

**THE STATE OF NEW HAMPSHIRE**

**Rockingham Superior Court**

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**NOTICE OF DECISION**

JEREMY D EGGLETON  
ORR & RENO PA  
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08-E-0572 The Mortgage Specialists, Inc. vs. Implode-Explode Heavy Ind

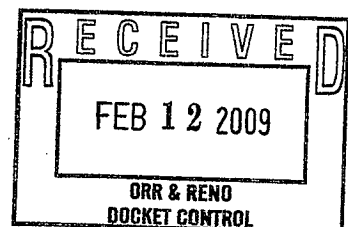
Enclosed please find a copy of the Court's Order dated 2/06/2009  
relative to:

**Order-Motion to Dismiss  
Procedural Order**

02/10/2009

Raymond Taylor  
Clerk of Court

cc: Donald L. Smith  
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<sup>1</sup> 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

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<sup>1</sup> 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 Implode-Explode tips about mortgage lenders, and allows users to post information that then becomes publicly visible and hosted by Implode-Explode. Implode-Explode's

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.

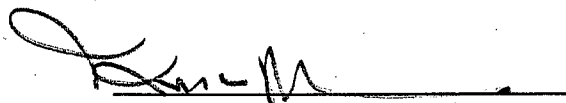
The judicial system's interest in the most effective resolution of the controversy, insofar as it affects the analysis, would suggest that the proceeding already initiated would be an efficient forum in which to conclude adjudication. As the case has already been before the court on this jurisdictional 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: February 6, 2009

  
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KENNETH R. MCHUGH  
PRESIDING JUSTICE