

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

The Mortgage Specialists, Inc.

v.

Implode-Explode Heavy Industries, Inc.

Docket No. 08-E-0572

**REPLY TO RESPONDENT'S OBJECTION TO PRELIMINARY
AND PERMANENT INJUNCTIVE RELIEF**

NOW COMES the Petitioner, The Mortgage Specialists, Inc. ("MSI"), by and through its attorneys, Devine, Millimet & Branch, Professional Association, and submits the following Reply to the Objection to Preliminary and Permanent Injunctive Relief filed by the Respondent, Implode-Explode Heavy Industries, Inc. ("Respondent"). In support of its Reply, MSI states as follows:

Preliminary Statement/Procedural Background

1. MSI filed this action after it discovered that Respondent had posted MSI's confidential financial information, including a confidential loan summary, on Respondent's website, www.ml-implode.com, and that a third party utilizing the username "Brianbattersby" had posted false and defamatory statements about MSI and its President, Michael Gill, on the same website. MSI had submitted the confidential loan summary to the New Hampshire Banking Department ("NHBD") and the Massachusetts Department of Banking ("MDB") as part of the regulatory examination process. Both New Hampshire and Massachusetts law specifically provide that such documents are confidential and proprietary and "shall not be made public."

2. MSI contacted Respondent and advised it that the loan summary was a confidential document that should not have been posted on the website. MSI also directed

Respondent to the "Brianbattersby" posts and advised Respondent that the comments were false and defamatory. MSI requested that Respondent remove the confidential loan summary and the "Brainbattersby" posts from the website, and also remove information contained in an article authored by Respondent that was derived from the confidential loan summary. MSI also requested that Respondent disclose the identity of the individual or entity that had provided it with the confidential loan summary and the identity and contact information for "Brianbattersby."

3. Respondent initially refused to remove the confidential document or the defamatory statements from its website. Respondent also refused to disclose the source of the confidential document or the identity of "Brianbattersby." As a result, MSI drafted pleadings seeking injunctive relief directing Respondent to remove the offending information and posts and to disclose the identity of "Brianbattersby" and the source of the document. MSI forwarded the draft pleadings to Respondent's counsel prior to filing. At that time, Respondent agreed to "temporarily" remove the confidential loan summary, the information derived from the summary, and the defamatory postings by "Brianbattersby." Respondent, however, would not agree to refrain from reposting the confidential document and information or the defamatory postings by "Brianbattersby." Respondent also refused to disclose the source of the confidential loan summary or the identity of "Brianbattersby."

4. MSI thereafter filed this action, seeking an injunction prohibiting Respondent from reposting the confidential loan summary and/or the information contained therein and from republishing the defamatory statements by "Brianbattersby." MSI also sought an injunction directing Respondent to disclose the source of the confidential loan summary and the identity and contact information for "Brianbattersby."

5. Respondent responded by moving to dismiss the action for lack of personal jurisdiction.

6. This Court issued an order on February 6, 2009, rejecting Respondent's personal jurisdiction argument. On that same date, the Court issued a Procedural Order in which it enjoined Respondent from reposting the confidential loan summary and/or the information contained therein. The Court then scheduled a hearing for March 5, 2009 to consider whether to extend the temporary injunction and to consider MSI's request that Respondent disclose the source of the confidential loan summary and the identity and contact information for "Brianbattersby."

7. On February 25, 2009, Respondent filed an Objection to Preliminary and Permanent Injunctive Relief ("Respondent's Objection") in which it raised several objections to the injunctive relief sought by MSI. MSI now submits this Reply to address the various issues raised in Respondent's Objection.

Argument

A. **The Requested Injunction Does Not Constitute A Prior Restraint On Speech**

8. Prior restraint involves a "governmental restriction on speech or publication *before its actual expression.*" BLACK'S LAW DICTIONARY 1232 (8th ed. 2004) (emphasis added); Alexander v. United States, 509 U.S. 544, 550 (1993) ("A prior restraint is an administrative or judicial order that restricts speech *in advance of it being made.*" (emphasis added)); State Ex Rel. Taft-Connor v. Court of Common Pleas of Franklin County, 83 Ohio.St.3d 487, 490 (1998) ("It is beyond cavil that there can be no prior restraint unless that restraint occurs prior to publication." (Pfeifer J, concurring)).

9. MSI does not seek to enjoin speech before its actual expression. MSI instead seeks to enjoin the republication of specific confidential information and specific false and defamatory statements that Respondent has already made available to the public. As a result, the requested injunction, and the injunctive relief already granted in this Court's February 6, 2009 Order, does not and cannot constitute a prior restraint on speech.

10. Assuming, *arguendo*, the doctrine of prior restraint had some application to the facts of this case, the United States Supreme Court has repeatedly recognized that an injunction prohibiting the repetition or continuation of specific speech is not an unconstitutional prior restraint if the court issuing the injunction has found the specific speech to be unlawful and if the injunction is "clear and sweeps no more broadly than necessary." Pittsburgh Press Co. v. Human Rel. Comm'n, 413 U.S. 376, 390 (1970).

11. The "restraint" at issue in this matter is the republication of a confidential financial document that the banking laws of New Hampshire and Massachusetts both prohibit from being disclosed to the public and the republication of false and defamatory statements about MSI and its President.¹ The Court has ample evidence to determine that the specific speech at issue -- *i.e.*, the posting and/or reposting of these materials and statements -- is unlawful.

12. The injunction, moreover, is narrowly tailored to achieve the specific objective of preventing the republication of this information. MSI has not, for example, requested that Respondent ban "Brianbattersby" from posting any further comments on its website or from posting comments about MSI in general. Similarly, MSI has not requested that Respondent remove its article about MSI, prohibit it from publishing any additional information about MSI on its website, or that Respondent remove MSI from its "ailing/watch list."

¹ The Verified Petition states that the allegations in the "Brianbattersby" postings are false and defamatory. MSI will confirm this fact at the March 5, 2009 hearing, if necessary. Respondent has not presented any evidence indicating that the statements are truthful.

13. MSI simply asks that Respondent be enjoined from republishing documents and information that have already been published once and which the evidence establishes are false and defamatory and/or were derived from unlawful sources. This narrow request to prohibit the republication of speech is not a prior restraint.

B. MSI Has Satisfied The Irreparable Harm Requirement

14. Respondent next argues that MSI is not entitled to injunctive relief because it has not demonstrated sufficient immediate and irreparable harm to warrant injunctive relief. According to Respondent, the damages MSI has sustained as a result of the unlawful posting of its confidential information and the false and defamatory statements about MSI and its President can be adequately remedied by monetary damages.

15. It is well-established that “injuries to goodwill and to reputation are not easily quantifiable [and] courts often find this type of harm irreparable.” Ross-Simons v. Baccarat, 217 F.3d 8, 13 (1st Cir. 2000); Cashmere Inst. v. Associated Dry Goods Corp., 799 F.2d 6, 14-15 (1st Cir. 1986).

16. The unlawful publication of MSI’s confidential information and the publication of false and defamatory statements about MSI and its President has harmed MSI’s reputation and, if Respondent is permitted to republish the information and statements, MSI will continue to suffer harm to its reputation. While a monetary award may compensate MSI for *some* of this harm, monetary damages can never fully compensate it for the harm to its reputation and the deterioration of its relationship with its lenders, several of whom have indicated that they will no longer provide loans through MSI based, at least in part, on the unlawfully disclosed confidential loan summary on Respondent’s website. See Verified Petition at ¶ 26. The republication of the offending information and comments will only exacerbate the harm to MSI’s reputation.

C. MSI Has Established That It Is Likely To Succeed On Its Request To Enjoin Respondent From Republishing The Confidential Loan Chart

17. Respondent next argues that although RSA 383:10-b prohibits the disclosure of confidential records and information acquired during a regulatory examination, MSI has no basis to seek an injunction prohibiting the publication of its confidential information because, according to Respondent, RSA 383:10-b does not create a private right of action. See Respondent's Objection at ¶ 4. Respondent's argument, when distilled to its essence, is that MSI is powerless to prohibit the publication of confidential information obtained in violation of RSA 383:10-b.

18. As an initial matter, MSI has not sued Respondent for monetary damages for a violation of RSA 383:10-b. MSI has sued respondent seeking an injunction to prohibit Respondent from republishing confidential documents that are prohibited from being disclosed to the public pursuant to RSA 383:10-b. Because MSI seeks only equitable relief, whether or not RSA 383:10-b creates a private cause of action is irrelevant. Kowalski v. Cedars, Portsmouth Condo. Assoc., 146 N.H. 130, 134 (2001) ("Given the equitable nature of the doctrine of unjust enrichment . . . we need not address whether RSA chapter 331-A provides a private right of action.").

19. In any event, a statutory standard of care supports a private cause of action where "the injured party is a member of the class intended by the legislature to be protected" and the "harm is of the kind which the statute was intended to prevent." Mahan v. N.H. Dept. of Admin. Services, 141 N.H. 747, 753 (1997).

20. RSA 383:10-b prohibits the disclosure of information submitted to the NHBD by a financial institution during the regulatory examination process. The statute is intended to protect the institution's right to maintain the confidentiality of its financial records and internal

operations. MSI submitted the confidential loan summary to the NHBD during the regulatory examination process and, thus, MSI clearly falls within the class the legislature intended to protect. The conduct the legislature seeks to prevent, moreover, is the unlawful disclosure and publication of its confidential documents -- the specific conduct at issue in this litigation. MSI, therefore, clearly has a right to seek appropriate remedies, including injunctive relief, to enforce its statutory rights under RSA 383:10-b.

21. Respondent next argues that MSI does not have a valid claim for "invasion of privacy" because New Hampshire law does not protect the unlawful publication of confidential commercial financial information.² See Plaintiff's Objection ¶¶ 6-11. It is undisputed, however, that New Hampshire recognizes a tort cause of action for violation of the right to privacy by public disclosure of private facts. Hamberger v. Eastman, 106 N.H. 107, 110-111 (1964); See also Whalen v. Roe, 429 U.S. 589, 599 (1977) (the constitutional right to privacy includes the "individual interest in avoiding disclosure of personal matters").

22. Respondent attempts to distinguish these cases on the grounds that an invasion of privacy claim is limited to "cases involving the physical privacy of the home and the intimacy of family life." See Plaintiff's Objection at ¶ 7.

23. In fact, in Remsberg v. Docusearch, 149 N.H. 148, 156-57 (2003), the New Hampshire Supreme Court ruled that a person has a reasonable expectation of privacy in his/her social security number and the unauthorized publication of another person's social security number can support a claim for invasion of privacy. Docusearch, 149 N.H. at 156-57. MSI had a similar expectation that the information and documents it provided to the NHBD during the regulatory examination process, including the confidential loan summary, would be held in

² Respondent has also argued that the confidential loan summary does not rise to the level of a defamatory statement. MSI, however, has never alleged that the information in the confidential loan summary is defamatory.

confidence. The unauthorized publication of that information by Respondent establishes a claim for invasion of privacy. This would be even more true if Respondent was to republish the confidential information after it had notice of that the information was confidential.

24. The common law protection against the unauthorized disclosure of private facts clearly extends beyond the "home" and "family life" and encompasses the disclosure of confidential commercial information -- including the unauthorized publication of confidential information submitted to a government agency.

D. MSI Is Entitled To Discover The Identity Of "Brianbattersby"

25. Respondent next argues that it cannot be compelled to disclose the identity of "Brianbattersby" because to do so would violate "Brianbattersby's" First Amendment right to anonymous speech. See Plaintiff's Objection at ¶¶ 12-19. In support of its position, Respondent relies primarily upon Quixtar, Inc. v. Signature Management Team, LLC, 566 F.Supp.2d 1205 (D. Nev. 2008).

26. Quixtar involved a witness who refused to answer questions about anonymous postings/blogs found on a website that the witness and/or his employer may have been involved in operating. Quixtar, 566 F.Supp.2d at 1209-10. The plaintiff moved to compel the witness to answer its questions. The Magistrate granted the motion to compel. Id. The witness thereafter filed an objection to the Magistrate's order. Id.

27. In considering the Magistrate's order, the Court observed that while there is certainly an interest in anonymous speech that interest must be weighed against the harm caused by such speech. In this regard, the Court noted that:

[W]here speaker's remain anonymous there is also a great potential for irresponsible, malicious, and harmful communication, and the lack of accountability that anonymity affords is anything but an unqualified good. This is particularly true where the speed and

power of internet technology makes it difficult for the truth to "catch up" with the lie. (citation omitted) Anonymity thus presents benefits, risks, and problems. To the extent that courts take on the task of protecting it, balancing is inevitable.

Quixtar, 566 F.Supp.2d at 1214.

28. The Court then held that a constitutional challenge to a request to disclose the identity of an anonymous internet poster may be considered under one of three approaches.

Quixtar, 566 F.Supp.2d at 1211-12. The first approach requires the moving party to establish that it has a "legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where the suit was filed," Id. at 1211. The second approach requires the moving party to present sufficient evidence to survive a motion to dismiss. Id. at 1211-12. The third approach requires the moving party to "submit evidence sufficient to overcome a limited motion for summary judgment attaching the actionability of the alleged defamatory conduct." Id. at 1212.

29. Respondent's reliance on Quixtar is misplaced. In Downing v. Monitor Publishing Co., Inc., 120 N.H. 383 (1980), the New Hampshire Supreme Court held that a newspaper is required to disclose the source of an anonymous source if the plaintiff has presented evidence to establish that there is a "genuine issue of fact regarding the falsity of the publication." Id. at 387 (requiring newspaper to disclose identity of anonymous source that provided defamatory statements about the Boscawen Chief of Police that were published in newspaper).

30. Here, the defamatory statement at issue in this litigation is a comment posted by "Brianbattersby" on Respondent's website which states that Mr. Gill "was caught back in 2002

FOR SIGNING BORROWER NAMES and bought his way out.” See Verified Petition at ¶ 16.³ MSI denies that in 2002 Mr. Gill was caught for signing borrower names or that Mr. Gill “bought his way out” of any alleged charges. MSI, therefore, has submitted evidence sufficient to establish a genuine issue of fact as to the falsity of the comments posted by “Brianbattersby” on Respondent’s website. As a result, Respondent is required to disclose the identity of “Brianbattersby.” Downing, 120 at 387.

31. MSI further submits that it has satisfied the more stringent standard articulated in Quixtar which requires evidence sufficient to overcome a limited objection to summary judgment.⁴ In this regard, Quixtar requires that the moving party present evidence that it has (1) taken reasonable steps to notify the anonymous poster that it is seeking an order of disclosure; (2) introduce evidence that that the statements at issue constitute defamatory speech; and (3) demonstrate that the balance of interests weighs in favor of disclosure. Quixtar, 566 F.Supp.2d at 1212.

32. MSI has taken considerable efforts to notify “Brianbattersby” that it seeks the disclosure of his/her identity. Indeed, MSI has retained a private investigator and has identified an individual named Brian Battersby who resides in New Hampshire and who works in the mortgage industry. MSI sought to take this individual’s deposition to determine whether he is in fact the individual who posted the comments on Respondent’s website, but its efforts to do so were thwarted by Respondent’s decision to quash MSI’s deposition subpoena.

33. Respondent nevertheless argues that MSI has failed to satisfy the notification prong because it did not post a comment on Respondent’s website notifying “Brianbattersby”

³ Respondent argues that MSI’ claim is “defective” because MSI purportedly did not set forth the defamatory statement in the Verified Petition. See Respondent’s Objection at n. 4. In fact, the defamatory portion of the “Brianbattersby” posting is quoted at paragraph 16 of the Verified Petition.

⁴ Neither the New Hampshire Supreme Court nor the First Circuit Court of appeals has decided which of the three approaches applies in New Hampshire.

that it was seeking the disclosure of his identity. As an initial matter, the Quixtar decision does not require such notification. Instead, it simply states that plaintiff's efforts "*should*" include posting a message on the same message board advising the anonymous poster that it is seeking the disclosure of the poster's identity. There is no mandate that MSI make such a posting. In addition, requiring a notice posting in this case would only cause further harm to MSI's reputation as it would emphasize and draw further attention to the defamatory statements by "Brianbattersby." MSI's failure to make a notice posting, therefore, is not "fatal" to its request for an injunction directing Respondent to disclose the identity of "Brianbattersby," even if this Court were to adopt the more stringent summary judgment standard articulated in the Quixtar decision.

34. Respondent also suggests that MSI has failed to make a showing of a viable cause of action for defamation. See Respondent's Objection at ¶ 14. Again, MSI's Verified Petition states that the defamatory statement at issue is a comment posted by "Brianbattersby" which states that Mr. Gill "was caught back in 2002 FOR SIGNING BORROWER NAMES and bought his way out." See Verified Petition at ¶ 16. MSI denies that in 2002 Mr. Gill was caught for signing borrower names or that Mr. Gill "bought his way out" of any alleged charges. A public posting on a mortgage-related website accusing MSI's President of forgery and bribery would tend to lower the business in the esteem of a substantial and respectable group.⁵ See Touma v. St Mary's Bank, 142 N.H. 762, 765 (1998). MSI, therefore, has stated a viable cause of action for defamation based on the postings on Respondent's website.

35. The balance of interests also weights in favor of directing Respondent to disclose the identity of "Brianbattersby." The speech at issue is defamatory and entitled to little, if any,

⁵ MSI also asserts that the second "Brianbattersby" post, which consists of a string of words including Mortgage Specialists, fraud, Michael Gill and NH, was included for the purpose of insuring that the post turned up on the prominent internet search engines and, thus, reach the largest possible audience.

First Amendment protection. See Doe v. Cahill, 884 A.2d 451, 457 (Del. 2005) (“It is also clear that the First Amendment does not protect defamatory speech.”); Taylor v. Carmouche, 214 F.3d 788, 793 (7th Cir. 2000) (holding that denigrating and defamatory remarks are not ordinarily afforded First Amendment protection); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1948) (including libel in the list of speech that is not protected by the First Amendment).

36. In contrast, MSI has made a strong showing that the “Brianbattersby” postings are defamatory and that it will be deprived of any remedy to recover for the harm to its reputation caused by the defamatory postings absent an order from this Court directing Respondent to disclose the identity of “Brianbattersby.” Again, the New Hampshire Supreme Court has expressly recognized the important interest a plaintiff has in discovering the identity of an anonymous source that cited in a newspaper article containing defamatory information. See Downing, 120 N.H. at 387. As a result, the balance of interests weighs in favor of the requested injunction.

37. Finally, Respondent also relies on the unpublished decision in Enterline v. Pocono Medical Center, 2008 WL 5192386 (M.D. Pa. Dec. 11, 2008) to support its contention that the Court cannot order it to disclose the identity of “Brianbattersby.” The Enterline decision adopted a broader standard for determining when the source of anonymous speech must be disclosed, holding that a plaintiff is entitled to discover the identity of an anonymous internet poster if: (1) the request is made in good faith and not for an improper purpose; (2) the information sought relates to a core claim or defense; (3) the identifying information is directly and materially relevant to that claim or defense; and (4) information sufficient to establish or disprove that claim or defense is unavailable from any other source. Id. at *9.

38. Here, MSI seeks the disclosure of the identity of "Brianbattersby" so that it can determine whether to bring a defamation claim against "Brianbattersby" to prevent further defamatory statements and to recover monetary damages for the compensable harm caused by the defamatory postings. MSI cannot do so unless and until it discovers the identity of "Brianbattersby." The information sought by MSI, therefore, is directly related to its defamation claim.

39. Respondent concedes these points, but nevertheless argues that it is not obligated to disclose the identity of "Brianbattersby" because MSI has already identified an individual who may be "Brianbattersby." As explained, while MSI has discovered an individual named Brian Battersby who may have posted the false and defamatory statements on Respondent's website, Respondent blocked MSI's opportunity to take that individual's deposition when it moved to quash MSI's deposition subpoena. In any event, if Brian Battersby denies that that he is the "Brianbattersby" who posted the comments at issue, the only means available for MSI to discover the identity of the actual "Brianbattersby" is if Respondent is order to disclose the identity. As a result, MSI has satisfied the requirements set forth in Enterline.

E. MSI Is Entitled To Discover The Identity Of The Individual or Entity That Provided Respondent With Its Confidential Loan Summary

40. Respondent spends a considerable amount of time arguing that the First Amendment prohibits this Court from ordering it to disclose the identity of "Brianbattersby." See Respondent's Objection at ¶¶ 12-22. Interestingly, Respondent cites no similar legal authority that would prohibit this Court from ordering it to disclose the identity of the individual and/or entity that provided it with MSI's confidential loan summary. Indeed, Respondent does not even suggest that the disclosure of the confidential loan summary, as part of an article written by Respondent, could qualify as anonymous speech protected by the First Amendment.

Respondent, thus, has failed to establish a constitutional bar that would limit this Court's authority to order Respondent to disclose of the source of the confidential loan summary. MSI respectfully requests that the Court issue an order directing Respondent to make this disclosure.

41. In any event, even if Respondent made such an argument the argument would fail under either the "anonymous speech" standards as set forth in Respondent's Objection.⁶ MSI has taken reasonable steps to discover the identity of the individual or entity that produced the confidential loan summary. See Exhibit A. In particular, MSI has contacted the NHBD and requested a formal investigation to determine whether the document was disclosed by the NHBD. The NHBD has informed MSI that they "do not believe that the information referenced was obtained from this office" and there was not "any indication that there was a breach in this office." See Exhibit B. MSI, moreover, has conducted an internal review and has not discovered any evidence that would suggest that document came from its offices. As a result, MSI has satisfied its obligation to take reasonable steps to discover the identity of the source of the document.

42. MSI has also provided a legal basis for the requested relief in that the disclosure of its confidential document and information violates RSA 383:10-b as well as the common law protection against the unauthorized disclosure of private, confidential facts. See *infra* at ¶¶ 17-24.

43. The balance of interests also weighs in favor of ordering Respondent to disclose the identity of the source of the confidential loan summary. RSA 383:10-b expressly provides that documents submitted to the NHBD during the course of a regulatory examination, including

⁶ MSI again asserts that the disclosure requirement at issue in this case are controlled by Downing, 120 N.H. at 387, not Quixtar or Enterline. As such, MSI must simply produce evidence that creates a general issue of facts as to whether the disclosure of the confidential loan summary violates RSA 383:10-b or MSI common law right to protection of its confidential information. MSI has satisfied these requirements and, thus, Respondent must disclose the source of the confidential loan summary.

the confidential loan summary at issue in this litigation, are confidential and privileged and "shall not be made public." See RSA 383:10-b. The purpose of this requirement is to permit banking and mortgage companies, like MSI, to submit complete and accurate information regarding their financial condition and internal operations so that the NHBD can assess the status of these companies.

44. A breach of the duty of confidentiality, as has occurred here, significantly undercuts the integrity of the NHBD's regulatory system and could significantly impact the NHBD's ability to receive complete and accurate information from banking and mortgage companies. In short, if a company is concerned that its financial condition and internal operations may be publicly disclosed, it may be less forthcoming in the information it provides to the NHBD. The public interest in maintaining the integrity of the NHBD regulatory process far outweighs any purported interest Respondent may have in protecting the source of the unlawfully disclosed confidential loan document.

WHEREFORE, MSI respectfully requests that this Honorable Court:

A. Issue an order prohibiting Respondent from reposting and/or republishing MSI's confidential loan summary, the information contained therein, and the false and defamatory comments posted by "Brianbattersby;"

B. Issue an order directing Respondent to disclose the identity of the individual and/or entity that provided it with the confidential loan summary;

C. Issue an order directing Respondent to disclose the identity and contact information for "Brianbattersby;" and

D. Grant MSI such other and further relief as this Court deems just and equitable.

Respectfully submitted,

THE MORTGAGE SPECIALISTS, INC.

By its attorneys,

DEVINE, MILLIMET & BRANCH
PROFESSIONAL ASSOCIATION

Date: March 4, 2009

By: 

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CERTIFICATE OF SERVICE

I certify that a copy of the forgoing has this day been forwarded to Jeremy D. Eggleton, Esquire, and William L. Chapman, Esquire, counsel of record for Respondent.


Alexander J. Walker, Jr.

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