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By: JUDITH CASTILLO  
Clerk

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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
15 FOR THE COUNTY OF SANTA CLARA  
16 UNLIMITED JURISDICTION

17 ECLIPSE AVIATION CORPORATION, a ) Case No.: 108 CV 110380  
18 Delaware corporation, )  
19 Plaintiff, ) ECLIPSE AVIATION CORPORATION'S  
20 vs. ) SUPPLEMENT TO OPPOSITION TO  
21 ) MOTION TO QUASH SUBPOENA  
22 )  
23 JOHN DOE; JANE DOE; and various other )  
24 unknown individuals designated VARIOUS ) Date: August 1, 2008 BY FAX  
25 DOES, ) Time: 10:00 a.m.  
26 ) Dept: 7  
27 Defendants. ) Judge: Hon. Manoukian

28 Plaintiff Eclipse Aviation Corporation ("ECLIPSE"), by counsel, files this supplement to  
its May 23, 2008 Opposition (the "Opposition") to the Motion to Quash and Supporting  
Memorandum of Points and Authorities (the "Motion to Quash"), filed by JOHN DOE (the  
"Movant"). For the reasons set forth below, the Motion to Quash is not well taken and should be  
denied with respect to the "Unreleased Posters" (as that term is defined in the Opposition), and  
Google, Inc. should be required to produce the subpoenaed information for those persons.

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1 I.

2 FACTS

3 A. ECLIPSE supplements the record submitted with the Opposition by the additional  
4 blogger posts set forth in Exhibit A hereto (the "Additional Posts"). The Additional Posts were  
5 sent to counsel for the Movant on June 27, 2008.

6 B. In addition, ECLIPSE supplements the record by submitting the verified  
7 complaint filed in the New Mexico action brought by ECLIPSE, styled *Eclipse Aviation*  
8 *Corporation v. John Doe; Jane Doe; and various other unknown individuals designated Various*  
9 *Does*, currently pending in the Second Judicial District Court for the District of New Mexico as  
10 cause no. Case No. CV 2008 02624 (the "Complaint"). This complaint is identical to the one  
11 provided to counsel for the Movant at the June 6, 2008 hearing before this Court.

12 C. This matter was heard originally on June 6, 2008. At that time, on the request of  
13 the counsel for the Movant, the matter was continued until August 1, 2008 at 10:00 a.m. PDT.

14 D. Under the rules of this Court and the Court's oral directive given at the June 6,  
15 2008 hearing, the Movant was required to file a reply in support of his Motion to Quash on or  
16 before July 10, 2008. He did not do so. This Supplement is therefore filed without the benefit of  
17 such a reply.

18 E. This is the second time the Movant has failed to respond, or support the Motion,  
19 the first being the Movant's failure to file a reply in support of the Motion before the June 6,  
20 2008 hearing.

21 F. To date, counsel for the Movant has taken no action in the New Mexico case,  
22 other than to enter an appearance.

23 II.

24 LEGAL ARGUMENT

25 A. Once ECLIPSE Had Made a Prima Facie Showing of the Elements of Its  
26 Claim Against the Movant, It Is Entitled to the Requested Discovery

27 Under the California law cited in the Opposition, once ECLIPSE has made a prima facie  
28 showing of a claim against the anonymous Unreleased Posters, ECLIPSE is entitled to learn the

1 identity of the posters so it can pursue the claims. *See, e.g., Krinsky v. Doe 6*, 159 Cal.App.4th  
2 1154, 72, citing, *Talley v. California*, 362 U.S. 60 (1960) (“we therefore agree with those courts  
3 that have compelled the plaintiff to make a prima facie showing of the elements of libel in order  
4 to overcome a defendant's motion to quash a subpoena seeking his or her identity”). See also,  
5 March 15, 2006 Order Denying Motion of Defendant to Quash Out-of-State Subpoena, entered  
6 in the *H.B. Fuller Company v. JOHN DOE*, Case Number 1-05-CV-053609; *Immunomedics, Inc.*  
7 *v. Jean Doe*, 775 A.2d 773 (N.J. App. Div. 2001); *Sony Music Entertainment Inc., et al. v.*  
8 *Does 1-40*, 326 F.Supp.2d 556 (S.D.N.Y 2004). This rule balances the First Amendment right to  
9 speak anonymously with the right of parties such as ECLIPSE to pursue valid claims against the  
10 anonymous parties.

11 B. ECLIPSE Has Made the Required Prima Facie Showing of a Claim  
12 Against the Movant for Breach of the INDAs

13 1. Elements of a Claim for Breach of Contract

14 To bring an action for breach of contract under New Mexico law, a party must:

- 15 -- Allege the existence of a contract;
- 16 -- State that it has performed all of its material obligations under the contract;
- 17 -- Allege that the other contracting party has breached the contract; and
- 18 -- Allege that it has been damaged by the breach.

19 *McCasland v. Prather*, 585 P.2d 336, 92 N.M. 192 (N.M. App. 1978) (setting out the general  
20 elements of a breach of contract claim in New Mexico). The verified complaint filed in the New  
21 Mexico action is a simple claim for damages and/or injunctive relief based upon the breach by  
22 certain John Does of their obligations to ECLIPSE under Invention and Nondisclosure  
23 Agreements (“INDAs”) they signed. The complaint alleges that certain unknown current or  
24 former employees signed the INDAs, are still bound by their terms, and are violating such terms  
25 by, inter alia, posting confidential information on the [eclipsecriticng.blogspot.com](http://eclipsecriticng.blogspot.com) website,  
26 damaging ECLIPSE as a result.

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28 ///

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1 The INDAs provide in part that each employee agrees:

- 2 • To serve the Company faithfully and to the best of my ability, and to devote my
- 3 entire time, energy and skill to the promotion of its interests;
- 4 • That all business information including but not limited to general business
- 5 operations, forecasts, costs, profits, sales, marketing strategies, methods of doing
- 6 business, servicing clients, customer relations, pricing strategies or pricing
- 7 methodologies, business forms developed for the Company, proposals, contracts,
- 8 names of suppliers, personnel, customer lists and potential customers shall
- 9 constitute trade secrets and proprietary information (hereinafter Proprietary
- 10 Information) of the Company and shall be held in confidence by me; and
- 11 • During the term of my employment and thereafter, to maintain in confidence and
- 12 use my best efforts to preserve the confidentiality of all trade secrets, Inventions,
- 13 Proprietary Information, or other information held in confidence by the Company
- 14 which are acquired by me or maintained in my custody, and to make no disclosure
- 15 or use of such information without the written permission of the Company. My
- 16 obligations of confidentiality will no longer apply (a) to information, which has
- 17 been disclosed by the Company to the general public or (b) to information, which
- 18 has been disclosed by the Company to third parties without restriction on
- 19 confidentiality.

20 Under the general test set out in *McCasland*, ECLISE has pled the elements of a breach  
21 of contract claim against the Movant.

22 2. The Prima Facie Showing Standard Under California Law

23 “Prima facie evidence is that which will support a ruling in favor  
24 of its proponent if no controverting evidence is presented.  
25 [Citations.] It may be slight evidence which creates a reasonable  
26 inference of fact sought to be established but need not eliminate all  
27 contrary inferences. [Citation.]” *Krinsky v. Doe 6*, 159  
28 Cal.App.4th 1154, 1163 (2008) *citing*, *Evans v. Paye* (1995) 32  
Cal.App.4th 265, 280, fn. 13.

27 ///  
28 ///

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1                   3.     ECLIPSE Has Provided the Court With the Required Prima Facie  
2                   Showing

3                   As shown by the evidence in the record before this Court, Eclipse has made the required  
4 prima facie showing of a claim against the Movant for breach of the INDA. ECLIPSE has  
5 shown the existence of the contract (the INDA), ECLIPSE'S compliance therewith, the breach  
6 thereof by the Movant, and the fact that ECLIPSE has been damaged because of the breach.

7                   With respect to the issue of breach, ECLIPSE has provided to the Court substantial  
8 evidence that current or former employees are breaching their INDAs. In the Opposition,  
9 ECLIPSE provided an attachment with all the blogger posts that violated the Movant's  
10 obligations to ECLIPSE under the INDAs. ECLIPSE also cited some of the more egregious  
11 examples, on pages 9-11 of the Opposition.

12                  With the Supplement, ECLIPSE provides further evidence that ECLIPSE of breach. Of  
13 the items set forth in Exhibit A to this Supplement are:

14                   *"The boots do not work. I cannot imagine deliveries without the*  
15                   *boots. How they will get them to work, I have no clue, but they are*  
16                   *redesigning them.*

17                   *There are power requirement issues, and aero issues, as well as of*  
18                   *course weight impacts depending on the design. As far as the*  
19                   *ice/engine issue, someone here suggested this might be an issue. If*  
20                   *it is, and they need to attack this problem, this might be very*  
21                   *complex. If the boot is impractical inboard, and they require*  
22                   *another solution, the impact for power requirements (heated edge)*  
23                   *or bleed air (is there sufficient margin) and plumbing... make this a*  
24                   *complex problem."*

25                   --Airtaximan, Oct 24, 2007, 11:51 AM

26                   *"Snip> After that December payment, the agreement calls for*  
27                   *monthly payments to Hampson of \$337,778 until early 2009.*  
28                   *Snip> the \$6 million was intended to cover "repairs" claims*  
                    *from Hampson..*

*Snip> It also calls for Eclipse to either take or pay for 350 tail*  
                    *sections for calendar year 2007 and 700 for calendar year 2008.*

*Just note, Shane, you misread this. It is not 350 in 2008 and 700 in*  
                    *2009.*

*If I read this correctly, Eclipse is to pay the 337K a month to pay*  
                    *off a 6 million penalty for not taking the promised number in 2006,*

1 and is to buy 350 shipsets in 2007, and 700 in 2008.

2 Since Eclipse actually took somewhere in the range of 90 - 110  
3 shipsets this year (based on the number of starts, plus the seven  
4 ship sets on stock according to Mouse), that shortfall of about 250  
5 tails that Eclipse isn't taking this year is not yet due. That is  
6 another about 25 million that Hampson is aiming to get  
7 before/during the apoclipse.

8 No wonder they are putting 250K in Escrow. Smart move to risk  
9 their reputation and the unforgiving spotlight they have draw to  
10 themselves and the performance of their new plants in Texas, if it  
11 gets them to the front of the queue for 25 Million after the total  
12 eclipse (apoclipse)".

13 --Freedomsjamtarts, December 12, 2007, 9:40 A.M.

14 "10% of workforce being laid off.  
15 No more free sodas.  
16 No Fed Ex.  
17 No color copies.  
18 No FIKI.  
19 No AvioNG.  
20 No weather.  
21 No real autopilot.  
22 Autopilot & actuator problems.  
23 Window problems.  
24 Poor quality control.  
25 Poor exterior fit & finish.  
26 Company teetering on bankruptcy 3 months ago.  
27 Postionholders getting screwed.  
28 Eclipse lying about missing AOPA.  
Poor relationships with vendors.  
Dayjet planes sitting idle.  
Eclipse hiring employees with no experience.  
66 planes that need retrofitted.  
Breakeven volume no where near being attained.  
Production of 1 aircraft per day missed.  
Nearly every other milestone missed.  
Higher purchase price than promised.  
High company overhead.  
Huge cash burn rate.  
Higher DOC than promised."

--Ninerzulu, October 21, 2007, 10:49 P.M.

25 The supplemental blog posts, together with the original posts, show that the Unreleased  
26 Posters have posted information that could not reasonably have come from sources outside of  
27 ECLIPSE, and therefore that the posters must either be current or former ECLIPSE employees  
28 (some of them are admittedly so), or else are "fences" passing along information provided by

1 current or former employees. This protected information includes information about:  
2 confidential supplier issues,<sup>1</sup> systems under development,<sup>2</sup> key personnel matters,<sup>3</sup> work  
3 scheduling matters,<sup>4</sup> financial matters,<sup>5</sup> and customer orders.<sup>6</sup> Some of the posters admit or  
4 strongly imply that they current or former ECLIPSE employees.<sup>7</sup> In some instances the posters  
5 appear to have no regard whatever for their obligations under the INDAs.

6 The facts summarized above, together with the blog posts themselves (submitted with the  
7 affidavits of Raymond Barratt), and the commentary on those posts (submitted by Vern Raburn  
8 or Mr. Barratt), provide more than the 'slight evidence' needed to create a "reasonable  
9 inference" that the Movant has breached his obligations under his INDA with ECLIPSE.

10 *Krinski, 159 Cal.App.4<sup>th</sup> at 1163.*

11 III.

12 CONCLUSION

13 ECLIPSE'S Opposition, as supplemented hereby, show that some of ECLIPSE'S current  
14 or former employees are posting ECLIPSE'S confidential business information on the ECLIPSE  
15 Critic Blogspot, in breach of their obligations to ECLIPSE under the INDAs they signed.

16 ECLIPSE has made a prima facie showing of all elements a claim for breach of the INDAs.

17 Under the *Krinsky* rule announced four months ago by the California Court of Appeal, as well as  
18

19  
20 <sup>1</sup> Freedomsjamarts, December 12, 2007, 9:40 a.m.; Exeac, February 20, 2008 8:31p.m.;Flightguy, December 1,  
2007, 10:35 p.m.; Exeac, March 18, 2008, 7:54 p.m. and March 19, 2008 at 6:48 a.m.; Airtaximan, December 12,  
2007, 8:33 a.m.

21 <sup>2</sup> Airtaximan, Oct 24, 2007, 11:51 a.m.;

22 <sup>3</sup> Coldwetmackeralofreality, February 28, 2008, 11:27 a.m. and February 27, 2008 at 2:38 p.m.; Eclipso, February  
23 28, 2007, 6:27 a.m.; Ninerzulu, October 21, 2007, 10:49 p.m.

24 <sup>4</sup> Eclipso, February 28, 2008, 6:27 a.m.; Eclipse, January 3, 2008, 10:21 a.m.

25 <sup>5</sup> Ninerzulu, February 19, 2008, 11:17 a.m.; Metalguy, January 18, 2008, 4:55 p.m.; Exeac, March 1, 2008, 8:10  
26 a.m.; Airtaximan, December 12, 2007, 8:36 a.m., and October 15, 2007, 3:12 p.m.

27 <sup>6</sup> Whytech, December 21, 2007 7:24 a.m., and December 21, 2007, 8:18 a.m.; Airtaximan, October 9, 2007, 1:12  
28 p.m.

<sup>7</sup> Eclipse, February 18, 2008, 1:25 p.m.; Exeac, March 1, 2008, 8:10 a.m.

1 prior California case law and the law from other jurisdictions, ECLIPSE is entitled to learn the  
2 identity of such persons, so ECLIPSE may pursue its claims against them in New Mexico. The  
3 Motion to Quash should be denied with respect to the Unreleased Posters.

5 Respectfully submitted,

6 Dated: July 21, 2008

MILLER, MORTON, CAILLAT & NEVIS, LLP

7  
8 By:

  
ANGELA F. STOREY  
Attorneys for ECLIPSE AVIATION  
CORPORATION

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PROOF OF SERVICE

I, the undersigned, declare: I am now and at all times herein mentioned have been over the age of eighteen years, a citizen of the United States, employed in Santa Clara County, California, and not a party to the within action or cause; my business address is 25 Metro Drive, 7<sup>th</sup> Floor, San Jose, CA 95110-1339. On the date set forth below, I served the below-stated person(s) the attached

**ECLIPSE AVIATION CORPORATION'S SUPPLEMENT TO OPPOSITION  
TO MOTION TO QUASH SUBPOENA**

BY FIRST CLASS MAIL on the following party(ies) in said action, in accordance with CCP §1013a, by placing a true copy thereof enclosed in a sealed envelope addressed as shown below. I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at San Jose, California. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on the same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED on the following party(ies) in said action, in accordance with CCP §1013a, by placing a true copy thereof enclosed in a sealed envelope addressed as shown below. I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at San Jose, California. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on the same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

BY FACSIMILE TRANSMISSION in accordance with CCP §1013(e), to the following party(ies) at the facsimile number(s) indicated. I caused a facsimile machine transmission to the facsimile numbers listed next to the below-stated person(s)' names. Upon completion of said facsimile transmission, the transmitting machine issues a transmission report showing the transmission was complete and without error.

BY OVERNIGHT DELIVERY on the following party(ies) in said action, in accordance with CCP §1013(c), by placing a true copy thereof enclosed in a sealed envelope, with delivery fees paid or provided for, in a designated area of outgoing overnight mail, addressed as set forth below. In the ordinary course of business mail, placed in that designated area and is picked up that same day for delivery the following business day.

BY PERSONAL SERVICE. I caused such envelope(s) to be delivered by hand this date to the offices of the addressee(s).

1 [X ] STATE I declare under penalty of perjury under the laws of the State of  
2 California that the foregoing is true and correct.

3 [ ] FEDERAL I declare under the laws of the United States of America that I am  
4 employed in the office of a member of the Bar of this court at whose direction the service was  
5 made and that the foregoing is true and correct.

6 **SEE ATTACHED SERVICE LIST**

7 Executed on July 21, 2008, at San Jose, California.

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9 PATRICIA A. FA'ATUAI  
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