Supreme Court of Florida -- as with virtually every court in the land -- has specifically held that a court may not enjoin speech, even alleged false speech, since to allow such injunctions would be an unconstitutional prior restraint on speech. *See, e.g., Moore v. City Dry Cleaners & Laundry*, 41 So.2d 865 (Fla. 1949); *Reiter v. Mason*, 563 So.2d 749 (Fla. 3d DCA 1990); *Animal Rights Fund of Florida, Inc. v. Siegel*, 867 So.2d 451 (Fla. 5th DCA 2004)(defamation may not be enjoined); *Miami Herald Pub. Co. v. Morphonios,* 467 So.2d 1026 (Fla. 3d DCA 1985). Accordingly, Count I of Plaintiff's Complaint seeking to enjoin Elliott from continued reporting about Plaintiff is without any basis in law or fact, is not supported by the application of existing law to those material facts, and must be dismissed.

WHEREFORE, Defendant, Christopher J. Elliott, respectfully requests this Court to dismiss Count I and Count II of the Complaint, with prejudice, and to award such other and further relief as it may deem appropriate and just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail, postage prepaid, to Daniel S. Newman, Esq. and Jeffrey R. Geldens, Esq., 2 South Biscayne Blvd., 21st Floor, Miami, Florida, David Bradley, Esq., 1645 Palm Beach Lakes Boulevard, 2nd Floor, West Palm Beach, Florida 33401 this 15th day of March, 2010.

GREENBERG TRAURIG, P.A.
450 South Orange Avenue, Suite 650
Orlando, Florida 32801
Telephone: (407) 420-1000
Facsimile: (407) 841-1295
Counsel for Defendant Christopher J. Elliott

By: Gregory Herbert
Gregory W. Herbert
Florida Bar No. 0111510
J. Seth Galloway
Florida Bar No. 0054013