

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

The Mortgage Specialists, Inc.

v.

Implode Explode Heavy Industries, Inc.

**OBJECTION TO VERIFIED PETITION FOR TEMPORARY, PRELIMINARY
AND PERMANENT INJUNCTIVE RELIEF BY REASON OF LACK OF *IN*
PERSONAM JURISDICTION**

NOW COMES the Respondent, Implode Explode Heavy Industries, Inc. (“Implode Explode”) and requests that the Court reject Petitioner, The Mortgage Specialists, Inc.’s (“Mortgage Specialists”) Petition for Injunctive Relief on the grounds that the Court has no personal jurisdiction over Implode Explode. In Support hereof, Implode Explode submits:

1. Implode Explode is a Nevada Corporation with a principal place of business at 5348 Vegas Drive, Las Vegas, Nevada.
2. Implode Explode publishes a news and analysis website on the internet, www.ml-implode.com, that educates readers about the housing finance sector of the U.S. economy in order to make that sector more transparent and accountable.
3. RSA 510:4, New Hampshire’s Long Arm Statute, permits a court to exercise personal jurisdiction over a non-resident defendant if the requirements of the Federal Due Process Clause are satisfied. *Metcalf v. Lawson*, 148 N.H. 35, 37 (2002) (citing *Alacron v. Swanson*, 145 N.H. 625, 628 (2000)).
4. For a court to exercise personal jurisdiction over a non-resident defendant like Implode Explode, the defendant must have minimum contacts with the forum “such

that the maintenance of the suit does not offend traditional notions of fair play and justice.” *Alacron*, 145 N.H. at 628 (quoting *Brother Records, Inc. v. Harpercollins Publishers*, 141 N.H. 322, 323 (1996)); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1946).

5. Sufficient minimum contacts give rise to either general or specific jurisdiction. *Revell v. Lidov*, 317 F.3d 467, 470 (5th Cir. 2002). “General jurisdiction exists when the defendant’s contacts with the forum state are unrelated to the cause of action but are continuous and systematic.” *Id.* (quotations and citations omitted). There is no general jurisdiction in this case because the mere happenstance that a reader in New Hampshire could view the material published by Implode Explode is insufficient to create general jurisdiction under *Perkins v. Genguet Consolidated Mining Co.*, 342 U.S. 437, 438 (1952). *See Revell*, 317 F.3d at 471.

6. Whether Implode Explode has sufficient minimum contacts to confer specific jurisdiction depends upon the relationship between the defendant, the forum and the litigation. *Metcalf*, 148 N.H. at 37. In *Metcalf*, the New Hampshire Supreme Court applied the test for specific jurisdiction, first established in *Skillsoft Corp. v. Harcourt General*, 146 N.H. 305, 308 (2001), in the internet context. Under *Skillsoft*, the Court must examine whether (1) the contacts relate to the cause of action; (2) the defendant has purposefully availed itself 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. *Id.* at 308. All three factors must be satisfied. *Metcalf*, 148 N.H. at 37.

7. In this case, the contacts between Implode Explode and New Hampshire do not relate to the cause of action. There purport to be two causes of action in this case:

(1) a statutory claim based upon non-disclosure provisions of Massachusetts and New Hampshire banking law; and (2) defamation. Verified Petition ¶25; ¶29. Implode Explode's contacts with New Hampshire do not relate to either cause of action. The allegedly defamatory statements were posted by an anonymous author on Implode Explode's website. Therefore, the allegedly defamatory statements do not give rise to a cause of action against Implode Explode. *See* 47 U.S.C.A. §230; *Doe v. Friendfinder Network, Inc.*, 540 F.Supp.2d 288, 294 (D.N.H. 2008) (citing *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007)). In addition, on the facts of this case, there is no private cause of action created by the banking statutes cited in Mortgage Specialists' Petition. *See* RSA 383:10-b. Thus, Implode Explode's contacts with New Hampshire do not relate to either cause of action. *See Situation Management Systems, Inc. v. ASP Consulting Group et al.*, 80 U.S.P.Q.2d 1692 (D.N.H. 2006) (requiring relation between causes of action and alleged contacts).

8. "The cornerstones upon which the concept of purposeful availment rest[s] are voluntariness and foreseeability." *The Lyme Timber Co. v. DSF Investors, LLC*, 150 N.H. 557, 561 (2004). In *Lyme Timber*, the defendant was a Massachusetts investment company that had entered into a development agreement with the Plaintiff, Lyme Timber, for a large factory in Boston. *Id.* Implode Explode's conduct in this case was not the same kind of voluntary conduct that conferred jurisdiction in *Lyme Timber*, because Implode Explode never engaged in the same kind of direct exchange of mail, email, faxes, negotiations and written agreements with the New Hampshire based party, as the defendant DSF did in *Lyme Timber*. *See id.* As to foreseeability, the mere presence of the plaintiff in the forum is not enough to confer jurisdiction. *Situation Management*, 80

U.S.P.Q.2d 1692. Rather, the conduct of the defendant must make it foreseeable that the defendant could be haled into court in the forum state. *Tavoularis v. Womer*, 123 N.H. 423, 427-28 (1983). “[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.” *VDI Technologies v. Price*, 781 F.Supp. 85, 89 (D.N.H. 1991) (emphasis added); see *Situation Management*, 80 U.S.P.Q.2d 1692 (“[To confer jurisdiction under *Calder*] a plaintiff must show that the defendant ‘expressly aimed its *tortious* conduct at the forum’”) (emphasis added). The only *tortious* conduct alleged in this case was the conduct of the anonymous poster, Brianbattersby. See Verified Petition ¶¶16, 29; see 47 U.S.C.A. §230 (immunizing website publisher from liability for state law claims arising from anonymous postings on the website). The claim against Implode Explode is in the nature of a statutory enforcement action; not only does the Petitioner have no standing to make such a claim, but even if proven, the alleged conduct by Implode Explode is not the kind of intentional *tortious* conduct that confers jurisdiction under New Hampshire law.

9. The third prong of the *Skillsoft* test requires the Court to weigh whether it would be fair and reasonable to subject the defendant to New Hampshire jurisdiction. 146 N.H. at 308. In this case, the burden of travel on the defendants to litigate this matter would be out of proportion to their contacts with New Hampshire in the context of this case. While the difficulty of travel is not determinative in and of itself, in light of the tenuous nature of the contacts Implode Explode had with New Hampshire, the balance favors not asserting jurisdiction because the burden of travel and discovery costs would be unreasonable in light of the claims being made. Furthermore, it is simply not fair to

subject Implode Explode's website, with a national reach, to jurisdiction in New Hampshire on the particular facts of this case.

10. Generally, in evaluating the second and third prongs of the *Skillsoft* test, the New Hampshire Supreme Court has cited *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D.Pa. 1997) for cases where the question, as it does here, concerns the respondent/defendant's conduct over its own website. See *Metcalf*, 148 N.H. at 39. *Zippo* created a sliding scale for jurisdiction over defendants who maintain internet websites, with one end being a website that does business, enters contracts, sends products into the forum state; and the other end being a website that only makes information available. *Zippo*, 952 F.Supp. at 1124. Jurisdiction was conferred by facts similar to the former, and not by facts similar to the latter. Between these two poles was a middle ground, where interactive websites permitted users to post and exchange information. *Id.* Clearly, the Implode Explode website occupies that middle ground.

11. The best case for evaluating the propriety of jurisdiction over a defendant based upon the *Zippo* scale's interactive website is *Revell v. Lidov*, 317 F.3d 467. In *Revell*, the Fifth Circuit held that Texas could not exercise jurisdiction over Columbia University merely because Columbia maintained a website for one of its academic journals, upon which a Massachusetts resident had posted an allegedly defamatory article about a Texas resident. 317 F.3d at 476.

12. *Revell* analyzed the defamation claim under *Calder v. Jones*, 465 U.S. 783 (1984), which established that a defendant may fall under the jurisdiction of a forum where the defendant has "expressly aimed" its tortious conduct—where the effects of its intentionally tortious conduct are felt. *Id.* at 789. But the Fifth Circuit noted that the

mere residence of a plaintiff in a forum will not alone support jurisdiction. *See Revell*, 317 F.3d at 473; *Situation Management*, 80 U.S.P.Q.2d 1692 (“The fact that [Mortgage Specialists has a] principal place of business in New Hampshire is insufficient to confer personal jurisdiction under *Calder*.”) In discussing what degree of conduct would constitute “express aim” at a forum state, the Fifth Circuit referred to *Young v. New Haven Advocate*, 315 F.3d 256, 258 (4th. Cir. 2002), a case with very similar facts to this one. *Revell*, 317 F.3d at 475. In *Young* two newspapers in Connecticut posted articles on the internet about the housing of Connecticut prisoners in Virginia that allegedly defamed a Virginia prison warden. 315 F.3d at 257. The Fourth Circuit held that it could not exercise personal jurisdiction over the newspapers because “they did not manifest an intent to aim their websites or the posted articles at a Virginia audience.” *Id.* at 258. “The application of *Calder* in the Internet context requires proof that the out of state defendant’s Internet activity is expressly direct at or directed to the forum state.” *Id.* Interpreting the Fourth Circuit’s ruling in *Young*, the Fifth Circuit in *Revell* wrote, “[M]ore than simply making the news article accessible to Virginians by defendants’ posting of the article on their Internet sites was required for assertion of jurisdiction: ‘The newspapers must, through the internet postings, manifest an intent to *target* and *focus* on Virginia readers.’” *Revell*, 317 F.3d at 475 (quoting *Young*, 315 F.3d at 262) (emphasis in original).

13. There was clearly no intent on the part of Implode Explode to target and focus on New Hampshire readers. Rather, “the post to the bulletin board here was presumably directed at the entire world, or perhaps just concerned U.S. citizens.” *Revell*, 317 F.3d at 475. Further, just as the Plaintiff’s Virginia residence in *Young* did not

confer jurisdiction in Virginia, the Petitioner's New Hampshire residence should not confer jurisdiction in New Hampshire. *See Young*, 315 F.3d at 258; *Situation Management*, 80 U.S.P.Q.2d 1692 ("The fact that [Mortgage Specialists has a] principal place of business in New Hampshire is insufficient to confer personal jurisdiction under *Calder*.").

14. For these reasons, this case is not comparable to *Brother Records*, 141 N.H. at 327. The basis of the court's determination that jurisdiction did exist in *Brother Records* was the deliberate exploitation of the New Hampshire print market by the defendants. *Id.* at 328. Unlike in *Brother Records*, there was no national distribution and sales network that sent the materials published by Implode Explode purposefully into the stores and shops of the State of New Hampshire. *See id.* Again, the mere fact that New Hampshire residents could fortuitously read the Implode Explode website online is insufficient for jurisdiction to lie in New Hampshire. *Revell*, 317 F.3d at 475.

WHEREFORE, Implode Explode respectfully requests that this Court deny The Mortgage Specialists, Inc.'s Petition for Injunctive Relief, and order such other and further relief as it deems just and necessary.

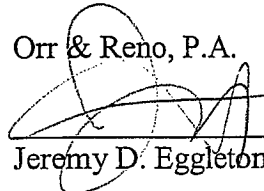
Respectfully submitted

IMPLODE EXPLODE
HEAVY INDUSTRIES, INC.

By its attorneys,

Orr & Reno, P.A.

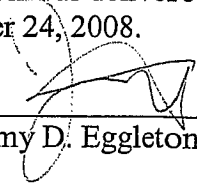
By:


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Certification

I, Jeremy D. Eggleton, certify that a copy of this Objection was delivered by hand to Donald L. Smith, counsel for the Petitioner, on November 24, 2008.



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