THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2009-0262

The Mortgage Specialists, Inc.

v.

Implode-Explode Heavy Industries, Inc.

MANDATORY APPEAL FROM RULING OF THE ROCKINGHAM COUNTY SUPERIOR COURT PURSUANT TO SUPREME COURT RULE 7

BRIEF FOR PETITIONER-APPELLEE THE MORTGAGE SPECIALISTS, INC.

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STATEMENT OF THE CASE/STATEMENT OF FACTS

MSI is a New Hampshire corporation with a principal place of business in Plaistow, New Hampshire. Appendix to Implode Brief ("App.") at 14. MSI is licensed by the NHBD and the MDB to provide mortgage brokering and mortgage banking services in New Hampshire and Massachusetts and is subject to the rules and regulations of the NHBD and the MDB. Id. at 13-14. In 2008, MSI submitted numerous documents to the NHBD and the MDB as part of the regulatory examination process in New Hampshire and Massachusetts. Id. at 15. Among the documents MSI submitted to the NHBD and the MDB was a chart with a breakdown of the number and monetary value of MSI's 2007 loan transactions (the "2007 Loan Chart"). Id.

New Hampshire and Massachusetts law specifically provide that the documents MSI submitted to the NHBD and the MDB, including the 2007 Loan Chart, are "confidential" documents and "shall not be made public." RSA 383:10-b; RSA 397-A:12; M.G.L. c. 255E § 8. The purpose of the confidentiality provision is to encourage the complete and accurate disclosure of information during the examination process without fear that the disclosing institution's confidential financial information will be disclosed to the public.

Implode is a Nevada corporation with a principal place of business in Las Vegas, Nevada. Implode operates a website, www.ml-implode.com, which, among other things, ranks various mortgage companies in the mortgage industry on a ranking device that Implode calls "The Mortgage Lender Implode-O-Meter." App. at 14-15. The website identifies mortgage companies that it claims are "at risk" and places them on one of two lists: the "Imploded Lenders" or the "Ailing/Watch List Lenders." Id. at 15. The website also includes articles written by Implode about the companies identified on the lists. Id.

In the Fall of 2008, MSI learned that it was included on Implode's "Ailing/Watch List Lender" list. See App. at 57-61. The Implode website also included an article about MSI (the "Article") written by Implode. See id. at 62-65. The Article, moreover, stated that it was based, at least in part, on an "unverified report" Implode had received concerning MSI's 2007 loan production. See App. at 64. The Article included a link to the "unverified report." See id. The "unverified report" was actually a scanned image that was in the exact same format and included virtually identical information to that found in the confidential 2007 Loan Chart that MSI submitted to the NHBD and the MDB. Id. at 16. In fact, the only difference between the 2007 Loan Chart and the "unverified report" on Implode's website was that in the "unverified report" the two zeros following the decimal point in the second loan column were redacted. Id.

MSI did not provide the 2007 Loan Chart, or the information contained therein, to Implode and, to the best of its knowledge, has only provided this confidential information to the NHBD and the MDB. App. at 16. It is unclear, therefore, how Implode came to possess a copy of the 2007 Loan Chart. Id.

In addition to the Article, Implode's website also contained comments posted on a message board by an individual using the username "Brianbattersby" dated October 4, 2008 and October 7, 2008. App. at 16-17. The October 4, 2008 post contained false and defamatory comments about MSI and its President, Michael Gill, including a statement that Mr. Gill "was caught for FRAUD back in 2002 FOR SIGNING BORROWERS NAMES and bought his way out." See Addendum, attached hereto, ("Add.") at 1.[1] The October 7, 2008 comment reads "Mortgage Specialists Fraud Michael Gill Fraud Mortgage Specialists NH Fraud Michael Gill NH Fraud" and was intended to insure that the comment turned up at or near the top of the list on

[1] This document is Exhibit K of The Mortgage Specialists, Inc's jurisdictional pleadings, but was not submitted as part of the Appendix to the Implode Brief. See App. at i.

the prominent Internet search engines. App. at 17. Indeed, as of November 12, 2008, Respondent's website was the second hit when the words Michael, Gill and Fraud were entered into a "Google" search. See id.

MSI contacted Implode soon after it learned that the Brianbattersby comments and the 2007 Loan Chart (and the information contained therein) had been posted on Implode's website. See App. at 17. MSI informed Implode that the 2007 Loan Chart was a confidential document under New Hampshire and Massachusetts law and that the comments by Brianbattersby were false and defamatory. See id. MSI requested that Implode immediately remove the 2007 Loan Chart (as well as the information contained in the chart) and the Brianbattersby comments from its website. See id. MSI further demanded that Implode disclose the identity of Brianbattersby and disclose the identity of the individual and/or entity that had provided it with the 2007 Loan Chart. See id.

Implode agreed to "temporarily" remove the 2007 Loan Chart and the Brianbattersby comments from the website. App. at 17. It refused, however, to permanently refrain from republishing the 2007 Loan Chart or the Brianbattersby comments. Id. Implode also refused to disclose the identity of the individual and/or entity that had provided it with the 2007 Loan Chart or to disclose the identity of Brianbattersby. Id.

On November 12, 2008, MSI initiated a lawsuit in the Rockingham County Superior Court by filing a Verified Petition for Temporary, Preliminary and Permanent Injunctive Relief (the "Petition"). See App. at 13-22. MSI asserted that Implode's unauthorized publication of the 2007 Loan Chart and the information contained therein violated New Hampshire and Massachusetts law and that it was entitled to an injunction enjoining the republication of the 2007 Loan Chart as well as the false and defamatory statements by Brianbattersby. See id. MSI

also sought an injunction directing Implode to disclose the identity of the individual and/or entity that had provided Implode with the 2007 Loan Chart, to produce all documents concerning that individual or entity, and to disclose the identity of Brianbattersby. See id. MSI did not assert any claims for monetary damages. See id.

The trial court scheduled a Temporary Hearing on November 24, 2008 to address MSI's request for a Temporary Restraining Order.[2] See App. at 24. On the morning of the Temporary Hearing, Implode filed an Objection to Verified Petition for Temporary, Preliminary, and Permanent Injunctive Relief By Reason of Lack of In Personam Jurisdiction and requested that the trial court dismiss the action on the grounds that Implode was not subject to personal jurisdiction in New Hampshire. MSI objected. On February 6, 2009, the trial court (McHugh J.) issued an order rejecting Implode's personal jurisdiction arguments.[3] See Add. at 2-12.

On February 25, 2009, Implode filed Respondent's Objection to Preliminary and Permanent Injunctive Relief and asked the trial court to address the merits of MSI's claim for injunctive relief. See App. 79-91. In its Objection, Implode argued that MSI had failed to satisfy the legal standard for injunctive relief and that the injunctive relief MSI sought was barred by the First Amendment. See id. MSI submitted a Reply, asserting that the evidence was more than sufficient to satisfy the injunction standard and that the publication of the 2007 Loan Chart and the false and defamatory statements by Brianbattersby did not fall within the scope of the protections afforded by the First Amendment. See id. at 93- 108. MSI further asserted that the First Amendment did not prohibit the trial court from ordering Implode to disclose the

[2] The trial court denied MSI's initial request for an *ex parte* Temporary Restraining Order on November 12, 2008, and scheduled a Temporary Hearing for November 24, 2008. See App. at 24-25.

[3] The Notice of Appeal filed by Implode challenged the trial court's order ruling that Implode was subject to personal jurisdiction. Implode has not briefed that issue and, thus, has waived the issue for purposes of appellate review. See State v. Mountjoy, 142 N.H. 648, 652 (1998) ("Issues raised in the notice of appeal but not briefed are deemed waived.").

identity of the individual and/or entity that had provided it with the 2007 Loan Chart or from ordering Implode to disclose the identity of Brianbattersby. See id.

The trial court (McHugh J.) held a hearing in chambers on March 5, 2009, at which the parties agreed to proceed on offers of proof and allow the trial court to resolve the litigation without a full evidentiary hearing. See Implode Brief at 41. Implode did not request a record of the hearing. On March 11, 2009, the trial court (McHugh J.) issued an order granting the injunctive relief requested by MSI and ordered Implode to disclose the individual/entity that provided it with the 2007 Loan Chart, produce all documents that it received from that individual/entity, disclose the identity of the anonymous poster, and refrain from reposting the confidential banking record and false and defamatory statements on its website or elsewhere. See id. at 36-42. Implode responded by filing this appeal.

SUMMARY OF THE ARGUMENT

The trial court properly granted the relief requested in MSI's Petition because the undisputed evidence demonstrated that Implode's unlawful conduct caused MSI to suffer irreparable harm and principles of equity support the decision. No error of law as to the issuance of this injunction exists.

Contrary to Implode's argument, the trial court did not err in enjoining Implode from republishing the 2007 Loan Chart and the Brianbattersby posts. This order did not constitute an unconstitutional prior restraint because rather than forbidding the dissemination of information in advance of publication, it simply prohibits Implode from republishing materials that were already determined to have been unlawfully published. What is more, since Implode is the moving party in this case, it is responsible for presenting a sufficient record to allow this Court to decide the issues presented on appeal. Implode, however, did not request or obtain a record of

the in chambers hearing and, as such, this Court must assume that the evidence presented supported the trial court's findings that the publications in question were unlawful. As a result, this Court's review is limited only to legal errors apparent on the face of the record.

In any event, the publication of the 2007 Loan Chart was unlawful because it violated the confidentiality requirements of RSA 383:10-b and constituted unauthorized public disclosure of private facts. Similarly, the comments posted by Brianbattersby were unlawful because they were false and defamatory. In simply prohibiting the republication of specific information and documents already found to be unlawful, MSI's request, and the trial court's order, were narrowly tailored to achieve the objective and are not an unconstitutional prior restraint.

The trial court's order directing Implode to identify the source of the 2007 Loan Chart was also reasonable and appropriate. Implode is not entitled to claim the protections of the so-called reporter's privilege because it is neither an established media entity nor did its conduct qualify as investigative reporting. Assuming *arguendo*, that Implode were entitled to invoke the reporter's privilege, MSI overcomes this qualified privilege because the press is a party to the action, the information that Implode seeks to keep confidential relates to the factual issue which is central to MSI's case, MSI has taken reasonable steps to discover the identity of the source of the 2007 Loan Chart from other sources, and under the circumstances, to deny disclosure would completely foreclose liability for any party responsible for the publication of the 2007 Loan Chart.

Additionally, the trial court did not err in directing Implode to disclose the identity of Brianbattersby. With respect to this particular disclosure, MSI has once again overcome a reporter's privilege (to the extent it applies) because MSI has established that the identity of Brianbattersby is essential to MSI's claim and has presented sufficient evidence to demonstrate a

genuine issue of material fact that the comments posted by Brianbattersby are false and defamatory. What is more, MSI has also made a reasonable effort to provide the anonymous speaker with notice of its intent to discover the identity of Brianbattersby. Section 230 of the Communications Decency Act has no bearing on this order as it neither treats Implode as "the publisher or speaker" of this information nor holds Implode accountable in any capacity.

Finally, the trial court's order directing Implode to turn over other documents concerning MSI that Implode may have obtained from the source of the 2007 Loan Chart was reasonable and appropriate because it does not violate any federal or state newsgathering privilege.

As a result, the trial court's decision granting MSI's Petition was proper and must be affirmed.

STANDARD OF REVIEW

Injunctive relief is warranted where the unlawful conduct of a party causes another to suffer irreparable harm. Thompson v. New Hampshire Bd. of Med., 143 N.H. 107, 109 (1998). It is within the trial court's sound discretion to grant an injunction after consideration of the facts and established principles of equity. Id. Injunctive relief is an equitable remedy, requiring the trial court to consider the circumstances of the case and balance the harm to each party if relief were granted. See UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14-15 (1987). This Court "will uphold the issuance of an injunction absent an error of law, abuse of discretion, or clearly erroneous findings of fact." Smith v. N.H. Bd. of Psychologists, 138 N.H. 548, 550 (1994).

On appeal, the appealing party "bears the burden of providing the court with a record sufficient to decide its issues on appeal." Tiberghein v. B.R. Jones Roofing Co., 151 N.H. 391, 394 (2004). In the absence of a sufficient record of the proceedings below, this Court assumes

"that that the evidence supports the result reached by the trial forum, and [the] review is limited to legal errors apparent on the face of the record. Id.

ARGUMENT[4]

I. THE TRIAL COURT'S ORDER ENJOINING IMPLODE FROM REPUBLISHING THE 2007 LOAN CHART AND THE BRIANBATTERSBY POSTS WAS REASONABLE AND APPROPRIATE

A. Prior Restraint Only Applies to a Prohibition on Speech in Advance of Its Publication

While prior restraints are generally disfavored, see Neb. Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976), the rationale behind this lack of toleration lies in the fact that suppressing speech in advance of a determination of its lawfulness, as opposed to imposing sanctions after the fact, "has an immediate and irreversible sanction." See id. at 559. Indeed, the United States Supreme Court has stated that the term "prior restraint" is used "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." Alexander v. United States, 509 U.S. 544, 550 (1993) (citing M. Nimmer, Nimmer on Freedom of Speech 4-14 (1984)) (emphasis added). An injunction against the repetition of a prior statement is not a prior restraint because it does not seek to prohibit future expression without first ruling on the lawfulness of the expression. See State Ex Rel. Taft-Connor v. Court of Common Pleas of Franklin County, 83 Ohio.St.3d 487, 490 (1998) ("It is beyond cavil that there can be no prior restraint unless that restraint occurs prior to publication." (Pfeiefer J, concurring)).[5]

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[4] To sustain the order in the case, the Court need not address the academic arguments that the Amicus Briefs, filed respectively by Public Citizen; and Citizen Media Law Project and The Reporters Committee for Freedom of the Press, raise. The essential issues contained within these briefs are sufficiently briefed by Implode and to the extent not incorporated therein, MSI has responded to all relevant concerns.

[5] The cases relied upon by Implode in its Brief are distinguishable from the facts here as they all present the classic prior restraint issue: whether a court can subject the press to a prior restraint before publication of material that it, as the publisher, lawfully received. See Implode Brief at 12. Additionally, in two of the cases cited, Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996) and Ford Motor Co. v. Lane, 67 F. Supp. 2d 745 (E.D.Mich.

The trial court's injunction does not constitute an unconstitutional prior restraint on speech. The trial court did not question Implode's right to publish the materials at issue in the first place nor did it prohibit Implode from publishing further comments, information or expression related to MSI. Instead, the trial court simply prohibited Implode from republishing materials that it had already determined were unlawfully published. The injunction, thus, does not and cannot constitute a prior restraint on speech.

This conclusion finds further support in the United States Supreme Court's decision in Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973). In Pittsburgh Press, the plaintiff argued that an administrative order directing a newspaper to cease allowing employers to place help-wanted advertisements in columns captioned "Jobs--Male Interest," "Jobs--Female Interest," and "Male-Female" was an unconstitutional prior restraint on expression. The Supreme Court rejected this argument, concluding that "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." Id. at 390. The Supreme Court further held that because the order at issue was "based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication." Id.

This case, like Pittsburgh Press, is not a case where this Court must speculate on the lawfulness and consequences of republication. Rather, the injunction encompasses only the republication of a confidential financial document that the banking laws of New Hampshire and Massachusetts both prohibit from being disclosed to the public and the republication of false and defamatory statements about MSI and its President. As explained more fully below, the trial

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1999), the federal courts appear to have assumed that the orders in question were prior restraints and offered no analysis to support this assumption.

court had ample evidence to determine that the specific speech at issue -- i.e., the reposting of these materials and statements -- was unlawful. As such, the injunction does not constitute an impermissible prior restraint on speech.[6]

B. The Publication of the 2007 Loan Chart was Unlawful

Implode dedicates a substantial portion of its brief to arguing that the trial court's injunction constitutes a prior restraint because the publication of the 2007 Loan Chart and the posting of the Brianbattersby comments were not unlawful and, thus, the trial court had no basis to enjoin the republication of the chart or the comments. The primary thrust of Implode's argument is that the publication of the 2007 Loan Chart was not unlawful because RSA 383:10-b purportedly does not create a private right of action and the publication of the 2007 Loan Chart does not constitute an invasion of privacy. Implode similarly argues that the Brianbattersby comments are not unlawful because they are not defamatory.

As a preliminary matter, the party appealing an order issued by the trial court "bears the burden of providing the court with a record sufficient to decide its issues on appeal." Tiberghein, 151 N.H. at 394; see also Sup. Ct. R. 13, 15. This party also has the burden of ensuring that an adequate taped or stenographic record is created in the first place. See State v. Staples, 120 N.H. 278, 284 (1980). The fact that proceedings occurred in chambers does not extinguish this burden. See id. at 284-84 ("'The court has a right to assume counsel will discharge this function for there are numerous matters properly conducted in Chamber conferences and off the record.'" Evans v. United States, 397 F.2d 675, 680 (D.C. Cir. 1968)). In the absence of a sufficient taped or stenographic record of the proceeding below, this Court assumes "that the evidence supports

[6] The fact that Implode voluntary removed the offending material certainly undercuts its argument that "the trial court's injunction against publication of the lawfully obtained 2007 Loan Chart would profoundly chill lawful speech." See Implode Brief at 16-17. On some level, the removal of this information constitutes an implicit admission that publication of the material was unlawful or unauthorized. To the extent Implode was steadfast in its stance that the material was protected by the First Amendment, it would not have allowed the specter of litigation to thwart its position.

the result reached by the trial forum, and review is limited to legal errors apparent on the face of the record." Tiberghein, 151 N.H. at 394.

Here, the trial court held a hearing in chambers at which the parties made offers of proof and concluded, based on the evidence presented by the parties, that the publication of MSI's confidential record was unlawful and that the Brianbattersby comments were defamatory.[7] As a result, the trial court issued the injunctive relief requested by MSI, including prohibiting Implode from republishing the 2007 Loan Chart (and the information contained therein) and from republishing the Brianbattersby comments. On appeal, Implode bears the burden of demonstrating that the trial court's conclusion is not supported by the evidence. Implode, however, never requested a stenographic or taped record, nor did it object to proceeding without such a record of the hearing. Accordingly, Implode has not and cannot provide this Court with a sufficient record of the evidence to properly evaluate the evidence presented to the trial court. This Court must therefore assume that the evidence supports the trial court's conclusion that the publication of the 2007 Loan Chart and the posting of the Brianbattersby comments were unlawful. See Tiberghein, 151 N.H. at 394.

Assuming, *arguendo*, that Implode had presented a sufficient record of the proceedings below, its contention that the publication of the 2007 Loan Chart was not unlawful would still fail. Contrary to Implode's suggestion, the issue is not whether the publication of the 2007 Loan Chart gives rise to a private cause of action, but instead whether the publication is unlawful. RSA 383:10-b (and its Massachusetts counterpart M.G.L. c. 225E § 8) states that all documents submitted by MSI to the NHBD as part of the examination process, including the 2007 Loan

[7] MSI does not dispute that the parties agreed to waive a formal evidentiary hearing before allowing the trial court to rule on the merits of the case. See Implode Brief at 4.

Chart, are "confidential" and "shall not be disclosed to the public." See RSA 383:10-b.[8] The publication of the 2007 Loan Chart is unlawful because it violates the confidentiality requirements of RSA 383:10-b. This is true regardless of whether RSA 383:10-b creates a private right of action.

In addition, whether or not RSA 383:10-b creates a private right of action is irrelevant in the case at hand. In this regard, MSI only sought equitable relief in the form of an injunction prohibiting Implode from republishing the 2007 Loan Chart and the Brianbattersby comments. This Court has previously recognized that that a party is entitled to equitable relief for the violation of a statute regardless of whether the statute provides for a private right of action. See Kowalski v. Cedars of Portsmouth Condo. Assoc., 146 N.H. 130, 134 (2001) ("Given the equitable nature of the doctrine of unjust enrichment . . . we need not address whether RSA chapter 331-A provides for a private right of action."). Accordingly, MSI is entitled to equitable relief enjoining the republication of documents that violate RSA 383:10-b regardless of whether that statute gives rise to a private right of action.

In an effort to defend its rights, MSI contacted the NHBD and requested a formal investigation to determine whether the document was disclosed by the NHBD. The NHBD informed MSI that they "do not believe that the information referenced was obtained from this office" and there was not "any indication that there was a breach in the Department." See Add. at 13. In any event, RSA 383:10-b does not bestow a right on the NHBD commissioner to enforce the statute -- by injunction or otherwise. Thus, under Implode's construction of the statute, no party could ever enforce the statute's confidentiality provisions. As a result, a citizen

[8] RSA 383:10-b does allow the NHBD commissioner to produce records submitted during an examination if the commissioner concludes that "the ends of justice and the public advantage will be subserved by the publication thereof." The NHBD has denied releasing the 2007 Loan Chart, whether in accordance with this provision or otherwise.

of New Hampshire would have no means, either through civil or criminal proceedings, to prevent the repeated publication of unlawfully disclosed information that causes irreparable harm to its reputation. New Hampshire's trial courts certainly have the authority to enjoin the republication of materials and/or information disclosed in violation of New Hampshire law. Otherwise, the confidentiality provisions of RSA 383:10-b are rendered meaningless.

In any event, Implode's contention that RSA 383:10-b does not provide for a private right of action is incorrect. A statutory standard of care supports a private cause of action where "the injured party is a member of the class intended by the legislature to be protected" and the "harm is of the kind which the statute was intended to prevent." Mahan v. N.H. Dept. of Admin. Services, 141 N.H. 747, 754 (1997). RSA 383:10-b prohibits the disclosure of information submitted to the NHBD by a financial institution during the regulatory examination process. The statute is intended to protect the institution's right to maintain the confidentiality of its financial records and internal operations. MSI submitted the 2007 Loan Chart to the NHBD during the regulatory examination process and, thus, MSI clearly and unequivocally falls within the class the legislature intended to protect. The conduct the legislature seeks to prevent, moreover, is the unlawful disclosure and publication of its confidential documents -- the specific conduct at issue in this litigation. MSI, therefore, has a right to seek appropriate remedies, including injunctive relief, to enforce its statutory rights under RSA 383:10-b.[9]

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[9] In support of its argument that RSA 383:10-b does not extend a cause of action to private parties, Implode compares the statute to RSA 359-C, which provides consumers with three remedies for violations of the act. Implode also makes much of the fact that in Cross v. Brown, 148 N.H. 485,486-87 (2002), this Court "ruled . . . that there was no private right of action to enforce the privacy protections of RSA 359-C other than the remedies set up by statute." Implode Brief at 8. What Implode fails to address, however, is that this ruling was based on the explicit language within the statute itself, which stated that these remedies "shall be the exclusive remedies available to a customer aggrieved by a violation of the provisions of this chapter." Cross, 148 N.H. at 486-87 (citing RSA 359-C:14-a (1995)). RSA 383:10-b does not include similar language limiting remedies for violations of its confidentiality provisions.

Finally, even if the posting of the 2007 Loan Chart was not an "unlawful" violation of RSA 383:10-b, the posting of this document still constitutes an "unlawful" invasion of privacy under New Hampshire law. The United States Supreme Court has acknowledged that free speech rights are not without limits, and restrictions imposed on such rights may properly be based on the privacy interests of others. See Rowan v. United States Post Office Dept., 397 U.S. 728, 737-38 (1970); see also Hill v. Colorado, 530 U.S. 703, 716-17, 120 (2000). In line with this reasoning, New Hampshire has recognized a cause of action in tort for violation of the right to privacy by public disclosure of private facts. See Hamberger v. Eastman, 106 N.H. 107, 110-111 (1964).[10] This cause of action involves "the invasion of something secret, secluded or private pertaining to the plaintiff" and also "depends upon publicity." Hamberger, 106 N.H. at 110-11. "Publicity . . . means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Restatement (Second) of Torts § 652D comment a at 384 (1977).

As already discussed, the 2007 Loan Chart was confidential or "secret" pursuant to RSA 383:10-b and pertained to MSI. The public therefore does not have a legitimate concern in learning about this confidential information. See Shulman v. Group W Productions, Inc., 74

[10] Although MSI acknowledges that Restatement (Second) of Torts § 652I comment c (1977). c states that "[a] corporation . . . has no personal right of privacy," the United States Supreme Court has held that corporations do not have a right to privacy that is coextensive with that of individuals. See United States v. Morton Salt Co., 338 U.S. 632, 652 (1950). Privacy rights accorded artificial entities are not stagnant, but depend on the circumstances. See United States v. Hubbard, 650 F.2d 293, 306-07 (D.C. Cir. 1980) ("[W]e think one cannot draw a bright line at the corporate structure. The public attributes of corporations may indeed reduce *pro tanto* the reasonability of their expectation of privacy, but the nature and purposes of the corporate entity and the nature of the interest sought to be protected will determine the question whether under given facts the corporation per se has a protectible privacy interest." (fns. omitted)). For the reasons stated herein, MSI does not purport to claim equality with individuals in the enjoyment of a right to privacy, but does contend that in light of the circumstances in this case, it clearly had a substantial privacy interest in keeping the 2007 Loan Chart confidential.

Cal.Rptr.2d 843, 857-58 (1998) ("All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of legitimate public interest." (emphasis added)).

> In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled.

Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975) (emphasis added). Since the New Hampshire legislature has determined that the public is not entitled to the document at issue, see RSA 383:10-b, it is not a matter of legitimate public concern and the public disclosure of the 2007 Loan Chart constitutes an actionable invasion of MSI's right to privacy. See Virgil, 527 F.2d at 1128 ("If the public has no right to know, can it yet be said that the press has a constitutional right to inquire and to inform? In our view it cannot. It is because the public has a right to know that the press has a function to inquire and to inform.").

In its Brief, Implode appears to confuse the common law tort of invasion of privacy through the publication of private facts with the common law tort of intrusion upon a party's solitude or seclusion. See Implode Brief at 10. In Hamberger, this Court stated

> The four kinds of invasion comprising the law of privacy include: (1) intrusion upon the plaintiff's physical and mental solitude or seclusion; (2) public disclosure of private facts; (3) publicity which places the plaintiff in a false light in the public eye; (4) appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness. . . . It is evident that these four forms of invasion of privacy are distinct, and based on different elements.

106 N.H. at 110. By misinterpreting the specific form of invasion, Implode has misstated the necessary requirements for a cause of action. See Implode Brief at 10 (arguing that "publication of the material must rise to the level of being 'offensive to persons of ordinary sensibilities'"). Implode is similarly mistaken when it asserts that the "right to privacy is limited to causes

involving physical privacy of the home and intimacies of interpersonal life and communication," id. at 9, as this Court has recognized that a person has a reasonable expectation of privacy in his/her social security number and the unauthorized publication of another person's social security number constitutes an invasion of privacy. See Rembsberg v. Docusearch, Inc., 149 N.H. at 148 (2003). MSI had a similar expectation that the financial information it provided to the NHBD during the regulatory examination process, including the 2007 Loan Chart, would be held in confidence. The unauthorized publication of this information on Implode's website is sufficient to establish a claim for invasion of privacy by public disclosure of private facts. The record presented to this Court is more than sufficient to support the trial court's conclusion that the publication of the 2007 Loan Chart was unlawful and that its order prohibiting the republication of the 2007 Loan Chart was reasonable, appropriate, and equitable.

C. The Brianbattersby Comments were Unlawful

Implode's contention that the comments posted by Brianbattersby are not unlawful because they are not defamatory similarly misses the mark. To prevail on a defamation claim, a plaintiff must prove that the statement at issue, when considered as a whole, was false, was negligently published, and would "tend to lower the plaintiff in the esteem of any substantial and respectable group, even though it may be quite a small minority." Touma v. St. Mary's Bank, 142 N.H. 762, 765 (1998) (citing Duchesnaye v. Munro Enterprises, Inc., 125 N.H. 244, 252 (1984)); see also Thomas v. Telegraph Publishing Co., 155 N.H. 314 (2007).

MSI asserts that two comments posted by Brianbattersby on October 4, 2008 and October 7, 2008 were defamatory. The October 4, 2008 post stated, in relevant part, that MSI's President, Michael Gill, "was caught for FRAUD back in 2002 FOR SIGNING BORROWERS NAMES and bought his way out." See Add. at 1. The October 7, 2008 comment reads

"Mortgage Specialists Fraud Michael Gill Fraud Mortgage Specialists NH Fraud Michael Gill NH Fraud." App. at 17. The trial court concluded, based on the evidence submitted, that the Brianbattersby comments were false and defamatory and enjoined the republication of those comments.[11] See Implode Brief at 36-42.

Implode challenges the trial court's holding by first arguing that the October 7, 2008 comment cannot be defamatory because it is "non-sensical." Implode Brief at 18. MSI agrees that the comment, when read in isolation, is non-sensical. However, MSI asserts, as it argued to the trial court, that the purpose of the "non-sensical" statement was to create a string of words which would draw Internet users to the October 4, 2008 post. See App. at 17. Indeed, this strategy proved successful and, as of November 12, 2008, Implode's website was the second hit when the words Michael, Gill, and Fraud were entered into a Google search. Id. The October 7, 2008 comment, thus, is part and parcel of the defamatory statements contained in the October 4, 2008 and was generated for the sole purpose of directing Internet users to the defamatory October 4, 2008 posting.

Implode next suggests that the October 4, 2008 Brianbattersby comment, when read in isolation, does not defame MSI because it only refers to Mr. Gill, not MSI. Implode Brief at 18. This argument also fails. As filed in its entirety with the trial court, the October 4, 2008 post specifically links "Mike Gill" as the "owner" of Mortgage Specialists. See Add. at 1. Thus, even a casual reader would recognize that the conduct alleged in the October 4, 2008 post was related to MSI. In addition, individuals familiar with the mortgage industry, the audience specifically targeted by MSI, would know that Mr. Gill is the President of MSI and, thus, that the alleged conduct was related to MSI. Finally, and perhaps most importantly, the comments by

[11] Again, Implode has not provided the Court with a transcript of the proceeding below and, accordingly, this Court must assume that the trial court's conclusion that the Brianbattersby comments were defamatory is supported by the record below. Tiberghein, 151 N.H. at 394.

Brianbattersby were linked to and appeared directly below the article Implode wrote about MSI, which specifically notes that "Michael Gill" is the "President" of Mortgage Specialists. See App. at 64. As a result, Implode's suggestion that the Brianbattersby comments are not "of and concerning" MSI is simply incorrect.

Finally, Implode argues that the Brianbattersby comments are not defamatory because "rhetorical hyperbole and vigorous epithets are statements of opinion, not expressions of fact, and cannot give rise to a claim of defamation." See Implode Brief at 19. In doing so, Implode analogizes the comments in the October 4, 2008 post to a statement calling a journalist the "journalistic scum of the earth." Id. The Brianbattersby comment, however, states that Mr. Gill "was caught for FRAUD back in 2002 FOR SIGNING BORROWER'S NAMES and bought his way out." This comment is not simply "rhetorical hyperbole" or a "vigorous epithet." It is a factual statement falsely accusing Mr. Gill of committing fraud (and apparently bribery) in 2002 and is actionable as defamation.

The record presented to this Court is more than sufficient to support the trial court's conclusion that the Brianbattersby comments were false and defamatory and that its order prohibiting the republication of those comments was reasonable, appropriate, and equitable.

D. The Final Order is Narrowly Tailored to Achieve Its Objective

The United States Supreme Court has recognized that an injunction prohibiting the repetition or continuation of specific speech is not an unconstitutional prior restraint if the court issuing the injunction has found the specific speech to be unlawful and the injunction is "clear and sweeps no more broadly than necessary." Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 390 (1970). As explained above, the trial court correctly concluded, based on the evidence submitted, that the publication of the 2007 Loan Chart and the

Brianbattersby comments was unlawful. The injunction it issued to prohibit the continuation of this unlawful conduct is narrowly tailored to achieve the specific objective of preventing the republication of this unlawful information. The injunction in this case simply prohibits the republication of information and documents the court has already found to be unlawful in as narrow of a fashion as possible. It does not prevent Implode from publishing information or articles about MSI nor does it prohibit Brianbattersby from posting additional comments about MSI. Indeed, Implode has failed to suggest how the injunction could have been more narrowly tailored, while still achieving its objectives.

II. THE TRIAL COURT'S ORDER DIRECTING IMPLODE TO DISCLOSE THE IDENTITY OF THE INDIVIDUAL/ENTITY THAT PROVIDED IT WITH THE 2007 LOAN CHART WAS REASONABLE AND APPROPRIATE

Implode argues that the trial court's order directing it to disclose the identity of the individual/entity that provided it with the 2007 Loan Chart was improper because it violates the so-called "reporter's privilege." In making this argument, however, Implode completely ignores this Court's decision in Downing v. Monitor Publishing Co., Inc., 120 N.H. 383 (1980), a case in which this Court specifically discussed the scope of the reporter's privilege in a civil action against a newspaper involving the publication of unlawful statements. As explained more fully below, MSI has satisfied the requirements for disclosure under the Downing standard even assuming Implode qualifies as a "journalist" entitled to the protections of the reporter's privilege.

A. Implode Is Not a Journalist Entitled to the Protections of the Reporter's Privilege

Even in the case of traditional media, the United States Supreme Court has acknowledged that deciding who qualifies for a reporter's privilege is difficult. See Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (determination of who qualifies is "a questionable procedure"). In the case of individuals disseminating information on the Internet, this task become even more intricate.

See In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1156-57 (D.C. Cir. 2005) (Sentelle, J., concurring) (acknowledging the problems that arise in determining whether the privilege protects "the proprietor of a web log: the stereotypical 'blogger' sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way"). Anyone seeking to evade legitimate court orders for the disclosure of information could potentially invoke a reporter's privilege. Such expansion runs counter to the fundamental notions of a privilege, which should be maintained for a select, well-defined group to the exclusion of all others, and weakens the effectiveness of the reporter's privilege as a device for protecting journalists.

Historically, the journalist's privilege embodied in most states' laws has been held to include traditional news establishments. See, e.g., Fla. Stat. § 90.5015 (limiting journalist's privilege to individuals who have a professional affiliation with an established media entity).[12] Additionally, both the Third Circuit and the Ninth Circuit have noted that "the [common law] journalist's privilege was not designed to protect a particular journalist, but 'the activity of investigative reporting more generally.'" See In re Madden, 151 F.3d 125, 129-30 (3d Cir. 1998) (citing Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993) and formulating a three-part test to limit the privilege to those who: (1) are engaged in investigative reporting; (2) are engaged in gathering news; and (3) possess the intent at the inception of the newsgathering process to disseminate this news to the public).

Here, Implode was neither an established media entity nor was it engaged in the activity of investigative reporting. All of Implode's information was given to it by third party sources. See App. at 29 ("All of the primary information on the site is *received*" (emphasis supplied)). It neither uncovered a story on its own nor did it independently investigate any of the information it

[12] See infra note 13.

received. Implode's primary goal was to offer a forum and foster discussion regarding the housing finance sector. See id. ("This site is a forum."). It intended at the inception to create this forum and not to engage in investigative reporting to disseminate to the public. Accordingly, Implode is not a "journalist" and, therefore, cannot "conceal [its] information within the shadow of the journalist's privilege." See In re Madden, 151 F.3d at 130.

B. MSI Has Satisfied the Requirements for Disclosure in *Downing*

This Court first addressed the existence of a qualified privilege for the press to withhold the identity of confidential news sources in Opinion of the Justices, 117 N.H. 386 (1977).[13] The decision in Opinion of the Justices recognized the existence of a reporter's privilege in civil proceedings; however, it failed to define "the scope of the privilege, whether it was absolute, who qualified as a reporter, what qualifies as 'the press,' what the situation would be if criminal proceedings were at issue, or whether libel actions would require disclosure." Id. at 389-90. Instead, this Court held that a reporter's privilege exists "in a civil proceeding involving the press as a nonparty." Id.

This Court next considered the qualified reporter's privilege in Downing v. Monitor Publishing Co., Inc., 120 N.H. 383 (1980). Downing involved a libel action by a public official against a newspaper based on information contained in an article published by the newspaper. Id. at 384-85. The plaintiff filed a motion to compel discovery of the names of the defendant's undisclosed sources for the allegedly libelous articles. Id. The trial court granted the motion after finding that the information sought by the plaintiff was "essential to the material issue in dispute . . . [and] is not available from any other source than the press." Id. at 385. On appeal, this Court held that "there is no absolute privilege allowing the press to decline to reveal sources

[13] New Hampshire is one of a minority of states that does not have a statutory "shield law" to prevent reporters from being compelled to disclose confidential information. Opinion of Justices, 117 N.H. at 388. To the extent a reporter's privilege exists in New Hampshire, it is a judicially-created doctrine.

of information when those sources are essential to a libel plaintiff's case." Id. at 386. While this Court conceded that "some safeguard should exist to prevent an order of disclosure when the plaintiff's claim of falsehood is entirely baseless," it held that "[i]t is sufficient to require that the plaintiff satisfy the trial court that he has evidence to establish that there is a genuine issue of fact regarding the falsity of the publication." Id. at 387.

While Downing dealt specifically with the issue of libel, the legal principals stated in that the decision apply with equal force to any publication that incorporates information that was unlawfully obtained and that is essential to the plaintiff's claim.

With respect to the disclosure of the 2007 Loan Chart, the facts of this case are analogous to Downing in that the press is a party to the action and the information that Implode seeks to keep confidential relates to a factual issue which is central to MSI's case. The identity of the person/entity that provided the 2007 Loan Chart to Implode is an essential element of any legal claim MSI might bring based on the publication of the 2007 Loan Chart. In this regard, MSI cannot pursue a claim against the individual/entity responsible for providing the 2007 Loan Chart to Implode unless and until Implode discloses the identity of the individual/entity. What is more, MSI cannot determine whether it may maintain an action directly against Implode unless and until it knows the identity of the source of the document. Accordingly, the identity of the individual or entity that provided the 2007 Loan Chart is essential to MSI's claims.

In addition, and as explained more fully above, there is a genuine issue of fact as to whether the publication of the 2007 Loan Chart was published in violation of New Hampshire and Massachusetts law and/or constitutes an invasion of privacy based on the disclosure of private facts. Indeed, the dispositive fact on this point is how and from whom Implode received

the 2007 Loan Chart. As a result, there is a genuine issue of fact regarding the unlawful publication of the 2007 Loan Chart.

Finally, MSI has taken reasonable steps to discover the identity of the source of the 2007 Loan Chart from other sources, including contacting the NHBD and requesting a formal investigation to determine whether the document was disclosed by the NHBD. The NHBD has informed MSI that they "do not believe the information referenced was obtained from this office and there was not "any indication there was a breach in the Department." Add. at 13. MSI has also conducted an internal review and has not discovered any evidence that the 2007 Loan Chart came from its office. App. at 106. As a result, MSI has taken reasonable steps to discover the party that provided the document to Implode.

Under the circumstances, to deny disclosure would completely foreclose liability against any party responsible for the publication of the 2007 Loan Chart. See Downing, 120 N.H. at 386. On balance, then, MSI's right to disclosure of the requested information from Implode in this case outweighs any potential harm to the free flow of information. While MSI recognizes that a "safeguard" must exist to prevent baseless claims in this regard, just like in Downing, it should be sufficient that there is a genuine issue of fact regarding violation of RSA 383:10-b and/or invasion of privacy.

C. MSI Has Satisfied the Requirements for Disclosure in *State v. Siel*

Rather than citing to the requirement set forth in Downing, Implode ignores this case completely and instead posits that MSI must demonstrate a series of requirements based on this Court's holding in State v. Siel, 122 N.H. 254 (1982). Siel, however, was a criminal case where the press was a non-party, and one that Implode acknowledges involved a criminal defendant's attempts to overcome the press's privilege not to reveal the identities of its confidential informants. See Implode Brief at 23. For the reasons stated herein, MSI maintains that the

standard set forth in Downing, not Siel, is the proper standard for determining the applicability of the press privilege with respect to disclosure of the 2007 Loan Chart.

Even if this Court were to conclude that Siel provides the appropriate standard in this case, MSI would still be entitled to discover the identity of the source of the 2007 Loan Chart. In Siel, this Court held that a party seeking the disclosure of a confidential source in a criminal case must demonstrate:

> (1) That he attempted unsuccessfully to obtain the information by all reasonable alternatives;
> (2) That the information would not irrelevant to his defense; and
> (3) That by a balance of probabilities, there is a reasonable possibility that the information sought as evidence would affect the verdict in his case.

Siel, 122 N.H. at 259. Implode interprets this language to mean that MSI could only discover the source of the 2007 Loan Chart if it proved (1) that the identity of the anonymous source was relevant to a right MSI sought to enforce; and (2) MSI has made reasonable but unsuccessful attempts to identify the source through alternative means. See Implode Brief at 23.

As discussed above, MSI has made reasonable efforts to identify the source of the 2007 Loan Chart through alternative means, including requesting an investigation by the NHBD and conducting its own internal investigation. App. at 106. These efforts were unsuccessful and Implode has not suggested any alternative avenues MSI might have pursued to discover the identity of the individual/entity that provided it with the 2007 Loan Chart.

The identity of the disclosing party, moreover, is necessary for MSI to seek legal redress from that individual/entity for the harm caused by the unlawful disclosure of its confidential financial records and/or to seek legal redress from Implode for the unlawful publication of the 2007 Loan Chart. The injunction issued by the trial court, thus, relates directly to MSI's ability to enforce its legal rights.

Finally, public interest strongly weighs in favor of requiring Implode to disclose the source of the 2007 Loan Chart. The purpose of the confidentiality provisions in RSA 383:10-b is to encourage and facilitate the complete and accurate disclosure of financial information and documentation during the regulatory examination process so the NHBD can assess the financial status of these companies. A breach of the confidentiality provisions of RSA 383:10-b undercuts the integrity of the NHBD's regulatory process and significantly impacts the NHBD's ability to obtain complete and accurate information from banking and mortgage companies. In short, if a company is concerned that its financial condition and internal operations will be publicly disclosed, it may be less forthcoming in the information it provides to the NHBD. The public interest in maintaining the integrity of the NHBD regulatory process far outweighs any purported interest Implode may have in protecting the source of the unlawfully disclosed confidential loan document.

III. THE TRIAL COURT'S ORDER DIRECTING IMPLODE TO DISCLOSE THE IDENTITY OF BRIANBATTERSBY WAS REASONABLE AND APPROPRIATE

A. MSI Has Satisfied the *Downing* Standard

Protections afforded by the First Amendment, such as the right to speak anonymously, are not absolute and may be limited by defamation considerations. See Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) ("Libelous utterances [are] not . . . within the area of constitutionally protected speech . . . ."); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (recognizing that defamatory speech is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality"). Anonymous speakers should not be able to use the Internet to freely defame individuals. See Best Western Int'l v. Doe, 2006 U.S. Dist. LEXIS 56014, at *9 (D. Ariz. 2006) ("'Those who suffer damages as a result of tortious or other

actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.' In re Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26, No. 40570, 2000 WL1210372, at *5 (Va. Cir. Ct. Jan. 31, 2000).").

> [W]here speakers remain anonymous there is also a great potential for irresponsible, malicious, and harmful communication, and the lack of accountability that anonymity affords is anything but an unqualified good. This is particularly true where the speed and power of internet technology makes it difficult for the truth to 'catch up' with the lie. Anonymity thus presents benefits, risks, and problems. To the extent that courts take on the task of protecting it, balancing is inevitable.

Quixtar, Inc. v. Signature Management Team, LLC, 566 F.Supp.2d 1205, 1214 (D. Nev. 2008) (internal citation omitted). Thus, as in other venues, anonymous speakers face civil responsibility for defaming individuals on the Internet. McMann v. Doe, 460 F.Supp.2d 259, 263 (D. Mass. 2006).

In Downing, this Court recognized that libelous speech is entitled to only limited protection and held that a libel plaintiff is entitled to unmask the identity of an anonymous speaker if the plaintiff "has evidence to establish a genuine issue of fact regarding the falsity of the publication." Downing, 120 N.H. at 387. Although Downing involved anonymous defamatory statements published in a newspaper rather than the Internet, the standard is not dependent on the medium in which the defamatory statement is published and, indeed, courts in other jurisdictions have applied a similar standard in the Internet context. See e.g., Polito v. AOL Time Warner, Inc., 78 Pa. D.C.4th 328 (2004) (holding that disclosure required where allegation made in good faith with some evidence to support allegations).

The facts of this case are strikingly similar to the facts at issue in Downing. MSI has sued Implode, the operator of the website that published the false and defamatory comments by

Brianbattersby. As relief, MSI seeks an injunction ordering Implode to disclose the identity of Brianbattersby. To the extent the reporter's privilege applies,[14] pursuant to Downing, MSI is entitled to discover the identity of Brianbattersby if the information is essential to its claims and it has submitted sufficient evidence to establish that "there is a genuine issue of fact regarding the falsity of the publication." Downing, 120 N.H. at 387. The identity of Brianbattersby is essential to MSI's claims because it cannot pursue a defamation claim against Brianbattersby unless and until Implode discloses the identity of Brianbattersby nor can it determine whether it has a basis to pursue a defamation action against Implode.[15] MSI, moreover, has presented sufficient evidence to establish a genuine issue of material fact that the comments posted by Brianbattersby are false and defamatory. Indeed, MSI specifically denied the veracity of those statements when it initiated this litigation and Implode has not produced any evidence to the contrary. As a result, MSI has satisfied the Downing standard and is entitled to discover the identity of Brianbattersby.

B. MSI Has Satisfied the Standard Proposed by Implode

Implode appears to argue that this Court should disregard the Downing decision and instead adopt a new standard based on a combination of decisions from other jurisdictions. See Implode Brief at 29-32. In this regard, Implode urges this Court to rule that a defamation plaintiff may only discover the identity of an anonymous speaker if the plaintiff (1) makes a reasonable effort to provide the anonymous speaker with notice of its intent to discover the identity and withholds action to give the speaker and opportunity to respond; and (2) demonstrates to the court that its defamation claim can survive a motion for summary judgment.

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[14] See supra Part II.A.

[15] Again, MSI's purpose in instituting this litigation was simply to find as narrow a means of relief as possible. Rather than suing first and asking questions later, MSI sought the best and most efficient method available at the time.

Id. at 29.[16] Implode provides no explanation for why this Court should abandon the Downing standard and, indeed, does not cite to, or much less discuss, the Downing standard in its Brief.

Even if this Court were to adopt the standard advocated by Implode, MSI would still be entitled to discover the identity of Brianbattersby. MSI did make reasonable efforts to locate Brianbattersby by hiring a private investigator to attempt to locate an individual named Brian Battersby. App. at 102. Through these efforts, MSI located an individual named Brian Battersby in Charlestown, New Hampshire. See id. MSI further discovered that Mr. Battersby was involved in the mortgage industry. See id. MSI served Mr. Battersby with a Subpoena Duces Tecum, dated January 20, 2009, and scheduled a deposition for February 2, 2009. Id. at 67-69. The Subpoena Duces Tecum specifically stated that the deposition related to this matter and requested that Mr. Battersby produce several categories of documents relating to Implode. See id. Unfortunately, rather than allowing the deposition to proceed and permitting MSI to determine whether Mr. Battersby was Brianbattersby, Implode instead chose to quash the subpoena based on its contention that Implode was not subject to personal jurisdiction. See id. at 70-72. In any event, MSI's decision to hire a private investigator to locate Brianbattersby and its subsequent decision to subpoena Mr. Battersby for a deposition constitutes "reasonable efforts" to locate the anonymous speaker and provide him with notice of its intent to seek the anonymous speaker's identity. Accordingly, MSI has satisfied the first prong of Implode's suggested standard.[17]

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[16] In support of this standard, Implode relies on the cases of Doe v. Cahill, 884 A.2d 451, 460 (Del. 2005) and Dendrite International, Inc. v. Doe, 775 A.2d 756 (N.J. Super.Ct. App.Div. 2001). Implode's proposed standard appears to be a combination of the standards articulated in these cases.

[17] In the trial court, Implode argued that it was not required to disclose the identity of Brianbattersby because MSI did not post a message of notification of its discovery request on the Implode message board. App. at 89. Implode has not asserted this argument in its Brief and, thus, has waived this issue on appeal. See State v. Mountjoy, 142 N.H. 648, 652 (1998). In any event, several commentators have criticized this "posting requirement" as "more idealistic than practical; a wronged plaintiff is unlikely to want to keep a false assertion alive by inviting continued debate." See, e.g., Siber & Marino, Unmasking Online Defendants: Addressing the Anonymous Posting of Rumors

MSI also provided the trial court with sufficient evidence to survive a motion for summary judgment on its claim that the Brianbattersby comments are false and defamatory. To establish a prima facie case of defamation under New Hampshire law, a plaintiff must demonstrate that: (1) Brianbattersby published a false and defamatory statement concerning MSI; (2) the defamatory statement was unprivileged and was published to a third person; (3) fault amounting to at least negligence on the part of Brianbattersby; and (4) MSI's reputation suffered injury as a result of the statement. See Restatement (Second) of Torts § 558 (1977); accord Independent Mechanical Contractors v. Gordon T. Burke & Sons, 138 N.H. 110, 118 (1993).

MSI specifically denied the allegations of fraud and bribery in the Brianbattersby comments when it initiated this litigation and Implode has not produced any evidence to the contrary. Furthermore, these defamatory statement are not subject to any privilege and were published via their dissemination on a publicly available website. Fault on the part of Brianbattersby is not capable of verification at this stage since the speaker's identity remains unknown. See Lewis, Note: Unmasking "Anon12345": Applying An Appropriate Standard When Private Citizens Seek the Identity of Anonymous Internet Defamation Defendants, 2009 U. Ill. L. Rev. 947, 953 (2009) ("Due to the necessity of proving the speaker's actual malice (for public figures) or negligence (for private citizens) in making the defamatory statement, identifying the anonymous defendant is mount. Proof would be next to impossible without a named defendant, as our adversary system relies on the discovery process - and resultant evidence - to bolster many claims."); accord Best Western Int'l v. Doe, 2006 U.S. Dist. LEXIS 56014, at *12 (D. Ariz. 2006) (recognizing that a plaintiff need only provide evidence within its

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While Preserving the First Amendment, N.Y.L.J., Apr. 9, 2007, at S4. For this reason, MSI also argues that the requirement is not necessary or practical. See App. at 102-03.

control). Finally, because the defamatory publications charge the plaintiff with a crime as well as activities which would tend to injure it in its trade or business, commonly called libel per se, damages are presumed and it may recover as general damages all damages which would normally result from such a defamation, such as harm to reputation. Chagnon v. Union-Leader Corp., 103 N.H. 426, 441 (1961) , cert. denied, 369 U.S. 830 (1962). These facts are more than sufficient to create a genuine issue of fact as to MSI's defamation claim and, thus, satisfy the second prong of Implode's suggested standard.

C. Section 230 Of The Communications Decency Act Does Not Immunize Implode From Disclosing The Identity Of Brianbattersby

Section 230 of the Communications Decency Act ("CDA") provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C.§ 230(f)(2). Whereas, "[t]he term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

While Section 230(c) sets limitations on a plaintiff's ability to put forth a libel claim against the host or administrator of a website directly, it does not completely deprive a plaintiff of the right to sue any party for the offending content. Quarmby, Article: Protection from Online Libel: A Discussion and Comparison of the Legal and Extrajudicial Recourses Available to Individual and Corporate Plaintiffs, 42 New Eng. L. Rev. 275, 287-88 (2008). In recent years,

plaintiffs in litigation have used a tactic known as a "John Doe" lawsuit to identify an unknown person who allegedly committed some type of tortious or illegal act online. See generally Lidsky, Article: Silencing John Doe: Defamation & Discourse in Cyberspace, 49 Duke L. J. 855 (2000). In many instances, if a plaintiff learns of a defamatory posting on an Internet site, for example, he or she may be unable to identify the publisher of the statement. In response, the plaintiff may bring a lawsuit against John Doe, using the lawsuit to issue a subpoena to the Internet provider to obtain identifying information. See id. at 858 n.6 and accompanying text. Generally, the subpoenaed third-party will not be liable for the conduct that led to the lawsuit. See id.

The injunctive relief with respect to the disclosure of Brianbattersby seeks nothing more than that which could be obtained by means of a subpoena to an Internet provider in a "John Doe" lawsuit. The Final Order neither treats Implode as "the publisher or speaker" of this information nor holds Implode accountable in any capacity. Accordingly, Section 230 does not bar this relief.[18]

Moreover, on the whole, Section 230 "cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts." Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d. 666, 669 (7th Cir. 2008). CDA immunity "applies only if the interactive computer service provider is not also an 'information content provider,' which is defined as someone who is 'responsible, in whole or in part,' for the creation or development of the offending content." Fair Hous. Council of San

[18] To the extent that this Court holds that procedurally, this case more appropriately should have been initiated by subpoenaing a John Doe, MSI contends that the applicable standard for disclosure would be the same and, thus, "this is a question of form and not substance," which "should not jeopardize its pursuit of a potentially meritorious claim." See In re Keene Sentinel,, 136 N.H. 121, 125 (1992).

Francisco Valley v. Roommates, LLC., 521 F.3d 1157, 1162 (9th Cir. 2008); see also 47 U.S.C. §230(f)(3).

When an Internet service provider fails to show that the posted information was provided "by another" information content provider within the meaning of Section 230, it cannot take advantage of the immunity of this statute. See Cisneros v Sanchez, 403 F Supp 2d 588, 593 (S.D. Tx 2005) (Section 230 does not allow "individuals to escape liability for making defamatory statements for which they would otherwise be held liable simply by publishing the defamatory statements on a web-site that they administer."). For example, Internet gossip columnist Matt Drudge could not invoke Section 230 immunity for the items he wrote based (supposedly) on information obtained from anonymous sources. See Blumenthal v. Drudge, 992 F. Supp. 44, 46 (D.D.C. 1998) (describing statements at issue); Blumenthal v. Drudge, 2001 U.S. Dist.LEXIS 1749, at *2 (D.D.C. 2001) (noting that court had denied Drudge's motion for judgment on the pleadings). The presumption that a defendant must have posted the information unless the defendant affirmatively shows that the content was provided by another through the identification of sources is in line with this Court's decision in Downing v. Monitor Publishing Co., Inc., 120 N.H. at 387-88, which held

> when a defendant in a libel action, brought by a plaintiff who is required to prove actual malice under New York Times, refuses to declare his sources of information upon a valid order of the court, there shall arise a presumption that the defendant had no source. This presumption may be removed by a disclosure of the sources a reasonable time before trial.

To the extent Implode claims it is immune under the CDA, Implode bears the burden of proving that the statements attributed to Brianbattersby were made by a third party and not by Implode itself under an assumed name. Implode may only satisfy that burden by disclosing the identity of Brianbattersby. If Implode refuses to disclose the identity of Brianbattersby, MSI is

entitled to a presumption that Brianbattersby does not exist and may pursue a legal claim for defamation against Implode based on the Brianbattersby comments. Id.[19]

IV. THE TRIAL COURT'S INJUNCTION ORDERING IMPLODE TO TURN OVER OTHER DOCUMENTS CONCERNING MSI THAT IMPLODE MIGHT HAVE OBTAINED FROM THE SOURCE OF THE 2007 LOAN CHART WAS REASONABLE AND APPROPRIATE

While the First Amendment generally protects the dissemination of news, it does not bestow the same latitude to the newsgathering process. See Branzburg v. Hayes, 408 U.S. 665, 667, 683 (1972) (rejecting a claim that the First Amendment's press clause gave journalists a right to refuse to cooperate with grand juries seeking the identities of confidential sources and noting that the press clause of the First Amendment did not give the institutional news media any rights not applicable to the general public). Although the United States Supreme Court has suggested that newsgathering is not without protection, the Court did not clearly define what protection should be afforded the press. See id. at 681.

Similarly, the New Hampshire Supreme Court has interpreted Part I, Article 22 of the State Constitution to mean that the press has a "right, though not unlimited, to gather news." Keene Publishing Corp. v. Cheshire County Superior Court, 119 N.H. 710, 711 (1979). Much like the amorphous federal counterpart "protection," however, the exact parameters of this "protection" remain unknown. Other than refusing to order the press to disclose anonymous or confidential sources in narrow circumstances, see, e.g., Opinion of the Justices, 117 N.H. 386, 388 (1977),[20] New Hampshire's press privilege has not given the press any greater protection

Publishing Corp. v. Cheshire County Superior Court, 119 N.H. 710 (1979) (per curiam); Keene Publishing Corp. v. Keene Dist. Ct., 117 N.H. 959 (1977).

In this case, the injunction ordering Implode to turn over other documents concerning MSI that Implode might have obtained from the source of the 2007 Loan Chart does not violate any federal or state newsgathering privilege. This particular order does not restrict Implode in its ability to gather information nor does it prohibit the publication of any of the materials in question. Assuming, *arguendo,* that this injunction has some attenuated effect on the ability of the press to gather news, shielding the press from turning over documents like the ones at issue -- a privilege that does not extend to the public at large -- could lead to dangerous and uncertain results.

CONCLUSION

For the reasons explained herein, MSI respectfully requests that this Honorable Court issue an order affirming the injunction issued by the trial court in its Final Order.

REQUEST FOR ORAL ARGUMENT

MSI requests oral argument. Alexander J. Walker, Jr. will argue for MSI.

Respectfully submitted,

THE MORTGAGE SPECIALISTS, INC.

By its attorneys,

DEVINE, MILLIMET & BRANCH
PROFESSIONAL ASSOCIATION

Date: 7/22/09

By: Donald L. Smith

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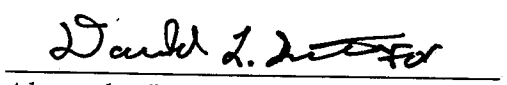
CERTIFICATE OF SERVICE

I certify that two (2) copies of Brief for Petitioner-Appellee The Mortgage Specialists, Inc. have this day been forwarded to Jeremy D. Eggleton, Esquire, and William L. Chapman, Esquire, counsel of record for Implode; Paul L. Apple, counsel for Citizen Media Law Project and the Reporters Committee for Freedom of the Press; and Paul Alan Levy, Esquire, and Jon Meyer, Esquire, counsel of record for Public Citizen Litigation Group.



Alexander J. Walker, Jr.

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ADDENDUM TO
BRIEF FOR PETITIONER-APPELLEE THE MORTGAGE SPECIALISTS, INC.

TABLE OF CONTENTS

Brianbattersby at 23:48 2008-10-03 said:

This guy Mike Gill(owner) just got a 1.3 MILLION DOLLAR US TAX LIEN from the IRS attached to himself in Rockingham and Strafford county NH. Also his soon be ex wife just put a lien on all properties in the state of NH. This guy is no stranger to REGULATORY ACTIONS. He was caught for FRAUD back in 2002 FOR SIGNING BORROWERS NAMES and bought his way out. He just paid 700,000 FRAUD FINE IN NH AND MA FOR SIGNING BORROWERS NAMES AGAIN ON 20 LOANS. He isn't really even the owner. He is listed as president of the company but the shares are in his wife's name. He is NOT ELIGABLE for a brokers license in NH. OH MAN WHAT WAS THE NH BANKING DEPT. THINKING? I guess with the big fine he doesn't have the money to pay the IRS or his wife off. Shouldn't have been dipping the pen in company ink Mr. Gill. EVERY DOG HAS HIS DAY! TODAY IS YOURS! Permalink

THE STATE OF NEW HAMPSHIRE

Rockingham Superior Court
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Kingston, NH 03848 1258
603 642-5256

NOTICE OF DECISION

DONALD L SMITH
DEVINE MILLIMET & BRANCH
PO BOX 719
MANCHESTER NH 03105

08-E-0572 The Mortgage Specialists, Inc. vs. Implode-Explode Heavy Ind

Enclosed please find a copy of the Court's Order dated 2/06/2009 relative to:

Order-Motion to Dismiss
Procedural Order

02/10/2009

Raymond Taylor
Clerk of Court

cc: Jeremy D. Eggleton
William L Chapman

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

The Mortgage Specialists, Inc.

v.

Implode-Explode Heavy Industries, Inc.

Docket No.: 08-E-572

ORDER ON MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

The petitioner, Mortgage Specialists, Inc. ("MSI"), a mortgage lender based in Plaistow, New Hampshire, brought a petition for injunctive relief against the respondent, Implode-Explode Heavy Industries, Inc. ("Implode-Explode"), a Nevada corporation that runs a website evaluating mortgage lending companies across the United States. The petition seeks an injunction preventing Implode-Explode from posting MSI's confidential financial information, including a confidential loan summary document, on its website, and to disclose the source of the confidential information. The petition also seeks an injunction prohibiting Implode-Explode from reposting[1] allegedly false and defamatory statements about MSI and its president, Michael Gill, from a person posting statements under the name "brianbattersby." Implode-Explode objected to the petition on the ground that it was not subject to personal jurisdiction in New Hampshire. For the purposes of this order, the court will treat Implode-Explode's objection to MSI's petition as a motion to dismiss for lack of personal jurisdiction. For the reasons stated below, Implode-Explode's motion is **DENIED**.

MSI's claim for injunctive relief arises partially out of a document and information

[1] Both the confidential loan document and the allegedly defamatory remarks have been removed from Implode-Explode's website, but Implode-Explode has not agreed to permanently refrain from reposting the items.

contained in an article written by Implode-Explode and published on Implode-Explode's website (the "Article"). The Article corresponds to MSI's placement on a list compiled by Implode-Explode identifying companies as "Ailing/ Watch List Lenders," and describes MSI as "based in Plaistow, NH," repeatedly refers to New Hampshire, and is based on New Hampshire sources, including unionleader.com and seacoastonline.com. The Article included a link to a document nearly identical to MSI's confidential loan production document, which MSI did not provide to Implode-Explode. MSI's claims are also based on comments posted October 4 and 7, 2008 by an individual under the username "Brianbattersby," which postings collectively contained allegedly false and defamatory comments about MSI and its President, including allegations of fraud.

As of the end of 2007, Implode-Explode's website had a core daily audience of approximately 100,000 visitors and was accessible from any location with internet access. The website allowed visitors, after registering on the website and creating a username, to post comments about the various lenders identified on the website, which comments would then become publicly viewable. The website also enabled users to submit feedback and information to Implode-Explode itself; to send and receive private messages; to create and vote in online polls; to search "Non-Imploded" mortgage lenders (presumably, mortgage lenders in good standing) by state by either clicking on a map or choosing a state name from a drop-down list containing the names of all fifty states, including New Hampshire; or to sign up for a "premium" information service for a fee of ten dollars a month after completion of an online application form. In addition, the website solicits advertisements and includes an advertisement inquiry form, and allows companies to submit online applications for inclusion in the "Non-Imploded" lender

category.

Implode-Explode argues that because it is a foreign corporation there is no basis for this court to exercise specific or general jurisdiction. Regarding specific jurisdiction, Implode-Explode asserts that it has had no related contacts and has not availed itself of New Hampshire law. It further argues that any contacts it has with New Hampshire would not be related to either of the plaintiff's causes of action, as required for specific jurisdiction, because (1) it cannot be held responsible for allegedly defamatory content posted by a third party; and (2) MSI has not adequately established a private cause of action that would allow it to sue for the breach of confidentiality. It further asserts that it would not be "fair and reasonable" to subject a Nevada corporation to a New Hampshire lawsuit absent Implode-Explode's specifically imposing itself on the New Hampshire marketplace. See Obj. at ¶9. Turning to general jurisdiction, Implode-Explode argues its contacts with the State of New Hampshire are neither continuous nor systematic.

The petitioner bears the burden of establishing personal jurisdiction. Vt. Wholesale Bldg. Prods. v. J.W. Jones Lumber Co., 154 N.H. 625, 628 (2006). It may defeat the motion to dismiss through a *prima facie* showing of jurisdiction. Id. "In determining whether the plaintiff has met its burden, we generally engage in a two-part inquiry." Chick v. C & F Enters., 156 N.H. 556, 557 (2007) (quotation omitted). "First, the State's long-arm statute must authorize such jurisdiction. Second, the requirements of the federal Due Process Clause must be satisfied." Id. (quotation omitted); see RSA 510:4, I (1997). "Because we construe the State's long-arm statute as permitting the exercise of jurisdiction to the extent permissible under the Federal Due Process Clause, our primary analysis relates to due process." Metcalf v. Lawson, 148 N.H. 35, 37 (2002)

(citations omitted).

"[A] court may exercise personal jurisdiction over a non-resident defendant if the defendant has certain minimum contacts with the forum, 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" Id. (quoting Alacron v. Swanson, 145 N.H. 625, 628 (2000)). "Jurisdiction can be 'general,' where the defendant's contacts with the forum State are 'continuous and systematic,' or 'specific,' where the cause of action arises out of or relates to the defendant's forum-based contacts." Lyme Timber Co. v. DSF Investors, LLC, 150 N.H. 557, 559 (2004) (quoting Staffing Network v. Pietropaolo, 145 N.H. 456, 458 (2000)).

The court finds that Implode-Explode's contacts with New Hampshire are not sufficiently "continuous and systematic" to subject it to general jurisdiction. See Revell v. Lidov, 317 F.3d 467, 471 (5th Cir. 2002) ("Though the maintenance of a website is, in a sense, a continuous presence everywhere in the world, the cited contacts of [the website owner] with [the forum state] are not in any way 'substantial.'"). Accordingly, the court will analyze whether Implode-Explode is subject to specific jurisdiction in New Hampshire.

"Where specific contacts with the forum are the basis for personal jurisdiction, whether those contacts are constitutionally sufficient requires an analysis of the relationship between the defendant, the forum and the litigation." Lyme Timber, 150 N.H. at 559-560 (citation omitted).

> In determining if the exercise of specific personal jurisdiction comports with due process, we examine whether: (1) the contacts relate to the cause of action; (2) the defendant has purposefully availed [it]self of the protections of New Hampshire law; and (3) it would be fair and reasonable to require the defendant to defend the suit in New Hampshire.

Metcalf, 148 N.H. at 37 (citing Skillsoft Corp. v. Harcourt General, 146 N.H. 305, 308 (2001)). "All three factors must be satisfied in order for the exercise of jurisdiction to be constitutionally proper, and each factor must be evaluated on a case-by-case basis." Id. at 37-38 (citations omitted).

Regarding the first prong of the specific jurisdiction analysis, the relation of the contacts to the cause of action, "[i]t is settled New Hampshire law that a party commits, for jurisdictional purposes, a tortious act within the state when injury occurs in New Hampshire even if the injury is the result of acts outside the state." Lyme Timber, 150 N.H. at 562 (quotations and citation omitted). Implode-Explode's contacts with New Hampshire, and MSI's claims against Implode-Explode, both stem from the article and postings on Implode-Explode's website pertaining to New Hampshire and to MSI specifically. Implode-Explode's argument as to the "relatedness" prong of the test was limited to an attack on the merits of MSI's substantive claims. Because the issue now before the court is limited to a jurisdictional inquiry alone, the court declines to address the substantive merits of MSI's petition at this time. The court accordingly assumes for the purposes of this order that MSI's substantive claims underlying its petition for an injunction against Implode-Explode, specifically, defamation and publication of confidential information, are appropriate and proper. Because the contacts with New Hampshire are the same as those leading to MSI's complaint, the court finds that the first element of the specific jurisdiction test is satisfied.

As to the second prong of the analysis, whether the defendant has purposefully availed [it]self of the protections of New Hampshire law, courts have identified "two cornerstones of purposeful availment." Gray v. St. Martin's Press, Inc., 929 F.Supp. 40,

45 (D.N.H. 1996) (quoting Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 207 (1st Cir. 1994)); see also Lyme Timber, 150 N.H. at 561. "One cornerstone is foreseeability: [t]he defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." Id. (quotation and citations omitted). "The second cornerstone is voluntariness: [j]urisdiction may not rest on the unilateral activity of another party or a third person." Id. (quotations and citations omitted).

The "effects test" first set forth in Calder v. Jones, 465 U.S. 783 (1984) is one method of measuring foreseeability. See Gray, 929 F.Supp. at 46; Panavision Int'l v. Toeppen, 141 F.3d 1316, 1321-22 (9th Cir. 1998); Revell, 317 F.3d at 472-76. "Under Calder, personal jurisdiction can be based upon: "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered-and which the defendant knows is likely to be suffered-in the forum state." Panavision, 141 F.3d at 1321 (quotation and citation omitted). Where out of state authors' allegations cause damage in the forum state, "[t]he authors' knowledge that the major impact of their article would be felt in the forum state was held to constitute a purposeful contact whereby the authors could reasonably expect to be haled into the forum state's courts to defend their actions." Gray, 929 F.Supp. at 46 (citing Calder, 465 U.S. at 789-90).

Implode-Explode's article centered on MSI as a New Hampshire mortgage lender. The article referred to MSI as being located in Plaistow, New Hampshire. The sources cited in the article were New Hampshire sources, including unionleader.com and seacoastonline.com, the online versions of New Hampshire newspapers. The allegedly defamatory comments by "brianbattensby" emphasized "NH" in such a way

that his comment, and thus Implode-Explode's website, would appear more prominently in a search engine's result containing New Hampshire as a search term. Accordingly, it was foreseeable, given the potential harm caused by listing MSI as "ailing" and a less-than-trustworthy mortgage lender, that Implode-Explode would be called to answer in a New Hampshire forum.

New Hampshire courts measure a defendant's voluntary use of the forum state in the internet context by reference to the "sliding scale" test of Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). See Metcalf, 148 N.H. at 39.

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Metcalf, 148 N.H. at 39 (quoting Zippo, 952 F.Supp. at 1124).

Implode-Explode's website falls into the middle ground. It is interactive on several levels. It is not a passive displayer of information from unrelated or public sources; Implode-Explode's authors and staff sought out information about mortgage lenders throughout the United States, including in New Hampshire. The website also enables users to exchange information with the host computer, including emailing

website also solicits advertising from businesses across the United States, as it is a commercial website. Users can donate money to Implode-Explode on the site, or become a premium user for a fee. The website applies to users in every state through its interactive map, which lists mortgage lending businesses in good standing on a state-by-state basis.

In addition, deliberately directing activity to all of the states has been held to weigh in favor of jurisdiction in New Hampshire. Brother Records, Inc. v. Harper-Collins Publishers, 141 N.H. 322 (1996) held that, where a book was published and released "through normal retail channels in the United States," sold in New Hampshire, and "the defendants' ultimate goals regarding the book included nationwide distribution and sale[,]" including in New Hampshire, then jurisdiction over the book's out-of-state authors was appropriate in New Hampshire. This is distinct from Metcalf, where a seller posted an item for sale on Ebay without any control over the state where the eventual purchaser would be located, or knowledge of the eventual destination of the item. See Metcalf, 148 N.H. at 40. Where, as here, the respondent's website courts New Hampshire business advertising and individual traffic, allows individuals to search for New Hampshire businesses, and wrote an article specific to MSI of Plaistow, New Hampshire and its lending practices in and around New Hampshire, the requirement of voluntariness has been met.

The third prong of the specific jurisdiction analysis concerns whether "it would be fair and reasonable to require the defendant to defend the suit in New Hampshire." Metcalf, 148 N.H. at 37 (quotation and citation omitted). "Once the plaintiff has demonstrated that his claim is related to the defendant's in-forum activities and that the

defendant purposely availed [it]self of the forum state, the court must consider . . . other factors which bear upon the fairness of subjecting a nonresident to the authority of a foreign tribunal." Gray, 929 F.Supp. at 48.

> The [United States] Supreme Court has identified five such factors, namely, (1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

Ticketmaster-New York, Inc. v. Alioto, 26 F.3d at 209 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985)). The court will address each in turn.

"Where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Panavision, 141 F.3d at 1322 (brackets, quotations and citations omitted). As to the defendant's burden of appearing in New Hampshire, "[a] defendant's burden in litigating in the forum is a factor in the assessment of reasonableness, but unless the 'inconvenience is so great as to constitute a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction.'" Id. at 1323 (quoting Caruth v. International Psychoanalytical Ass'n, 59 F.3d 126, 128-29 (9th Cir. 1995)). Here, requiring an entity that deliberately targets all fifty states to defend itself in one of those states does not constitute a deprivation of due process, particularly, as the Ninth Circuit notes, "in this era of fax machines and discount air travel." Id.

As to New Hampshire's interest in adjudicating this dispute, "it is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur

within the state." Gray, 929 F.Supp. at 49 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984)). Where, as here, a New Hampshire business is alleging harm in New Hampshire, the state itself has an interest in adjudicating the dispute.

Regarding MSI's convenience in adjudicating the suit, "the plaintiff's choice of forum is entitled to substantial deference with respect to his own convenience." Id. (citation omitted). Where MSI's place of business and customers are located in New Hampshire, this factor weighs in favor of New Hampshire's jurisdiction.

The judicial system's interest in the most effective resolution of the controversy, insofar as it affects the analysis, would suggest that the proceeding already initiated would be an efficient forum in which to conclude adjudication. As the case has already been before the court on this jurisdictional issue, it would be efficient to continue the case in a court familiar with the parties and their claims.

The above-cited factors of fairness, taken as a whole, therefore suggest that New Hampshire is a reasonable forum in which to adjudicate MSI's petition against Implode-Explode.

Because the court finds that specific jurisdiction over Implode-Explode is proper in New Hampshire, Implode-Explode's motion to dismiss for lack of personal jurisdiction is **DENIED**.

So Ordered.

DATE: Feb 6, 2009

KENNETH R. MCHUGH
PRESIDING JUSTICE

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PETER C. HILDRETH
BANK COMMISSIONER

ROBERT A. FLEURY
DEPUTY BANK COMMISSIONER

December 22, 2008

Alexander J. Walker, Jr.
Devine Millimet & Branch PA
111 Amherst Street
Manchester, NH 03101

Re: The Mortgage Specialists, Inc.

Dear Attorney Walker:

I am in receipt of your letter dated December 16, 2008 in reference to the above entitled matter. While I understand your client's concern, I do not believe that the information referenced was obtained from this office. The Banking Department takes confidentiality very seriously. Breach of our confidentiality rules is grounds for dismissal and all new employees receive confidentiality training. If you have any indication that there was a breach in the Department, I look forward to hearing from you as soon as possible.

Sincerely,

Mary L. Jurta
Director, Consumer Credit Division

RECEIVED DEC 24 2008