STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

The Mortgage Specialists, Inc.

v.

Implode-Explode Heavy Industries, Inc.

No. 08-E-0572

RESPONDENT'S OBJECTION TO PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

NOW COMES Implode-Explode Heavy Industries, Inc., Respondent in this action, and objects to Petitioner's request for injunctive relief. In support of this objection, Respondent submits:

Introduction

1. Petitioner requests the Court to enjoin Respondent from reposting on its website two items: (i) a copy or image of "the 2007 Loan Chart and any information or data contained therein," or providing a link or information to access the chart; and (ii) the October 4 and October 7, 2008 postings by a blogger using the pseudonym "Brianbattersby." Petitioner further requests the Court to order Respondent to disclose the identity of the source that provided Respondent with the 2007 Loan Chart and the identity of Brianbattersby. The Court should deny Petitioner's request for permanent injunctive relief.

Argument

Petitioner is Not Entitled to Injunctive Relief

2. The Court should deny Petitioner's request for injunctive relief because it would constitute a "prior restraint" of speech in violation of Respondent's rights guaranteed by the First Amendment. A prior restraint on publication is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 559 (1976) An "injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971). For this reason, a prior restraint "bear[s] a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). This presumption is entitled to even more weight when the prior restraint takes the form of an injunction because an injunction targets a specific speaker. *See Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union*, 239 F.3d 172, 176 (2nd Cir. 2001); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 764 (1994) ("Injunctions ... carry greater risks of censorship and discriminatory application than do general ordinances"). Petitioner seeks to achieve in this case what the U.S. Supreme Court roundly rejected in *New York Times Co. v. U.S.*, 403 U.S. 713, 719 (1978): a prior restraint of publication of documents, or their contents, acquired by a news organization. Justice Brennan framed the issue thusly: "So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession." *Id.* at 725. The court properly recognized that an injunction against the publication of non-public governmental records acquired by a news organization would

be an extraordinary burden on free speech, and upheld the denial of an injunction. *Id.* at 715. Further, as the New Hampshire Supreme Court stated in *Petition of Keene Sentinel*, 136 N.H. 121, 127 (1992), "effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting."[1] On this most profound principle, the Court must reject Petitioner's request to enjoin publication of materials in Respondent's possession.

3. Moreover, Petitioner cannot satisfy the standard for issuance of injunctive relief. In *ATV Watch v. New Hampshire Dept. of Resources and Economic Development*, 155 N.H. 434, 438 (2007), the court stated that"[a]n injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief ... there is no adequate remedy at law ... and the party seeking an injunction is likely to succeed on the merits." *Id.* (citations and internal quotations omitted). With respect to the first requirement, there is no immediate danger of irreparable harm because the allegedly offending material has been voluntarily taken down from Respondent's website.[2] Verified Petition at ¶22. That said, even if Respondent reposted the material, Petitioner would not be able to satisfy the second requirement. The only reason Petitioner has advanced to claim irreparable harm and to enjoin publication of the 2007 Loan Chart is that "it has been informed by multiple lenders that they will no longer provide loans through Petitioner based, at least in part, on the unlawfully disclosed confidential information found on Respondent's website." Verified Petition at ¶26. This plainly is a claim for money damages because of an alleged loss of business. As such,

[1] The Verified Petition at paragraph 5 refers the Court to Respondent's "website, www.ml-implode.com," titled "The Mortgage Lender Implode-O-Meter," the website "track[s] the housing finance breakdown" that has so devastated the country's economy.

[2] Respondent, as a news organization serving the housing finance market, has the right to publish truthful information within its possession.

Petitioner has an adequate remedy at law and no injunction is necessary. *ATV Watch*, 155 N.H. at 438. Finally, for the reasons set forth below with respect to Petitioner's claim under RSA 383:10-b, its defamation claim, and its invasion of privacy claim, Petitioner cannot demonstrate likelihood of success on the merits. Simply put, there is no legal basis for an injunction on the facts of this case. *See ATV Watch*, 155 N.H. at 438.

Publication of Confidential Information

4. Petitioner has correctly alleged that RSA 383:10-b requires the Banking Department to not make public records it acquires in its investigations and examinations. But Petitioner has cited no authority to support the contention that it has a right "to protect and maintain the integrity of banking department examinations" or "to determine whether banking department officials are the source of the confidential information found on Respondent's website," Verified Petition at ¶28 — particularly by suing a third-party news organization. Unlike some state laws that extend to private parties a right of action, *e.g.*, RSA 356:11 (right to injunctive relief for threatened injury because of a monopoly), RSA 383:10-b provides for no similar right. Any investigation into the internal workings of the banking department is, therefore, a matter for the Commissioner and should not subject a third party, news organization or otherwise, to injunctive relief. Indeed, no part of RSA 383:10-b prohibits Respondent from publishing information, controlled by RSA 383:10-b, that it acquires. In fact, RSA 383:10-b does not even purport to empower the government to sanction Respondent for doing so. If RSA 383:10-b does not create a public right of action against Respondent, surely it does not create a private right of action by implication.

Defamation Arising From Posted 2007 Loan Chart

5. Publication of the "2007 Loan Chart" does not rise to the level of a defamatory statement. "A statement is not actionable if it is substantially true." *Chagnon v. Union Leader Co.*, 103 N.H. 426, 437, 174 A.2d 825, 832 (1961). Petitioner has itself stated that the 2007 Loan Chart is a true and accurate representation of information that it provided to New Hampshire regulatory authorities. Petitioner, therefore, cannot claim that posting such information is a defamatory.

Invasion of Privacy

6. Petitioner's claim that the posting of the 2007Loan Chart constitutes an invasion of privacy also is meritless. The cases offered by Petitioner in its jurisdictional pleadings in support of an "invasion of privacy" claim are not applicable to the kind of financial information at issue in this case.[3]

7. *Whalen v. Roe*, 429 U.S. 589 (1977), cited by Petitioner, affirms that the right of privacy exists in the intimate family context, not a commercial context like this. Justice Stewart, writing in concurrence, observed, "although the Constitution affords protection against certain kinds of government intrusions into personal and private matters, there is no 'general constitutional right to privacy.'" 429 U.S. at 608. He went on to state that the court's precedential basis for the existence of a right of privacy was limited to cases involving the physical privacy of the home and the intimacies of family life. *Id.* (distinguishing rights of privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965)

[3] *See* Petitioner's Memorandum of Law in Support of Its Reply to Respondent's Objection at 9. Invasion of privacy was not initially pled in the Verified Petition. Petitioner asserted the privacy claim only after Respondent noted in its jurisdictional pleadings that there was no statutory cause of action, and no way of claiming defamation against Respondent on the facts pled. This only underscores the insufficiency of the Verified Petition with regard to the standard Petitioner is required to meet to enjoin the publication of materials in Respondent's possession, or to compel Respondent to disclose the identities of anonymous posters to its website.

(decision to use birth control protected) and *Stanley v. Georgia*, 394 U.S. 557 (1969) (possession of pornography in home not actionable) from the facts of *Whalen*, where he concluded that no right of privacy was violated by the State of New York's amassing of prescription data and medical records.

8. Petitioner points to no case where the publication of commercial financial information resulted in an invasion of privacy. In fact, the common law invasion of privacy tort is intended to protect the private lives of individuals. *See id.* In *California Bankers' Association v. Shultz*, 416 U.S. 21 (1974), Justice Douglas, writing in dissent from a majority that upheld a statute requiring banks to maintain certain records in anticipation of criminal or civil actions, opined that financial information of this type should be encompassed by the zone of privacy — not because it is confidential information *per se*; but rather because of what the government could learn to its advantage about the individual account holder's personal, political, or religious views. 416 U.S. at 90. Clearly, such concerns do not animate this case. Not only was Justice Douglas concerned about *government* intrusion into private lives, but the concern he expressed was predicated on the freedom of conscience — something not at issue with a corporate entity like Petitioner.

9. The approach to the common law tort of invasion of privacy in New Hampshire is consistent with a personal protective sphere rather than a corporate one. Although Petitioner cited *Hamberger v. Eastman*, 106 N.H. 107 (1964) in support of its invasion of privacy claim, neither *Hamberger* nor the more recent ruling in *Fischer v. Hooper*, 143 N.H. 585 (1999), dealt with commercial financial information. Rather, these cases, like *Griswold* and the cases cited cases in *Whalen*, 429 U.S. at 608 (Stewart,

J., concurring), dealt with the zone of privacy inherent in the home and family setting. *Hamberger* recognized a cause of action for invasion of privacy in a situation where the defendant set up a microphone and recording device in the bedroom of his tenants, and listened to their bedroom activities from his apartment. 106 N.H. at 241-42. *Fischer* approved a cause of action in the context of the surreptitious recording of intimate conversations between a mother and her daughter. 143 N.H. at 589-90. The test for whether an invasion of privacy has occurred under New Hampshire law is whether "the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues." *Id.* at 590.

10. As a matter of law, Respondent's publication of the 2007 Loan Chart it acquired as part of its news gathering does not rise to the level of "offensive[ness] to persons of ordinary sensibilities." *See Remsberg v. Docusearch, Inc.*, 149 N.H. 148, 156 (2003) (determination of offensiveness may be made as a matter of law). In this case the "2007 Loan Chart," attached as Exhibit A, is simply a table aggregating account information. Nothing in the table provides an indication that it is confidential or sensitive information, and there is nothing about its publication that a person of "ordinary sensibilities" would find offensive, in the way that an ordinary person would immediately recognize that recorded bedroom activities were private matters. *See Hamberger*, 106 N.H. at 111.

11. Petitioner also claims irreparable harm in seeking to enjoin reposting of the alleged false and defamatory Brianbattersby comments. Verified Petition at ¶29. However, it has long been the rule that equity will not enjoin publication of defamatory

statements. In *Metropolitan Opera Ass'n, Inc., supra*, the Second Circuit stated: "In addition to the First Amendment's heavy presumption against prior restraints, courts have long held that equity will not enjoin a libel." 239 F.3d at 177 (citing, *Nebraska Press Ass'n*, 427 U.S. at 559, 96 S.Ct. 2791; *American Malting Co. v. Keitel*, 209 F. 351, 354 (2d Cir.1913); *Kramer v. Thompson*, 947 F.2d 666, 677-78 (3d Cir.1991)). The basis for this rule is that "ordinarily libels may be remedied by damages...equity will not enjoin a libel absent extraordinary circumstances." *Metropolitan Opera Ass'n, Inc.*, 239 F.3d at 177; *accord, Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C.Cir.1987); *see Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419-420 (1971) (" No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court"). Here, Petitioner has alleged no extraordinary circumstances that support injunctive relief.

Petitioner is Not Entitled to An Order Requiring Respondent to Disclose Its Sources

12. Anonymous speech has been a cherished part of our heritage since at least as early as the anonymous pamphleteers who rallied support for adoption of our federal constitution. It has always enjoyed the protection of the First Amendment:

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. ... It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation-and their ideas from suppression-at the hand of an intolerant society.

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995). Because the First Amendment applies to speech over the Internet, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997), it provides protection to those who make anonymous postings.

Quixtar, Inc.v. Signature Management Team, LLC, 566 F. Supp.2d 1205 (D. Nev. 2008).

13. *Quixtar*, based on Respondent's research, is the latest federal case to address the issue of the level of protection the First Amendment extends to those who post anonymously on the Internet. It discussed three different standards courts have used in deciding whether to order disclosure. They range from requiring the party seeking disclosure to show a "legitimate, good faith basis" to support a claim, to requiring the claim to withstand a motion to dismiss standard, to requiring the claim to survive a hypothetical motion for summary judgment. *Quixtar*, 566 F. Supp.2d at 1211-1213. In summarizing these approaches, the district court stated:

> Despite differences, the weight of authority holds that courts must adopt procedures that strike a balance between the plaintiff's need to destroy the Doe's anonymity and the anonymous speaker's First Amendment rights. Moreover, no decision this Court has encountered has simply rejected procedural precautions on the basis that the anonymous speech was commercial in nature.

Id. at 1211. The *Quixtar* court adopted the summary judgment standard, the most protective standard, initially articulated by the Delaware Supreme Court in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (discussing *Dendrite International Inc. v. Doe*, 775 A.2d 756 (N.J. App. 2001), which first explored the contours of this analysis), in a case where the plaintiffs asserted defamation and invasion of privacy claims based on an anonymous posting on an Internet blog. Under the summary judgment standard, a party is required to (i) take such steps as posting an announcement on the same message board that contains the allegedly defamatory statement that the anonymous poster is the subject of subpoena or application for disclosure; (ii) set forth the exact statements purportedly made by the poster; (iii) satisfy the summary judgment standard. Additionally, under this "*Dendrite* Test," the Court must (iv) balance the First Amendment right of anonymous free speech

against the strength of the *prima facie* case presented and the necessity of disclosure of the poster's identity. *See Quixtar*, 566 F. Supp.2d at 1211-1213. Here, virtually any "procedural precaution" the Court adopts will require protection of Respondent's anonymous sources, because Petitioner has not shown sufficient facts for a *prima facie* claim.

14. To impinge on the anonymous rights of posters, Petitioner must at least make a showing of a viable cause of action. *Quixtar*, 566 F.Supp. at 1211-13; *Cahill*, 884 A.2d at 460-61; *Dendrite*, 775 A.2d at 760-61.

15. Petitioner cannot do so as to the first allegedly defamatory statement, that Brianbattersby "posted false and defamatory comments about Petitioner and its President, Michael Gill, on the website, including a statement that Mr. Gill 'was caught for FRAUD back in 2002 FOR SIGNING BORROWER NAMES and bought his way out.'" Verified Petition at ¶16. The allegedly defamatory statement is set out in Petitioner's Memorandum of Law In Support of Its Reply to Respondent's [Jurisdictional] Objection, at Exhibit K.[4] It contains a number of assertions, but Petitioner has made no showing that this statement is untrue and, thus, defamatory. *See Chagnon*, 103 N.H. at 437.

16. Nor can Petitioner do so as to the second Brianbattersby posting, "Mortgage Specialists Fraud Michael Gill Fraud Mortgage Specialists NH Fraud Michael Gill NH Fraud." As Petitioner, itself, has alleged, the statement is "a nonsensical comment." Verified Petition at ¶17. The comment is no more than an expression of

[4] As a matter of law, since the statement was not set forth in the Verified Petition , Petitioner's claim is defective; it is axiomatic that a complaint must set forth the allegedly defamatory statement, and the statement must be "of and concerning" Petitioner. *See Nash v. Keene Publishing Corp.*, 127 N.H. 214, 219 (1985); *Thomson v. Cash*, 199 N.H. 371, 374 (1979); *Chagnon*, 103 N.H. at 346. The Verified Petition does not satisfy this standard. First, the statement was not set forth in its entirety. Second, the portion that was set forth did not refer to Petitioner. See Verified Petition at ¶16.

opinion, commentary that does not give rise to a defamation claim. In *Pease v. Telegraph Pub. Co., Inc.*, 121 N.H. 62, 65 (1981), the court ruled that calling someone "the journalistic scum of the earth" was not actionable: "[E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet ...." *See McMann v. Doe*, 460 F.Supp.2d 259 (D. MA 2006) (court refused to order identification of web site operator, ruling that allegedly defamatory statements were opinion) (alternate holding). Because the statements that Petitioner sets forth are either nonsensical, not of and concerning Petitioner, or not contradicted by any factual assertions by Petitioner, Petitioner has not met the any of the standards enunciated in *Quixtar*, and the anonymity of Brianbattersby should not be pierced. 566 F. Supp.2d at 1211-1213.

17. Moreover, as to these statements Petitioner has not met the notification prong of the *Dendrite* test by "posting a message of notification of its discovery request to the anonymous defendant on the same message board as the original allegedly defamatory posting." *Dendrite*, 775 A.2d at 760. This is a fatal error in any effort to seek injunction. *See Cahill*, 884 A.2d at 461.

18. Further, the First Amendment protects Respondent from the compelled disclosure of the identity of its sources and posters. In a recent decision, the Federal District Court for the district of Pennsylvania rejected arguments similar to those Petitioner makes in this case. *Enterline v. Pocono Medical Center*, 08-CV-1934-ARC, 2008 WL 5192386 (M.D. Pa. Dec. 11, 2008). In *Enterline*, the defendant medical center, defending a suit for sexual harassment, moved to compel the local newspaper, the *Pocono Record*, which had published a story about the lawsuit, to disclose the identities

of eight anonymous posters on the *Record's* website. *Id.* at *1. The court held that the First Amendment conferred standing on the newspaper to assert the First Amendment rights of its online posters. *Id.* at *4. The court then held that the First Amendment protected the newspaper from compelled disclosure of its posters. *Id.* at *6. The deciding factor in *Enterline* was that the medical center knew from the content of the posts that the posters were employees of the medical center, and thus their identities could be obtained through "normal, anticipated forms of discovery." *Id.* Most importantly, the principles of the First Amendment trumped the relatively insignificant practical consequences of ordering disclosure of information that would likely emerge through alternative avenues in the regular course of discovery. *Id.* "While disclosure of the commentators' identities would certainly be helpful to the Plaintiff, the Court does not believe that this is an exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker." *Id.* In this case, Petitioner has already been able to identify an individual through its own means[5] who is likely to provide Petitioner with "information sufficient to establish or to disprove [its] claim or defense" and thus, Respondent should not be compelled to unmask its poster. *See id.* (citing *Doe v. 2 TheMart.com Inc.*, 140 F.Supp.2d 1088 (W.D. Wash. 2001)).

19. In addition, and finally, Petitioner has no defamation claim against Respondent as a consequence of the Brianbattersby postings because Respondent is immunized from state tort law claims by §230 of the Communications Decency Act. *See* 47 U.S.C.A. §230. The allegedly defamatory statements in this case were posted by an anonymous third party on Respondent's website. Under 47 U.S.C.A. §230, statements

[5] *See*, generally, Respondent's *Ex Parte* Motion to Quash (January 27, 2009).

posted on a website do not give rise to a cause of action against the host of the website or the internet service provider upon whose electronic infrastructure these comments were posted. *Id.; see Doe v. Friendfinder Network, Inc.*, 540 F.Supp.2d 288, 294 (D.N.H. 2008) (citing *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007)).

WHEREFORE Respondent respectfully requests the Court to deny Petitioner the relief it seeks and dismiss its petition.

Respectfully Submitted,

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Dated: February 25, 2009

By: William L. Chapman
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CERTIFICATE OF SERVICE

I, William L. Chapman, hereby certify that on this 25th day of February 2009, I delivered the foregoing pleading to Donald L. Smith, counsel for Petitioner by electronic mail.

William L. Chapman