STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

The Mortgage Specialists, Inc.

v.

Implode-Explode Heavy Industries, Inc.

No. 08-E-0572

**SURREPLY TO PETITIONER'S REPLY**

NOW COMES the Respondent, Implode Explode Heavy Industries, Inc. ("Implode Explode" or "Respondent") and submits the following Surreply in response to the Petitioner, The Mortgage Specialists, Inc.'s ("Mortgage Specialists" or "Petitioner") March 4, 2009 Reply. In support hereof, Implode Explode states as follows:

1. Implode Explode objects to all requests for relief made by the Petitioner in its original Verified Petition, including the request to compel the Respondent to disclose the identity of the source of the 2007 Loan Chart. The Respondent has no claim against the Petitioner under any of the various theories advanced, and, therefore, no basis upon which to receive injunctive relief.

2. Regarding the Petitioner's suggestion that Implode Explode does not defend its objection to the compelled production of the source of the 2007 Loan Chart, Reply at ¶ 40, the source of the 2007 Loan Chart is protected by the qualified reporter's privilege conferred by the New Hampshire Constitution. "Our constitution quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting. News

gathering is an integral part of the process." *Opinion of the Justices*, 117 N.H. 386, 389 (1977) (recognizing that news sources are protected by a reporter's privilege). "In [a] civil proceeding involving the press as a nonparty, the balance is struck in favor of the press." *Id.* In this case, Mortgage Specialists has not filed any claims against Implode Explode—or any party for that matter; it seeks only injunctive relief based upon hypothetical, or potential claims, all of which are clearly invalid as regards Implode Explode. Therefore, Implode Explode is not a "party" to any case in which the privilege conferred upon it as a news gathering organization under the New Hampshire constitution should be pierced.

3. Contrary to the Petitioner's assertion, *Downing v. Monitor Publishing Co.*, 120 N.H. 383 (1980) does not control here with regard to the disclosure of confidential sources, or anonymous posters. The key in *Downing* was that the subject of the motion to compel disclosure of anonymous sources, the Concord Monitor, *was also the defendant in the action*—a libel suit. In *Downing*, the Court answered the question it left open in *Op. Jus.*, 117 N.H. at 389: whether the reporter's privilege protected a news organization from having to disclose sources in a libel suit. The Court expressly distinguished *Downing* from a case, like this one, where the news organization was not a party to the suit.

4. Here, the Petitioner has no claim against Implode Explode for defamation. The Petitioner has admitted that the Loan Chart itself is not defamatory. Reply at n. 2. The Petitioner has stated that it has no disagreement with the article written about Mortgage Specialists by Implode Explode. Reply at ¶12. Implode Explode is insulated by 47 U.S.C.A. §230 from liability for the various postings by anonymous posters that

the Petitioner claims are defamatory. *Id.*

5. The Petitioner has no claim against Implode Explode under RSA 383:10-b, which, while conferring confidentiality on information gathered by the banking department, provides no private cause of action to enforce the confidentiality designation. Indeed, RSA 383:10-b provides no mechanism at all to prevent the disclosure of submitted information. If any duty not to disclose exists under RSA 383:10-b, it rests with the Banking Commissioner. This is in stark contrast to RSA 359-C, which not only declares that personal bank account information is confidential, but also provides three remedies for consumers in the event of a disclosure or a threatened disclosure, including, expressly, the ability for a threatened account holder to enjoin the public disclosure of his or her account information. RSA 359-C:14; *see Cross v. Brown*, 148 N.H. 485, 486 (2002). The Court ruled in *Cross* that there was no private right of action to enforce the privacy protections of RSA 359-C other than the remedies set up by the statute. 148 N.H. at 486. The case is even clearer under RSA 383:10-b, because the Legislature, in contrast to the provision of various causes of action for account holders in RSA 359-C, did not provide *any* mechanism to enforce the confidentiality provision of RSA 383:10-b. Indeed, it is clear that the Legislature did not attach the same degree of privacy to the information protected by the confidentiality provision of RSA 383:10-b that it did to the bank account information protected by RSA 359-C. Not only did the Legislature not create a cause of action of any kind to enforce RSA 383:10-b, but it expressly permitted the Banking Commissioner to make any of the information submitted under RSA 383 public if, in his sole discretion, he believed that the disclosure of this information was in the public interest. RSA 383:10-b. The fact that the Commissioner has the complete

discretion to make information like the 2007 Loan Chart public seriously undermines the Petitioner's claim of a right to enforce the confidentiality provided by RSA 383:10-b.

6. The Petitioner's invasion of privacy claim is also without merit. The Commissioner's discretion, under RSA 383:10-b, to publish information like the Loan Chart means that this information is simply not the kind of private information, the publication of which a person of ordinary sensibilities would find to be offensive. *See Remsberg v. Docusearch*, 149 N.H. 148, 156 (2003). The Petitioner's attempt to argue, through *Docusearch*, that a party has an expectation of privacy in commercial information fails as well. The information in *Docusearch* that the Petitioner argues proves the rule was the social security number—a deeply personal piece of information. 149 N.H. at 156. The concerns that animated the Court's finding, in *Docusearch*, that the disclosure of a social security number could give rise to an invasion of privacy claim were fundamentally personal—specifically, that the social security number, which was already the subject of countless contractual and statutory protections, could be exploited for nefarious purposes such as identity theft. *Id.* The tort of invasion of privacy, under U.S. and New Hampshire law, is intended to protect profoundly *personal* information, about real human beings, most often, though perhaps not always, in the home and family context.

7. Further, even if the Petitioner's claim for invasion of privacy had merit, this still would not justify the compelled disclosure of the source of the 2007 Loan Chart. Under New Hampshire's test for whether injunctive relief is permitted, the Petitioner must show a likelihood of success on the merits. *ATV Watch v. NH DRED,* 155 N.H. 434, 438 (2007). Even assuming that Petitioner could sustain a claim for invasion of

privacy in this case, the appropriate relief in that case would be limited to enjoining the publication of the private information held by the Respondent. Compelling the Respondent to reveal the identity of the source of the information does nothing to address the Petitioner's claim for invasion of privacy *by the Respondent.*

8. Additionally, the test for injunctive relief requires the Petitioner to plead adequate facts to support its request for injunctive relief. The Petitioner never claimed any invasion of privacy in its Verified Petition; it claimed only that it wanted to maintain the integrity of the banking department process by enforcing the confidentiality provisions of RSA 383:10-b. Verified Petition at ¶28. The Petitioner's invasion of privacy claim was formulated only in its memoranda of law during the jurisdictional arguments in this case.

9. The Petitioner has not pled any facts showing that the Respondent obtained the 2007 Loan Chart illegally. It is not sufficient to say that the mere possession of the information implies that it was obtained illegally. News organizations every day receive anonymous, unmarked envelopes containing sensitive documents in their mailboxes. The essential role of the press in a democratic society would be utterly undermined if each news organization had to first ascertain whether the documents obtained in this manner were covered by some confidentiality agreement or privilege— and the free press would be destroyed if news organizations were prohibited from publishing these documents if their confidentiality was known. For this reason, an entire line of cases from the U.S. Supreme Court stands for the proposition that the First Amendment prohibits courts from preventing the publication of information that has been legally obtained by the press. *E.g., Florida Star v. B.J.F.*, 491 U.S. 424 (1989); *Cox*

*Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Landmark Communications Inc. v. Virginia*, 435 U.S. 829 (1978). "State action to punish the publication of truthful information seldom can satisfy constitutional standards." *Petition of Brooks*, 140 N.H. 813, 819 (1996) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979)).

10. Petitioner states that it is entitled to injunctive relief despite the availability of money damages through an action at law because "monetary damages can never fully compensate it for the harm to its reputation." Reply at ¶16. This is the case, of course, with any libel action, yet it remains incontrovertible that defamation is an action at law, and "equity will not enjoin a libel." *Metropolitan Opera Co. v. Local 100*, 239 F.3d 172, 177 (2nd Cir. 2001). Petitioner's support for the assertion that reputation damage can be "irreparable" is taken far out of context. *Ross-Simmons v. Baccarat*, 217 F.3d 8, 13 (1st. Cir. 2000), held that injunctive relief in the form of specific performance would be appropriate in a breach of contract action to prevent the plaintiff from losing a prestigious brand or unique product line and suffering consumer abandonment as a consequence. *Id.* This ruling is legally and factually inapposite to the present case.

11. Finally, Petitioner's assertion that the prior publication of the 2007 Loan Chart means that an injunction against a republication of the chart would not be a prior restraint is baseless. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) dealt with commercial speech, specifically, the posting of advertisements by the newspaper in sex-designated categories (*e.g.*, "Men-Help Wanted"). *Pittsburgh Press* does not support the Petitioner's argument for three reasons: (1) the speech in *Pittsburgh Press*, commercial speech, enjoys a lesser degree of protection than other speech (414 U.S. at 388); (2) that this manner of advertising had

been a "continuing course of repetitive conduct" was not a controlling factor in the Court's decision to enjoin the manner of publication (see 414 U.S. at 390); (3) the illegality of the manner of advertising had been determined by the Human Rights Commission (414 U.S. at 389).

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

Respectfully Submitted,

Implode-Explode Heavy Industries, Inc.

By its Attorneys,

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Dated: March 5, 2009

By:_____
Jeremy D. Eggleton, Bar No. 18170
William L. Chapman, Bar No. 397

**CERTIFICATE OF SERVICE**

I, William L. Chapman, hereby certify that on this 5th day of March 2009, I delivered the foregoing pleading to counsel for Petitioner by hand.

_____
Jeremy D. Eggleton