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December 15, 2008

Raymond W. Taylor, Clerk
Rockingham County Superior Court
P.O. Box 1258
Kingston, NH 03848-1258

Re: *The Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*
Docket No. 08-E-0572

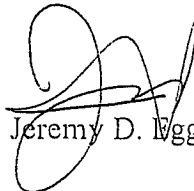
Dear Clerk Taylor:

Please find enclosed the Respondent's Memorandum of Law in Surreply to the Petitioner's Reply for submission in the above-captioned matter.

Please note that this Memorandum of Law includes Exhibit A, the "2007 Loan Chart," that the Petitioner alleges to be "confidential information" subject to non-disclosure. In anticipation of the Petitioner's objection to the public disclosure of said Exhibit A, and without concurrence or admission on the part of the Respondent that said Exhibit A is required to be withheld from public disclosure, the Respondent respectfully requests that the Court seal Exhibit A until the Petitioner has had the opportunity to object.

Thank you for your usual care, courtesy and attention to this matter.

Very truly yours,


Jeremy D. Eggleton

JDE:kjc
Enclosure
cc: Donald L. Smith, Esquire

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

The Mortgage Specialists, Inc.

v.

Implode-Explode Heavy Industries, Inc.

No. 08-E-0572

**RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS
OBJECTION AND IN RESPONSE TO PETITIONER'S REPLY**

Respondent, Implode-Explode Heavy Industries, Inc. ("Implode-Explode"), submits the following Memorandum of Law in support of its Objection, and in response to the Reply submitted by the Petitioner on December 8, 2008.

Introduction

The Petitioner ("Mortgage Specialists") has failed to show that this Court has jurisdiction over Implode-Explode. Not only do Implode-Explode's contacts with New Hampshire fail to support jurisdiction under the constitutional due process analysis; they also fail the basic requirements of RSA 510:4, the New Hampshire long-arm statute. Accordingly, the Court should dismiss this petition for lack of jurisdiction over the respondent.

- I. **Implode-Explode did not transact business in New Hampshire, commit a tortious act within New Hampshire, or own property in New Hampshire; therefore, no jurisdiction exists under the New Hampshire long arm statute.**

A determination regarding jurisdiction begins with authority under RSA 510:4, the New Hampshire long-arm statute. *Staffing Network, Inc. v. Pietropaolo*, 145 N.H. 456, 457 (2000). RSA 510:4 permits jurisdiction over a party if that party "transacts any

business in this state, commits a tortious act within this state, or has the ownership, use, or possession of any real or personal property situated in this state[.]” *Id.*

The Petitioner has not asserted any fact supporting an allegation that Implode-Explode conducted business in New Hampshire. While New Hampshire residents, like any person with access to the worldwide web, may read the Implode-Explode website, contribute comments, email tips, and engage in conversations with other commenters and readers of the website, this is not “transacting business” as there is no exchange for value. *See* WEBSTER’S NEW INTERNATIONAL DICTIONARY, 3rd Ed. (1986) 2425 (“Transaction”), 302 (“Business”); Petitioner’s Reply, Memorandum of Law at 2-3 (“Reply Memo ____”). Any person has the option of advertising on the Implode-Explode website, but, even assuming, without conceding, that this advertising would be a business transaction, the *availability* of this advertising capacity to New Hampshire residents does not mean that any New Hampshire residents are in fact transacting business in this way. Mortgage Specialists has not asserted that New Hampshire residents are using this feature—only that they could do so. *Id.* at 3. This is no basis for jurisdiction.¹ Compare *Whitney Information Network Inc. v. Xcentric Ventures, LLC*, 347 F. Supp. 2d 1242 (M.D. Fla. 2004) (jurisdiction appropriate in Florida when advertising space was proffered specifically to merchants in Florida, and website sold products for value to consumers in Florida).

The Petitioner also has not provided sufficient facts for a prima facie showing that Implode Explode committed a tortious act in the state of New Hampshire. First,

¹ Nor would it be even if it were shown that New Hampshire users were advertising on Implode-Explode’s website. The distinguishing factor in *Whitney Information* was that the advertising could be *targeted at the forum state*, not that advertisers in the forum state could purchase space on the website. 347 F. Supp. 2d at 1244.

Mortgage Specialists continues to claim that the allegedly defamatory statements of “Brianbattersby,” an anonymous poster on Implode-Explode’s website, are somehow attributable to Implode-Explode. Reply Memo at 2. Under 47 U.S.C.A. §230, Implode-Explode is immunized from any state tort liability for posters who place independent content on its website. See 47 U.S.C.A. §230 (c)(1) and (e)(3); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 294 (2008).

Recognizing that its first Verified Petition alleged no tortious conduct on the part of Implode-Explode, and hence no basis for jurisdiction under RSA 510:4, Mortgage Specialists repackaged its statutory claim under RSA 383:10-b as an invasion of privacy based upon the publication of allegedly privileged data. Reply Memo at 9. But the cases cited by Mortgage Specialists in support of an “invasion of privacy” claim are not applicable to the kind of financial information at issue in this case.

In *Whalen v. Roe*, 429 U.S. 589, 608 (1977), Justice Stewart, writing in concurrence, observed, “[A]lthough the Constitution affords protection against certain kinds of government intrusions into personal and private matters, there is no ‘general constitutional right to privacy.’” *Id.* He went on to state that the Court’s precedential basis for the existence of a right of privacy was limited to cases involving the physical privacy of the home and the intimacies of family life. *Id.* (distinguishing rights of privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (decision to use birth control protected) and *Stanley v. Georgia*, 394 U.S. 557 (1969) (possession of pornography in home not actionable) from the facts of *Whalen*, where he concurred that no right of privacy was violated by the State of New York’s amassing of prescription data and medical records).

Mortgage Specialists points to no case where the publication of financial information of the kind in this case resulted in an invasion of privacy. In *California Bankers' Association v. Shultz*, 416 U.S. 21, 90 (1974), Justice Douglas, writing in dissent from a court that upheld a statute requiring banks to maintain certain records in anticipation of criminal or civil actions, opined that financial information of this type should be encompassed by the zone of privacy—but not because it is confidential information *per se*; rather, because of what the government could learn to its advantage about the individual account holder's personal, political, or religious views. *Id.* Clearly, such concerns do not animate this case: not only was Justice Douglas concerned about *government* intrusion into private lives, but the concern he expressed was predicated on the freedom of conscience—something not at issue with a corporate entity like Mortgage Specialists.

Mortgage Specialists also cited *Hamberger v. Eastman*, 106 N.H. 107, 110-11 (1964). Neither *Hamberger*, nor the more recent ruling by the New Hampshire Supreme Court in *Fischer v. Hooper*, 143 N.H. 585, 589-90 (1999), dealt with financial information of this kind. Each of these cases dealt, like *Griswold* and cited cases in *Whalen*, 429 U.S. at 608 (Stewart, J., concurring), with the zone of privacy inherent in the home and family setting. *Hamberger* recognized that there existed a cause of action for invasion of privacy in a situation where the defendant set up a microphone and recording device in the bedroom of his tenants, and listened to their bedroom activities from his apartment. 106 N.H. at 241-42. *Fischer* approved the cause of action in the context of the surreptitious recording of intimate conversations between a mother and her daughter. 143 N.H. at 589-90. Hence, the test for whether an invasion of privacy has occurred

under New Hampshire law is whether “the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues.” *Id.* at 590.

As a matter of law, Implode-Explode’s publication of information garnered through assiduous reporting in this case does not rise to the level of “offensive[ness] to persons of ordinary sensibilities.” *See Remsberg v. Docusearch, Inc.*, 149 N.H. 148, 156 (2003) (determination of offensiveness may be made as a matter of law). In this case the “2007 Loan Chart,” attached as Exhibit A, is nothing but a table aggregating account information. Nothing in the table provides an indication that it is confidential or sensitive information, and there is nothing about its publication that a person of “ordinary sensibilities” would find offensive, in the way that an ordinary person would immediately recognize that recorded bedroom activities were private matters. *See Hamberger*, 106 N.H. at 111.

Therefore, Mortgage Specialists has still not submitted facts supporting a prima facie case that Implode-Explode was involved in tortious activity. Accordingly, this Court should dismiss the Petition because the elements for jurisdiction under the New Hampshire long-arm statute have not been met. *See RSA 510:4.*

II. It would not be fair and reasonable to subject Implode-Explode to jurisdiction in New Hampshire on the facts of this case because Implode-Explode has had no related contacts with the State of New Hampshire and has not availed itself of New Hampshire law.

Specific jurisdiction can be conferred when the defendant’s contacts with the State of New Hampshire relate to the cause of action; the defendant has purposefully availed itself of the protections of New Hampshire law; and it would be fair and

reasonable to require the defendant to defend suit in New Hampshire. *Metcalf v. Lawson*, 148 N.H. 35, 37 (2002). The plaintiff bears the burden of demonstrating that there exist substantive facts sufficient to establish personal jurisdiction under the above test. *Phelps v. Kingston*, 130 N.H. 166, 170 (1987). In this case, Mortgage Specialists' recitation of facts does not show any contacts that Implode-Explode had with the State of New Hampshire relating to the cause of action in this case. Nor has Mortgage Specialists provided facts showing that Implode-Explode has purposefully availed itself of the protections of New Hampshire law. Therefore, it would not be fair and reasonable to require the defendant to defend suit in New Hampshire. *See Metcalf*, 148 N.H. at 37.

A. Related Contacts

Mortgage Specialists has not shown that Implode-Explode has any contacts with New Hampshire, let alone contacts that are related to a supposed cause of action. First, the Petitioner has no cause of action against the Implode-Explode. RSA 383:10-b, which ostensibly deems certain information submitted by Mortgage Specialists to the New Hampshire banking department to be private, does not create a private cause of action to enforce the state's obligation to maintain said privacy. Second, Mortgage Specialists' allegations of defamation are based upon statements by a website content provider, "Brianbattersby," for which Implode-Explode has no liability under state law. 47 U.S.C. §230. Finally, for reasons discussed, *supra*, Mortgage Specialists' claim of invasion of privacy does not, as a matter of law, arise to the level of a disclosure that would be "offensive to a person of ordinary sensibilities." *See Remsberg*, 149 N.H. at 156. Without a claim to "relate" to, Implode-Explode's "contacts" with the State of New Hampshire do not confer jurisdiction. Contrast these circumstances with the case of

Whitney Information, 347 F. Supp. 2d. at 1244, in which claims of trademark infringement were against the defendant operator of the out-of-state website, and not some third party.

More importantly, Mortgage Specialists has not alleged any substantial contacts between Implode-Explode and the State of New Hampshire. Mortgage Specialists has asserted that Implode-Explode's website has a comment page, permitting residents of New Hampshire to post comments. Reply Memo at 3. The website has a registration feature permitting readers, including any New Hampshire readers, to vote in online polls, and trade private messages with one another. *Id.* The website permits readers from anywhere in the world to pass tips to the editorial staff at Implode-Explode. *Id.* In addition, users may donate money to Implode Explode on the website (Reply Memo, Exhibit A); advertise on the website (*id.*, Exhibit E); and become a premium user for a fee (*id.*, Exhibit H).

But the mere fact that this level of interactivity exists does not create contacts with the State of New Hampshire for jurisdictional purposes. The possibility of fleeting, informational contact between New Hampshire residents and Implode-Explode is not sufficient to confer jurisdiction. Implode-Explode has even fewer contacts with the State of New Hampshire than the defendant did in *Metcalf*, in which the New Hampshire Supreme Court held that an internet sales contract entered into with a New Hampshire resident on a third party website was not enough to confer jurisdiction. *Metcalf*, 148 N.H. at 37. This case is dissimilar to *Whitney Information*, 347 F. Supp. 2d at 1244, because in *Whitney Information*, the website (1) permitted users to purchase advertisements directed towards specific states—and cited the forum state as an example;

(2) offered products and merchandise to users for sale; and (3) provided a service whereby it actively organized disgruntled consumers into groups of class-action plaintiffs in the forum state. *Id.*

In this case, there is no merchandise sold to users in New Hampshire, advertising is not directed at any particular jurisdiction, and Implode-Explode is not in the business of organizing lawsuits against companies like Mortgage Specialists. Implode-Explode provides information, nothing more. Implode-Explode's contacts with the State of New Hampshire are no more substantial than they are with any other of the fifty states within reach of the internet. The mere fact that Implode-Explode wrote an article about a New Hampshire corporation does not suffice to create jurisdiction. *See Revell v. Lidov*, 317 F.3d 467, 475 (5th Cir. 2002); *Situation Management*, 80 U.S.P.Q.2d 1692 (D.N.H. 2006) ("The fact that [the Petitioner has a] principal place of business in New Hampshire is insufficient to confer personal jurisdiction under [*Calder v. Jones*, 465 U.S. 783 (1984) (basing California jurisdiction over Florida defendant in defamation action on focus of libelous article on Plaintiff's activities in California)].").

B. Purposeful Availment

Mortgage Specialists has not submitted facts showing that Implode-Explode purposefully availed itself of New Hampshire law. It is true that readers from New Hampshire, like readers all over the world, have access to the information published by Implode-Explode on its website, and the opportunity to interact with the website. But it would merely be fortuitous that New Hampshire residents would take affirmative action on the website to do so. Implode-Explode was not targeting New Hampshire advertisers in the way that the defendant in *Whitney Information* targeted Florida advertisers. 347 F.

Supp. 2d. at 1244; *see Revell*, 317 F.3d at 473. Nor was Implode-Explode, like the *Whitney Information* defendant, seeking to organize New Hampshire users into legal classes for the purpose of filing lawsuits. *See id.*

Most importantly, Implode-Explode did not make a deliberate decision to conduct commerce in the State of New Hampshire, like the defendant in *Brother Records v. HarperCollins Publishers*, 141 N.H. 322, 325 (1996). In *Brother Records*, the key fact in the New Hampshire Supreme Court's determination that jurisdiction existed was that the defendant had entered into a contract to distribute and sell books through nationwide retail networks. *Id.* at 326-27. A nationwide distribution of books for sale naturally meant that such books would be distributed to and sold in New Hampshire—thus the *Brother Records* defendant purposefully availed itself of New Hampshire law. *Id.* at 327. But a distribution network that physically puts books for sale into New Hampshire bookstores, and makes sales agreements with New Hampshire booksellers, is very different from having information available for any user, anywhere on the worldwide web.

First, with a *Brother Records*-type distribution network, the purveyor of information has made an affirmative decision to serve only those areas where its distributor distributes and sells books. The *Brother Records* defendant was not selling the books in question in China or Togo, for instance. To that extent, the *Brother Records* defendant was purposefully availing itself of the law in those places where the book *was* distributed and sold, including New Hampshire. *Id.* at 327.² This surmounts the

² This should clarify Mortgage Specialists' mischaracterization of Implode-Explode's position on *Brother Records*. In its Reply Memo, Mortgage Specialists appeared to reduce Implode-Explode's distinction of *Brother Records* to the simplistic (and incorrect) assertion that because the mode of distribution was electronic, rather than physical, *Brother Records* did not apply. Reply Memo at 17-18. The real difference

voluntariness requirement of purposeful availment. *See The Lyme Timber Co. v. DSF Investors, LLC*, 150 N.H. 557, 561 (2004). Here, by contrast, the information in question is available free around the world to anyone with access to the worldwide web. While the information is being “distributed” electronically around the globe, *where* it ends up being read is a matter of the purest fortuity. Implode-Explode is wholly dependent on the whims of readers choosing to access its website, and then choosing to access specific information in the website. There was no attempt by Implode-Explode to “target and focus” on New Hampshire readers. *See Revell*, 317 F.3d at 473; compare *Whitney Information*, 347 F. Supp. 2d. at 1244 (where focus on Florida readers was manifest in state-specific advertising capabilities).

The second element of purposeful availment, foreseeability, is also unmet. Since Implode-Explode does not sell goods, specifically target New Hampshire for advertising, or organize New Hampshire consumers, it is not foreseeable that it should be haled into court in New Hampshire. It is conceivable that Implode-Explode, like the National Enquirer in *Calder*, could be subject to New Hampshire jurisdiction for writing a defamatory article about a New Hampshire resident. In that case, it would be foreseeable that the harm arising from the article would occur in New Hampshire. But here, where there is no defamation claim against Implode-Explode, it is not foreseeable that Implode-Explode could be haled into court in New Hampshire.

Even if it was foreseeable that writing an article about a New Hampshire defendant might create jurisdiction based upon some kind of claim, the two elements of

is that, in *Brother Records*, there existed an express agreement to vend products in the State of New Hampshire (among other places), whereas here, contact between Implode-Explode and residents of the State of New Hampshire depends entirely upon the independent volition of internet users who “reach out” of New Hampshire to contact Implode-Explode—not *visa versa*.

the purposeful availment analysis must be weighed together. *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 208 (1st. Cir. 1994). A sufficient showing of foreseeability can nevertheless be undermined by a weak showing of voluntariness. *Id.* Because Implode-Explode's reach into New Hampshire is purely fortuitous, based upon the whims of internet users who choose to read its website, the jurisdictional requirement of purposeful availment fails. *See Metcalf*, 148 N.H. at 37.

C. Fair Play and Substantial Justice

"In constitutional terms, the jurisdictional inquiry is not a mechanical exercise. The [U.S. Supreme] Court has long insisted that concepts of reasonableness must inform a properly performed minimum contacts analysis...[C]ourts must consider a panoply of other factors which bear on the fairness of subjecting a nonresident to the authority of a foreign tribunal[, including:] (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, (5) the common interests of all sovereigns in promoting substantive social policies." *Ticketmaster*, 26 F.3d at 209 (internal quotations and citations removed). In very close cases, these "gestalt factors" can tip the balance against jurisdiction, even when the petitioner has made a minimally sufficient showing of relatedness and purposefulness. *Id.* at 210. "The weaker the [petitioner's] showing on the first two prongs, the less a [respondent] need show in terms of unreasonableness to defeat jurisdiction." *Id.*

The First Circuit's analysis of these gestalt elements in *Tickemaster* is directly applicable here, and is quoted hereafter in its entirety, with references to the parties in this case:

The burden associated with forcing a [Nevada] resident to appear in a [New Hampshire] court is onerous in terms of distance, and there are no mitigating factors to cushion that burdensomeness here. This burden, and its inevitable concomitant, great inconvenience, are entitled to substantial weight in calibrating the jurisdictional scales. Indeed, the [U.S. Supreme] Court has stated that this element, alone among the gestalt factors, is 'always a primary concern.'... These are not empty words, for most of the cases that have been dismissed on grounds of unreasonableness are cases in which the defendant's center of gravity...was located at an appreciable distance from the forum.

See id. (internal citations omitted).

The forum state has a demonstrable interest in exercising jurisdiction over one who causes tortious injury within its borders. Though we deem it inappropriate to correlate the strength or weakness of [the petitioner's] case on the merits with the strength or weakness of the forum state's interest in this regard, we think it is both appropriate and useful to note [that New Hampshire's] interest in the litigation *sub judice* is arguably lessened by doubts surrounding whether [the respondent's] act [gives rise to any subject matter jurisdiction, *see, supra*, discussion of whether a tortious act has even occurred.]

See id. at 211 (internal citations omitted).

Given the sparseness of the record, it is difficult to say whether trying the case in [New Hampshire] would be more convenient for [the petitioner] than trying it in [Nevada]. Certain key witnesses on the issue of injury may be in [New Hampshire.] But other key witnesses, [including the writers, editors, and staff of Implode-Explode] may well be residents of [Nevada]. While we must accord [the petitioner's] choice of forum a degree of deference in respect to the issue of its own convenience, the [petitioner's] actual convenience seems to be at best a makeweight in this situation.

See id., at 211 (internal citations omitted).

[T]he interest of the judicial system in the effective administration of justice does not appear to cut in either direction.

See id.

The frailty of the [petitioner's] showings on the first two furcula of the due process inquiry required us to consider the gestalt factors and assess the reasonableness of an assertion of jurisdiction by a [New Hampshire] court. Doing so, we found that, while many of those factors possess little significance for the purposes of this case, there is one factor—the defendant's convenience—that stands out from the crowd... We now conclude, considering the totality of the circumstances, that [respondent's] burden of appearance is so onerous that it renders the exercise of in personam jurisdiction unreasonable.

See id. at 212.

The weakness of Mortgage Specialists' showing on the question of relatedness and purposefulness requires the Court to assess whether it would be fundamentally fair to subject Implode-Explode to jurisdiction in New Hampshire. The Court should rule as the First Circuit did in *Ticketmaster*, and deny Mortgage Specialists' argument for jurisdiction.

III. Implode-Explode does not have the kind of continuous and systematic contacts with the State of New Hampshire that would confer general jurisdiction.

Mortgage Specialists' argument regarding general jurisdiction falls well short of the constitutional requirement set forth in the defining case on the question, *Perkins v. Benguet Consolidated Mining Co.*, 332 U.S. 437 (1952). In *Perkins*, the defendant maintained corporate offices in the forum state, held directors meetings, kept corporate files, distributed salary checks drawn on the forum state's banks, addressed correspondence from the forum state, and used one of the forum state's banks as a transfer agent. *Id.* at 438. These are the kind of "continuous and systematic" contacts required to confer general jurisdiction, and they do not exist in this case. *See id.*; Reply Memo at 2-4.

Conclusion

In its essence, the jurisdictional question can be distilled to the simple yet beguiling notion that jurisdiction will not lie if its assertion would “offend traditional notions of fair play and substantial justice.” *Alacron v. Swanson*, 145 N.H. 625, 628 (2000). In this case, fair play and substantial justice would not be served by finding that jurisdiction over Implode-Explode exists, because Implode-Explode’s contacts with New Hampshire are fleeting and fortuitous at best—and in any case, are not related to the purported causes of action in the underlying claim. Furthermore, the fortuitous nature of Implode-Explode’s contacts with New Hampshire means that it has not purposefully availed itself of New Hampshire law. Given the paucity of contacts, and their fortuitous, involuntary nature, it would be unfair and unreasonable to compel Implode-Explode to answer to this petition in New Hampshire. Accordingly, Implode-Explode reiterates its request that the Court dismiss this petition for injunctive relief.

Respectfully submitted

IMPLODE EXPLODE
HEAVY INDUSTRIES, INC.

By its attorneys,

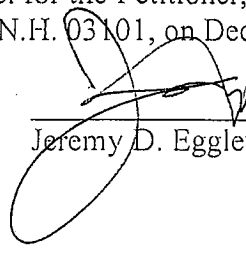
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Certification

I, Jeremy D. Eggleton, certify that a copy of this Memorandum of Law in Surreply was sent by first class mail to Donald L. Smith, counsel for the Petitioner, at Devine, Millimet and Branch, P.A., 111 Amherst Rd., Manchester, N.H. 03101, on December 15, 2008.



Jeremy D. Eggleton, Bar No. 18170

