UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

GLOBAL DIRECT SALES, LLC, PENOBSCOT INDIAN NATION, CHRISTOPHER RUSSELL and RYAN HILL, Plaintiffs v. AARON KROWNE, individually and d/b/a THE MORTGAGE LENDER IMPLOD-O-METER and ML-IMPLODE.COM, KROWNE CONCEPTS, INC., IMPLODE-EXPLODE HEAVY INDUSTRIES, INC., JUSTIN OWINGS, KRISTA RAILEY, STREAMLINE MARKETING, INC. and LORENA LEGGETT, Defendants.	Case No. 8:08-cv-02468 Hon. Deborah K. Chasanow **NOTICE OF MOTION & MOTION FOR JUDGMENT**

NOTICE OF MOTION FOR JUDGMENT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(c) & 56

Defendants Implode-Explode Heavy Industries, Inc. ("IEHI") and Krowne Concepts, Inc. ("KCI") hereby move this Court to grant judgment in their favor pursuant to Rule 12(c) and Rule 56 of the Federal Rules of Civil Procedure.

PLEASE TAKE NOTICE that a supporting memorandum accompanies this motion, along with a supporting Declaration (with exhibits) of Aaron Krowne, CEO of IEHI and Krowne Concepts, Inc., and a supporting Declaration (with exhibits) of Charles J. Borrero, Lead Counsel for IEHI and KCI (which includes an Appendix with one hard-to-find judicial opinion pursuant to Local Rule 105).

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Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

GLOBAL DIRECT SALES, LLC, PENOBSCOT INDIAN NATION, CHRISTOPHER RUSSELL and RYAN HILL,

Plaintiffs

v.

AARON KROWNE, individually and d/b/a THE MORTGAGE LENDER IMPLOD-O-METER and ML-IMPLODE.COM, KROWNE CONCEPTS, INC., IMPLODE-EXPLODE HEAVY INDUSTRIES, INC., JUSTIN OWINGS, KRISTA RAILEY, STREAMLINE MARKETING, INC. and LORENA LEGGETT,

Defendants.

Case No. 8:08-cv-02468

Hon. Deborah K. Chasanow

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, A JUDGMENT ON THE PLEADINGS[1]

On January 3, 2013, default was vacated with respect to defendants Implode-Explode Heavy Industries, Inc. ("IEHI") and Krowne Concepts, Inc. ("KCI" or "Krowne Concepts"), and the Court granted them leave to file dispositive motions.[2] IEHI and Krowne Concepts (collectively "Movants" or "the movants") herein set forth bases for summary judgment in their favor with respect to the sole remaining count in this action: defamation by libel. Movants respectfully request that this Court enter judgment accordingly.

[1] The Motion for a Judgment on the Pleadings targets the defamation *per quod* claims levied by each plaintiff, and all claims as to the Penobscot Indian Nation and KCI.

[2] Defendant Krista Railey remains in default.

I. BACKGROUND

Defendants here, blogger Krista Railey and the owners of the "Implode-O-Meter" website (http://www.ml-implode.com), allegedly published an article entitled "The Penobscot Indian Tribe Down Payment Grants" that was critical of seller-financed downpayment assistance programs ("SFDAPs") in general, and a program of the Penobscot Indian Nation ("PIN") in particular. Plaintiffs claim they suffered reputational harm thereby.

A. The Parties

1. The Plaintiffs

The Penobscot Indian Nation ("PIN") is a Native American Government that established and operated the Grant America Program ("GAP"), a SFDAP in January 2007. Compl. ¶¶1, 9, 17. PIN is a municipality of the state of Maine. Compl. ¶9 (citing the Maine Indian Claims Settlement Act, as amended). Global Direct Sales ("GDS") is a Maryland LLC based in Gaithersburg, MD. Compl. ¶¶10, 16. Christopher Russell was the founder and CEO of Ameridream, a nonprofit SFDAP, from 1999 to 2001. Deposition of Chrisopher Russell ("Russell Dep.") 6:16, Ex. D to the Declaration of Charles Borrero ("Borrero Decl."). He was the also architect of GAP and the CEO of GDS. Russell Dep. 18:19. Ryan Hill is not identified in the Complaint, but he was an investor, co-owner, and CFO of GDS. Russell Dep. 19:1-10.

2. The Defendants & Their Website

WWW.ML-IMPLODE.COM was at all relevant times a website that ranks businesses in the mortgage lending industry on a scale called "The Mortgage Lender Implode-O-Meter." Visitors could register on the site to post publicly viewable comments. See generally MortgageSpecialists v. Implode-Explode Heavy Indus., 160 N.H. 227, 231 (2010). Aaron Krowne created the Mortgage Lender Implode-O-Meter website in late 2006 or early 2007 with

the purpose of educating the public about the stability of the housing finance sector. The website held itself out as providing coverage of "the housing finance sector, the economy and the country" with a unique focus on the collapse of the mortgage lending industry.[3] Railey Dep. 15:8-11; Krowne Decl. ¶ 4, Ex. J.

Krowne Concepts, Inc. ("KCI") is a Nevada corporation formed by Aaron Krowne on March 15, 2007. KCI owned the website (ML-Implode.com) from that date until September 1, 2007, when ownership was transferred to defendant IEHI, Inc. The transfer was executed primarily to include Justin Owings in the ownership, as he had taken on responsibilities of running the site.

Implode-Explode Heavy Industries, Inc. ("IEHI"), a Nevada corporation formed in July 2007, owned the website at all times relevant here. It was owned equally by Aaron Krowne and Justin Owings. IEHI also owns "sister" sites hf-implode.com, builder-implode.com, and bankimplode.com, focusing on hedge funds, builders, and banks, respectively (all founded in approximately September 2007).

Krista Railey, a recreational blogger, was a frequent poster on the IEHI/ML-Implode forums, which were open to the general public. Ms. Railey had some twenty years experience in the mortgage industry at the time she began blogging on the ML-Implode site and she had become disillusioned with it. Deposition of Krista Railey, Ex. C to the Declaration of Charles Borrero ("Borrero Decl.) attached hereto ("Russell Dep.") 9:1-23, 19:1-24, 32:11-23. She expressed cynicism about ongoing mortgage lending (and related underwriting) practices there

[3] Months later, the website's warnings about instability in the housing sector and an impending collapse proved prophetic when the sub-prime mortgage market "crashed." The collapse spread through the financial sector, resulting in mind-boggling losses, the failure of numerous banks and mortgage lenders, and the near-collapse and federal bailout of many others. See Borrero Decl. Ex. I; Krowne Decl. ¶27.

and on other websites. Railey Dep. 14:2-13. Her extensive commentaries were noticed by IEHI staff and she was invited to have a blog (an independently controlled, "self-branded" sub-site where a writer may opine as they please) on ML-Implode.com.[4] Her site was entitled "The FHA Mortgage Whistleblower" (http://whistleblower.ml-implode.com). Railey Dep. 15:2, 12-14. She was never an employee of IEHI or KCI. Railey Dep. 33:22-24 (noting that her blogging on ML-Implode "was just a hobby I was doing. . . . community service, so to speak." In September 2008 she interviewed Christopher Russell about the Grant America Program via telephone and authored the article at issue here.[5] Railey Dep. 17:13-14.

B. The Article

The article Plaintiffs find irksome ("What the SFDPA Administrators Don't Want You to Know Part 1: The Penobscot Indian Tribe Downpayment Grant Program") was Ms. Railey's first on her "Mortgage Whistleblower" blog. It was the culmination of her research regarding SFDAPs, which began in June 2008. See Decl. of Krista Railey in Support of Defs.' Opp'n to Pls.' TRO Mot. [ECF No. 18-2], attached hereto as Borrero Decl. Ex. F ("Railey Decl.") ¶28. She began looking into PIN's SFDAP, the Grant America Program ("GAP"), after reading public filings and the anonymous Congressional testimony of "Mr. House" concerning nonprofit DAPs. Railey Dep. 48:10-25. She figured out that Mr. House's secret identity was James Brandon (Id.

[4] This privilege had been extended to other posters/bloggers before. See, e.g., Krowne Decl. ¶20, Exs. J & K (e.g., opinionarmageddon.ml-implode.com).

[5] Ms. Railey's article was not the first one on the website critical of seller-funded downpayment assistance programs, though it was the first such blog article. Indeed, there were two such postings in January and June 2008. Both criticized down payment programs similar to GAP in that they directed a property seller's money though a third party (e.g., Ameridream), to facilitate mortgage financing insured by the federal government by helping buyers nominally qualify for FHA insurance. Krowne Decl. ¶20, Exs. J & K.

49:4-13) and deduced that part of his testimony referred to Chrisopher Russell and Ryan Hill. Railey Dep. 49:12-50:9.

On the night of September 9, 2008, Ms. Railey posted a draft of the article on a part of the website she believed to be private (i.e., not publicly available). Railey Decl. ¶27. Shortly after midnight on September 10, 2008, a mere three hours after Ms. Railey uploaded her draft, she received a comment purportedly from Christopher Russell complaining about it in general terms. Railey Decl. ¶28. Russell identified no inaccuracies or errors, yet he threatened to sue if the article was not removed in its entirety. Within 45 minutes of the comment being posted, the article was removed. Id. ¶29. On September 15, 2008, after an internal discussion among Aaron Krowne, Robin Medeke, Randall Marquis, and Krista Railey—and after Ms. Railey double-checked her sources (and double-checked the hyperlinks to those sources embedded in the document), Ms. Railey reposted the article. Id. ¶30. The reposted article had minor revisions, e.g., the removal of the word "scam") and the addition of an introduction describing the complaint and revision. Id. ¶30; Borrero Decl. Ex. E. Both the original draft and the final version included hyperlinks to some twenty documents and sources so readers could further educate themselves and readily assess the veracity of the article. Id. ¶33.

The article discusses SFDAPs, which enable prospective home buyers without enough money for a downpayment to qualify for Federal Housing Administration ("FHA") insured mortgages. At all times relevant here, FHA-insured loans required the home buyer make a downpayment of at least three percent of the total purchase price. With a few exceptions, this downpayment had to come out of the buyer's own pocket. In SFDAPs, the seller provides the requisite downpayment amount, either directly or indirectly through a third-party organization.

The Government Accountability Office ("GAO") and the Department of Housing and Urban Development ("HUD") reported in 2005 that such programs result in both inflated sale prices and higher mortgage delinquency rates. Borrero Decl. Ex. H. SFDAPs have even been described as "scams" by the IRS. See Borrero Decl. Ex. G. On July 24, 2008, Congress passed the Housing and Economic Recovery Act ("HERA"), H.R. 3221, and it was signed into law on July 30, 2008 (Pub. L. 110-289). Two weeks after this lawsuit was filed, new FHA regulations required by HERA went into effect that prohibited indirect seller grants including those provided by Plaintiffs' Grant America Program ("GAP"), the subject of the article. Aware of the pending legislation, GAP began winding down in early 2008, stopped accepting applications by October 1, 2008, and ceased operations by the end of 2008. Russell Dep. 65:14-19. See also Krowne Decl. Ex. C (GAP webpage).

Ms. Railey's source material included transcripts from Congressional hearings about the Plaintiffs, articles in reputable papers such as the New York Times and Forbes Magazine, and website registrations connected with Plaintiffs, a web domain arbitration decision concerning Russell and Ameridream, as well as reports about downpayment assistance programs (DAPs), FHA insurance, tax treatment of DAPs, and related topics. Railey Dep. 75:9-11; Railey Decl. ¶32; Borrero Decl. Ex. J (August 14, 2008 Forbes article). At the time of authorship and publication, Ms. Railey believed that every statement made in the article was true and supported by her research. Id. ¶10 ("I fully researched everything that appeared in both the September 9 draft version and September 15 final version of the article, and both versions included links to supporting materials on which my article was based."), ¶¶ 31-36 (listing factual bases for all purportedly defamatory claims contained in the Article).

C. Procedural History

On September 19, 2008, Plaintiffs filed a complaint in this case alleging, *inter alia*, defamation against Defendants. More specifically, Plaintiffs complain that Krista Railey's article called Plaintiffs' Grant Assistance Program ("GAP") a "scam," identified Christopher Russell and Ryan Hill as the architects of another "seller-funded down payment scam," suggested that GAP was not approved by HUD, described seller contributions to GAP as "concessions," and accused the Penobscot Indian Nation ("PIN") of laundering seller-sourced down payments for a fee. Compl. ¶37 (characterizing thirteen statements in Ms. Railey's article as defamatory).[6]

After a series of motions and Defendants' default, Plaintiffs sought judgment. The Court denied Plaintiffs' motion, ruling in part that defendants failed to adequately allege defamation except with respect to statements that may be defamatory *per se* because they failed to allege damages. Russell v. Railey et. al., No. 08-cv-02468-DKC [Docket No. 112], 2012 U.S. Dist. LEXIS 49370, 10-11 (D. Md. Apr. 9, 2012) (Mem. Op.). Upon KCI and IEHI's motion, the Court vacated the entry of default and granted leave to file this motion. [Docket Nos. 121, 126]

II. LEGAL STANDARDS & ELEMENTS

A. Summary Judgment

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate in cases where the moving party shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See 7- Eleven, Inc. v. McEvoy, 300 F.Supp.2d 352, 355 (D.Md. 2004) (citing Kitchen v. Upshaw, 286 F.3d 179, 182 (4th Cir. 2002). Once a moving party shows that there is no genuine issue of fact, the non-moving party has the burden

[6] The Complaint was unaccompanied by the purportedly defamatory article. A copy of what we suspect Plaintiffs refer to is attached hereto as Borrero Decl. Ex. B.

of showing the court, by asserting specific facts, that there is a genuine issue to be determined at trial. See Sylvia Development Corp. v. Calvert County, 48 F.3d 810, 817 (4th Cir. 1995) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). In evaluating whether a dispute about a material fact is 'genuine,' the court must determine whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Olsen v. Largo-Springhill Ltd. Partnership, 919 F.Supp. 847, 849-50 (D.Md 1995) (citing Anderson, 477 U.S. at 248). The non-moving party must present more than a "scintilla" of evidence in its favor. See Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 818 (4th Cir. 1995) (quoting Anderson, 477 U.S. at 252).

A mere denial of the allegation asserted is not sufficient to defeat summary judgment. See Stone v. University of Maryland Medical Sys. Corp., 855 F.2d 167, 175 (4th Cir. 1988) ("the nonmovant's version of events must be supported by sufficient evidence to permit a reasonable jury to find the fact[s] in his favor in order to defeat a motion for summary judgment") (quoting Anderson, 477 U.S. at 249-50). The moving party's burden is met by showing to the court that there is an absence of evidence of some element on which the opposing party bears the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986) ("Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'"

This case is well-suited for summary judgment, as the key facts are not in dispute. See generally Olsen v. Largo-Springhill Ltd. Partnership, 919 F.Supp. 847, 850 (D.Md 1995) (noting that summary judgment is designed "to secure the just, speedy and inexpensive determination of every action . . . .") (citations omitted). Indeed, in a case like this, "the Court must not shy away

from granting summary judgment where [the Rule 56] standard has been met." Seymour v. A.S. Abell Co., 557 F. Supp. 951, 954 (D. Md. 1983). As Judge Skelly Wright explained in Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966):

> Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement.
> In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the [New York Times v. Sullivan] principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government . . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide open, for self-censorship affecting the whole public is "hardly less virulent for being privately administered."

(citations omitted). See also Time, Inc. v. Johnston, 448 F.2d 378, 383 (4th Cir. 971); Fitzgerald v. Penthouse International, Ltd., 525 F. Supp. 585, 596 (D. Md. 1981), rev'd on other grounds, 691 F.2d 666 (4th Cir. 1982); Woods v. Hearst Corp., 2 Med. L. Rep. 1548, 1549 (D. Md. 1977).

B. Judgment on the Pleadings

A complaint may be dismissed pursuant to Rule 12 after the pleadings are closed if no material facts remain at issue and the parties' dispute can be resolved on both the pleadings and those facts of which the court can take judicial notice. Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings can be made any time after the pleadings are closed and need not await discovery. See Hughes v. Tobacco Inst., Inc., 278 F. 3d 417 (5th Cir. 2001); Carlson v. Reed, 249 F. 3d 876 (9th Cir. 2001). A motion under Rule 12(c) is generally treated in the same manner as a Rule 12(b)(6) motion to dismiss. See EEOC v. J.H. Routh Packing Co., 246 F.3d 850, 851 (6th Cir.2001) (equating the standards applicable to dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim and under Rule 12(c) for judgment on the pleadings). The pleadings are construed liberally, and the court does not resolve

contested facts. See Brittan Commc'ns Int'l Corp. v. Southwestern Bell Tel. Co., 313 F. 3d 899 (5th Cir. 2002); Aponte-Torres v. University of Puerto Rico, 445 F. 3d 50 (1st Cir. 2006). Instead, the Court must accept all well-pleaded material allegations of the nonmoving party as true, and views all facts and inferences in a light most favorable to the pleader. See Lindsay v. Yates, 498 F.3d 434, 437 (6th Cir. 2007).

A pleading's legal conclusions, however, are not deemed admitted. Kottmyer v. Maas, 436 F. 3d 684 (6th Cir. 2006). Conclusory allegations or legal conclusions masquerading as factual allegations will not hinder a Rule 12 motion. See Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d Cir.2002). Pleadings require more than labels and conclusions; formulaic recitation of the elements of a cause of action will not do. Yeiser v. GMAC Mortgage Corp., 535 F.Supp.2d 413 (S.D.N.Y., 2008); Ello v. Singh, 2007 WL 3084979, *3 (S.D.N.Y. 2007).

The plaintiff may be required to amplify a claim with factual allegations to render the claim plausible. Cf. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007); Crisci-Balestra v. Civil Service Employees Union, 2008 WL 413812 (E.D.N.Y. 2008). In other words, the plaintiff must state enough facts to state a claim to relief that is plausible on its face. Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007). In civil rights cases, the Rule 12(c) test is to be applied with "particular strictness." Cleveland v. Caplaw Enters., 448 F. 3d 518 (2d Cir. 2006).

C. Libel Under Maryland Law

1. Elements

In Maryland, liability for defamation may lie where the plaintiff shows, to the satisfaction of the fact-finder, that (1) the defendant made a defamatory statement to a third person, (2) the statement was false, (3) the defendant was legally at fault in making the statement, and (4) the plaintiff thereby suffered harm. Piscatelli v. Van Smith, 424 Md. 294, 306; (citing Independent

Newspapers, Inc., v. Zebulon J. Brodie, 407 Md. 415 (2009) (setting forth the fundamental requirements of an internet defamation action)); Offen v. Brenner, 402 Md. 191, 198 (2007); Batson v. Shiflett, 325 Md. 684, 722-23 (1992). Certain statements disparaging one's business reputation or alleging criminal activity may be considered defamation *per se*, such that damages need not be proven to establish liability. When the allegedly defamed person is a public figure, the additional element of "actual malice" must be satisfied. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). Likewise, where a qualified privilege applies, the higher standard of actual malice applies regardless of whether the plaintiff is a public figure.

A "defamatory statement" is one that "tends to expose a person to public scorn, hatred, contempt, or ridicule, which as a consequence, discourages others in the community from having a good opinion of, or associating with, that person." Piscatelli, 424 Md. at 306 (internal quotation marks and citation omitted). A "false statement" is one that is "not substantially correct." Id. (citing Batson v. Shiflett, 325 Md. 684, 726 (1992)). "Actual malice" is defined as "a person's actual knowledge that his [or her] statement is false, coupled with his [or her] intent to deceive another by means of that statement." Id. at 308 (quoting Ellerin v. Fairfax Sav. F.S.B., 337 Md. 216, 240).

2. Burdens of Proof

Plaintiffs bear the burden of proving falsity, particularly where the purportedly defamatory statements involve matters of obvious public concern. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-76 (1986). See also Piscatelli, 424 Md. at 306. A defamatory statement must contain or clearly imply something that is demonstrably false. See Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1093 (4th Cir. 1993) ("Though opinion per se is not immune from a suit for libel, a statement is not actionable unless it asserts a provably false fact or factual

connotation.") See also Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990). Moreover, substantially accurate statements are not actionable, even if minor details are inaccurate. AIDS Counseling & Testing Ctrs. v. Group W Television, Inc., 903 F.2d 1000, 1004 (4th Cir. 1990).

Where a defendant makes a prima facie case that a privilege applies, Plaintiffs must prove the additional element of "actual malice" attributable to the defendant. Piscatelli, 424 Md. at 307. Similarly, where a defendant shows that the purportedly defamed subject is a public figure, plaintiffs must prove actual malice by clear and convincing evidence. New York Times Co. v. Sullivan, 376 U.S. 254, (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Rosenbloom v. Metromedia, 403 U.S. 29 (1971). If the Plaintiffs fail to carry the burden of proving malice, the judge may rule on the element of malice as a matter of law. Piscatelli, 424 Md. at 308; Simon v. Robinson, 221 Md. 200, 205-6 (the question of whether a privilege was abused is "subject to the censorial power of the judge where there is no evidence of malice, and the burden on the issue is on the plaintiff.").

Finally, to recover punitive damages, Plaintiffs must prove by clear and convincing evidence that the publisher acted with actual malice. Fid. First Home Mortg. Co. v. Williams, 208 Md. App. 180, 214, (Md. Ct. Spec. App. 2012) (citation omitted); Le Marc's Mgmt. Corp. v. Valentin, 349 Md. 645, 651-56, 709 A.2d 1222, 1225-28 (1998) (adopting malice standard for awarding punitive damages and proving abuse of defamation privileges); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

3. Defamation is a Determination to be Made by the Trial Judge

Like malice, whether a publication is defamatory is a question of law for the court. Piscatelli, 424 Md. at 306. In making this determination, the Court must read the publication as a whole. Id. (citing Chesapeke Publ'g Corp. v. Williams, 339 Md. 285, 295 (1995)).

III. ARGUMENT

A. Summary

Plaintiffs complain of myriad statements in the article (Compl. ¶37), but their case falls short on every element. Even assuming *arguendo* IEHI or Krowne Concepts could be liable for a blogger's article, Plaintiffs cannot satisfy their burden of showing these statements to be anything other than a fair and accurate representation of fact and opinion. Regardless, the article is subject to privileges that preclude a defamation action here, even under the summary judgment standard. Finally, each defendant here is protected by the First Amendment (Freedom of the Press and Freedom of Speech) with respect to the publication of the article, such that this case must be dismissed as a matter of law.

More specifically, IEHI and KCI raise the following arguments: (1) This suit is barred by the Communications Decency Act ("CDA"); (2) Plaintiffs cannot meet their burden of proving falsity because the article concerns a matter of public interest and were true; (3) the author of the article was an independent blogger not acting as an agent of IEHI or KCI, such that neither may be held vicariously liable for her actions; (4) Even if any part of the article was false or defamatory, it was published without malice; and (5) no plaintiff has suffered harm from this article, which cannot be fairly read to constitute defamation *per se*. Any one of these constitutes a complete defense here. Additionally, (6) by virtue of PIN's status as a municipality of Maine and a federally recognized Native American government, the First Amendment precludes it from maintaining this action. Finally, with respect to KCI, (7) it was in no way responsible for the website during any period relevant here. This brief will first address issues and parties that the Court may dispose of on the pleadings.

B. Requests for Judgment on the Pleadings (Or Alternatively, Summary Judgment)

1. The Court Should Enter Judgment Against The Penobscot Indian Nation Because it is a Government Entity That May Not Maintain A Defamation Claim

The Penobscot Indian Nation ("PIN") is a federally recognized Indian tribe and a municipality of the state of Maine. Compl. ¶¶1, 9, 15-18. Indeed, that is why it was able, under HUD rules,[7] to create a housing agency and provide downpayment assistance. . As a government entity (Compl. ¶¶9, 15-18), PIN may not maintain a libel action, due principally to First Amendment concerns over "the possibility that a good faith critic of government will be penalized for his criticism." New York Times Co. v. Sullivan, 376 U.S. 254, 291(1964) ("For good reason, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.") (citation and internal quotation marks omitted). See also Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). PIN wishes to enjoy the benefits of status as a government entity (namely, tax exemption and the ability to profit from the government programs loophole with respect to SFDAPs) without bearing its burdens. See, e.g., Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980) (discussing tribes' taxation immunity). The Court should not permit it to do so.

2. The Court Should Grant Judgment in Favor of KCI Because KCI Did Not Own, Control, or Have Any Responsibility for the Website During Any Relevant Period

KCI may be dismissed on the pleadings since ownership of the website was completely transferred on September 1, 2007 (Compl. ¶43) and the allegedly libelous publication did not occur until September 15, 2008 (Compl. ¶36). See Krowne Decl. ¶5, Ex. K.

[7] See Borrero Decl. ¶11, Ex. J at 2-24 (HUD Handbook 4155.1 REV-5, p. 2-24) (referring to downpayment assistance from a government program).

3. The Court Should Grant Judgment In Favor of Defendants With Respect to the Defamation *Per Quod* Claims Because Plaintiffs Must, But Cannot, Prove Damages

Even assuming *arguendo* that the article contained defamatory statements, Plaintiffs suffered no harm as a consequence. One reason for this is that down payment assistance programs in general, and Plaintiffs' grant program in particular, already had a poor reputation based in part on articles that predated the one *sub judice*. See Borrero Decl. Ex. I (August 14, 2008 Forbes article entitled "Going Tribal" describing the "Penobscot operation" and stating "Russell got rich off this racket once before.")[8] Another reason is that any harm would have had to have fallen within the narrow window of September 9, 2008 and October 1 2008, when Plaintiffs shut down the website because their SFDPA practice was outlawed by the Housing and Economic Recovery Act of 2008. See Pub. L. 110-289 § 2113 (SFDAPs effective October 1, 2008). Russell Dep. 62:3-16. Additionally, on June 27, 2011, Mr. Russell's rebuttal statement was posted on ML-Implode website. It is impossible to read the article without seeing that the agreed-upon rebuttal is posted. See Krowne Decl. ¶¶45-49. Thus, even assuming *arguendo* Plaintiffs' allegations are accurate, there was no concrete harm nor is there any ongoing injury attributable to the posting of Ms. Railey's article.

Finally, Russell complains almost solely of injury to future business dealings with PIN that amount to nothing more than fanciful plans to build a casino. Russell Dep. 67:7-13, 78, 83. It would be generous to call such claims of injury speculative. This reputational harm, like the casino, is a chimera. Plaintiffs' reputation was established based largely on other reports and articles well before Ms. Railey wrote hers. See, e.g., Krowne Decl. ¶15. 16, Exs. F, G (excerpts from other blogs); Borrero Decl. ¶10, Ex. I (Forbes "Going Tribal" article dated August 14, 2008). Rather than damages, it seems that what Plaintiffs really seek here is a chilling effect on

[8] Available at http://www.forbes.com/forbes/2008/0901/042.html) (also at ECF No. 18-11); Krowne Decl. ¶15. 16, Exs. F, G (excerpts from a "Bank Lawyer" and "CalculatedRisk" blogs).

media coverage—possibly to protect future endeavors. See Russell Dep. 79:1-81:4 (describing a potential post-HERA SFDAP arrangement).

Moreover, citing Samuels v. Tschechtelin, 135 Md.App. 483, 549 (2000), this Court has noted that plaintiffs alleging defamation *per quod* "must sufficiently allege actual damages . . . which they do not do." Mem. Op., No. 08-2468-DKC at 8 n.7 (April 9, 2012) [Docket No. 112]. Since Plaintiffs have not amended their Complaint, each of the defamation *per quod* claims should be dismissed on the pleadings. Thus, while the article must be considered in its entirety, discussion of the allegedly libelous statements herein will focus on those that, taken as true, were identified as plausibly constituting defamation *per se* if they imply criminal activity:

> a. That the Penobscot Indian Tribe's Grant America Program is a scam.
> . . . .
> d. Russell and Hill created a new venture known as the Dp Funder Program and the Owner's Alliance. The Dp funder is another type of seller-funded down payment scam.
> . . . .
> j. The Penobscot Indian Tribe isn't really providing assistance and is merely 'laundering' the down payment for a fee.
> k. Russell and Hill are already working on an alternative scheme through the Down Payment Grant Alliance. They intend to replace one scam with another even more complicated scam. Kind of like a convoluted down payment shell game.

Id. at 8.

C. Because the Author Acted as an Independent Blogger, The Movants Are Not Legally Responsible for Article & This Case Must Be Dismissed Under the Communications Decency Act

Plaintiffs' case falls short on elements one and three because Krista Railey was a blogger not acting as an agent of either Defendant in publishing the article, such that Defendants disseminated the article innocently. For the same reason, this suit is precluded by § 230 of the Communications Decency Act, 47 U.S.C. § 230.

1. The Communications Decency Act, 47 U.S.C. §230

Section 230 of the federal Communications Decency Act ("CDA") effectively immunizes interactive computer service providers from tort suits with respect information provided by another information content provider. 47 U.S.C. § 230(c)(1) ("No 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.") See also Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003). An "interactive computer service" is "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). An "information content provider" is "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." Id. § 230(f)(3). The statute does not set forth specific criteria for determining what makes a party responsible for the "development" of content under § 230(f)(3), so courts often look to the totality of the circumstances in making the determination. Ascentive, LLC v. Opinion Corp., 842 F. Supp. 2d 450, 475-76 (E.D.N.Y. 2011) (finding CDA immunity applicable to "PissedConsumer" website postings even though the site invites people to submit negative reviews and noting it is "not unlike the targeted solicitation of editorial material engaged in by a narrow genre of publishers"). It is clear, however, that "[l]awsuits seeking to hold a service liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." Zeran v. America Online, 129 F.3d 327, 330 (4th Cir. 1997). Batzel, 333 F.3d at 1031 ("[CDA §230] precludes liability for

exercising the usual prerogative of publishers . . . to edit the material published . . . .”). Keenly aware that that the statute eradicates the ability to bring defamation suits against websites hosting content provided by others, the Fourth Circuit panel in Zeran explained: “The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. . . . Section 230 was enacted, in part, to maintain the robust nature of internet communication.” Zeran, 129 F.3d at 330-31. See also Blumenthal v. Drudge, 922 F. Supp. 44, 52 (D.D.C. 1998) (same); 141 Cong. Rec. H8470 (1995) (statement of Rep. Barton) (describing the purpose of § 230 as providing “a reasonable way to . . . help [interactive service providers] self-regulate themselves without penalty of law”); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) (“So long as a third party willingly provides the essential published content, the interactive service provider receives full immunity [under § 230] regardless of the specific editing or selection process.”); Green v. America Online, Inc., 318 F.3d 465, 472 (3rd Cir. 2003) (noting that § 230 “does not require an interactive service provider to restrict speech . . . .”).

The immunity shelters providers who merely provide a forum for commentary, hold editorial authority, or exercise editorial functions. Donato v. Moldow, 374 N.J. Super. 475, 865 A.2d 711, 727-28 (N.J. Super. A.D. 2005) (“Development requires material substantive contribution to the information that is ultimately published. . . . [S]electively deleting or allowing to remain certain postings, and commenting favorably or unfavorably on some postings, without changing the substance of the message authored by another, does not constitute ‘development’ within the meaning of § 230(f)(3).”) Deciding not to remove a posting after hearing a complaint of defamation constitutes an editorial function and therefore falls within the immunity provided by § 230. Universal Comm’n Sys., Inc. v. Lycos, 478 F.3d 413, 420 (1st Cir.

2007); Global Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F. Supp.2d 929 (D. Ariz. 2008). As does making minor edits. Ben Ezra, 206 F.3d at 985-6 (deletion of information did not transform ICS provider into information content provider); Schneider, 31 P.3d at 39-43 (website not liable despite right to edit posted matter); Ramsey v. Darkside Prods., Inc., 2004 U.S. Dist. LEXIS 10107, *19-20 (D.D.C. 2004) (because Defendant did no more than select and make minor alterations to [an ad], it cannot, as a matter of law, be considered the content provider of the advertisement for purposes of § 230."). Indeed, even encouraging the publication of defamatory content does not make a website operator responsible "for the 'creation or development' of every post on the site. . . . Unless Congress amends the [CDA], it is legally (although perhaps not ethically) beside the point whether defendants refuse to remove the material, or how they might use it to their advantage." Global Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008) (applying CDA immunity to "ripoffreport.com" where defendants allegedly used reviews as leverage to coerce targeted businesses into paying for a program purporting to help resolve consumer complaints and encouraged defamatory posting by others for their own financial gain).

Here, the movants did little more than provide a canvas upon which third parties placed material. Compl. ¶¶47-48 ("The mission of the website is transparency, education and accountability.") (internal quotation marks omitted). This article is plainly about a topic of public interest, as the author understood it. Railey Dep. 33:23-24 (describing her blog postings as "community service, so to speak"); 34:7-23 As such, they are immune from liability under CDA § 230. Gentry, 99 Cal. App. 4th at 833-34 (eBay not liable despite highly structured feedback forum); Universal Comms., 2007 WL 549111 (provider immune from liability for message board postings of another even where the "construct and operation" of the website

might influence the content of the postings); Carafano, 339 F.3d at 1124-25 (internet dating service immune even where it "contributes much more structure and content than eBay by asking 62 detailed questions and providing a menu of 'pre-prepared responses'"); Prickett v. InfoUSA, Inc., 561 F. Supp.2d 646 (E.D. Tex. 2006) (applying § 230 immunity where website prompts users to select subcategories for postings and explaining that "The fact that some of the content was formulated in response to the Defendant's prompts does not alter the Defendant's status.").

2. Movants Are Not Legally Responsible for the Article

Even setting aside CDA § 230, the claims against Movants fail because Krista Railey never acted as an employee or agent of KCI or IEHI. In fact, she was an employee of Streamline Marketing at the time of publication.[9] Railey Dep. 31. She write on the ML-Implode website and other cites as an independent blogger. Railey Decl. ¶4 (the author describing herself as "an independent analyst and journalist"); Railey Dep. 65:2-4. Nor was she instructed to write about any particular person or lender or topic. Krowne Decl. 5, 7, 22, 32. So far as the movants are concerned, this case therefore fails to meet the third element of libel: legal responsibility.

D. Plaintiffs Must (But Can't) Prove Actual Malice Because The Publication at Issue is Privileged and Protected by the First Amendment

Typically, whether the plaintiff is a public or private figure dictates whether a defamation claim must be proven on a negligence or malice basis. Piscatelli, 424 Md. at 308 n.2 (citing Chesapeke Publ'g, 339 Md. at 297). Here, however, the article is privileged such that the actual malice standard applies regardless of the subjects' public or private status.[10] See Jacron Sales

[9] Streamline has nothing to do with this case and has been dismissed. (Docket Nos. 85, 86.)

[10] A website, like a newspaper, has standing to assert the First Amendment rights and privileges of its online posters. Cf. Enterline v. Pocono Medical Center, No. 08-cb-1934-ARC, 2008 WL 5192386, *4 (M.D. Pa. Dec. 11, 2008) (the First Amendment protects a newspaper from compelled disclosure of the identities of those who posted anonymously to its website); Bilney v. The Evening Star Newspaper Co., 406 A.2d 652, 656 (Md. Ct. Spec. App. 1979 (reporter's privilege applies regardless of whether the publisher is a party to the suit).

Co. v. Sindorf, 276 Md. 580, 600 (1976) (". . . where a common law conditional privilege is found to exist, the negligence standard of Gertz is logically subsumed in the higher standard for proving malice . . . and therefore becomes irrelevant to the trial of the case.) See also Marchesi v. Franchino, 283 Md. 131 (1978) ("actual malice" to defeat Maryland privilege is the same as "actual malice" to defeat First Amendment privilege).

1. First Amendment Protections Apply Because The Article Addressed A Serious Matter of Public Concern and Because Plaintiffs Are Public Figures

Long before the internet existed, the U.S. Supreme Court recognized that "[f]reedom of the press is a fundamental personal right which 'is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'" Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (quoting Lovell v. City of Griffin, 303 U.S. 444, 452 (1938). The First Amendment applies to speech conveyed via the internet, including the website and article at issue here. Reno v. ACLU, 521 U.S. 844, 870 (1997). See also Quixar, Inc. v. Signature Mgmt. Team, LLC, 566 F. Supp.2d 1205 (D. Nev. 2008) (applying freedom of speech protections to defamation claims based on an anonymous internet blog post); MortgageSpecialists, 160 N.H. at 233-34 (applying newsgathering privilege to the same website at issue in this case, noting "[t]he fact that *Implode* operates a website makes it no less a member of the press."). Where the public interest is strong, First Amendment freedoms may restrict the tort of defamation. Rosenblatt, 388 U.S. 75, 86 (1975) ("The thrust of New York Times is that when interest in public discussion are particularly strong . . . the Constitution limits the protections afforded by the law of defamation."); Chandok v. Klessig, 632 F.3d 803, 813 (2d Cir. 2011) ("the First Amendment . . . limits the reach of state defamation laws insofar as they are applied to speech on matters of public concern.").

a. *The Article Addresses a Matter of Serious Public Concern*

The First Amendment—more specifically, freedom of the press and freedom of speech—shields the publishers of this article from suit. See generally Curtis Publishing Co. v. Butts, 388 U.S. 130, 150 (1966) ("information and opinion on issues of public concern is ordinarily a legitimate, protected and indeed cherished activity"); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986) ("when the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a higher barrier . . . ."). In considering whether speech is directed to a matter of public concern, courts look to "the content, form, and context of a given statement, as revealed by the whole records." Connick v. Myers, 461 U.S. 138, 148 (1983).

The subprime mortgage market, which precipitated the collapse or bailouts of integral financial firms, losses literally measured in trillions of dollars, the creation of the Consumer Financial Protection Bureau, and the amendment of statutes governing financial institutions, mortgages, and derivative transactions (not to mention countless Americans who lost their homes) is plainly a matter of public concern (and was at all times relevant here). See generally Borrero Decl. Exs. G-J. SFDAPs in general, and GAP in particular, are matters of public concern because (1) they arguably abused an exception in FHA regulations to ensure that mortgages benefiting buyers who could not afford a three-percent (3%) downpayment would nonetheless be insured by the federal government, (2) SFDAP loans have higher default rates, (see, e.g., Borrero Decl. Ex. H), and (3) Congress was debating new laws concerning mortgage downpayments (see generally H.R. 600, H.R. 6694). Moreover, at the time the article was published, SFDAPs such as GAP had just five weeks earlier been explicitly outlawed by HERA § 2113, which was to take effect on October 1, 2008, less than two weeks after the article was

posted. See Railey Dep. 33:23-24 (describing her blog postings as "community service, so to speak"); 34:7-23 (describing the risks she perceived at the time regarding SFDAPs and describing them as "a threat to the FHA insurance fund"); 67:20-24 ("I believe the articles impacted the issue. . . . It had an impact on the debate [over SFDAPs]."). The article focused on GAP; to the extent it addressed Mr. Russell, it was as CEO of GDS, the architect of GAP, and his relevant history. Thus, the Court should find that the entire article addressed matters of public concern and is protected by the First Amendment.

b. *The Actual Malice Standard Applies Because Each Plaintiff is a Public Figure*

The designation of a plaintiff as a public figure "may rest on two alternative bases: individuals may achieve such pervasive fame or notoriety that they become public figures for all purposes and in all concepts; or individuals may voluntarily inject themselves or be drawn into a particular public controversy and thereby become public figures for a limited range of issues," Waicker v. Scranton Times P'ship., 113 Md. 621, 623-24 (Md. App. 1997) at 629-30 (citations omitted). Public figures are not necessarily public officials. Butts, 388 U.S. at 133 (former athletic director of the University of Georgia is a public figure) and The Associated Press v. Walker, 418 U.S. 323 (1974) (former general who had been in command of federal troops during the 1957 school desegregation crisis is a public figure); New York Times, 418 U.S. at 351 (actual malice standard also applies to a person "who injects himself or is drawn into a particular public controversy and thereby becomes a public figure becomes a public figure for a limited range of issues."). Each plaintiff here qualifies as a public figure under any definition.

In Rosenblatt v. Baer, the Supreme Court explained "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of

governmental affairs. . . ." 388 U.S. 75, 86 (1975). Indeed, in Rosenblatt, as here, the plaintiff was not elected, though she was a county employee. The Court explained that neither factor was dispositive, and that "the crucial issue is whether her appointed position was such as to give her "substantial responsibility for or control over the conduct of government affairs." Id. Accord Samborsky v. Hearst , 2 Media L. Rptr. 1639 (D. Md. 1977) (applying Rosenblatt and finding an unelected zoning hearing examiner is a public official) (attached hereto as Borrero Decl. Ex. A).

Here, as in Rosenblatt, Plaintiffs had control over a government program. In light of GAP's national scope, the public at large had interest in Plaintiffs' qualifications and performance. Moreover, PIN, as a government, is a public figure for obvious reasons, and GDS was at all relevant times a contractor for PIN's Fair Housing Administration. As such, they were public figures. For the reasons that follow, Christopher Russell is also a public figure.

First, Russell founded and headed a lobbying organization ("HAND"), that lobbied for expansion of DAPs. Russell Dep. 118, 131. This alone renders him a limited purpose public figure with respect to mortgage policies in general and DAPs in particular. See Waicker v. Scranton Times P'ship., 113 Md. 621, 629 (Md. App. 1997) 113 Md. 621, 624 (Md. App. 1997) (finding a private real estate investor to be a limited purpose public figure with respect to allegedly defamatory statements about practice of using unethical tactics to buy properties and below-market prices, play[ing] on fears . . . that property values will drop . . . ."). Additionally, he ran for a seat in the Maryland state legislature, an experience which gave him the idea for the Ameridream SFDAP. Russell Dep. 9. He conceived of, created and ran GDS and the entire GAP operation—a government program based specifically on obtaining loan insurance from the federal government. Moreover, he was the subject of numerous reports and articles, and gave an interview to a Forbes reporter prior to his interview with Ms. Railey. Railey Dep. 75:9-11;

Railey Decl. ¶32; Borrero Decl. Ex. J (Forbes article); Krowne Decl. ¶15. 16, Exs. F, G (blog excerpts). Given the widespread public attention to mortgage finance and DAPs, largely as a consequence of HERA, and Russell's participation in the controversy, the Court should find that Mr. Russell's participation in the controversy sufficient to warrant public figure status. And because each plaintiff is a public figure at for the purposes relevant here, Plaintiffs must prove actual malice attributable to Defendants in order to prevail. See generally Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public concern.").

c. *The Actual Malice Standard Applies Because the Publication is Shielded by Privileges That Preclude Liability Unless Abused*

Under Maryland law, there are three privileges that act as affirmative defenses to defamation: The fair reporting privilege, the fair comment privilege, and a related privilege to publish matters involving violations of law. Whether one of these privileges applies is a question of law. Piscatelli, 424 Md. at 307. "In some circumstances, an absolute or qualified privilege defeats a claim of defamation, if the defendant did not abuse that privilege."[11] Id. "Once a prima facie case for a privilege is adduced, the plaintiff must produce facts, admissible in evidence, demonstrating the defendant abused the privilege in order to generate a triable issue for the fact-finder." Id. (citing Hanrahan v. Kelly, 269 Md. 21, 29-30 (1973)). To demonstrate such abuse, the plaintiff must demonstrate that the defendant made her statements with malice, defined as 'a person's actual knowledge that his or her statement is false, coupled with his or her intent to deceive another by means of that statement.'" Id. at 307-08 (quoting Ellerin v. Fairfax Sav. F.S.B., 337 Md. 216, 240 (1995)). All relevant circumstances, including the defendant's

[11] An absolute privilege provides immunity regardless of the purpose or motive of the defendant, or the reasonableness of her conduct. Piscatelli, 424 Md. at 307 (citation omitted). A qualified privilege is "conditioned upon the absence of malice and if forfeited if it is abused." Id.

reasonable belief in the truth of her statements, may be considered in determining whether a privilege has been abused. Piscatelli, 424 Md. at 308 ("Were the plaintiff who is confronted with a conditional privilege incapable of proving malice necessary to overcome that hurdle, it would be of no consequence that he might have met the lesser standard of negligence."). The question of malice "need not be submitted to the fact-finder when the plaintiff fails to allege or prove facts that would support a finding of malice." Id. (citations omitted); Simon, 221 Md. at 205-6.

i. The Fair Reporting Privilege & The Privilege to Report Violations of Law

The Fair Reporting Privilege. The fair reporting privilege is a qualified privilege to report legal and official proceedings that are, in and of themselves defamatory, so long as the account is "fair and substantially accurate." Piscatelli at 309 (quoting Chesapeke Publ'g, 339 Md. at 296). It springs from the public's interest in access to information about official proceedings and public meetings. Id. (citing Restatement (Second) of Torts §611 cmt. A (1977). See also 50 Am. Jur. 2d Libel & Slander § 298 (2011) ("the publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and a complete or a fair abridgment of the occurrence is reported."). A defendant abuses this privilege where her account "fails the test of fairness and accuracy." Id. A defendant passes this test when her reports are "substantially correct, impartial, coherent, and bona fide." Id. (citation omitted). Summary judgment on this point is appropriate "where the plaintiff fails to point to evidence of unfairness and inaccuracy." Id. (citing Rosenberg, 328 Md. at 679 (affirming summary judgment where defendant established the fair reporting privilege and there was "no trace of malice"). Cf. Von Bulow v. Von Bulow, 811 F.2d 136, 143 (2d Cir. 1987) (noting that the privilege may be invoked where "the intent to use material—sought, gathered, or received—

to disseminate information to the public and that such intent existed at the inception of the newsgathering process . . . ."); Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993) (applying reporter's privilege to an investigative book author).

The Privilege to Report Violations of Law. In Maryland, everyone enjoys a privilege to "pass on information about matters involving violation of the law." Seymour v. A.S. Abell Co., 557 F. Supp. 951, 954 (D. Md. 1983). (citations omitted). The privilege applies where the allegedly defamatory statements are "1) about matters involving violation of the law; 2) substantially accurate; and 3) fair." Id. (citation omitted). Id. at 957-958. In Seymour, the allegedly defamatory statements concerned an internal police investigation about misappropriation of police property. Id. at 956. The court granted summary judgment in favor of the defendants, explaining that "the policy behind the privilege is that the public's strong interest in receiving information about matters involving violations of the law outweighs the interests of the subjects of the defamatory statements at least where the defamatory statements are not made with actual malice." Id. at 955 (citation omitted).

The article at issue is protected by both of these privileges. First, Plaintiffs complain of their association with the Congressional testimony attributed in the article to "Mr. House." Russell Dep. 108. But there is no dispute that "Mr. House" actually did say those things, such that the article is merely repeating allegations raised in a Congressional hearing. Cf. Seymour, 557 F. Supp. at 956 ("Significantly, each of the articles makes clear that the investigation and charges involved 'alleged' wrongdoing; nowhere is it mentioned that Seymour or any other policeman had been found guilty nor do any of the articles simply assert as a fact that [anyone] committed wrongful acts.") It was Mr. House's testimony that prompted the author to look into Russell and PIN. Dep. 48:10-21. The article starts there and moves forward to reveal the

exploitation of a loophole to the taxpayers' detriment. As explained in Section E.2, *infra*, that exploitation constituted a violation of HUD rules as well as freshly passed legislation. The Court should accordingly find that article is covered from start to finish by these privileges.

ii. The Fair Comment Privilege

The purportedly libelous statements (e.g., that PIN was "laundering" downpayments) were no more than fair commentary on matters of public interest. Hence, they are privileged. As the Maryland Court of Appeals put it:

> Maryland recognizes that, under the fair comment privilege, a newspaper, like any member of the community, may, without liability, honestly express a fair and reasonable opinion or comment on matters of legitimate public interest. The reason given is that such discussion is in the furtherance of an interest of social importance, and therefore it is held entitled to protection even at the expense of uncompensated harm to a plaintiff's reputation. Thus, the fair comment privilege is available for opinions or comments regarding matters of legitimate public interest.

Piscatelli, 424 Md. at 315 (citation omitted). The question to ask is "Would an ordinary person, reading [the article], be likely to understand it as an expression of the writer's opinion or as a declaration of an existing fact?" Id. Derogatory opinions based on statements of fact as well as criticism based on facts that are truly stated or otherwise known likewise fall under the protection of the fair comment privilege. Id. at 317.

In Piscatelli, the Court affirmed the trial court's dismissal of Plaintiffs' defamation claims, noting that the articles included the bases for the opinions at issue, "enabling readers to judge for themselves the quality of the opinions." Id. This is precisely what the author did here—she reported information she believed to be true and strived to verify, and her post **linked directly to her sources.** Thus, no abuse of this or any privilege occurred here, and the case should be dismissed.

E. The Article Is Substantially Accurate & Is Not Demonstrably False

1. The Terms "Scam" and "Laundering" Are Not Defamatory In This Context

Plaintiffs' case fails at its heart because it is based on statements that are not demonstrably false. GAP was fairly described as a scam because the term "scam," as used in the article, is neither defamatory nor inaccurate. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69 (1986). The purportedly libelous statements were at most, rhetorical hyperbole. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990); Perry v. Columbia Broadcasting System, Inc., 499 F.2d 797 (7th Cir. 1974); Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 728 (1st Cir. 1992); Dilworth v. Dudley, 75 F.3d 307, 309 (7th Cir. 1996) (Posner, C.J.) ("[Rhetorical hyperbole] is a well recognized category of, as it were, privileged defamation."). Cf. Mashburn v. Collin, 355 So.2d 879, 882 (La. 1977). As Chief Judge Poser explained in Dilworth:

> [Rhetorical hyperbole] consists of terms that are either too vague to be falsifiable or sure to be understood as merely a label for the labeler's underlying assertions; and in the latter case the issue dissolves into whether those assertions are defamatory. If you say simply that a person is a rat," you are not saying something definite enough to allow a jury to determine whether what you are saying is true or false. If you say he is a rat because . . . , **whether you are defaming him depends on what you say in the because clause.**

75 F.3d at 309-310 (emphasis added).

Here, the "because" is evident from the context of the article in general and its last two paragraphs in particular: SFDAPs are a scam because they facilitate mortgage lending by circumventing underwriting standards thereby making taxpayers insure loans that inflate housing prices. "Scam" and "laundering" are simply not defamatory in this context. As Chief Judge Posner continued in Dilworth:

> Among the terms or epithets that have been held . . . to be incapable of defaming because they are mere hyperbole rather than falsifiable assertions of discreditable fact are scab," "traitor," "amoral," "scam," "fake," "phony," "a snake-oil job," "he's

> dealing with half a deck," and "lazy, stupid, crap-shooting, chicken-stealing idiot." It is apparent from the list that the defamatory capability of these terms cannot be determined without consideration of context. . . . Each of the terms has both a literal and a figurative meaning and whether it is capable of being defamatory depends on which meaning is intended, a question that can be answered only by considering the context in which the term appears.

Id. at 310 (citations omitted). See also Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 14 (1970) ("blackmail"); McCabe v. Rattiner, 814 F.2d 839 (1st Cir. 1987) ("scam"); Vogel v. Felice, 2005 WL 675837 (Cal. Ct. App., March 24, 2005) ("A statement that [a person] is a 'Dumb Ass,' even first among 'Dumb Asses,' communicates no factual proposition susceptible of proof or refutation."); cf. Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2002 (2012) ("That a definition is broad enough to encompass one sense of a word does not establish, however, that the word is *ordinarily* understood in that sense."). Indeed, Russell draws an absurd distinction between "racket" (in the Forbes article) and "scam" (in Railey's article) claiming that one flatly implies a crime while the other does not. Russell Dep. 86-87, 90.

So too with respect to the term "laundering," since Ms. Railey's article clearly uses the term to refer to the circulation of funds to avoid FHA underwriting requirements. See Railey Dep. 144:17-145:4 ("It was meant metaphorically."); Russell Dep. 75:3-76:8 (explaining why the IRS began penalizing sellers providing downpayment funds and claiming it as a charitable deduction: ". . . because they were getting something for their money. The house was selling."). As this Court has already noted, "[t]he term 'laundering' may have a certain definition in the Criminal Code. It may not necessarily have that same definition when used in this article." Russell et. al. v. Krowne et. al., No. 08-2468, Hr'g Tr. 39:22-23 (D. Md. Nov. 11, 2008). See also Waicker, 113 Md. at 623-24 ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and vary greatly in color and content according to the circumstances and the time in which it is used.") (quoting Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.).

The same had been suggested by earlier articles, as it is a parsimonious way to describe the circular funding arrangement behind SFDAPs. See Krowne Decl. Ex. F (October 23, 2007 Calculated Risk blog entry explaining "the DAP programs simply keep contract sales prices inflated, channel fees into the pockets of 'nonprofits' who provide no other service than laundering money, and result in lower insurance premiums than FHA should be getting for loans with riskier profiles"), Ex. G (June 10, 2008 Bank Lawyer's Blog entry describing HUD's attempts to restrict DAPs, and describing downpayment assistance as a "scheme")

2. The Statements Plaintiffs' Complain About Are True or Substantially Accurate

Plaintiffs discontinued their program because it was explicitly forbidden by HERA. Russell Dep. 90. But even while they were providing "grants," the HUD Handbook considered gifts from seller funded sources to be unlawful inducements to purchase, such that "the amount of the gift must be subtracted from the sales price," reducing the maximum loan that the FHA would insure of the property, or at least public sources stated as much. See Borrero Decl. ¶12, Ex. K (Congressional Research Service Report 7-5700) at 3. Moreover, in May 2006, the IRS issued Revenue Ruling 2006-27, which distinguishes SFDAPs that qualify for tax-exemption from those that do not. In its press release announcing the ruling, the IRS described certain non-exempt programs as "scams" because they funnel downpayments from sellers to buyers through "self-serving, circular-financing arrangements . . . ." Id., Ex. K at 5.

The article did not suggest that GAP failed to result in a downpayment to a prospective home buyer who is short on cash, but rather accurately stated (with references and links to sources like HUD's own concentric study) that where downpayment funds originate in the seller's pocket, they systematically result in inflated home prices and losses to the taxpayer. See id.; Railey Decl. Exs. B, C; See generally Borrero Decl. ¶12, Ex. K. Moreover, the article rightly

suggested that GAP ran awry of applicable Federal Housing Administration ("FHA") rules, which precluded down payment assistance providers from requiring repayment. FHA-approved lenders were required to follow HUD Handbook 4155.1, REV-5, "Mortgage Credit Analysis for Mortgage Insurance: One to Four-Family Properties" and various HUD mortgagee letters when underwriting FHA loans. Russell was keenly aware of these rules. Russell Dep. 120-21. As the article suggested, the Plaintiffs' down payment program was a scheme to avoid FHA underwriting requirements concerning gift funds for down payments. At the time, FHA's Handbook provided, in pertinent part:

> **C. Gift Funds.** An outright gift of the cash investment is acceptable if the donor is the borrower's relative, the borrower's employer or labor union, a charitable organization, a governmental agency or public entity that has a program to provide homeownership assistance to low- and moderate-income families or first-time homebuyers, or a close friend with a clearly defined and documented interest in the borrower. ***The gift donor may not be a person or entity with an interest in the sale of the property***, such as the seller, real estate agent or broker, builder, or any entity associated with them. Gifts from these sources are considered inducements to purchase and must be subtracted from the sales price. ***No repayment of the gift may be expected or implied.*** (As a rule, we are not concerned with how the donor obtains the gift funds ***provided they are not derived in any manner from a party to the sales transaction***. Donors may borrow gift funds from any other acceptable source provided the mortgage borrowers are not obligors to any note to secure money borrowed to give the gift.)

HUD Handbook 4155.1 REV-5, "Mortgage Credit Analysis for Mortgage Insurance: One to Four-Family Properties" at 2-25 (October 2003) (Section 3: Borrower's Cash Investment in the Property) (emphases added), Borrero Decl. ¶11, Ex. J [also Docket No. 18-4]. Plaintiffs will no doubt argue that the fact that they used a preexisting pool of funds means that they never violated this rule. That interpretation of the rule flies in the face of its purpose—to provide some underwriting standards so that the federal government is not insuring especially risky loans. It also requires a shrewdly (or preposterously) narrow reading of "**No repayment of the gift may**

be expected." This is particularly so in light of the fact that under GAP, repayment by the seller (in the form of fees collected by GDS or PIN) was not only expected, but required. Indeed, the sample seller enrollment form that was posted on the GAP website provides for a "Seller Program Fee" of "1-10% of Purchase Price" in addition to a "Seller Processing Fee" and a "Seller Service Fee" (Total Paid to PIN Fair Housing Administration). Krowne Decl., Ex. O (GAP Seller Enrollment Form requiring Seller to "instruct the settlement/closing agent to withhold the service fee from Seller's proceeds, and to forward said service fee to G.A.P. after the successful completion of settlement/closing on the enrolled home."); Borrero Decl. Exs. N, O ("Dp Funder Agreement" and Instructions); Russell Dep. 92:5-17, Ex. O. Plaintiffs ignore this fact, resting the legitimacy of their grant practices on an April 2008 stipulation executed by HUD and the Penobscot Indian Tribe. Pls.' Mot. Sum. J. at 5 (Docket No. 114) (citing Russell Decl., Ex. A & ¶ 14). That stipulation states that "[b]ased on [PIN's] continued status as a Federally Recognized Indian Tribe with inherent sovereign powers . . . HUD finds that PIN's Grant America Program ("GAP") meets HUD's current policies pertaining to the source of gift funds for the borrower's required cash investment for obtaining FHA insured mortgage financing." Railey Decl. Ex. F (Docket No. 18-9). Plaintiffs treat this stipulation as if it creates a loophole for PIN that swallows the rest of FHA Handbook. Even if the stipulation affirmed PIN's status as a government entity, it did not absolve GAP from other HUD requirements. Rather, it states that HUD will "insure mortgages **that meet FHA requirements** in which home buyers obtain down payment assistance provided by PIN for the borrower's required cash investments." Penobscot Indian Nation v. HUD, No. 07-1282 (D.D.C. March 5, 2008) (April 3, 2008 Stipulation) (Ex. B to Russell Decl. and Ex. F to Railey Aff.) (emphasis added). Whether HUD failed to successfully target seller-funded programs before 2008 because of an imperfect

regulatory system or because it turned a blind eye is irrelevant. By exploiting PIN's status as a government entity and using the GAP as a vehicle for circumventing the FHA downpayment repayment prohibition, Plaintiffs successfully encouraged HUD to insure mortgages with downpayments not truly funded by an "outright gift." Read in totality, the article suggests as much and no more.[12]

F. Plaintiffs Must, But Cannot, Prove "Actual Malice" Because There Was None

1. At the Time of Publication, The Author Believed the Article Was Accurate

As stated above, the actual malice standard requires the publisher to have "**knowledge** that a defamatory statement was false or with **reckless disregard** of whether it was false or not." New York Times, 376 U.S. at 280 (emphases added). See also Samborsky v. Hearst Corp., 2 Med. L. Rptr. 1638, *2 (D.Md. 1977) (attached hereto as Borrero Decl. Ex. A) (citing Kapliloff v. Dunn, 27 Md. App. 514 (1975). "Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Seymour v. A.S. Abell Co., 557 F. Supp. 951 (D.Md. 1983) (quoting St. Amant, 330 U.S. at 731). And those doubts must have existed **at the time of publication**. Id.; New York Times, 376 U.S. at 286; Hearst, 2 Media L. Rptr. at 1640.

[12] Even assuming the article implied a violation of HUD rules, it would not necessarily imply a crime, as such violations are often civil or contractual. In that respect, this case like McCabe v. Rattiner, where the use of the term "scam" under the circumstances suggests an improper or unethical, but not necessarily illegal, activity or motive. 814 F.2d 839, 842 (1st Cir. 1987) (discussing the difference between facts and opinions in the context of defamation liability in light of the First Amendment, and noting that the word "scam" does not have a precise meaning and "[w]hile some connotations of the word may encompass criminal behavior, others do not. The lack of precision makes the assertion "X is a scam" incapable of being proven true or false." (citing Buckley v. Littel, 539 F.2d 882, 895 (2d Cir.1976) ("[t]he issue of what constitutes an 'openly fascist' journal is as much a matter of opinion or idea as is the question what constitutes 'fascism' or the 'radical right'")).

There is simply no reason to believe that Ms. Railey or any other defendant acted with malice.[13] She believed everything she wrote was true at the time she authored it. Railey Decl. ¶35 ("I stand behind all of the statements I have made in my article about the Plaintiffs, and I believe each and every one of them to be based in truth and supported by my research."). And she did not merely rehash the Forbes article that had called GAP a "scheme" and referred to it and Russell's previous SFDAP endeavor as "a racket." Borrero Decl. Ex. J. Indeed, she (a) provided extensive citations (via hyperlinks within the article itself) to immediately accessible sources, (Railey Dep. 51:10-11; (b) interviewed Mr. Brandon, who had testified to Congress, (Id. 49:14-15); and (c) interviewed Christopher Russell after informing him that she was writing an article about SFDAPs. Id. 70:10-14. Krowne Decl. ¶8, Ex. I (Railey email regarding interview).

2. Defendants Did Not Act With Malice, Partly Because Refusal to Retract an Article Is Not Sufficient Evidence of Malice

This very court has repeatedly dismissed similar defamation actions on *mens rea*/actual malice grounds prior to the CDA. In Samborsky v. Hearst, the plaintiff was an employee of Hartford County, Maryland who conducted zoning hearings. 2 Media L. Rptr. 1639 (D.Md. 1977) (attached hereto as Borrero Decl. Ex. A). She claimed that the *Baltimore News American* published an article falsely stating that she had been brought before the Maryland bar on conflict of interest charges. Ms. Samborsky demanded a correction. The *News American* refused to

[13] Plaintiffs claim that the article was posted to extort Plaintiffs into advertising with ML-Implode. It therefore bears emphasizing that Ms. Railey was never included in advertising dealings and has repeatedly denied knowledge of any ad outreach pertaining to GAP. Railey Decl. ¶ 37; Krowne Decl. ¶¶7 (IEHI never directed Ms. Railey to write about Plaintiffs nor did it provide any other substantive direction on the article), 21-22 (noting that because GAP was a SFDAP, sales agent Lorena Leggett had already been directed not to solicit GAP as an advertiser); Railey Dep. 103:22-23 (denying knowledge of advertising solicitation prior to this lawsuit being filed).

retract even though the reporter admitted that parts of the statement were false. Id. at 1640. After finding Ms. Samborsky to be a public official, the court dismissed her libel claim, emphasizing that malice is determined by looking to the time of publication, not to any latter occurrence such as refusal to publish a retraction. Id. (applying and citing New York Times, 376 U.S. at 286). Indeed, the court granted summary judgment for the defendant based on the failure to prove actual malice, without reaching question of whether statements at issue were substantially true. Id.

Here, as in both New York Times and Hearst, Plaintiffs sought but failed to obtain a complete retraction. (It bears noting, however, that Movants posted a response at Mr. Russell's request and that they have never refused to retract any part of the article proven to be false or anything other than opinion. Krowne Decl. ¶¶11, 32. And as in Hearst, the reporter "attempted to verify the information with various people including plaintiff . . . ." Samborsky at *3. She also checked public records to corroborate her information. Consequently neither doubted the validity of their stories; and neither acted with malice.[14] See also New York Times v. Connor, 365 F.2d 567, 577 (5th Cir. 1966) (NYT's failure to retract a statement about Connor, the Birmingham Police Commissioner, did not constitute actual malice).

Finally, dismissal on *mens rea*/actual malice grounds is compelled by Ryan v. Brooks, 634 F.2d 726 (4th Cir. 1980). In Ryan, as here, defendant did not give a verbatim account of the story that he received from his sources. In Ryan, the defendant used the word "extorted" to describe how a corporation obtained political contributions from its executives. The Fourth

[14] In fact, even a complete failure to verify the information would not be sufficient to demonstrate malice. See St. Amant v. Thompson, 390 U.S. 727, 730 (1968). In St. Amant, a reporter quoted (from the affidavit of a stranger) an allegedly defamatory statement about the plaintiff. The Supreme Court held that the actual malice standard was not met even though the reporter had no personal knowledge of the plaintiff's activities, did not even attempt to verify the information he obtained, did not consider whether the statements were defamatory. Id.

Circuit held that absent evidence of knowing falsehood or reckless disregard of the truth, the fact that the defendant changed the words of his source does not create a jury issue on the question of actual malice. 634 F.2d at 733. Accord Seymour v. A.S. Abell Co., 557 F. Supp. 951, 958 (D. Md. 1983) ("the use of the word 'theft' as a substitute for 'misappropriation' or 'conversion' is of no legal significance.").

Similarly here there is no evidence that defendants knew or doubted the veracity of their statements. The fact that they used the word "scam" to describe exploited loopholes does not create a jury issue. Indeed, even though the author seems to have changed her views somewhat, the movants cannot be held liable for their decision not to submit in to Plaintiffs' threats. Id. (the court cannot "find proof of malice in [defendants'] use of slightly stronger language than his source's."). See also Time, Inc. v. Pape, 401 U.S. 279 (omission of the word "alleged" in a story on police brutality did not raise a jury issue on actual malice); Orr, 586 F.2d at 1116; Hearst, 2 Med. L. Rep. 1678 (D. Md. 1977). Accord Seymour, 557 F. Supp. at 957-958 (D. Md. 1983) (applying Ryan and granting summary judgment in favor of defendants where there was no evidence that defendants entertained serious doubts as to the truth of their statements or published them with "purposeful avoidance of the truth").

Based on the foregoing (or just a plain reading of the article) it is clear that the author justifiably opined that GAP was a "scam" because it shuffled money around in order to take advantage of a loophole perceived by Plaintiffs. There is simply no evidence whatsoever that Defendants had reason to entertain serious doubts as to the accuracy of the article. Therefore, no reasonable jury could find that the defendants acted with malice.

CONCLUSION

For the reasons stated above, Plaintiffs have not been defamed, maliciously or otherwise, and the article is neither mendacious nor actionable. If directed toward more constructive endeavors, Plaintiffs' adroitness and honey-badgeresque persistence would be commendable. But with all due respect for the ability of unfairly maligned persons to vindicate their good name, this unfounded lawsuit wastes time and aims to muffle a free press. Movants therefore request that the Court issue the broadest ruling it deems just in the interest of discouraging such suits and affirming the primacy of free expression. See generally New York Times, 376 U.S. at 271-72 (Recognizing that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the breathing space they need to survive." (citations and internal quotation marks omitted)).

WHEREFORE, defendants IEHI and Krowne Concepts respectfully request that the Court grant this motion and enter judgment in their favor.

Respectfully submitted,

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