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 TO VACATE DEFAULT

On June 17, 2011, this Court entered default against defendants Implode-Explode Heavy Industries, Inc. ("IEHI") and Krowne Concepts, Inc. (collectively "Defendants"). (Docket No. 106.) IEHI respectfully request that the Court vacate the entry of default and permit Defendants to have their day in court. In the interest of justice, the Court should vacate default here because good cause exists, the default did not result from egregious behavior, and vacating default would cause little or no prejudice to Plaintiffs.[1]

[1] Undersigned counsel spoke with Michael Braunstein, counsel for Plaintiffs, on June 21, 2012 to ask if Plaintiffs would consent to the Court's vacating the entry of default. Naturally, Mr. Braunstein indicated that Plaintiffs would not consent to this motion.

FACTS

On September 19, 2008, Plaintiffs filed a complaint in this case alleging, *inter alia*, defamation against Defendants. More specifically, Plaintiffs allege that an article authored by defendant Krista Railey ("the Article") improperly 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). (Incidentally, the Complaint was unaccompanied by a copy of the purportedly defamatory article, though a copy was provided with Mr. Russell's Certification in Support of Plaintiffs' Motion for a Preliminary Injunction [Docket No. 11-8].) Defendants filed their Answer on November 18, 2008 (Docket No. 29), followed by an "Anti-SLAPP" Motion to Dismiss on November 11, 2009 (Docket No. 59). The Court denied Defendants' Motion to Dismiss on July 12, 2010 (Docket No. 93). At that point or shortly thereafter, Defendants had exhausted their financial resources litigating this case and could no longer afford to pay their attorneys. See Declaration of Aaron Krowne ("Krowne Decl.") ¶¶14-22, attached hereto. As such, on May 31, 2011 the Court granted Defendants' attorneys' motion to withdraw. (Docket No. 104.)

Defendant remained unrepresented until recently obtaining counsel on a *pro bono* basis. In the interim, on June 17, 2011, the Court entered default against defendants IEHI and Krowne Concepts, Inc. (Docket No. 107.) On September 28, 2011, Plaintiffs moved for default judgment against defendants. Aaron Krowne, principle and owner of defendants IEHI and Krowne Concepts, Inc., made efforts to file persuasive materials with this Court during this period. See

(Docket Nos. 105, 108, 110, 111.) But, as the Court explained in its April 9, 2012 opinion, Local Rule 101.1.a precludes it from considering such submissions from anyone other than an attorney duly representing a corporate entity. Mem. Op. (Docket No. 112) at 5 n.5 (April 9, 2012). Although the Court denied Plaintiffs' motion for default judgment, it analyzed the Complaint under the default judgment standard and essentially found it to adequately allege defamation, such that Defendants are potentially (and, at this point, virtually) liable under that standard. (Docket No. 112.) On May 15, 2012, Plaintiffs again moved for default judgment against IEHI and Krowne Concepts, and for summary judgment against Krista Railey. At that time, undersigned counsel agreed to represent IEHI and Krowne Concepts in this matter on a *pro bono* basis if Mr. Krowne also retains local counsel to facilitate a *pro hac vice* admission.

LEGAL STANDARD

Courts disfavor default judgments, preferring to decide cases on their merits. See Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 244 (3d Cir. 1951); see also Gross v. Stereo Component Systems, Inc., 700 F.2d 120, 122 (3d Cir. 1983); Feliciano v. Reliant Tooling Company, Ltd., 691 F.2d 653, 656 (3d Cir. 1982); Farnese v. Bagnasco, 687 F.2d 761, 764 (3d Cir. 1982). Feliciano v. Reliant Tooling Co., 691 F.2d 653, 656 (3d Cir. 1982) (setting aside default under Rule 60(b)); SEC v. McNulty, 137 F.3d 732, 738 (2nd Cir. 1998).

This Court should vacate the entry of default against Defendants pursuant to Federal Rule 55(c) and Rule 60(b). Rule 55(c) provides, "For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Fed. R. Civ. P. 55(c); see generally S.E.C. v. Apolant, 411 F.Supp.2d 271 (E.D.N.Y. 2006) (granting motion to vacate default pursuant to Rule 55(c)). Rule 60(b) authorizes a court to vacate the entry of default on the basis of, among other things,

"mistake, inadvertence, surprise or excusable neglect . . . ." Fed. R. Civ. P. 60(b)(1), (4). Whether to grant a motion to vacate a default is within the sound discretion of the district court. See Payne v. Brake, 439 F.3d 198, 204 (4th Cir. 2006); State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada, 374 F.3d 158 (2d Cir. 2004). In exercising that discretion, the Court considers: "whether the moving party has a meritorious defense, whether it acts with reasonable promptness, the personal responsibility of the defaulting party, the prejudice to the party, whether there is a history of dilatory action, and the availability of sanctions less drastic." Payne, 439 F.3d at 204-05 (citing Consol. Masonry & Fireproofing, Inc. v. Wagman Constr. Corp., 383 F.2d 249, 251 (4th Cir. 1967)); see also EMASCO Insur. Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987) (considering four factors: (1) whether lifting the default will prejudice the plaintiff, (2) whether the defendant has a prima facie meritorious defense, (3) whether the defaulting defendant's conduct is excusable or culpable, and (4) the effectiveness of alternative sanctions). All doubts regarding default are resolved in favor of the defaulting party. Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 809 (4th Cir. 1988). In this case, each factor favors vacating default and allowing the case to proceed on the merits.

ARGUMENT

I. GOOD CAUSE EXISTS TO VACATE DEFAULT

A. DEFAULT WAS NOT THE RESULT OF WILLFUL CONDUCT

The Court should vacate default because it is not the result of willful conduct. "In the context of a default, willfulness requires conduct that is more than merely negligent or careless; the defaulting party must have engaged in egregious or deliberate conduct or conduct that was egregious and was not satisfactorily explained." Guangxi Nanning Baiyang Food Co. Ltd. v. Long River International, Inc., No. 09-3059, slip op. at *7 (S.D.N.Y. March 30, 2009) (citing

N.Y. v. Green, 420 F.3d 99, 108 (2d Cir. 2005)); Hritz v. Woma Corp., 732 F.2d 1178, 1183 (3d Cir. 1984) (noting that such conduct amounts to more than mere negligence).

In this case, litigation expenses had a severely detrimental effect on Krowne Concepts and IEHI. Krowne Decl. ¶¶14-22; Krowne Decl. to Anti-SLAPP Mot. ¶¶7-8 (stating that funds expended on the defense of this case had already driven IEHI to the brink of bankruptcy). Beginning in 2009, Mr. Krowne made attempts to curtail the mounting legal fees. Id. ¶¶23-26. Employees even agreed to pay cuts to keep the ventures afloat a while longer, and counsel agreed to indefinitely defer a portion of their bills. Id. ¶¶9-12, 20-21. Nonetheless, in May 2011, Defendants' counsel understandably withdrew due to Defendants' inability to pay. See id. ¶6 ("IEHI's costs of defending itself in this matter total over $90,000.") , ¶20; Withdrawal Mots. (Docket Nos. 98, 101 & 102). Moreover, Mr. Krowne repeatedly sought representation on behalf of IEHI and Krowne Concepts during this period, and did obtain some *pro bono* assistance with respect to Defendants' "Anti-SLAPP" Motion to Dismiss. Id. ¶¶23-25. Beyond that bit of assistance, Mr. Krowne was simply unable to find *pro bono* counsel and local counsel until very recently. Krowne Decl. ¶41. (Indeed, undersigned counsel reviewed the docket sheet for the first time in May 2012.)

The default was not the result of egregious behavior, but rather excusable neglect due to the considerable expenses incurred in the early stages of fighting this case. Indeed, Plaintiffs' deeper pockets are the sole reason the case has reached this point. Therefore, justice favors allowing Defendants to defend against Plaintiffs' unfounded allegations of defamation. Cf. J&J Sports Prods., Inc. v. Avenue Tap, Inc., No. MJG-11-1598 (D. Md. April 19, 2012) (Vacating default judgment in part on the condition that Defendant deposit $3,000 with the Clerk of Court in payment for costs expended incident to the default judgment.)

B. DEFENDANTS TOOK ACTION AS SOON AS POSSIBLE

The Court should vacate default because Defendant took prompt action upon becoming aware of the impending default. Mr. Krowne became aware of the impending default in June 2011, after the Court issued a show cause order warning of default against IEHI and Krowne Concepts (Docket No. 107). As the Court noted in its April 9, 2012 opinion (Docket No. 112), Aaron Krowne made repeated attempts to file relevant materials with the Court thereafter. See Docket Nos. 105, 108, 110. As mentioned above, Mr. Krowne made attempts to curtail the legal costs of this suit beginning in 2009. Krowne Decl. ¶¶23-26. Additionally, as discussed in subsection D, *infra*, Defendants have cooperated in discovery and have taken no intentionally dilatory action. Therefore, it is clear that Defendant took seriously the Court's Notice and repeatedly made efforts to litigate this case.

C. DEFENDANTS HAVE A MERITORIOUS DEFENSE

In assessing the meritorious defense factor, the Court may examine the defendant's answer as well as the allegations in its motion to set aside the entry of default. A defaulting party is not required to prove beyond a shadow of a doubt that it will win at trial, "but merely to show that [it has] a defense to the action which at least has merit on its face." EMASCO, 834 F.2d at 74. Plaintiffs' Complaint falls short of alleging a claim with respect to Counts Three (Unfair Business Practice) and Four (Injunctive Relief). See Mem. Op. at 13-14 (April 9, 2012) (Docket No. 112). Defendants therefore focus here on Plaintiffs' allegations of defamation in the form of libel (Counts One and Two). As evidenced by their Answer (Docket No. 29), Defendants deny the core allegations of the Complaint. Defendants herein specify grounds for their defense, which, when established at trial, will enable them to prevail.

In Maryland, liability for defamation may lie where the plaintiff shows[2] 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. Offen v. Brenner, 402 Md. 191, 198 (2007); see also Independent Newspapers, Inc., v. Zebulon J. Brodie, 407 Md. 415 (2009) (setting forth the fundamental requirements of an internet defamation action). As this Court noted in its April 9, 2012 opinion, in Maryland, certain statements disparaging one's business reputation or alleging criminal activity may be considered defamation *per se*. Mem. Op. 8-9 (identifying four statements as defamatory *per se*). With the Court's permission, Defendants will focus on the second element, showing that none of the purportedly false statements are lies or mischaracterizations. See Railey Aff. in Opp'n to Pls.' TRO Mot. Ex. H (Docket No. 18-11) (August 7, 2008 Forbes article entitled "Going Tribal" describing the "Penobscot operation" and stating "Russell got rich off this racket once before."); 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 down payment assistance programs, and describing down payment assistance as "scheme"). Defendants will also show Plaintiffs' case falls short on elements one and three because Kritsa Railey was a blogger not acting as an

[2] It bears noting that 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). Accordingly, 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).

agent of either Defendant in publishing the article, such that Defendants disseminated the article innocently. Finally, Defendants will show, even assuming *arguendo* that the statements were false, 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. See Railey Aff. Ex. H (Docket No. 18-11) (August 7, 2008 Forbes article entitled "Going Tribal" describing the "Penobscot operation" and stating "Russell got rich off this racket once before.") (available at http://www.forbes.com/forbes/2008/0901/042.html); see also Krowne Decl. Exs. F & G (blog entries predating Ms. Railey's article). 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, presumably because their down payment grant practice was outlawed by the Housing and Economic Recovery Act of 2008. See Pub. L. 110-289 § 2113 (outlawing seller-financed down payment assistance programs effective October 1, 2008).

The Court should vacate default because Defendant has a meritorious defense. First, PIN, as a government entity (Compl. ¶¶9, 15-18), 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).

Second, truth is an absolute defense to defamation, and given their day in Court, Defendants will show that the article was accurate, and that Plaintiffs' GAP program was fairly

described as a "scam." The purportedly libelous statements were fair comments on a matter of public interest or, at most, a bit of rhetorical hyperbole. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990); cf. Mashburn v. Collin, 355 So. 2d 879, 882 (La. 1977). Ms. Railey's article was based on, among other things, transcripts of Congressional hearings, newspaper articles, information about websites connected with Plaintiffs, and reports about down payment assistance programs, mortgage insurance, and taxation of down payment assistance funds. Railey Aff. ¶32 (Docket No. 18-2 & Turner Decl. Ex. D); see also id. ¶¶10, 31 ("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."). Indeed, the article was accompanied by links to over twenty documents and sources. Railey Aff. ¶¶33-36 (enumerating factual bases for the allegedly defamatory statements). The article did not suggest that GAP failed to result in a down payment that may aid a prospective home buyer who is short on cash, but rather accurately stated that where down payment funds originate from the seller's own pocket, they systematically result in inflated home prices and losses to the taxpayer. 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. 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, Section 3C of FHA's Handbook provided, *in extenso*:

> **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.) This rule also applies to properties of which the seller is a government agency selling foreclosed properties, such as the Veterans Administration or Rural Housing Services. Only family members may provide equity credit as a gift on a property being sold to other family members. These restrictions on gifts and equity credit may be waived by the jurisdictional HOC provided that the seller is contributing to or operating an acceptable affordable housing program.
>
> FHA deems the payment of consumer debt by third parties to be an inducement to purchase. While FHA permits sellers and other parties to make contributions of up to six percent of the sales price of a property toward a buyer's actual closing costs and financing concessions, this policy applies exclusively to the provision of mortgage financing. Other expenses paid on behalf of the borrower must result in a dollar-for-dollar reduction to the sales price. The dollar-for-dollar reduction to the sales price also applies to gift funds not meeting the requirement that the gift be for downpayment assistance and is provided by an acceptable source. When someone other than a family member has paid off debts, the funds used to pay off the debt must be treated as an inducement to purchase and the sales price must be reduced by a dollar-for-dollar amount in calculating the maximum insurable mortgage.

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) (Ex. A to Declaration of Krista Railey in Opp'n to Pls.' TRO Mot.) (Docket No. 18-4). At trial, Defendants will show 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. H (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."). 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. for Def. & 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 Aff. 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 the Tribe's status as a government entity for purposes of the FHA rules, it did not absolve it or the GAP program from other FHA requirements, e.g., that no repayment of the down payment gift be expected or required. First, there is no indication that HUD was aware of the GAP requirement that Sellers pay a fee set at 1-10% of the purchase price plus two other fees when it agreed to that stipulation, and the Court did not reach such a question in its opinion. See generally Penobscot Indian Nation v. HUD, No. 07-1282 (D.D.C. March 5, 2008) (Mem. Op. Docket No. 41) (finding deficiencies under the APA and vacating a final rule precluding FHA from insuring mortgages with certain types of down payment assistance). Indeed, in that case PIN pointed out that "no records were kept identifying the funding source for any down payment assistance for several years of the period HUD purportedly analyzed [in the internal loan analysis leading up the promulgation of the rule at issue]." Id. at 15. Nor does the stipulation suggest

that HUD waived any restrictions on down payment assistance with respect to GAP. 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). The fact that HUD appears to have largely turned a blind eye to seller-funded programs prior to 2008 is beside the point. By exploiting PIN's status as a government entity and using the GAP as a vehicle for circumventing the FHA down payment repayment prohibition, Plaintiffs successfully encouraged HUD to insure mortgages whose down payments were not truly funded by an "outright gift." When read in totality, the article suggests as much and no more, despite its use of the term "scam."[3]

[3] Given the opportunity, Defendants will also take issue, respectfully, with the characterization of the article's mention of "laundering" as implying criminal activity. Compare Mem. Op. at 10 (Docket No. 112) (citing Macklem v. Pearl, No. 10-830, 2011 WL 2200037 at *4 (N.D. Ill. May 31, 2011)) with Hr'g Tr. 39:22-23 (Nov. 11, 2008) (This honorable Court noting that "[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."). As Ms. Railey's article (as well as other, earlier articles) suggested, the sort of down payment arrangement described, which requires repayment by the seller, does essentially require what may be parsimoniously described as "laundering." See Krowne Decl. Exs. F (Calculated Risk blog) and G (BankLawyer blog). Indeed, it is a bit difficult to describe the program's funding structure without using the term. Moreover, since violations of HUD rules, like violations of SEC rules, may be civil rather than criminal, even Macklem is not necessarily to the contrary. Rather, this situation is more like, e.g., McCabe v. Rattiner, where the use of the term "scam" under the circumstances suggests an improper or unethical, but not necessarily criminal, 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'")).

The other statements Defendants complain of were similarly accurate, as Ms. Railey explained in her affidavit as well as her September 26, 2008 "Response to Initial Complaint."[4] Krowne Decl., Ex. I ("Railey Response"). For instance, Plaintiffs claim that the article's characterization of the seller's contribution to GAP as a "concession" is false. Pls.' Mot. for Default J. at 5. But, as Ms. Railey explained, even PIN's gift confirmation letters suggest that it is a concession for tax purposes. See Railey Aff. ¶36, Ex. R; Railey Response at 5 (citing PIN's "gift letter" and a 2005 GAO Report). See also IRS Revenue Ruling 2006-27 (Where the down payment provider "receives a payment from the home seller that directly correlates to the amount of the down payment assistance [it] provides to the home buyer, "[t]he payments do not proceed from detached and disinterested generosity, but rather are in response to an anticipated economic benefit, namely facilitating the sale of a seller's home. Under [Commissioner v. Duberstein, 363 U.S. 278, 285 (1960)], such payments are not gifts for purposes of § 102. . . . [T]he down payment assistance received by those home buyers represents a rebate or purchase price reduction. As a rebate or purchase price reduction, the down payment assistance is not includible in a home buyer's gross income under § 61 and the amount of the down payment assistance is not included in the home buyer's cost basis under § 1012, as adjusted under § 1016."). Railey Aff. Ex. R (Docket No. 18-22) (sample GAP letter to buyer noting, in last ¶, that IRS Ruling 2006-27 requires that down payment assistance be treated, for tax purposes, "as a rebate against the purchase price of the property.").

[4] Plaintiffs point to Ms. Railey's latest, curiously vague declaration to support their claims. Compare, e.g., Railey Decl. ¶8 (Docket No. 109-6) ("Again in 2009, I advised IEHI and Krowne that the article was not factual [*sic*] accurate and should be removed from the website or substantially corrected.") with Railey Aff. ¶ 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."). Ms. Railey does not elaborate; her declaration fails to specify any inaccuracies, state when she learned of them, or explain why her statement is at odds with her October 2008 sworn affirmations of the article's veracity.

Finally, Plaintiffs fail to even allege harm. See Samuels v. Tschechtelin, 135 Md. App. 483, 549 (2000) (to maintain a defamation claim under a *per quod* theory, a plaintiff must sufficiently allege actual damages). First, since the article was accurate, Plaintiffs have only themselves to blame for any harm they now perceive. Second, if there was any harm from the article as described in the Complaint, it would have been triggered between September 9 and 10, 2008, since the original draft of the article was available online only during that period. Railey Aff. (Docket No. 18) ¶¶27-29. On September 10, 2008, Christopher Russell commented on the posted article, and it was immediately taken down. Id. ¶29; Turner Decl., Ex. F. Although the comment did not specify any errors, the article was revised and reposted (with a link to Mr. Russell's comment) on September 15, 2008. Railey Aff. (Docket No. 18-2) ¶¶30-31. Thus, the article as described in the Complaint was posted for a maximum of two days, and the revised article included supporting materials and a link to Mr. Russell's comments. And any consequences of the revised posting would have occurred by October 1, 2008, when GAP ceased operating (at least with respect to new applications and accounts). Moreover, any harm that Plaintiffs may have perceived during that three-week period or thereafter would have to be tied to Ms. Railey's article as opposed to other articles such as those cited herein and by Ms. Railey (e.g., the "Going Tribal" article in Forbes magazine) that were critical of seller funded programs in general, and Plaintiffs' program in particular. Regardless, the parties and the Court are left to imagine what harm could have befallen Plaintiffs, since the Complaint fails to specify any, and therefore falls short of alleging defamation as a matter of law.

For the forgoing reasons, Defendants have a meritorious defense and this case should proceed to a determination on the merits.

D. THERE IS NO PREJUDICE TO PLAINTIFFS AND DEFAULT WILL LEAD TO A HARSH RESULT FOR DEFENDANTS

This Court should vacate default because it will not result in prejudice to Plaintiff but will result in an unfair and harsh result to Defendants. Plaintiffs timely received most, if not all, of the relevant discovery either formally or informally from Defendants. Discovery in this matter has included the deposition of Mr. Krowne as well as Mr. Owings (former co-owner of IEHI). Krowne Decl. ¶¶42-43. Defendants also provided timely responses to interrogatories, despite Plaintiffs' failure to respond to interrogatories. Id. ¶¶43-44. (Ms. Railey provided both formal and informal responses as well as multiple declarations.) Therefore, Plaintiffs have suffered no prejudice to with respect to the discovery process. (Ironically, it is Defendants who suffer from a dearth of discovery responses in part for the same reason they ended up in default—lack of representation.)

Plaintiffs have suffered little or no improper or unfair prejudice from the article's presence online. As explained above, Ms. Railey immediately reconsidered the article on September 10, 2008 and included Mr. Russell's comment when the revised article was posted on September 15, 2008. Plaintiffs always had the opportunity to post a rebuttal on the website, and in June 2011 Ms. Railey, author of the article *sub judice*, posted a rebuttal approved by Mr. Russell. Krowne Decl. ¶¶27-29, 45, Exs. A & B (email exchanges concerning Mr. Russell's rebuttal). Defendants posted this response on the website within two days in the form of a link and a brief descriptive statement right above the article, such that nobody can read the article without seeing that a responsive comment (and rebuttal) is available. Krowne Decl. ¶¶29-30, 45.

As mentioned above, seller-financed programs like GAP were explicitly outlawed by statute effective October 1, 2008, and Plaintiffs took down their website on or before October 14, 2008 and posted a notice suggesting they had ceased operating the Grant Assistance Program.

See Krowne Decl. ¶¶50-51, Ex. E (GAP website message). Thus, any harm to GAP would have been incurred during the last three weeks of September 2008, though Plaintiffs have not specified what harm they have suffered. Nor have Plaintiffs specified any prejudice that they have suffered in the interim. 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 Plaintiffs' allegations are accurate, there is no ongoing injury, nor has any harm resulted from the delay. Conversely, allowing the entry of default to stand would create a harsh and inequitable result for Defendants, who have already been clobbered financially and whose credibility will suffer from an adverse judgment. Cf. J&J Sports Prods., Inc. v. Avenue Tap, Inc., No. 11-1598-MJG (D. Md. April 19, 2012) at 5 (noting that "there is a plausible defense position that the Court should not award the maximum possible damages" and conditionally vacating default judgment in part).

It is not Defendants' intent to drag things out. Rather, Defendants have always hoped for a prompt resolution of this matter, and will gladly proceed to trial, or otherwise cooperate in an effort to close this case.[5]

CONCLUSION

In sum, Plaintiffs have already succeeded in effectively bankrupting Defendants with this litigation. Krowne Decl. ¶¶23-26; Krowne Decl. to Anti-SLAPP Mot. ¶¶7-8. Defendants' lack of funds caused a delay in securing counsel and resulted in default. Allowing default to stand would create an extremely harsh result because the Complaint lacks merit. Moreover, Plaintiffs have suffered no harm from the delay (or from the alleged conduct).

[5] In the interest of efficiency or expediency, Defendants IEHI and Krowne Concepts would not object to resolving the remainder of this litigation before a Magistrate Judge, if it would please the Court.

For the foregoing reasons, the court should vacate default and allow Defendants their day in court. At a minimum, Defendants should be permitted to hold Plaintiffs to their burden of proof with respect to damages.

WHEREFORE, defendants IEHI and Krowne Concepts respectfully request that this Court **VACATE** the default entered against them and reset this matter for trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing Motion to Vacate Default and Proposed Order were sent electronically on July 2, 2012 to counsel for Plaintiffs, Michael L. Braunstein and Gary E. Mason, and to defendant Krista Railey.

By: /s/
Tamara Good, Esquire (Bar No. 29106)
Good Law, PC
17 W. Pennsylvania Ave., Suite 100
Towson, MD 21204
Telephone: (410) 830-3410
Facsimile: (866) 833-2364
Email: good@goodlawmd.com

/s/
Charles J. Borrero (NY Bar No. 744418)
1452 Deer Park Ave., Suite A
Babylon, NY 11703
(917) 584-1075
cjb53@georgetown.edu
(admitted *pro hac vice*)

Counsel for Defendants IEHI & Krowne Concepts, Inc.

Copies to: Gary E. Mason
Whitfield Bryson & Mason LLP
1625 Massachusetts Ave NW Ste 605
Washington, DC 20036
gmason@wbmllp.com

Michael L. Braunstein
Kantrowitz Goldhamer and Graifman PC
747 Chestnut Ridge Rd
Chestnut Ridge, NY 10977
mbraunstein@kgglaw.com

Krista Railey
22260 Village Way
Canyon Lake, CA 92587
kraileyus2@aol.com