1STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

The Mortgage Specialists, Inc.

v.

Implode-Explode Heavy Industries, Inc.

No. 09-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 web site 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 the Petitioner's request for permanent injunctive relief.

Argument

A. Petitioner is not entitled to injunctive relief

2. The Court should deny Petitioner's first request for permanent 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"). The 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): the prior restraint of publication of documents leaked to the press and in the possession of the press. 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 Supreme Court property recognized that an injunction

against the publication of non-public material acquired through skillful reporting by a news organization would be an extraordinary burden on free speech, and upheld the denial of an injunction prohibiting the publication of non-public government records. *Id*. at 715; *cf. Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496-97 (1975) (information derived from public record cannot give rise to invasion of privacy claim against the press). On this most profound First Amendment principle, the Court must reject the Petitioner's request to enjoin the publication of materials in Implode Explode's possession.

3. The New Hampshire Supreme Court articulated the test for whether injunctive relief is called for in *ATV Watch v. New Hampshire Dept. of Resources and Economic Development*, 155 N.H. 434, 438 (2007). "An 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 condition, there is no immediate danger of irreparable harm because the allegedly offending material has been voluntarily taken down from Implode Explode's website.[1] Verified Petition at ¶22. With respect to the second condition, 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

[1] Implode Explode, as a news organization, nevertheless maintains its absolute right to publish truthful information within its possession.

plainly is a claim for money damages because of an alleged loss of business. As such, Petitioner has an adequate remedy at law and no injunction is necessary. *ATV Watch*, 155 N.H. at 438. For reasons articulated below with respect to its purported claim under RSA 383:10-b, its purported defamation claim, and its purported invasion of privacy claim, the Petitioner is not likely to succeed on the merits. Therefore, 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. To begin with, Petitioner has correctly noted 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 its 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"—particularly by suing third-party news organizations. Verified Petition at ¶28. 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 private right of action. 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 to injunctive relief. Indeed, no part of RSA 383:10-b prohibits a news organization like Implode Explode from publishing information, controlled by RSA 383:10-b, that it acquires by happenstance or otherwise. Nor does RSA 383:10-b empower even the government to sanction a news organization for doing so. If RSA 383:10-b does not

create a public right of action against a news organization like Implode Explode, then it surely does not create a private right of action by implication.[2]

Defamation Arising From Posted Loan Chart

5. Neither does the publication of the "2007 Loan Chart" amount to 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). The Petitioner has itself stated that the Loan Chart is a true and accurate representation of information about itself that the Petitioner provided to New Hampshire regulatory authorities. Therefore, the Petitioner cannot claim that posting such information is a defamatory statement.

Invasion of Privacy

6. The Petitioner's claim that the posting of the Loan Chart constitutes an invasion of privacy is also meritless. The cases offered by the 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, 608 (1977), cited by the Petitioner, affirms that the right of privacy exists in the intimate family context, not a commercial context

[2] Moreover, and perhaps most importantly in this case, the Petitioner has not demonstrated conclusively that the only possible source for this information was an official one. However, Implode Explode maintains that, even if this information was acquired from an official source, as opposed to a private source, its ability to publish the information is not constrained by RSA 383:10-b or any other authority.

[3] *See* Petitioner's Memorandum of Law in Support of Its Reply to Respondent's Objection at 9. Invasion of privacy was not initially raised by the Petitioner in its Verified Petition; the Petitioner only repackaged its claims to include the common law tort of invasion of privacy after Implode Explode noted in its jurisdictional pleadings that there was no statutory cause of action, and no way of claiming defamation against Implode Explode on the facts pled. This only underscores the insufficiency of its *Petition* with regard to the summary judgment standard it is required to meet in order to enjoin the publication of materials in Implode Explode's possession, or cause Implode Explode to disclose the identities of anonymous posters to its website.

like this. Justice Stewart, writing in concurrence, observed, "[A]lthough the Constitution affords protection against certain kinds of government intrusions into personal and private matters, there is no 'general constitutional right to privacy.'" *Id*. 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) (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 concurred that *no right of privacy was violated by the State of New York's amassing of prescription data and medical records*).

8. The Petitioner points to no case where the publication of financial information of the kind at issue in this case resulted in an invasion of privacy. In fact, this common law tort cause of action is intended to protect the private lives of individual real people. *See id*. In *California Bankers' Association v. Shultz*, 416 U.S. 21, 90 (1974), Justice Douglas, writing in dissent from a court 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—but not because it is confidential information *per se*; rather, because of what the government could learn to its advantage about the individual account holder's personal, political, or religious views. *Id*. 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 the 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. For instance, although the Petitioner cited *Hamberger v. Eastman*, 106 N.H. 107, 110-11 (1964) for support of its invasion of privacy claim, neither *Hamberger*, nor the more recent ruling by the New Hampshire Supreme Court in *Fischer v. Hooper*, 143 N.H. 585, 589-90 (1999), dealt with financial information of this kind. Each of these cases dealt, like *Griswold* and cited cases in *Whalen*, 429 U.S. at 608 (Stewart, J., concurring), with the zone of privacy inherent in the home and family setting. *Hamberger* recognized that there existed 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 the 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. Hence, 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, Implode-Explode's publication of information garnered through assiduous reporting in this case 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 nothing but 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***.**, 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.

B. 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 the level of protection the First Amendment extends to those who post anonymously on the Internet. It discussed three different standard 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 his 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 Plaintiff is required to (i) take steps, such as a posted announcement on the same message board that the allegedly defamatory statement was posted on, to notify the anonymous poster that he 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 the Petitioner has not shown sufficient facts for a *prima facie* claim.

14. In order to impinge on the anonymous rights of posters, the Petitioner has to make a legal and evidentiary showing of a valid cause of action before impinging on the anonymous poster's right to speak anonymously. *Quixtar*, 566 F.Supp. at 1211-13; *Cahill*, 884 A.2d at 460-61; *Dendrite*, 775 A.2d at 760-61.

15. The Petitioner fails this test as to the first allegedly defamatory statement.

The Petitioner has alleged 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 the 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 the Petitioner has not offered evidence to show that this statement is defamatory, principally because it has not offered any fact showing that any of the assertions in the statement are untrue. *See Chagnon*, 103 N.H. at 437.

16. The second Brianbattersby posting, "Mortgage Specialists Fraud Michael Gill Fraud Mortgage Specialists NH Fraud Michael Gill NH Fraud," likewise does not satisfy the summary judgment standard, and therefore fails the third prong of the *Dendrite* test. As Petitioner, itself, has alleged, the statement is "a nonsensical comment." Verified Petition at ¶17. The comment is no more than an expression of opinion, commentary that does not give rise to a defamation claim. As the court stated in *Pease v. Telegraph Pub. Co., Inc.*, 121 N.H. 62, 65 (1981), in holding 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

[4] As a pure matter of law, the fact that the statement was not inserted into the Verified Petition should also disqualify the petition, insofar as it is axiomatic that the petition 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 Petiton 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 the Petitioner. See Verified Petition at ¶16.

statements were opinion) (alternate holding). Because the statements that the Petitioner sets forth are either nonsensical, not of and concerning the Petitioner, or not contradicted by any factual assertions by the Petitioner, the Petitioner has not met the summary judgment standard enunciated in *Quixtar*, and the anonymity of Brianbattersby should not be pierced. 566 F. Supp.2d at 1211-1213.

18. Moreover, with neither posted statment has the Petitioner adhered to 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 Implode Explode from the compelled disclosure of the identity of its sources and posters. In a recent decision, the Federal District Court for Pennsylvania rejected arguments similar to those the 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 the fact 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, the Petitioner has already been able to identify an individual, through other sources,[5] who is likely to provide the Petitioner with "information sufficient to establish or to disprove [its] claim or defense" and thus, Implode Explode should not be compelled to unmask its poster. *See id* (citing *Doe v. 2TheMart.com Inc.*, 140 F.Supp.2d 1088 (W.D. Wash. 2001)).

19. In addition, the Petitioner has no defamation claim against Implode Explode as a consequence of the Brianbattersby postings because Implode Explode 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 author on Implode Explode's website. Under 47 U.S.C.A. §230, statements posted on a website do not give rise to a cause of action against the publisher 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)).

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

WHEREFORE Implode-Explode Heavy Industries, Inc. respectfully requests the Court to deny Petitioner the relief it seeks and dismiss its petition.

Respectfully Submitted,

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Dated: February 20, 2009

By:_____
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CERTIFICATE OF SERVICE

I, William L. Chapman, hereby certify that on this 23rd day of February 2009, I hand delivered the foregoing pleading to Donald L. Smith, counsel for Petitioner by electronic mail.

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William L. Chapman