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**Hawaiian Airlines, Inc. v. Mesa Air Group:
Breach of Confidentiality Agreement Leads to \$80 Million Judgment**

The recent decision of a United States Bankruptcy Court holding a potential investor liable for a breach of a confidentiality agreement and awarding \$80 million in damages to the plaintiff for such breach serves as a dramatic reminder of the importance of strictly adhering to the terms of these commonplace agreements. The case, *Hawaiian Airlines, Inc. v. Mesa Air Group, Inc.*,¹ is summarized below.

In 2003, Hawaiian Airlines, Inc. (“Hawaiian Airlines”) commenced a chapter 11 reorganization case in the United States Bankruptcy Court of the District of Hawaii (the “Court”) and in connection with it, it also started a sale process in order to find investors that would fund its plan of reorganization. Hawaiian Airlines furnished information to prospective investors through physical documents and a dataroom that contained electronic information that Hawaiian Airlines considered confidential and competitively sensitive (the “Evaluation Material”) to be used by prospective investors exclusively for purposes of conducting due diligence while evaluating a potential transaction with Hawaiian Airlines.

As is customary in such circumstances, Hawaiian Airlines required prospective investors to execute a confidentiality agreement (“Confidentiality Agreement”) as a pre-condition to gaining access to the dataroom and the Evaluation Material. Mesa Air Group, Inc. (“Mesa”) participated in the sale process as a potential investor and as such, executed a Confidentiality Agreement in 2004 and gained access to the Evaluation Material. The Confidentiality Agreement signed by Mesa contained the following provision, some version of which is routinely included in such agreements:

“Mesa hereby agrees that the Evaluation Material will be used solely for the purpose of evaluating the Transaction between the Company and Mesa. Without limiting the foregoing, Mesa specifically agrees that the Evaluation Material shall not be used to obtain any competitive advantage at any time in the event a Transaction with the Company is not consummated. In addition, such information will be kept confidential by Mesa . . . In

¹ No. 03-00817, (Bankr. D. Haw. Oct. 30, 2007).

any event, Mesa shall be responsible for any breach of this agreement by Mesa's employees, officers and Representatives, and Mesa agrees, at Mesa's sole expense, to take all reasonably necessary measures to prevent Mesa and Mesa's employees, officers and Representatives from prohibited or unauthorized disclosure or use of the Evaluation Material."

Mesa decided not to invest in Hawaiian Airlines. However, in September 2005 Mesa publicly announced that it intended to begin operating inter-island flights among the Hawaiian Islands during the first quarter of 2006, in direct competition with Hawaiian Airlines.

On February 13, 2007, Hawaiian Airlines filed a complaint against Mesa for injunctive relief, specific performance and damages for breach of the Confidentiality Agreement and sought the return of property from Mesa. Hawaiian Airlines alleged that Mesa had used confidential information it had obtained during the due diligence process to go into competition with Hawaiian Airlines and had therefore violated the terms of the Confidentiality Agreement.

On October 30, 2007 the Bankruptcy Court rendered a judgment in favor of Hawaiian Airlines. The Court ordered Mesa to pay \$80 million in damages to Hawaiian Airlines representing, in the Court's view, lost revenues and increased costs suffered by Hawaiian Airlines as a result of Mesa's competitive entry into the marketplace as facilitated by Mesa's improper use of Evaluation Material. The Court also ordered Mesa to return any Evaluation Material provided by Hawaiian Airlines that still remained in Mesa's possession.

Discussion

The categories of information included in the Evaluation Material provided by Hawaiian Airlines consisted of the sort of information typically provided to potential investors. As outlined by the Court, such information, contained in a confidential information memorandum and a presentation which Hawaiian Airlines' management made to the creditors committee included the following:

- a) Hawaiian Airlines' projections of the future operational and financial performance of its business.
- b) A list of all of Hawaiian Airlines' contracts with third parties, identifying the other party to the contract and the starting and ending dates of each contract.
- c) Certain details about Hawaiian Airlines' passenger profile, such as the number of connecting passengers from Japan and the number of Japanese visitors embarking on inter-island tours on Hawaiian Airlines during their stay in Hawaii.
- d) Details about Hawaiian Airlines' expansion plans.
- e) Details about Hawaiian Airlines' strategy for marketing to wholesale tour operators.
- f) Details about Hawaiian Airlines' contracts with codeshare partners and its outsourcing initiatives.
- g) Details about Hawaiian Airlines' pricing policies, frequent flyer program, and credit card relationships.

The Court noted that while an expert in the airline business might have been able to make an “educated guess” about some of these topics by drawing inferences from information in Hawaiian Airlines’ public filings, such inferences would not have been as accurate and reliable as the information which Mesa obtained directly from Hawaiian Airlines because publicly disclosed projections are “not audited, are not updated and corrected to the same extent as the reporting companies’ internal information, and do not include certain important pieces of information.” The Court noted further that even if one could draw such inferences, the fact was that the actual information provided to Mesa by Hawaiian Airlines (especially the projections) never became generally available to the public.

The nature of Mesa’s defense was that the information which Hawaiian Airlines provided was of little if any value to it or any other market participant. The Court’s rejection of Mesa’s argument fell into two general categories: First, Mesa had failed to meet its obligation to keep the Evaluation Material confidential whether such information was valuable or not; and second, that Mesa had used the Evaluation Material to further its own objectives in competition with Hawaiian Airlines in breach of the agreement not to do so. Indeed, the Court concluded that Mesa’s misuse of the Evaluation Material was such that it became a substantial factor in Mesa’s decision to enter the market for Hawaii inter-island air transportation services and the breach of the Confidentiality Agreement was a substantial factor in bringing about the economic damages suffered by Hawaiian Airlines.

In a separate set of findings issued in the case concurrently with the findings summarized above, the Court found that subsequent to the initiation of the litigation by Hawaiian Airlines, the chief financial officer of Mesa had wiped the hard drives of two computers clean of all electronic Evaluation Material he had received from Hawaiian Airlines thus depriving Hawaiian Airlines of possible evidence to support its claims against Mesa. The Court did not find credible the officer’s explanation that he had been clearing the hard drives of “adult content.” To remedy the prejudice suffered by Hawaiian Airlines of being deprived of possible evidence of Mesa’s misuse of Evaluation Material, the Court drew a number of adverse inferences against Mesa which directly supported its finding of liability on the breach of contract claim.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Jon Mark at (212) 701-3100 or jmark@cahill.com; or Maria Brito at (212) 701-3668 or mbrito@cahill.com.