

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

JACQUI DUNN and WHITFORD LAND  
TRANSFER CO.,

Plaintiff,

v.

FIRST AMERICAN MORTGAGE  
SOLUTIONS, LLC

Defendant.

Case 2:17-CV-02953 (GAM)

**ORAL ARGUMENT REQUESTED**

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MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS THE COMPLAINT

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First American Mortgage Solutions, LLC (“Mortgage Solutions”) respectfully submits this memorandum of law in support of its motion to dismiss the Complaint filed June 30, 2017 (the “Complaint”).

### **PRELIMINARY STATEMENT**

The sum and substance of Plaintiffs’ complaint for defamation and tortious interference against Mortgage Solutions is as follows: Plaintiff Jacqui Dunn (“Dunn”), who alleges to be a settlement agent in the lending industry, claims that she has been placed on one or more lender exclusionary, watch or ineligibility lists (*i.e.* one or more lenders have decided that they will not do business with her or have otherwise determined that further scrutiny of transactions involving Dunn is required). Unhappy with this situation, she has apparently scoured the internet for a scapegoat and identified Mortgage Solutions -- not a lender, and not one of the parties who has decided not to do business with her, but rather a vendor and service provider that for profit, and at the request of a client, reports as to whether an individual does or does not appear on (i) that client’s own list submitted to First American and maintained on its proprietary platform, or (ii) another available industry or lender exclusionary, watch or ineligibility list.

Plaintiffs rely on Mortgage Solution’s website, and the services it states it provides on its website and in a separate letter sent to Dunn, to allege that by providing the foregoing services, Mortgage Solutions has improperly defamed and interfered with Dunn’s business and that of her employer, Whitford Land Transfer Company (“Whitford”). However, that is simply not true. Providing a protected, for profit service during which Mortgage Solutions reports the truth (*i.e.* whether a person does or does not appear on an industry or lender list) is not improper or defamatory but instead entirely lawful. For these reasons, as further discussed below, Plaintiffs’ complaint should be dismissed.

## STATEMENT OF FACTS

For the purposes of this motion to dismiss for failure to state a claim, First American accepts as it must the scant, few well-pleaded, factual allegations set forth in Plaintiffs' Complaint.

In this matter, Plaintiff Dunn alleges that lender Freedom Mortgage informed her that her name appeared on a watch or exclusionary list, and that as a result, it chose not to do business with her. (Compl. at ¶ 9). Plaintiff does not allege who, if anyone at all, created or published the list relied upon by Freedom Mortgage, the content thereof, the information supplied to Freedom Mortgage or whether the information originated from Mortgage Solutions.

Plaintiff Dunn alleges that she and her employer, Whitford, were similarly "blacklisted from performing any real estate closings for Provident Funding," a separate lender, again because Dunn's name appeared on one or more exclusionary lists. (Compl. at ¶¶ 17-18). Here too, Plaintiff does not allege who, if anyone at all, created or published the list relied upon by Provident Funding, the content thereof, the information supplied to Provident Funding or whether the information originated from Mortgage Solutions.

Apart from the foregoing, Plaintiffs seek to skewer Mortgage Solutions because it is a "service provider" (Compl. at ¶ 20) in the lending industry. As it reports on its website, Mortgage Solutions compares the names of potential participants in lending transactions to industry and lender watch and exclusionary lists (*i.e.* including a lender's own list that is uploaded to Mortgage Solutions' proprietary system) and reports the results of same to its paying clients upon request. (Compl. at ¶ 11; Exh. 1 and Exh. 2). As explained in the website relied upon by Plaintiffs, Mortgage Solutions provides reports with "Hit" or "No Hit" notifications -- it

does not espouse on the character or credibility of individuals and Plaintiffs do not, and cannot, complain otherwise. (Compl. at Exh. 1).

Notably, while the reports generated by Mortgage Solutions are integral to, and necessarily must form the basis of the Complaint, such reports are nowhere appended or cited either because they were unavailable to Plaintiffs or because they in fact entirely jettison Plaintiffs' baseless claims. The reports requested and paid for by Mortgage Solutions' clients, and delivered by Mortgage Solutions appear in the following example form and content:<sup>1</sup>



• Participant(s) identified: Escrow Company; Property Management; Title Insurance Company

• Follow your INTERNAL POLICY regarding parties that appear on an industry INELIGIBLE list.

• Reverify all documents.

Input names, Input participant Role, matched participant name(s)

INPUT PARTICIPANT NAME	INPUT PARTICIPANT ROLE	MATCHED PARTICIPANT NAME	CLIENT LISTS
Escrow Company	ESCROWCOMPANY	Escrow Company	4 lists
Property Management	PROPERTYMANAGEMENT	Viewpoint Property Management Inc	3 lists

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<sup>1</sup> The content of reports generated by Mortgage Solutions are properly reviewable on this motion to dismiss. The Third Circuit has explained:

In deciding motions to dismiss pursuant to Rule 12(b)(6), courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim. A document forms the basis of a claim if the document is integral to or explicitly relied upon in the complaint. The purpose of this rule is to avoid the situation where a plaintiff with a legally deficient claim that is based on a particular document can avoid dismissal of that claim by failing to attach the relied upon document. Further, considering such a document is not unfair to a plaintiff because, by relying on the document, the plaintiff is on notice that the document will be considered.

*Lum v. Bank of Am.*, 361 F.3d 217, 221 n.3 (3d Cir. 2004), (internal citations and quotation marks omitted); *see also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997).

(Certification of Jeffrey Moyer, dated August 25, 2017 (“Moyer Cert.”)).

That is the entirety of the factual allegations pleaded by Plaintiffs. From the foregoing, Plaintiffs improperly conclude -- without any attempt to link Mortgage Solutions to Plaintiffs’ interactions with Freedom Mortgage or Provident Funding -- that the “compiling, keeping, hosting or otherwise making the exclusionary list available online or otherwise” amounts to an improper publication of defamatory material by Mortgage Solutions. (Compl. at ¶ 26). Remarkably, Plaintiffs allege that Mortgage Solutions improperly failed to investigate the reasons for Dunn’s inclusion on one or more lists as reported by Freedom Mortgage or Provident Funding without setting forth a single factual averment of why it would have such a responsibility given the nature of its business (*i.e.* merely reporting on records, but not determining the content of records). (Compl. at ¶ 16, Exh. 1 and Exh. 2). Based on the foregoing, Plaintiffs seek also to allege a claim for tortious interference with contractual relationships. (Compl. at Count II).

Plaintiffs’ claims necessarily fail and should be dismissed. To the extent Mortgage Solutions published any reports identifying Dunn as an individual listed on a lender exclusionary list, that fact, according to Plaintiffs’ own pleadings, is true. The services Mortgage Solutions provides are privileged. And Plaintiffs have failed to adequately plead that conduct performed by Mortgage Solutions impacted Plaintiffs’ business at all. Plaintiffs’ allegations of tortious interference are likewise deficient for failure to plead intent to harm, absence of privilege or causation and because any information passed on by Mortgage Solutions was true.

#### **ARGUMENT**

Federal Rule of Civil Procedure 12(b)(6) provides that a court may dismiss a complaint “for failure to state a claim upon which relief can be granted.” Rule 12(b)(6) is designed to

screen out cases where no remedy is available or owing to a plaintiff under the facts alleged. *Levy v. Keystone Food Prods.*, 2008 WL 4115856, at \*2 (E.D. Pa. Aug. 28, 2008).

A motion filed under Rule 12(b)(6) requires the reviewing court to determine “whether the plaintiff would be able to prevail even if she were able to prove all of her allegations.” *Aquila v. Nationwide Mut. Ins. Co.*, 2008 WL 4899359, at \*3 (E.D. Pa. Nov. 13, 2008) (citing *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006)). If a complaint does not allege enough factual matter (taken as true) to suggest all the required elements of a cause of action, dismissal is appropriate. *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead factual allegations sufficient “to raise a right to relief above the speculative level...on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The “mere possibility of misconduct” is not enough. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 678. (quotation and citation omitted).

Speculative and conclusory statements are not enough. “[A] plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions...a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

Tested under the foregoing standards, Plaintiffs’ Complaint should be dismissed.

#### **A. Plaintiffs Fail to Adequately Plead a Cause of Action for Defamation**

“Defamation, of which libel, slander, and invasion of privacy are methods, is the tort of detracting from a person’s reputation, or injuring a person’s character, fame, or reputation, by false and malicious statements.” *Joseph v. Scranton Times L.P.*, 959 A.2d 322, 334 (Pa. Super.

Ct. 2008). The elements of Pennsylvania defamation law are defined by statute. In order to successfully plead a claim for defamation, a plaintiff has the burden of showing:

- (1) The defamatory character of the communication.
- (2) Its publication by the defendant.
- (3) Its application to the plaintiff.
- (4) The understanding by the recipient of its defamatory meaning.
- (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
- (6) Special harm resulting to the plaintiff from its publication.
- (7) Abuse of a conditionally privileged occasion.

42 Pa.C.S. § 8343(a).

Once a plaintiff establishes these elements, the defendant has the burden of proving the following, when relevant to the claim:

- (1) The truth of the defamatory communication.
- (2) The privileged character of the occasion on which it was published.
- (3) The character of the subject matter of defamatory comment as of public concern.

*Id.* § 8343(b).

Although a defendant in a defamation action ordinarily would bear the burden of pleading and establishing one of the foregoing defenses, where such defense is evidenced, as is the case here, by the Plaintiffs' Complaint itself, the plaintiff should be nonsuited. *Chicarella v. Passant*, 494 A.2d 1109, 1113 (Pa. Super. Ct. 1985). In such a situation, there is no viable reason to allow a frivolous, facially non-meritorious claim to proceed.

**1. Plaintiffs' Claim For Defamation Is Barred By Plaintiffs' Admission Of The Truth Of The Allegedly Defamatory Information**

Plaintiffs have not alleged that Mortgage Solutions reported any information to Freedom Mortgage or Provident Lending, let alone that it reported Dunn's watch/exclusionary list status to them, or that it was the original source of this information (as opposed to either lender first learning this through other industry sources). Indeed, from the face of the Complaint, it appears that Plaintiffs did nothing more than spin the wheel of Russian Roulette -- on the internet -- with Mortgage Solutions winning the status of defendant here based solely on the services it provides.

However, even if Plaintiffs were able to plead and allege that (i) Mortgage Solutions acted as originator of the information learned by Freedom Mortgage or Provident Lending; and (ii) Mortgage Solutions provided either or both with one of its reports, any such amendments to the pleadings would be futile. The reason is simple -- according to Dunn's own Complaint, it is *true* that Dunn appears on one or more lender exclusionary lists. Thus a report from Mortgage Solutions stating same cannot amount to defamation as a matter of law.

There is no viable allegation that Mortgage Solutions provided negligent reports or wrongly reported that this Dunn, as opposed to some other Dunn, was listed on a watch or lender list.<sup>2</sup> According to Dunn, both Freedom Mortgage and Provident Lending confirmed to her that

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<sup>2</sup> Plaintiffs intimate that Mortgage Solutions has an affirmative duty to (i) learn the basis for a lender's inclusion of an individual on their list; and (ii) investigate the propriety of a lender's determination before reporting whether or not an individual has or has not been listed. There is no basis for Plaintiffs' legal conclusion in fact or in law. And it is preposterous to presume that a reporting vendor would be obligated or inclined to become versed in and/or second guess a client's practices and policies. As stated on the website relied upon by Plaintiffs, Mortgage Solutions provides its services in the best manner possible by employing "best-of-breed name matching software" to reduce the risk of false positives in its reporting. (Compl. at Exh. 1). Nothing more is required.

she indeed appeared on one or more lender exclusionary lists. Dunn may feel as though she does not belong on any such list, and Dunn may want to confront a lender, but that does not in any manner change the *truth* of a report that she in fact appears on same. For this reason alone, Plaintiffs' cause of action for defamation must be dismissed *with prejudice*.

In Pennsylvania truth is an absolute defense to a defamation claim and a defendant need only show substantial, rather than complete, truth. *See Bobb v. Kraybill*, 511 A.2d 1379, 1380 (Pa. Super. Ct. 1986) (citation omitted). As stated, while courts generally do not consider affirmative defenses at this stage of the case, they may be addressed -- and in fact should be addressed -- when they appear on the face of the complaint. *Chicarella*, 494 A.2d at 1113; *Morrison v. Chatham Univ.*, 2016 WL 4701460, at \*4 (W.D. Pa. Sept. 8, 2016).

In *Morrison*, for example, an African-American doctoral student sued her graduate university for, *inter alia*, discrimination and defamation in connection with allegedly improper allegations of plagiarism, and the fact that her diploma states she received an F due to plagiarism. *Morrison*, 2016 WL 4701460, at \*4. However, the face of the complaint made clear that she in fact received a failing grade and was dismissed. *Id.* Thus, the defamation claim had to be dismissed -- with prejudice -- because the face of the complaint demonstrated the affirmative defense of truth. *Id.* (collecting cases). *See also, Ames v. Amer. Radio Relay League Inc.*, 2016 WL 7404473, at \*1 (E.D. Pa. Dec. 22, 2016) (dismissing complaint at motion to dismiss stage because the alleged defamatory statements were true); *Whiting v. Safe Auto Ins. Co.*, 2016 WL 3940827, at \*4 (E.D. Pa. July 20, 2016) (dismissing a defamation claim pursuant to Rule 12(b)(6) because the factual allegations in the complaint, taken as true, "in no way undermine[d] the truth of" the defendant's statement).

Plaintiffs cannot viably dispute the truth of any report that could have been made by

Mortgage Solutions stating that Dunn appears on one or more lender exclusionary lists. For this reason alone, Plaintiffs' cause of action for defamation must be dismissed.

**2. Plaintiffs' Claim For Defamation Is Barred Because Any Report Made By Mortgage Solutions To Paying Clients Is Privileged**

Even if (i) Mortgage Solutions reported to Freedom Mortgage and Provident Funding that Dunn appeared on a watch or exclusionary list; and (ii) Dunn could overcome the truth of that fact (*she cannot*), Plaintiffs' cause of action still would be subject to dismissal because any reports between Mortgage Solutions and paying clients are necessarily privileged.

It is well settled that a publisher of allegedly defamatory matter is not liable if the publication was made subject to a privilege, and the privilege was not abused. Restatement (2nd) of Torts § 593. "A privileged communication is one made upon a proper occasion, from a proper motive, in a proper manner and based upon reasonable and probable cause." *Baird v. Dun & Bradstreet*, 285 A.2d 166, 171 (Pa. Super. Court.1971) (collecting cases). An occasion giving rise to a conditional privilege occurs when (1) some interest of the publisher of the defamatory matter is involved; (2) some interest of the recipient of the matter, or a third party, is involved; or (3) a recognized interest of the public is involved. *Beckman v. Dunn*, 419 A.2d 583, 588 (Pa. Super. Ct. 1980). It is always for the court to determine whether the alleged defamatory publication is privileged; if found so to be, and if there be no intrinsic or extrinsic evidence of malice, it is the duty of the court to direct a nonsuit. *Baird*, 285 A.2d at 171.

Clearly, a proper occasion resulting in a conditional privilege is present in this case. An interest of Mortgage Solutions is involved in any reports it issues to paying clients in the industry, and an interest of any paying client is involved given their desire to limit undue risk in the placement of loans. Surely, lenders who use Mortgage Solutions' services have a legitimate

business interest in the information gathered and reported by Mortgage Solutions.

In *Baird*, the Pennsylvania Supreme Court reviewed the decision of a trial court that, among other things, had denied the defendant's motion for j.n.o.v. in response to a jury verdict in favor of the plaintiff. Three of the plaintiffs had sued Dun & Bradstreet for defamation as a result of statements reporting to subscribers that the plaintiffs had been accused of embezzlement. On this issue of embezzlement defamation, the Pennsylvania Supreme Court held that Dun & Bradstreet “is a credit reporting agency in the business of reporting financial information to subscribers” and that “the reports are prima facie privileged and the plaintiff has the burden of proving abuse of that privilege.” *Baird*, 285 A.2d at 170. “The basis for the privilege is that the subscriber who requests information from a credit agency has a legitimate business interest in the information gathered by the agency.” *Chicarella*, 494 A.2d at 1113. Because the plaintiffs in *Baird* failed to show abuse of the privilege, the court affirmed the trial court's nonsuit of these claims. *Baird*, 285 A.2d at 170.

Since *Baird*, Pennsylvania courts will dismiss defamation claims at the motion to dismiss stage where it appears on the face of the complaint that the alleged defamatory communication was made by a paid-for service provider in response to a request made for information bearing on the recipient's conduct of its business.

In *Chicarella*, an investigator was sued for issuing a report regarding a plaintiff's character that allegedly published defamatory matter to an insurance company -- the insurance company had hired the investigator to prepare the report. The Court of Common Pleas dismissed the investigator on preliminary objections, and dismissal was upheld on appeal. Relying on *Baird*, the Pennsylvania Superior Court found that publications made by an investigator to an insurance company were privileged because the insurance company had a legitimate business

interest in obtaining the information it paid the investigator to receive.

In the instant case, the insurance company's interest in paying only legitimate claims was raised by appellant's personal injury action. It is also in society's best interest for valid insurance claims to be ascertained and fabricated claims exposed.

*Chicarella*, 494 A.2d at 1113. Moreover, because the complaint did not allege facts which, if proven, could demonstrate malice or negligence on the part of the investigator, dismissal was appropriate. *Id.* See also, *Campbell v. Willmark Serv. Sys., Inc.*, 123 F.2d 204 (3d Cir. 1941) (publication of information by inspector hired to inspect stores privileged); *Elia v. Erie Ins. Exchange*, 634 A.2d 657 (Pa. Super. Ct. 1993) (physician medical examination done for insurance company privileged); *Parks Miller v. Cantorna*, 2016 WL 2752633, at \*8 (M.D. Pa. May 11, 2016) (speaking the truth about investigation findings is not only truthful but privileged, thus barring defamation claim).

Under the foregoing authority, Plaintiffs' cause of action for defamation must be dismissed due to conditional privilege.

**3. Plaintiffs Fail To Plead The Content, Publisher And Recipient Of Any Allegedly Defamatory Information With Sufficient Particularity To State A Claim Of Defamation.**

Plaintiffs cannot credibly dispute that dismissal is appropriate given (i) the truth of any allegedly defamatory statement; and (ii) conditional privilege. However, separate bases for dismissal exist -- namely that Plaintiffs' cause of action for defamation is deficient given the failure to adequately plead the elements of the claim.

A defamation claim must allege with particularity, among other things, the content of the defamatory statements, the identity of the persons making such statements, and the identity of the persons to whom the statements were made. *Itri v. Lewis*, 422 A.2d 591, 592 (Pa. Super. Ct.

1980). “An allegation which merely avers that the alleged defamatory statement was published to a third person is defective.” *Suppan v. Kratzer*, 660 A.2d 226, 229 (Pa. Commw. Ct. 1995). Where a plaintiff fails to plead the content, publisher, and recipient elements of defamation with sufficient specificity, the court should grant a motion to dismiss. *Savage v. Connecticut Gen. Life Ins., Co.*, 1996 WL 434288, at \*3 (E.D. Pa. July 31, 1996) (granting motion to dismiss because the plaintiff “failed to identify the speaker or the recipient of the allegedly defamatory statement, or the date or place thereof”); *Menkowitz v. Pottstown*, 1999 WL 410362, at \*4 (E.D. Pa. June 21, 1999) (granting motion to dismiss because the plaintiff’s allegations were ambiguous and “lack[ed] detail as to the substance of the allegedly defamatory statements, to whom they were made, and, with the exception of the allegations concerning [one of the defendants], by whom...”); *Foster v. UPMC S. Side Hosp.*, 2 A.3d 655, 666 (Pa. Super. Ct. 2010) (finding complaint “fatally vague” where it failed to identify “who made the statements and to whom the statements were made”).

In this matter, Plaintiffs allege that Dunn appears on an exclusionary list. Plaintiffs fail to set forth a single similar allegation concerning Whitford, thus any claim for defamation by Whitford should be dismissed.

As concerns Dunn, the content (what is actually stated on any such list) is not alleged and without more, cannot plausibly be presumed by the Court to be defamatory in nature. Regardless, an alleged appearance on any such list does not amount to the publication of defamatory information to a third party. Neither does an alleged “keeping” or “hosting” of such lists by Mortgage Solutions on behalf of its clients amount to publication, improper or otherwise. Finally, although Plaintiffs contend that Freedom Mortgage and Provident Lending learned of Dunn’s inclusion on one or more such lists, Plaintiffs do not contend that their information

originated from Mortgage Solutions, and if so, the time or the substance of what was said. The Complaint is entirely devoid of information concerning what statements, if any, were made to Freedom Mortgage or Provident Lending and by whom.

As previously stated, from the face of the Complaint, it appears that Plaintiffs did nothing more than spin the internet's wheel of Russian Roulette to identify Mortgage Solutions as a potential defendant. This is insufficient to support a claim for defamation against Mortgage Solutions.

To be sure, even if Plaintiffs had some factual basis to amend their pleadings to allege that it was a Mortgage Solutions report that flagged Dunn's watch or exclusionary list status to Freedom Mortgage or Provident Lending, that would still not be enough.

Whether the statements at issue are capable of defamatory meaning is a question of law to be decided by the Court. *Blackwell v. Eskin*, 916 A.2d 1123, 1125 (Pa. Super. Ct. 2007). In making this legal determination, the Court must view the statement in the factual context in which it was made. *See Baker v. Lafayette Coll.*, 532 A.2d 399, 402 (Pa. 1987). There is nothing defamatory about providing a report to a requesting lender that a potential loan participant appears on one or more such lists (whether it be the lender's own list uploaded to Mortgage Solutions' platform or a different available list). *Whiting*, 2016 WL 3940827, at \*4 (a truthful statement is not defamatory in character). For this reason too, Plaintiffs' claim for defamation should be dismissed.

#### **4. Plaintiffs Fail to Plead Special Harm Or Slander Per Se**

Finally, in pleading a claim of defamation, a plaintiff must plead either special harm or defamation per se. *See, e.g., Smith v. IMG Worldwide, Inc.*, 437 F. Supp. 2d 297, 307 (E.D. Pa.

2006). To plead special harm, “a plaintiff must plead a specific monetary or out-of-pocket loss as a result of the defamation.” *Cornell Co., Inc. v. Borough of New Morgan*, 512 F. Supp. 2d 238, 271 (E.D. Pa. 2007); *see also* FED. R. Civ. P. 9(g); *Bocobo v. Radiology Consultants of S. Jersey, P.A.*, 2005 WL 3158053, at \*8 (D.N.J. Nov. 21, 2005) (dismissing trade libel claim because the “Complaint lacks the specificity required when pleading special damages”).

None of Plaintiffs’ allegations pleads any amount of monetary losses as a result of an alleged defamatory statement made by Mortgage Solutions -- the sole allegation is that the threshold for diversity is met. (Compl. at ¶ 5). Therefore, Plaintiffs fail to plead the special harm element of a defamation claim.

While Pennsylvania recognizes an exception to the requirement of showing special harm where the words spoken constitute slander per se, Plaintiffs fail to adequately plead such a claim. *Smith*, 437 F. Supp. 2d at 307. Defamation per se requires the pleading of “words imputing (1) criminal offense, (2) loathsome disease, (3) business misconduct, or (4) serious sexual misconduct.” *Syngy, Inc. v. Scott-Levin, Inc.* 51 F. Supp. 2d 570, 580 (E.D. Pa. 1999) (internal quotations and citations omitted). In this matter, Plaintiffs allege that exclusionary and related lists identify “individuals and entities with whom [certain lenders] choose not to do business.” (Compl. at ¶ 18). Plaintiffs conclude for the Court, without any factual basis whatsoever, that the “obvious implication of someone’s inclusion on such a list is that such person engaged in some sort of dishonest, unethical or other unprofessional behavior.” (Compl. at ¶ 18).

Plaintiffs’ allegation is entirely implausible in the industry. There are any number of reasons understood and utilized by lenders to determine whether or not to do business with certain individuals, running the gamut from past fraud to the simple reason that the lender does not believe the individual or entity’s loans are of sufficient investment quality. *See, e.g. Family*

*Home and Fin. Ctr., Inc. v. Federal Home Loan Mortg. Co.*, 525 F.3d 822 (9th Cir. 2008) (brokerage put on lender exclusionary list because of investment quality of loans). Indeed, it is for this reason that Mortgage Solutions' website, relied upon by Plaintiffs, on its face explains that the services offered by Mortgage Solutions reach "beyond fraud detection" in the services provided, and separately include extend to comparing participant names with watch and exclusionary lists. (Compl. at Exh. 1). For this reason too Plaintiffs' claim for defamation should be dismissed.

**5. Courts Across the United States Regularly Dismiss Claims, Like Those Pleaded Here, For Defamation Arising From Inclusion On A Watch Or Exclusionary List**

Courts across the United States have uniformly and repeatedly dismissed cases for defamation against lenders who have placed individuals on watch lists and published such information to third parties. Simply stated, the decision by a company to watch list an individual or entity is not actionable, and neither is publication of that information within the industry. Mortgage Solutions, a mere vendor that investigates and reports on such occurrences, merits the same treatment -- dismissal of Plaintiffs' claims. *See Elias v. Federal Home Loan Mort. Corp.*, 581 Fed. Appx. 461 (6th Cir. 2014) (claims for tortious interference and defamation against Freddie Mac for publication of watch list identifying plaintiff dismissed because of truth and privilege); *Family Home and Fin. Ctr., Inc.*, 525 F.3d at 822 (privilege bars defamation claim against lender for inclusion of plaintiff on watch list); *El-Sayed v. Bank of Am., N.A.*, 2014 WL 3870785 (E.D. Mich. Aug. 7, 2014) (dismissal of claims against lender in connection with exclusionary list).

**B. Plaintiffs Fail to Adequately Plead a Cause of Action for Tortious Interference**

Plaintiffs obliquely conclude that, given Mortgage Solutions' participation as a vendor in the industry, and its refusal to identify the lists on which Dunn appears by reason of client confidentiality agreements (Compl. at ¶ 4), Mortgage Solutions intends to harm Plaintiffs and has thus tortiously interfered with its business. Plaintiffs' tortious interference claim is as deficient as, if not more deficient than, Plaintiffs' cause of action for defamation.

Pennsylvania law has long recognized the tort of intentional interference with contractual relations. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 470 (Pa. 1979); *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 393 A.2d 1175, 1181-82 (Pa. 1978). The Restatement of Torts (Second), which has been embraced by the Pennsylvania Supreme Court, *see Adler, Barish, Daniels, Levin and Creskoff*, 393 A.2d at 1183, describes this tort as follows:

One who *intentionally* and *improperly* interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Restatement of Torts (Second) § 766 (1977) (emphasis added).

Under Pennsylvania Law a plaintiff must plead the following elements to state a claim for tortious interference with prospective contractual relationships: (1) a prospective contractual relation; (2) a purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damage resulting from the defendant's conduct. *Nathanson v. Medical College of Pa.*, 926 F.2d 1368, 1392 (3d Cir. 1991) (quoting *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 471 (Pa. 1979)); *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 925 (3d Cir. 1990) (citing *Thompson Coal Co.*).

Even given the most indulgent reading of the Plaintiffs' Complaint, it is clear that Plaintiffs have not, and quite frankly cannot, plead the second, third, or fourth elements of their claim. Moreover, as with claims for defamation, truth is a complete defense to Plaintiffs' faulty claim.

### **1. Plaintiffs Have Not Adequately Pleaded Intent To Cause Harm**

Plaintiffs have not viably alleged, and cannot allege, that Mortgage Solutions took a single act with malice toward Dunn or Whitford -- Plaintiffs cannot even allege that Mortgage Solutions knew who either were, or did anything other than perform an automated search across inputted data points in accordance with the services they provide to paying clients per their website.

To establish the second element of a tortious interference claim -- that of intent -- a plaintiff must show that the defendant acted for the malevolent purpose of interfering with the plaintiff's existing or prospective business relationships." *Valley Forge Convention & Visitors Bureau v. Visitor's Servs., Inc.*, 28 F. Supp. 2d 947, 951 (E.D. Pa. 1998). "It must be emphasized that [this] tort...is an intentional one" meaning that, liability for tortious interference arises only if the defendant was acting "for the purpose of causing harm to the plaintiff..." *Glenn v. Point Park College*, 272 A.2d 895, 899 (Pa. 1971). In this regard, Pennsylvania courts have held that "in order to succeed on their [tortious interference] claim, the plaintiffs must demonstrate that defendant acted solely, or at least primarily, to cause specific harm to plaintiffs' relationship..." *Gelman v. Citizens Bank of Pa.*, 2010 WL 7786113 (Pa. Com. Pl. Jan. 1, 2010) (citing Comment "j" to § 766 Restatement of Torts (Second)).

In a conclusory, unsubstantiated matter, Plaintiffs allege that Mortgage Solutions and

others, through publication of exclusionary list information, specifically intend to harm business between specific settlement agents and agencies and lenders. (Compl. at ¶ 7). Such a general and entirely incredible allegation given the business in which Mortgage Solutions engages is entirely insufficient to meet the pleading requirements as to the element of intent. Plaintiffs have not raised a single plausible allegation that Mortgage Solutions, in providing the vast array of services enumerated on its website, is motivated by anything other than its legitimate business interests in providing services in the lending industry.

## **2. Plaintiffs Have Not Adequately Pleaded Absence of Privilege or Justification**

The third element of tortious interference -- that the defendant acted without privilege or justification -- “requires proof that the defendant’s actions were improper under the circumstances presented.” *Phillips v. Selig*, 959 A.2d 420, 429 (Pa. Super. Ct. 2008).<sup>3</sup> In evaluating whether a defendant acted improperly, “the central inquiry is whether the defendant’s conduct is sanctioned by the rules of the game which society has adopted.” *Phillips*, 959 A.2d at 435 (internal quotation marks omitted).

“The nature of a defendant’s conduct is a chief factor in determining whether the conduct is improper or not.” Restatement (Second) of TORTS § 767 cmt. c. Courts have been clear that “[w]rongful conduct... requires something more than mere breach of contract,” *Windsor Secs.*,

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<sup>3</sup> In determining whether a defendant acted improperly, Pennsylvania courts look to the factors enumerated in Restatement § 767:

- (a) the nature of the actor’s conduct,
- (b) the actor’s motive,
- (c) the interests of the other with which the actor’s conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (f) the proximity or remoteness of the actor’s conduct to the interference, and
- (g) the relations between the parties.

*Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 393 A.2d 1175, 1184 (1978).

*Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 663 (3d Cir. 1993) (citing Restatement (Second) of Torts § 767 cmt. d), and will not deem wrongful a defendant's conduct that protects its own business interests, even where such interests conflict with plaintiff's interests.<sup>4</sup>

While Plaintiffs unilaterally conclude that the services Mortgage Solutions provides are not justified, because it (i) fails to perform some lengthy investigation into the reason why individuals are included on watch or exclusionary lists; and (ii) keeps its clients lists confidential, Plaintiffs' lackluster and self-serving conclusions miss the mark. As discussed at length (*see* Section A.2, *supra*), any information provided by Mortgage Solutions in connection with investigation requested and paid for by any client is privileged.

### **3. Plaintiffs Have Failed To Allege Actual Damage Resulting From The Defendant's Conduct**

As explained repeatedly, Plaintiffs nowhere in the entirety of their Complaint have alleged that Mortgage Solutions published any information to Freedom Mortgage or Provident Lending that caused either to elect not to do business with Dunn or Whitford. For this reason too, Plaintiffs' cause of action for tortious interference necessarily fails.

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<sup>4</sup> *See, e.g., Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 673 (3d Cir. 1991) (rejecting tortious interference of prospective contractual relations claim against parent company whose "interest in the financial stability of its subsidiary and the need to avoid a situation where the two would be working at cross-purposes justified the disruption of negotiations with [plaintiff]"); *McCartney v. Dunn & Conner, Inc.*, 563 A.2d 525, 530 (Pa. Super. Ct. 1989) ("Enforcing or complying with one's own valid contract does not constitute unjustifiable interference with another's contract. An action to protect one's contractual right is also ordinarily justification for interference with another's contract.").

**4. Plaintiffs' Cause of Action For Tortious Interference Because Plaintiffs Cannot Allege That Mortgage Solutions Supplied Any Untruthful Information**

Finally, “[t]he communication of truthful information does not constitute improper interference with another’s contractual relationships.” *Rossi v. Schlarbaum*, 600 F. Supp. 2d 650, 660 (E.D. Pa. 2009); *Atiyeh Publ’g, L.L.C. v. Times Mirror Magazines, Inc.*, 2000 WL 1886574, at \*3 (E.D. Pa. Dec. 7, 2000) (citing *Yaindl v. Ingersoll–Rand Co. Standard Pump–Aldrich Division*, 281 Pa. Super. 560, 422 A.2d 611, 623 n. 12 (Pa. Super. Ct. 1980)).

In other words, sharing truthful facts does not give rise to liability even if “the facts are marshaled in such a way that they speak for themselves and the person to whom the information is given immediately recognizes them as a reason for breaking his contract or refusing to deal with another.” *Id.* (citing Restatement (Second) of Torts § 772 cmt. b (1979)). Compare Restatement (Second) of Torts § 581A (1979) (“One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.”).

As addressed in detail, *if* Mortgage Solutions provided one of its reports to Freedom Mortgage or Provident Lending, any publication of the fact of Dunn’s appearance on a watch or exclusionary list is, by Plaintiffs’ own admissions, true. (*See*, Section A.1, *supra*). Thus Mortgage Solutions cannot be liable for the provision of such truthful information under a theory of tortious interference as a matter of law, and for this reason too, Plaintiffs’ claim for tortious interference should be dismissed.

**CONCLUSION**

For all of the foregoing reasons, Mortgage Solutions respectfully requests that the Court enter an Order dismissing Plaintiffs’ Complaint against it with prejudice.

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Respectfully submitted,

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