THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2009 Term
June Session

Docket No. 2009-0262

The Mortgage Specialists, Inc.

v.

Implode-Explode Heavy Industries, Inc.

APPEAL FROM
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF IMPLODE-EXPLODE HEAVY INDUSTRIES, INC.

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BRIEF OF IMPLODE-EXPLODE HEAVY INDUSTRIES, INC.

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Statement of the Facts and the Case

Appellant-Respondent, Implode Explode Heavy Industries, Inc. ("Appellant"), operates a website entitled the "Mortgage Lender Implode-O-Meter" at www.ML-Implode.com, dedicated to reporting, commentary, and public discussion of the United States mortgage industry. Appendix 29-33 ("App. ___"). Appellant gathers news, writes articles and editorials, and supports reader feedback through comment sections, tips, and guest submissions. App. 29.[1] One feature of ML-Implode.com is a series of lists, including a "Non-Imploded Lender's List," an "Imploded Lenders" list, and an "Ailing/Watch List Lenders" list. App. 50, 58, 60. Appellant developed the "Implode-O-Meter" prior to the devastating collapse of the credit markets, a crisis that has affected the entire United States. Appellant's analysis of—and warnings about—the weaknesses of lending practices in the boom of the mid-2000s presaged the subprime mortgage crisis.

Appellant received a document that purported to represent the 2007 loan figures for the Appellee, Mortgage Specialists, Inc. ("MSI"). App. 16. Appellant posted a link to this document, the so-called "2007 Loan Chart," in an August 19, 2008 article that Appellant wrote, headlined "The Mortgage Specialists-Retail..." (remainder of headline cut off in record copy of article), detailing a series of administrative actions that had been taken against MSI by the New Hampshire Banking Department. App. 63. By clicking on the link a reader could open a window that showed the 2007 Loan Chart. Following publication of the article, an anonymous online reader with the pseudonym

[1] App. at 28-65 contains a series of exhibits that were attached to MSI's Reply to Appellant's Objection to the original Verified Petition on the ground of jurisdiction. The jurisdictional pleadings are not included in the Appendix since Appellant has elected not to brief that issue, but they form part of the record on which the trial court based its Final Order.

"Brianbattersby" posted two comments about MSI and its president on the part of the website dedicated to reader feedback. App. 16-17.

MSI sent Appellant a draft Verified Petition for Temporary, Preliminary and Permanent Injunctive Relief. App. 4. Thereupon, Appellant agreed to remove the 2007 Loan Chart and two Brianbattersby posts, but did not agree to do so permanently. Id. In response, MSI filed its Verified Petition together with an Ex Parte Motion for a Temporary Restraining Order. App. 1. The allegations in the motion are based on allegations in the Verified Petition, and do not set forth any new substantive facts or arguments. The trial court denied the motion, marking the box that stated: "[I]t does not appear that immediate and irreparable injury, loss or damage will result to the Petitioner[.]" App. 25.

In its Verified Petition, MSI alleged that Appellant had placed MSI on the "Ailing/Watch" list and posted the "Mortgage Specialist—Retail..." article with a link to the 2007 Loan Chart on its website. App. 16; *see* Special Appendix (filed under seal). It claimed it had submitted the 2007 Loan Chart to the Massachusetts Department of Banking and the New Hampshire Banking Department, and that the loan chart was a confidential, privileged document. App. 15. It further claimed that the two Brianbattersby comments were "false and defamatory comments about [MSI] and its President, Michael Gill...including a statement that Mr. Gill 'was caught for FRAUD back in 2002 FOR SIGNING BORROWERS NAMES and bought his way out." App. 16 (referring to a comment posted on October 4, 2008). MSI did not include the entire October 4 posted comment. Id. MSI referred to the second comment, of October 7,

2008, reading, "Mortgage Specialists Fraud Michael Gill Fraud Mortgage Specialists NH Fraud Michael Gill NH Fraud" as "nonsensical." App. 17.

MSI claimed that the publication of the 2007 Loan Chart violated the confidentiality provisions of RSA 383:10-b and alleged it suffered irreparable harm as a result of the publication of the loan chart, stating that "multiple lenders...will no longer provide loans through [MSI] based, at least in part, on the [publication of the 2007 Loan Chart]." App. 17-18. MSI sought to enjoin reposting of the 2007 Loan Chart, alleging it would cause irreparable harm, but without stating what that harm would be. App. 19. Next, MSI claimed it was entitled to an order requiring Appellant to disclose the identity of the source of the loan chart, stating that "the disclosure of the source of the documentation/information is necessary to protect and maintain the integrity of banking department examinations and will allow [MSI] and the Court, to determine whether banking department officials are the source of the confidential information." Id. Finally, MSI claimed it was entitled to enjoin reposting of the Brianbattersby comments, and disclosure of Brianbattersby because it had suffered irreparable harm from his comments, again without stating what the harm was. Id.[2]

Counsel for Appellant accepted service on November 23, 2008, and entered a special appearance for the purpose of contesting the court's jurisdiction over Appellant, a Nevada corporation. App. 26-27. While the jurisdictional ruling was pending, MSI conducted a parallel inquiry into the identity of Brianbattersby and located an individual named Brian Battersby, who resided in Charlestown, N.H. On January 20, 2009, MSI subpoenaed Battersby for deposition. Appellant moved to quash the subpoena on the

[2] In it Reply to Appellant's Objection, MSI claims that Brianbattersby's comments injured MSI's reputation. App. 97.

ground that the court had yet to rule on the jurisdictional issue. App. 70. The court quashed the subpoena over MSI's objection. App. 78. On February 6, 2009, the trial court ruled it had jurisdiction over Appellant.

Appellant objected to MSI's petition on the merits, arguing that the First Amendment protects its right to publish lawfully obtained materials in its possession; that the New Hampshire qualified newsgathering privilege protects its sources from disclosure; that developing First Amendment jurisprudence protects it from having to disclose the identity of Brianbattersby; and that MSI failed to meet the New Hampshire standard for issuance of an injunction. App. 79-91. The parties waived an evidentiary hearing, and the trial court ruled on the pleadings. Brief Appendix 5 ("Br. App. ___"). In its Final Order, the court summarily rejected all of Appellant's arguments, and ordered the relief MSI requested:

1. The Respondent, and all of its agents, servants, employees, and representatives, are enjoined from displaying, posting, publishing, distributing, linking to and/or otherwise providing any information for the access or other dissemination of copies of and/or images of a 2007 Loan Chart and any information or data contained therein, including on the website operated at www.ml-implode.com and any other websites under respondent's ownership and control;
2. The Respondent is ordered to immediately disclose the identity of the individual and/or entity that provided it with the 2007 Loan Chart;
3. The respondent is ordered to immediately produce all documents that concern petitioner that it received from the individual or entity that provided it with the 2007 Loan Chart;[3]
4. The respondent is ordered not to re-post or re-publish the October 4, 2008, and October 7, 2008, false and defamatory postings by "Brianbattersby;" and

[3] Althouth MSI requested this relief in its Verified Petition, at no point in subsequent pleadings did it further address why it needed such documents or why it would suffer irreparable harm without them.

5. The respondent is ordered to immediately disclose the identity of "Brianbattersby," including his full name, address, email address, phone number, and any other personal information respondent possesses.

Br. App. 5-6.

In granting MSI the foregoing relief the trial court stated: "At first blush it seemed to this Court that the petitioner's requests were reasonable." Br. App. 3. It characterized those requests as follows:

> All that the petitioner has requested is that the 2007 Loan Chart and any future loan charts prepared pursuant to New Hampshire law not be included in any other report referencing MSI, and further that the respondent be ordered to divulge the identity of the person or entity that provided the unauthorized 2007 Loan Chart information to it and also identify Brianbattersby who allegedly provided it with defamatory information.

Br. App. 3. In contrast, the trial court characterized Appellant's response to those "reasonable" requests as "knee-jerk:"

> One would have hoped that when a legitimate publisher of information was notified of the fact that certain unauthorized information was given to it which was then published, presumably in good faith, the publisher would, in order to maintain the integrity of its publication, willingly provide the wronged party with the information requested. Instead, the respondent exhibited a knee-jerk reaction.

Br. App. at 3-4.

Appellant moved to stay the court's order pending appeal. App. 116-19. MSI objected and also moved for contempt. App. 120-27. The basis of the contempt motion was that Appellant had mistakenly republished the 2007 Loan Chart when it posted the public court pleadings from the case in ".pdf" format on its website. Some of the pleadings included copies of the 2007 Loan Chart whose publication the trial court had enjoined in its Final Order. App. 133-36. Appellant's counsel responded to the contempt

motion by stating that he "inadvertently did not excise the Exhibit containing the 2007 Loan Chart" from copies of the pleadings he had sent to Appellant for posting. App. 143. Further, Appellant submitted evidence, in its reply to MSI's objection to the motion to stay, of a significant drop in the number of tips it had received from readers and users following the Final Order. App. 148, 150.

By order of April 13, 2009, the trial court granted the Motion to Stay and deferred action on MSI's Motion for Contempt "until after the Supreme Court has issued its findings on appeal." App. 153. The trial court restated its order prohibiting Appellant from publishing the 2007 Loan Chart. This appeal followed.

Summary of the Argument

The trial court erred in granting MSI's request to prohibit reposting the 2007 Loan Chart and two Brianbattersby comments because MSI failed to demonstrate it would succeed on the merits of any claim against Appellant, that it would suffering irreparable harm, and that it had no adequate remedy at law. MSI has no claim against Appellant under RSA 383:10-b to "maintain the integrity of banking department examinations" or for any other relief; it has no claim for invasion of privacy under New Hampshire law; and the First Amendment and Part 1, Article 22 of the New Hampshire Constitution protect Appellant's right to post the 2007 Loan Chart and Brianbattersby comments.

The trial court erred by enjoining Appellant from reposting the 2007 Loan Chart and two Brianbattersby comments because its prohibition constitutes an unlawful "prior restraint" on publication in violation of the First Amendment and Part 1, Article 22.

The trial court also erred in ordering Appellant to disclose the identities of the source of the 2007 Loan Chart and Brianbattersby because the First Amendment and Part

1, Article 22 protect the right of a speaker to maintain his anonymity. To pierce that shield of anonymity, the First Amendment and New Hampshire newsgathering privilege require a party seeking such relief to demonstrate that the speaker's identity is relevant to a right the party seeks to protect, and to demonstrate it has undertaken, without success, reasonable alternative means to obtain the speaker's identity. The trial court erred because it failed to require MSI to meet either of these requirements.

Argument

I. THE TRIAL COURT ERRED IN ENJOINING THE PUBLICATION OF THE 2007 LOAN CHART AND THE POSTINGS OF BRIANBATTERSBY BECAUSE MSI HAS NO CLAIM AGAINST APPELLANT THAT WILL SUCCEED ON THE MERITS, THERE IS NO DANGER OF IRREPARABLE HARM, AND THE BALANCE OF HARMS FAVORS APPELLANT.

A. Standard of Review

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. *ATV Watch v. New Hampshire Dept. of Resources and Economic Development*, 155 N.H. 434, 437-438 (2007). In addition, "injunctive relief is an equitable remedy, requiring the trial court to consider the circumstances of the case and balance the harm to each party if relief were granted." *Kukene v. Genualdo*, 145 N.H. 1, 4 (2000). The trial court retains the discretion to decide whether to grant an injunction after consideration of the facts and established principles of equity. *Id.* The propriety of affording equitable relief rests in the sound discretion of the trial court to be exercised according to the circumstances and exigencies of the case. *Blagbrough Family Realty Trust v. A & T Forest Products, Inc.*, 155 N.H. 29, 46 (2007). This Court will uphold a trial court's equitable order unless its

decision constitutes an unsustainable exercise of discretion. *Id.* However, this Court reviews the trial court's application of the law to the facts *de novo*. *Id.* at 33.

B. MSI is not likely to succeed on the merits of its claim that Appellant's publication of the 2007 Loan Chart was unlawful.

1. RSA 383:10-b does not create a private cause of action to enforce its confidentiality provisions.

Publication of the 2007 Loan Chart cannot give rise to a claim against Appellant under RSA 383:10-b because that statute neither creates a private cause of action nor forbids a third party from publishing information protected by it. RSA 383:10-b requires the Banking Department to not make public records it acquires in its investigations and examinations. *Id.* MSI claimed in paragraph 28 of its Verified Petition 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 confidential information found on Respondent's website." *Id.* MSI cited no authority for this proposition, and there is none. RSA 383:10-b does not even purport to empower the government to sanction Appellant for publishing information protected by it, let alone MSI. Unlike some state laws that extend to private parties a right of action, RSA 383:10-b provides for no similar right.

For instance, RSA 359-C declares that personal bank account information is confidential, but also provides three remedies for consumers in the event of a disclosure or threatened disclosure—including, expressly, the ability of the threatened account holder to enjoin the public disclosure of his or her account information. RSA 359-C:14; *Cross v. Brown*, 148 N.H. 485, 486 (2002). Significantly, 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 statute. *Cross*, 148 N.H. at 486. Under RSA 383:10-b,

the Legislature did not create any mechanism to enforce the confidentiality provisions of RSA 383:10-b. In fact, the Legislature clearly did not attach the same degree of privacy to information protected by RSA 383:10-b because it gave the Commissioner the discretion to make "records of investigations and reports of examinations" public if he determined that doing so would be in the public interest. *Id.* Since RSA 383:10-b does not authorize the Commissioner to take action against Appellant under the circumstances of this case, surely it does not give MSI that authority, or the authority to "maintain the integrity of banking department examinations." App. 19.

2. <u>The publication of the 2007 Loan Chart is not an invasion of privacy.</u>

In a Memorandum of Law attached to its Reply to the Respondent's Objection to its Verified Petition by Reason of Jurisdiction,[4] MSI asserted a new cause of action for invasion of privacy, not in its original Verified Petition,[5] that purported to justify the injunctive relief requested. Relying on *Whalen v. Roe*, 429 U.S. 589 (1977), MSI argued that publication of the 2007 Loan Chart amounted to an invasion of privacy because the 2007 Loan Chart constituted "private" information. This claim cannot succeed on the merits because a right of privacy exists in the intimate personal context, not in a commercial context like this.

The right of privacy is limited to cases involving the physical privacy of the home and intimacies of interpersonal life and communication. *Whalen v. Roe*, 429 U.S. at 608 (1977) (Stewart, J. concurring) ("[A]lthough the Constitution affords protection against certain kinds of government intrusions into personal and private matters, there is no

[4] See n. 1, *supra*.

[5] Thus underscoring the insufficiency of the Verified Petition—upon which the trial court's determination regarding an injunction must be made—with regard to the standard MSI is required to meet to enjoin the publication of the 2007 Loan Chart, or to compel Appellant to disclose the identities of anonymous posters to its website, or its sources.

'general constitutional right to privacy'"). Justice Stewart distinguished 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 concluded that no right of privacy was violated by the State of New York amassing prescription data and medical records. *Id.*; *cf. Bartnicki v. Vopper*, 532 U.S. 514, 540-41 (2001) (Breyer and O'Connor, JJ., concurring) (holding that publication of illegally intercepted telephone conversations about non-intimate subject matter not sanctionable).

New Hampshire's approach to the common law tort of invasion of privacy is consistent with a personal protective sphere rather than a corporate one. *See Hamberger v. Eastman*, 106 N.H. 107, 111-12 (1964) (recognizing cause of action when defendant had recorded tenants' intimate bedroom activity); *Fischer v. Hooper*, 143 N.H. 585, 589-90 (1999) (approving cause of action for recording of intimate conversations between ex-spouse and daughter). To have a cause of action for invasion of privacy in New Hampshire, the publication of the material must rise to the level of being "offensive to persons of ordinary sensibilities." *Remsburg v. Docusearch, Inc.*, 149 N.H. 148, 156 (2003). This determination is made as a matter of law. *Id.* In this case, the 2007 Loan Chart aggregates financial information, Sp. App., and there is nothing about publication of that information that a person of ordinary sensibilities would find offensive, in the way that an ordinary person would immediately recognize that recorded bedroom activities are intimate and private matters. *See Hamberger*, 106 N.H. at 111.

3. Since Appellant lawfully obtained the 2007 Loan Chart, the trial court's injunction prohibiting its publication is a classic prior restraint on Appellant's right to speak, and is erroneous as a matter of law.

i. A prohibition on the publication of lawfully obtained information is a prior restraint in violation of the First Amendment.

A prior restraint bears a heavy presumption against its constitutional validity. *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *State v. Chong*, 121 N.H. 860, 862 (1981); *Petition of Brooks*, 140 N.H. 813, 319 (1996) ("state action to punish the publication of truthful information seldom can satisfy constitutional standards") (quotation and citation omitted). The First Amendment protects freedom of speech and freedom of the press, including speech and the press on the internet, by providing, "Congress shall make no law ... abridging the freedom of speech, or of the press ....". *CBS v. Davis,* 510 U.S. 1315, 1317 (1994); *Reno v. American Civil Liberties Union,* 521 U.S. 844, 870 (1997). Indeed, a primary purpose of the guarantee of freedom of the press is to prevent prior restraints on publication, *Near v. Minnesota,* 283 U.S. 697, 713 (1931), "the most serious and the least tolerable infringement" of First Amendment rights. *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976). Therefore, "[e]ven a temporary restraint on pure speech is improper absent the 'most compelling circumstances." *CBS v. Davis,* 510 U.S. at 1317 (quoting *In the Matter of Providence Journal Co.,* 820 F.2d 1342, 1351 (1st Cir.1986)); *Near v. Minnesota,* 283 U.S. at 716 (prior restraints only issued when necessary to prevent publication of troop movements during time of war, the overthrow of government, or obscenity). The heavy presumption against the validity of prior restraints is entitled to even more weight when the prior restraint takes the form of an injunction because an injunction targets a specific speaker. *See Madsen v. Women's Health Center*, 512 U.S. 753, 764 (1994); *Metropolitan Opera*

Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union, 239 F.3d 172, 176 (2nd Cir. 2001)).

In *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971), known famously as the "Pentagon Papers Case," the Supreme Court held that enjoining the publication of classified, non-public Defense Department reports that had been obtained by the press was an impermissible prior restraint. In a line of cases following *New York Times*, the Supreme Court has yet to uphold a prior restraint on, or sanction for, the publication of truthful, lawfully obtained information. *Cox v. Cohn*, 420 U.S. 469 (1975) (affirming that even if a state or federal law prohibits the disclosure of certain information, that information may still be published without sanction if it is truthful and the publisher obtained it from public sources.);[6] *Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989) (newspaper cannot be sanctioned for publishing name of rape victim obtained from public record); *Bartnicki v. Vopper*, 532 U.S. at 528 (radio station cannot be sanctioned for broadcast of recording intercepted in violation of wiretapping statutes).

This is the law even for information that has been given to a publisher by someone who obtained the information improperly or unlawfully. *See CBS v. Davis*, 510 U.S. at 1318 ("Nor is the prior restraint doctrine inapplicable because the [information to be published] was obtained through 'calculated misdeeds' of [the publisher.]"); *Bartnicki v. Vopper*, 532 U.S. at 528 ("[W]here the publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, the government may not punish the ensuing publication of that information based upon the defect in a chain[.]"); *Providence Journal Co.*, 820 F.2d at 1348-49.

[6] In *Cox*, the issue was not a prior restraint, but whether a news organization could be sanctioned for publishing the name of a victim of crime in violation of state law; the Supreme Court held that the First Amendment barred any sanction. *Cox*, 420 U.S. at 495-96.

The *New York Times* principle is not limited in application to situations like *Cox*, 420 U.S. at 471, or *Florida Star*, 491 U.S. at 538, where the government erroneously published or furnished the information in the first instance and the respondent sought to republish the information, but covers where the publisher "relie[s] upon routine newspaper reporting techniques to ascertain the [information claimed to be private, protected, or confidential.]" *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979).

ii. Because Appellant obtained the 2007 Loan Chart lawfully, the trial court's injunction against its publication is a prior restraint and must be overturned.

MSI argued in its pleadings that Appellant's reliance on such weighty cases as *New York Times* was misplaced—that the 2007 Loan Chart could hardly be compared with the Pentagon Papers. The trial court adopted this reasoning wholesale, dismissing out of hand Appellant's basic First Amendment argument:

> A review of all the pleadings filed by the respondent suggests that it is of the opinion that because it is a member of the loose organization known as 'the press' it can publish anything, be it true or false, and not be restricted in any way. The respondent has categorized the petitioner's request as an attack on the press and on its first amendment protection. Particularly in this case, such a stance rewards and encourages the proliferation of unauthorized communication. The respondent's position is akin to one who uses a sledgehammer to kill an ant...One would hope that the ideals of truth and justice are not lost in the respondent's desire to protect its right to publish anything without consequence[.]

Br. App. 4-5.

But the protections of the First Amendment are not limited to "matters of transcendent importance[.]" *Dishnow v. Sch. Dist. of Rib lake,* 77 F.3d 194, 197 (7th Cir.1996) (Posner, J.). "That the public was not large, that the issues were not of global significance, and ... not ... vital to the survival of Western civilization [does] not place

[this] speech outside the orbit of [First Amendment] protection." *Id.* Appellant seeks nothing more than to exercise its rights under the First Amendment, which protect its ability to publish documents in its possession, without regard to whether they constitute confidential or protected information. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir.1996).

Even assuming the 2007 Loan Chart constitutes confidential commercial information, its publication does not threaten any interest "more fundamental than the First Amendment itself." 78 F.3d at 227. In *Proctor & Gamble*, the well-known consumer products giant was a party to civil litigation and had stipulated to the entry of a protective order prohibiting disclosure of trade secrets and other confidential documents obtained during the discovery process. *Id.* at 222-24. A journalist from Business Week magazine obtained some of those documents. Procter & Gamble sought an injunction prohibiting Business Week from publishing or disclosing any information contained in the documents. The district court held an evidentiary hearing and found that Business Week had knowingly violated the protective order by obtaining the documents. The district court therefore enjoined Business Week from using the confidential materials it had obtained unlawfully. *Id.*

In reversing, the Sixth Circuit held that Business Week's planned publication of the documents did not constitute a grave threat to a critical government interest or to a constitutional right sufficient to justify a prior restraint. *Id.* at 227. The court found that Procter & Gamble's commercial interest in the confidential documents was insufficient to justify an injunction under this standard. *Id.* at 225. Further, the court held that Business Week's allegedly improper conduct in obtaining the documents did not justify imposing a

prior restraint, and that the district court was misguided when it inquired into that issue. *Id.*

This long unbroken line of First Amendment jurisprudence governs this case. The record does not show how Appellant obtained a copy of the 2007 Loan Chart,[7] but neither MSI nor the trial court posited that Appellant had acquired the document through unlawful means.[8] In the Final Order, the trial court observed only that Appellant received the document and published it in "good faith." Br. App. 3. In seeking to enjoin publication of the 2007 Loan Chart, MSI made precisely the same argument that Proctor & Gamble made in the eponymous Sixth Circuit case, and this Court should reject that argument on the same grounds. 78 F.3d at 225 ("The private litigants' interest in protecting their vanity or their commercial self-interest *simply does not qualify as grounds for imposing a prior restraint.*") (emphasis added); *see Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (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 the court").

Ford Motor Co. v. Lane, 67 F.Supp.2d 745, 753 (E.D.Mich. 1999) is also directly on point. There, the court decided in favor of the right to publish on facts even more favorable to Ford than are present in this case. Ford sought to enjoin the publication of confidential company documents and information by the respondent, Lane, on his website. *Id.* at 746. Lane had obtained the information from anonymous internal sources at Ford, and the court characterized the information as "closely guard[ed]

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[7] "It is unclear...how the Respondent came to possess a copy of the 2007 Loan Chart." Verified Petition at ¶14, App. 16.

[8] MSI argued, in essence, that Appellant's possession of the 2007 Loan Chart was unlawful *per se* because RSA 383:10-b had deemed that information to be confidential or it was private confidential information, the possession of which constituted an invasion of privacy. App. 18, 98-99.

strategic, marketing, and product development plans. These plans are 'trade secrets[.]'". *Id.* at 748. Unlike the facts here, the court also found that Lane was aware of the confidentiality of the documents, which, unlike the 2007 Loan Chart, were littered with markings denoting their secrecy, as well as the duty of confidentiality owed to Ford by the employees who had furnished him the documents. *Id.*

Despite these facts, the district court reaffirmed the reach of the First Amendment and the right of Lane to publish even confidential information that Lane knew to have been provided in breach of the informant's duty to Ford. *Id.* at 752-53 ("While it may be true that Ford's trade secrets here are more competitive in nature and more carefully protected than those at issue in *Procter & Gamble,* they are certainly not more volatile than those at issue in the Pentagon Papers case."). This Court should embrace the rule enunciated in *Proctor & Gamble* and applied *Ford Motor Co.* and affirm Appellant's right to publish lawfully obtained material in its possession.

iii. Failure to overturn the trial court's injunction against publication of the lawfully obtained 2007 Loan Chart would profoundly chill lawful speech.

The trial court was clearly upset in the face of what it deemed to be "reasonable requests" from MSI not to publish the 2007 Loan Chart. "At its core, this is not even a press issue; this Court has not concluded that the press has any responsibility to 'police' the information it is given." Br. App. 6. This statement betrays a fundamental misunderstanding about how a newsgathering organization conducts business. As Appellant argued below, in a statement that the trial court found "troubling":

> 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 undermined if each news organization first had to ascertain whether the documents obtained in this

> manner were covered by some confidentiality or privilege—and the free press would be destroyed if news organizations were prohibited from publishing these documents if their confidentiality was known.

Id. at 4; *see Florida Star*, 491 U.S. at 535 (acknowledging "the timidity and self-censorship which may result from allowing the media to be punished for publishing truthful information."). It is precisely for this reason that the Sixth Circuit chastised the district court in *Proctor & Gamble* for its probing, and constitutionally impermissible review of the publisher's knowledge of the source and confidentiality of the material it published. 78 F.3d at 225 ("While these might be appropriate lines of inquiry for a contempt proceeding or a criminal prosecution, they are not appropriate bases for issuing a prior restraint"). Nothing, in fact, could be further from the purpose of the First Amendment or this Court's admonition in *Petition of Keene Sentinel*, 136 N.H. 121, 127 (1992), that "effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting." *Id.* (quoting *Opinion of the Justices*, 117 N.H. 386, 389 (1977).

The trial court's ruling in this case contradicts nearly forty years of Supreme Court jurisprudence. It has done precisely what the Supreme Court resoundingly rejected in *New York Times*, 403 U.S. at 719, when Justice Brennan declared, "[S]o 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 trial court's injunction against the publication of the 2007 Loan Chart is erroneous as a matter of law and should be vacated as an impermissible prior restraint on Appellant's right to speak under the First Amendment and Pt. I, Art. 22 of the New Hampshire Constitution.

C. MSI is not likely to succeed on the merits of its claim that Brianbattersby's posted comments are defamatory.

MSI complained about two statements posted by Brianbattersby. App. 16-17, 19. The second of these is, as MSI has admitted, "nonsensical": "Mortgage Specialists Fraud Michael Gill Fraud Mortgage Specialists NH Fraud Michael Gill NH Fraud." App. 17. It is well established under New Hampshire law that, to be actionable, a statement must be a statement of fact. *Pease v. Telegraph*, 121 N.H. 62, 65 (1981)(actionable statements must "reasonably be understood as assertions of fact"). Since Brianbattersby's second statement is not even a coherent sentence, it is not actionable under New Hampshire law and MSI cannot succeed on the merits of a defamation claim predicated upon it.

MSI set forth Brianbattersby's first post in its Verified Petition as follows: "[Mr. Gill] was caught for FRAUD back in 2002 FOR SIGNING BORROWERS NAMES and bought his way out." App. 16 (referring to a comment posted on October 4, 2008 but not setting forth the entire comment). Under basic principles of defamation law, a given statement, to be actionable, must be "of and concerning" the plaintiff and tend to lower the plaintiff in the esteem of any substantial and respectable group. *See Rest. 2d. Torts* §558; *Independent Mechanical Contractors v. Gordon T. Burke & Sons, Inc.*, 138 N.H. 110, 119 (1993); *Thomson v. Cash*, 119 N.H. 371, 373 (1979) (citations omitted). This first statement is not "of and concerning" MSI; it is a statement about Michael Gill, who is not a party to this suit. As the trial court found: "Those comments purportedly contained false and defaming allegations about the Petitioner's president, accusing him, among other things, of fraud for signing borrowers names to an application." Br. App. 2. Further, the post refers to an enforcement action taken in 2002, and MSI never alleged that Gill was then its President or had any relationship with it.

Moreover, rhetorical hyperbole and vigorous epithets are statements of opinion, not expressions of fact, and cannot give rise to a claim of defamation. *Pease*, 121 N.H. at 66. Brianbattersby's first posting is typical of internet chat rooms and blog chains in that it is wholly opinion, fueled by invective and hyperbole. This is not the kind of "statement" upon which a reasonable person would rely or be influenced by. *Doe v. See Doe v. Cahill*, 884 A.2d 451, 465 (Del. 2005) ("Blogs and chatrooms [unlike the *Wall Street Journal*, for instance] tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely."); *see Pease*, 121 N.H. at 66 ("journalistic scum of the earth" not actionable); *Rocker Mgmt, LLC v. John Does 1 through 20*, 2003 WL 22149380 at *2 (N.D. Cal. 2003) (vulgar, offensive, hyperbolic messages are not likely to be viewed as assertions of fact); *Global Telemedia Int'l, Inc. v. Doe*, 132 F.Supp.2d 1261, 1264-67 (C.D. Cal. 2001) (postings full of hyperbole, invective, short hand phrases strongly suggest they are opinions of the posters and not factual assertions); *SPX Corp. v. Doe*, 253 F.Supp.2d 974 (N.D. Ohio 2003) ("Statements appearing in such locations as forum and commentary newspaper sections, or other venues often associated with 'cajoling, invective and hyperbole' are more likely opinion[.]").

Furthermore, MSI has no claim against Appellant for Brianbattersby's statements even if they are defamatory because 47 U.S.C. §230(c)(1) confers immunity upon Appellant for statements posted on its website by third-party users and readers. *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)). Accordingly, MSI has no likelihood of success on the merits of a claim against Appellant arising from the

two postings. Therefore, the trial court's injunction prohibiting reposting was erroneous as a matter of law.

D. MSI did not show that it would suffer an irreparable harm if the 2007 Loan Chart and the Brianbattersby statements were reposted.

The only actual harm alleged by MSI anywhere in its pleadings was that "multiple lenders...will no longer provide loans through [MSI] based, at least in part, on the [publication of the 2007 Loan Chart]." App. 18-19. MSI alleged that it had suffered irreparable harm from the Brianbattersby postings, but failed to state how it was harmed. App. 19. Even if those postings caused damage to MSI's business, "equity will not enjoin a libel," *Metropolitan Opera Co. v. Local 100*, 239 F.3d 172, 177 (2nd Cir. 2001); MSI, like any other party claiming it has been defamed, has an adequate remedy at law in an action for damages. There is no justification, therefore, for an injunction against the Brianbattersby postings.

With respect to the 2007 Loan Chart, the only damage alleged by MSI is a loss of business, presumably commissions and service fees, arising from a drop in the number of loans it was brokering. App. 18-19. MSI provided no support for the assertion that this loss of business was attributable to the publication of the 2007 Loan Chart. Yet, as Appellant reported in its August 19, 2008 article, MSI entered into consent orders with both the Massachusetts and New Hampshire Banking Departments, which had inspected MSI and discovered numerous violations, including the fraudulent issuance of a forty year balloon mortgage to a customer who had thought he was agreeing to a thirty year fixed mortgage. App. 62-65. The article reported that MSI had to pay hundreds of thousands of dollars in fines. App. 64. Thus, the notion that MSI's loss of business was due to the publication of the *truthful* 2007 Loan Chart, and not to these adverse public

state regulatory actions, or the devastating collapse of the mortgage market, is doubtful. Even if established by the evidence, however, this loss of business clearly translates into a claim for money damages. Thus, MSI has an adequate remedy at law, and the alleged harm is not "irreparable." *McCabe v. Arcidy*, 138 N.H. 20, 30 (1993).

II. THE TRIAL COURT ERRED IN ORDERING APPELLANT TO DISCLOSE THE IDENTITIES OF THE SOURCE OF THE 2007 LOAN CHART AND BRIANBATTERSBY BECAUSE ANONYMOUS SPEECH IS PROTECTED BY THE FIRST AMENDMENT AND THE NEW HAMPSHIRE CONSTITUTION.

Even taking MSI's allegation of harm at face value, there is no harm accruing from the ongoing anonymity, *per se*, of the source of the 2007 Loan Chart and the identity of Brianbattersby. An injunction compelling the disclosure of their identities is therefore impermissible. Simply put, MSI has not met the standards for disclosure of anonymous speakers that have evolved under First Amendment and New Hampshire law.

A. The newsgathering privilege under Part I, Article 22 of the New Hampshire Constitution protects the identity of the anonymous source of the 2007 Loan Chart.

In *Opinion of the Justices*, 117 N.H. at 389, the Court first addressed the question of whether a news reporter could be ordered "to disclose the sources of information which he utilized in preparing a series of articles." The issue arose in a removal proceeding before the Senate President and Council under RSA 4:1. Relying on Part I, Article 22, the Court stated:

> 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. Newsgathering is an integral part of the process. One study showed that more than ninety percent of the reporters surveyed believed protection of identity was more important than protection of contents.

117 N.H. at 389. The Court, noting that the issue arose in a "civil proceeding involving the press as a non-party," struck the balance "in favor of the press." *Id.*[9]

The newsgathering privilege was next discussed in *Keene Pub. Corp. v. Keene Dist. Ct.*, 117 N.H. 959 (1977):

> In this state the press has been held to have a right, though not unlimited, to gather the news so as to effectuate the policy of the constitution that a free press is 'essential to the security of freedom in a state.'

117 N.H. at 961 (citing New Hampshire Constitution, Part I, Article 22; *Opinion of the Justices*, 117 N.H. 386 (1977)). At issue in *Keene Pub. Corp.* was a district court order closing a probable cause hearing in a criminal case. The closure order was to address the defendant's concern for adverse pretrial publicity. Drawing on a standard adopted by the American Bar Association Standards Relating to Fair Trial and Free Press, the Court held that the proponent of closure must demonstrate that the failure to close the hearing would constitute "a clear and present danger" to a fair trial because there "is a substantial likelihood that the information prejudicial to the accused's right to a fair trial would reach potential jurors; and ... [t]he prejudicial effect of such information on potential jurors cannot be avoided by alternative means." *Id.* at 961-962. Continuing, the Court stated that "[t]he proposed standard accords with this court's policy and offends neither our State nor the Federal Constitution." *Id.* at 962; *accord Keene Publishing Corp. v. Cheshire County Super. Ct.*, 119 N.H. 710 (1979).[10]

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[9] The Court did "not decide the scope of the privilege, whether it is absolute, who is a reporter, what qualifies as 'press,' what the situation would be if criminal proceedings were at issue or whether libel actions would require disclosure." 117 N.H. at 389.

[10] The Court also has referred to the newgathering privilege in *The Associated Press v. State*, 153 N.H. 120, 128 (2005), and *Petition of Keene Sentinel*, 136 N.H. at 127.

Taking up a question left open in *Opinion of the Justices*, the Court, in *State v. Siel*, 122 N.H. 254 (1982), held that Part I, Article 22 provides a qualified privilege to reporters to protect their confidential sources in criminal cases. Although *Siel* involved a confidential source, whereas here the source of the 2007 Loan Chart is anonymous, the Court's holding is instructive. The party seeking the identity of the source must demonstrate:

> (1) That he has attempted unsuccessfully to obtain the information by all reasonable alternative;
> (2) That the information would not be irrelevant to his defense; and
> (3) That by a balance of the probabilities, there is a reasonable possibility that the information sought as evidence would affect the verdict in his case.

122 N.H. at 259.

Considered together, these cases stand for the proposition that intrusion into the qualified privilege to gather the news – here, by ordering Appellant to identify the anonymous source – requires, *at a minimum*, that MSI demonstrate that (1) the identity of the anonymous source is relevant to *a right* MSI seeks to enforce, and (2) it has made reasonable but unsuccessful efforts to identify the source through alternative means. The trial court, however, required no such demonstration and based its disclosure ruling on nothing more than its view of how Appellant should "maintain the integrity of its publication."

In its Final Order, the trial court stated that MSI "asks for no sanctions or money damages as against" Appellant, nor does it claim that Appellant "had some duty or responsibility to verify the" 2007 Loan Chart or "knew or should have known that the publication of the 2007 Loan Chart was prohibited by New Hampshire law." Br. App. 2. Instead, it stated that when asked for the identity of unauthorized information "a

legitimate publisher...*to maintain the integrity of its publication*, [would] willingly provide the wronged party with the information requested." Id. at 3-4 (emphasis added).

At no point did the trial court address why the source's identity was relevant to a right MSI was seeking to enforce, other than to speculate that it might "seek money damages" against the source if it knew the source's identity. Id. at 5. Yet, MSI never stated or implied that was the reason it sought the identity of source. Rather, the sole reason it gave the trial court was that "disclosure of the source of the documentation/information is necessary to protect and maintain the integrity of banking department examinations and will allow Petitioner, and the Court, to determine whether any banking department officials are the source of the confidential information found on Respondent's website." App. 19. Yet, MSI failed to cite any authority that gave it the right to maintain the integrity of banking department examinations. Its position on source disclosure was that it only had to "create... a general issue of facts as to whether the disclosure of the confidential loan summary violates RSA 383:10-b or MSI's common law right to protection of its confidential information." App. 106, n. 6.

Not only did the trial court make no finding that disclosure was relevant to a right MSI sought to enforce, it likewise made no finding that MSI had undertaken, without success, reasonable alternative means to identify the anonymous source of the loan chart. Rather, the trial court's order of source disclosure is based on nothing more that its belief that MSI's request was "reasonable" and that "a legitimate publisher," notified it had published "unauthorized information ... to maintain the integrity of its publication ... [would] willingly provide ... the information requested." Br. App 3-4. But just as the United States Supreme Court cautioned in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S.

241, 258 (1974), that it was not for the government to "exercise... editorial control and judgment," so, too, is it not for the trial court to decide how Appellant should maintain the integrity of it publication. The newsgathering privilege has no such fragile foundation; instead it is firmly grounded in Part 1, Article 22 of the New Hampshire Constitution. The order must be vacated.

B. **The trial court erred in ordering Appellant to disclose the identity of Brianbattersby.**

Freedom of speech, whether secured by the First Amendment or Part I, Art. 22 of the New Hampshire Constitution, is "indispensible to the discovery and spread of political truth and essential both to stable government and to political change." *Independent Newspapers v. Brodie*, 966 A.2d 432, 440 (Md. 2009) (quoting *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis & Holmes, JJ., concurring)); *see Keene Sentinel*, 136 N.H. at 127. The importance of anonymous speech to our society has been recognized repeatedly by the United States Supreme Court. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). In *McIntyre*, Justice Stevens, writing for the majority, stated:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Great works of literature have frequently been produced by authors writing under assumed names. Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

Id. (quoting *Talley v. California,* 362 U.S. 60, 80 (1960)). Since the First Amendment protects speech on the internet as fully and completely as it does any other medium of speech, *Reno v. ACLU*, 521 U.S. at 870, anonymous speakers on the internet are due the full protection of the First Amendment. *Id.* The First Amendment demands due process protections for anonymous speakers. *See Cahill*, 884 A.2d at 455. These protections were urged upon the trial court in this case and ignored. App. 86-90. This Court should vacate the trial court's order compelling disclosure of the identity of Brianbattersby under the prevailing test for whether the First Amendment has been satisfied when a party seeks to unmask an anonymous speaker.

i. **The trial court's order failed to balance Brianbattersby's First Amendment rights against MSI's need to discover his identity.**

The Delaware Supreme Court, in *Doe v. Cahill*, 884 A.2d at 455, noted:

> The internet is a unique democratizing medium unlike anything that has come before. Unlike thirty years ago, when many citizens were barred from meaningful participation in public discourse by financial or status inequalities and a relatively small number of powerful speakers could dominate the marketplace of ideas the internet now allows anyone with a phone line to become a town crier with a voice that resonates farther than it could from any soapbox...Many participants in cyberspace discussions employ pseudonymous identities, and, even when a speaker chooses to reveal her real name, she may still be anonymous for all practical purposes. For better or worse, then, the audience must evaluate a speaker's ideas based on her words alone. This unique feature of the internet promises to make public debate in cyberspace less hierarchical and discriminatory than in the real world because it disguises status indicators such as race, class, and age

Id. at 455-56 (citations and quotations omitted). Thus, anonymity is crucial to the expression of political views, to avoid presumptions and stereotypes that could arise about one's views if one's identity were open, and to avoid "revenge and retribution." *Doe*, 884 A.2d at 457; *Quixtar Inc. v. Signature Management Team, LLC*, 566 F.Supp.2d

1205, 1213 (D. Nev. 2008) (applying balancing test to weigh First Amendment rights of anonymous speakers); *see Swiger v. Allegheny Energy, Inc.*, 2006 WL 1409622 (unreported decision E.D.Pa. May 19, 2006) (employee terminated after being identified as online poster of comments critical of his employer).

In order to comport with the First Amendment's protection for anonymous speech, a court order to unmask an anonymous internet speaker must reflect a due process that provides the speaker with notice and an opportunity to respond, and demands that the party have a viable cause of action against the speaker before a third party is ordered to reveal the identity of the speaker. *Independent Newspapers*, 966 A.2d at 450-51 (citing *Doe*, 884 A.2d at 457). This due process requirement is necessary because "posters have a First Amendment right to retain their anonymity and not to be subject to frivolous suits for defamation brought solely to unmask their identity." *Id.* at 449.

Although the First Amendment does not protect a speaker from liability for defamatory speech, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), it is far too easy in the internet environment for potential plaintiffs to inhibit the free flow of speech through actual or threatened legal action. *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 858 (2000). According to Lidsky, the threat of legal action against individuals who speak on the internet is motivated by a desire to silence speech rather than redress damages:

> One of the most striking features of these new [libel] cases [against individual anonymous online speakers] is that, unlike most libel suits, they are not even arguably about recovering money damages, for the typical John Doe has neither deep pockets nor libel insurance from which to satisfy a defamation judgment ... The goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him[.]

Id. at 858-862. "This 'sue first, ask questions later' approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked." *Doe v. Cahill*, 886 A.2d at 457.

Absent a protective standard for courts to use when determining whether an anonymous speaker should be unmasked, news organizations would be put in the position of having to defend the interests of parties, the anonymous posters, with whom their interests are not necessarily aligned—flatly contradicting the intent of 47 U.S.C. §230, which was calibrated to free Internet Service Providers ("ISPs"), including website operators, from the fetters of litigation arising from user content, and thereby promote the erection and maintenance of websites for public discourse. *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003).

New Hampshire courts, like courts elsewhere, must balance the right of a party seeking to identify an anonymous poster to develop facts in pursuit of a claim of defamation with the First Amendment right of the anonymous poster to safeguard his identity. Although such a balancing test was urged on the trial court, App. 86-90, the trial court refused to undertake any analysis of the relative interests at stake in this case. The court found only that "the petitioner's requests [are] reasonable... all it wants from the respondent is the identity of the...entity or individual that made allegedly defamatory statements about petitioner to the respondent." Br. App. 3-4, 6. It conducted no analysis of the independent First Amendment rights of Brianbattersby. *Id.* at 5. Therefore, the

trial court's injunction compelling Appellant to disclose the identity of Brianbattersby was erroneous as a matter of law.

ii. In order to assure that the First Amendment rights of an anonymous speaker are protected, a party seeking to unmask an anonymous speaker must (1) make reasonable efforts to provide the speaker with notice of its intent to do so and withhold action to give the speaker an opportunity to respond; and (2) demonstrate to the court that its claim of defamation can survive a motion for summary judgment.

Scores of courts have addressed the question of what kind of due process is necessary for a party to be able to unmask an anonymous speaker. *See, e.g. Independent Newspapers*, 966 A.2d at 449-56; *Doe v. Cahill*, 884 A.2d at 457-60; and cases cited. The common point of departure for most courts trying to balance the rights of anonymous speakers and the rights of claimant parties is *Dendrite International v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

In *Dendrite*, the plaintiff, a corporation, filed a complaint against a number of John Doe defendants for having posted allegedly defamatory statements on a Yahoo! online bulletin board dedicated to news and information concerning Dendrite. *Id.* at 763-64. The plaintiff was denied an order permitting it to conduct discovery against Yahoo! as to the identity of the anonymous posters. *Id.* On review, the appellate court concluded that, to prevent "plaintiffs [from using] discovery procedures in order to harass, intimidate or silence critics in the public forum[,]" something more than a mere showing that the claim could survive a motion to dismiss is necessary to unmask an anonymous speaker. *Id.* at 770-71. Most recently, the *Dendrite* test was adopted by the Maryland Court of Appeals, Maryland's highest court, in *Independent Newspapers*, 966 A.2d at 457; *see, e.g., Mobilisa, Inc. v. Doe 1 and The Suggestion Box, Inc.*, 170 P.3d 712, 719

(Ariz. 2007); *Krinsky v. Doe*, 159 Cal.App.4th 1154 (2008); *Western Intl, Inc. v. Doe*, 2006 WL 2091695 at *4 (D.Ariz.).

In *Cahill*, 884 A.2d at 455, the Delaware Supreme Court adopted a more stringent standard. John Doe posted two statements on a blog run by the Delaware State News concerning one of the plaintiffs' performance as a city councilman. *Id.* at 454. The plaintiffs filed suit against a John Doe defendant,[11] asserting defamation, and invasion of privacy claims. *Id.* The plaintiffs obtained a court order requiring Comcast, the Internet Service Provider that owned the Doe's internet address, to furnish the identity of John Doe. *Id.* Comcast notified John Doe, who then filed a motion for protective order to prevent the plaintiffs from obtaining his identity. *Id.* The trial court denied Doe's Motion, finding that the plaintiffs only had to show they had a "good faith" claim to support their requested discovery. *Id.*

On appeal, the Delaware Supreme Court rejected this standard, which MSI also advanced in its pleadings, *see* App. 106, n. 6, as "too easily satisfied:"

> "We must adopt a standard that appropriately balances one person's right to speak anonymously against another person's right to protect his reputation... We are concerned that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously...[i]ndeed, there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics..."

Id. at 456. The court also rejected the "motion to dismiss" standard on the ground that surviving a motion to dismiss is far too simple in a state like Delaware, which, like New Hampshire, has simple notice pleading requirements. *Id.* at 458 (citing *Ramunno v. Cawley*, 705 A.2d 1029 (Del. 1998) (even silly or trivial libel claims can survive a motion

[11] The original claim was against four defendants; the appeal dealt only with the claims against one of the John Does.

to dismiss where the plaintiff pleads facts that put the defendant on notice of his claim, however vague or lacking in detail these allegations may be)); *see Border Brook Terrace Condo. Ass'n*, 137 N.H. 11, 18-19 (1993); *Ellis v. Robert C. Morris, Inc.*, 128 N.H. 358, 363-64 (1986). This degree of protection was insufficient in light of the anonymous speaker's competing First Amendment rights. *Id.* at 458.

Although it drew heavily upon the analytical framework established in *Dendrite*, adopting the notice and the opportunity-to-respond requirements, the Delaware Supreme Court imposed a more stringent "summary judgment" standard for the plaintiff with respect to whether it has shown a viable claim:

> [T]he summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously... [B]efore a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion.

Cahill, 884 A.2d. at 460.

Like Delaware, New Hampshire is a notice-pleading jurisdiction. When initiating an action in court, a plaintiff need only provide a general notice of the claim asserted. *Porter v. City of Manchester*, 151 N.H. 30, 43 (2004). As the courts of Delaware, New Jersey and Maryland have shown, the lenient standards of notice pleading are not a sufficient safeguard for an anonymous speaker's First Amendment rights. *See Cahill*, 884 A.2d at 458; *Dendrite*, 775 A.2d at 760-61; *Independent Newspapers*, 966 A.2d at 457. The broad protection given to speech under the Part 1, Article 22 requires that a plaintiff show more than a vague, if well-pleaded, allegation of wrongdoing before a court will unmask an anonymous poster. *State v. Allard*, 148 N.H. 702, 706 (2002);

Associated Press v. State, 153 N.H. 120, 140 (2005). To properly balance the rights of the plaintiff for redress and of the anonymous speaker under the First Amendment and Part 1, Article 22, a plaintiff should have to (1) undertake reasonable efforts to notify the anonymous speaker of the discovery request and withhold action to give the speaker an opportunity to respond; and (2) plead sufficient facts to survive a motion for summary judgment. *Id.* at 460-61.

iii. **This Court should vacate the trial court's order compelling the disclosure of the identity of Brianbattersby because MSI did not allege sufficient facts in support of each element of its claim of defamation to justify unmasking Brianbattersby, and it had alternative means of discovering the identity of Brianbattersby.**

MSI's claim for defamation would not survive a motion for summary judgment, because MSI has not shown that there is no issue of material fact, and that it is entitled to judgment as a matter of law. *Town of Peterborough v. MacDowell Colony, Inc.*, 157 N.H. 1, 5 (2008). Reviewing the facts and drawing all inferences in favor of the claimant, as is required under the standard for summary judgment, *see id.*, MSI would not be entitled to judgment as a matter of law.

In order to prove defamation in New Hampshire, a plaintiff must present sufficient facts to demonstrate (a) a false and defamatory statement of fact that is of and concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) damages resulting from the statement. *See Rest. 2d. Torts* §558; *Independent Mechanical Contractors*, 138 N.H. at 119. MSI cannot prevail in this case because, as noted *supra*, Brianbattersby's statements are neither "of and concerning" MSI, *see Thomson*, 119 N.H. at 373, nor of a form or context that would lead a "hearer of common and reasonable understanding" to think they

were assertions of fact, rather than opinion. *See Pease*, 121 N.H. at 66; *Doe v. Cahill*, 884 A.2d at 465 (noting that internet chat rooms, blogs and online commentary "are not a source of facts or data upon which a reasonable person would rely").

In addition to overlooking the insufficiency of MSI's pleadings, the trial court disclosure order ignored the fact that MSI apparently located an individual named Brian Battersby in Charlestown, N.H. App. 102. Although the trial court quashed the deposition subpoena, nothing prevented MSI from speaking to Battersby to determine if he were the source of the two postings. If he refused to answer, MSI could bring a discovery action against him under RSA 498:1. In this factual context, especially, MSI has an adequate remedy and there is no need for injunctive relief to compel Appellant to identify Brianbattersby.

III. THE TRIAL COURT ERRED IN ORDERING APPELLANT TO TURN OVER OTHER DOCUMENTS CONCERNING MSI THAT APPELLANT MIGHT HAVE OBTAINED FROM THE SOURCE OF THE 2007 LOAN CHART

Although MSI requested this relief in its original Verified Petition, MSI did not argue for it in its subsequent pleadings, and the trial court did not analyze the propriety of the relief in its Final Order. The newsgathering privilege in New Hampshire is not limited solely to sheltering the identities of anonymous or confidential sources, but protects a news organization's right to gather news. *Keene Pub. Corp.*, 119 N.H. at 711; *see Siel*, 122 N.H. at 259. That right would be fatally compromised if, without any showing whatsoever, a news organization could be compelled to forfeit documents and information it had acquired through the newsgathering process. It would be impossible to reconcile Part I, Article 22's command that the "liberty of the press" shall be "inviolably preserved" with such an outcome.

Furthermore, *New York Times* stands for the proposition that the government cannot prohibit a speaker's publication of confidential, non-public documents. 403 U.S. at 714. This right, grounded in the First Amendment, would be meaningless if the government could obtain such documents before publication, which is exactly what MSI asked the trial court to do in this case. When balanced against the command of the First Amendment and Pt. I, Art. 22, MSI's mere request for any documents the anonymous source might have given to Appellant should not have been granted.

Conclusion

The trial court's order did not discuss any of the authorities upon which Appellant relied. Br. App. 5. Instead, the trial court apparently granted MSI's requests for injunctive relief because they were "reasonable." Br. App. 3-4. That is not the law, certainly when Appellant's position is grounded in the First Amendment, Part I, Article 22, and well-established New Hampshire law on the propriety of injunctive relief. This Court should vacate the trial court's order and dismiss the case.

Request for Oral Argument

Appellant requests fifteen minutes for oral argument by Jeremy D. Eggleton.

Respectfully submitted,

IMPLODE EXPLODE HEAVY INDUSTRIES, INC.

By its attorneys,

Orr & Reno, P.A.

By: _____

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Certification

I, Jeremy D. Eggleton, certify that on this the 22nd day of June, 2009, I forwarded two copy of this brief and accompanying appendices to Alexander Walker, counsel for the petitioner-appellee, at the law offices of Devine, Millimet and Branch, P.A., by first class and electronic mail.

_____

Jeremy D. Eggleton

THE STATE OF NEW HAMPSHIRE
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NOTICE OF DECISION

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08-E-0572 The Mortgage Specialists, Inc. vs. Implode-Explode Heavy Ind

Enclosed please find a copy of the Court's Order dated 3/11/2009 relative to:

Final Order

03/25/2009

Raymond Taylor
Clerk of Court

cc: Donald L. Smith
William L Chapman

SUCP Form SUCP050 (Rev. 09/27/2001)

36

3/11 Ct.

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY SUPERIOR COURT

The Mortgage Specialists, Inc.

v.

Implode-Explode Heavy Industries, Inc.

Docket No: 08-E-0572

FINAL ORDER

The petitioner in this case, The Mortgage Specialists, Inc. (MSI) is a New Hampshire cooperation licensed by the New Hampshire Banking Department to engage in mortgage brokering and mortgage banking services. It has a principal place of business at 2 Main Street in Plaistow, New Hampshire. The respondent Implode-Explode Heavy Industries, Inc. (Implode-Explode) is a Nevada cooperation with a business address of 5348 Vegas Drive, Las Vegas, Nevada. It operates a website which ranks various businesses in the mortgage industry on a ranking device that it calls "The Mortgage Lender Implode-O-Meter." The respondent was founded in 2007 and has been publishing information on its website since that time which is accessible in all 50 States. It openly seeks information from any source that has a bearing on the mortgage industry.

In October of 2008 two references to the petitioner and its president appeared on the respondent's website. The first was in the nature of a reported story which suggested that the petitioner was in trouble with the New Hampshire Banking Department as a result of its alleged improper mortgage activities which were detailed in the story. Included was information obtained from a document known as the 2007 Loan Chart that the petitioner prepared and filed with the New Hampshire Banking Department pursuant to RSA 383:10-b. Said statute provides that the information contained on these Loan Charts "shall not be made public" unless an overriding reason requires it as determined exclusively by the New

Hampshire Banking Department. A few days after this story appeared on the respondent's website there appeared on the same website comments by an entity known as "Brianbattersby." Those comments purportedly contained false and defaming allegations about the petitioner's president, accusing him, among other things, of fraud for signing borrower's names on loan applications.

When this information came to the attention of the petitioner it immediately contacted the respondent through counsel and made it aware of the relevant banking statute concerning the dissemination of Loan Charts and also proving information to suggest that Brianbattersby's comments were both false and defamatory. While the respondent agreed voluntarily to not republish the information it had already published, on a temporary basis, it refused to commit to the non-publishing on a permanent basis. Nor would it agree to provide the petitioner with what the petitioner requested, specifically the identity of both the source of the story containing the unauthorized 2007 Loan Chart information and the identity of Brianbattersby. This litigation was filed so that the petitioner could obtain the information sought.

It is important at the outset to make it clear that the petitioner does not "blame" the respondent for the publishing of the unauthorized and allegedly defamatory website postings, and it asks for no sanctions or money damages as against the respondent. The petitioner does not claim that the respondent had some duty or responsibility to verify the information with respect to either the story or the Brianbattersby comments prior to posting them on its website. The petitioner does not allege that the respondent knew or should have known that the publication of the 2007 Loan Chart was prohibited under New Hampshire law.

Even now, months after the story and comments appeared on the respondent's website, the petitioner has not asked this Court to have the respondent remove its article

about MSI, with the exception of the 2007 Loan Chart, nor has it asked this Court to prohibit the respondent from publishing any additional information about MSI on its website. The petitioner has also not asked this Court to ban Brianbattersby from posting any further comments on the respondent's website or from posting the comments of any other person or entity with respect to the operation of MSI. All that the petitioner has requested is that the 2007 Loan Chart and any future loan charts prepared pursuant to New Hampshire law not be included in any other report referencing MSI, and further that the respondent be ordered to divulge the identity of the person or entity that provided the unauthorized 2007 Loan Chart information to it and also identify Brianbattersby who allegedly provided it with defamatory information.

At first blush it seemed to this Court that the petitioner's requests were reasonable. The Court has every reason to believe that the respondent is a reputable entity desirous of only publishing legitimate information about the mortgage industry to various interested parties. In fact when the respondent disseminated its "standards for reporting information," the following appeared on its website:

> "All leads on companies must be supported by multiple independent sources. We prefer in the following order: (1) communication from the company itself; (2) mainstream or industry press coverage (or blog coverage with clear supporting evidence); (3) multiple independent tips from individuals."

It appears the respondent did not comply with its standards when reporting on the purported conduct of MSI. Then when the respondent was asked to disclose the identity of persons or entities that had provided it with unauthorized information and potentially defamatory information the respondent refused outright. One would have hoped that when a legitimate publisher of information was notified of the fact that certain unauthorized information was given to it which was then published, presumably in good faith, the

publisher would, in order to maintain the integrity of its publication, willingly provide the wronged party with the information requested. Instead, the respondent exhibited a knee-jerk reaction.

A review of all the pleadings filed by the respondent suggest that it is of the opinion that because it is a member of the loose organization known as "the press," it can publish anything, be it true or false, and not be restricted in any way. The respondent has categorized the petitioner's request as an attack on the press and on its first amendment protection. Particularly in this case such a stance rewards and encourages the proliferation of unauthorized communication. The respondent's position is akin to one who uses a sledgehammer to kill an ant. It wants this Court to believe that if the petitioner is granted the relief requested then that is procedurally the first step in eliminating the freedom of the press. The respondent's pleadings contain the following conclusion:

> "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 matter 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 were known."

While that language is troubling to this Court, that is not the issue that is involved in this case. Again, the petitioner does not claim that the respondent wrongfully published the information about MSI. It is willing to hold the respondent harmless with respect to the publication of that information. All it wants from the respondent is the identity of the individual or entity which provided unauthorized information to the respondent and also the identity of the entity or individual that made alleged defamatory statements about the petitioner to the respondent. One would hope that the ideals of truth and justice are not

lost in the respondent's desire to protect its right to publish anything without consequence to the provider of unauthorized and defamatory information.

The Court also takes issue with several positions espoused by the respondent in its pleadings. First, the respondent claims that while the publication of the 2007 Loan Chart may have been unauthorized, it was not illegal. Secondly, the respondent argues that to the extent that anyone has the right to attempt to enforce the statute prohibiting dissemination of loan charts, it is the New Hampshire Banking Department that is the sole entity that can do so not a mortgage company that provided the banking department with the chart in the first place. Thirdly, the information contained on the 2007 Loan Chart cannot fit into the category of "defamatory" because presumably the figures on the chart were accurate. Finally, the respondent argues that injunctive relief is not authorized under New Hampshire law when there is an adequate remedy in a civil court for money damages. Certainly that statement is true. However the petitioner has not sought any damages against the respondent. While it may seek money damages as against the two individuals or entities whose identity is sought herein, obviously no claims for damages can be made against these individuals or entities unless their identity is first known.

The parties have agreed that the Court can resolve the issues raised in this litigation without the need of an evidentiary hearing. Both parties were given an opportunity to file whatever pleadings they were desirous of filing on these issues. Upon review of those pleadings the Court enters the following Order:

1. The respondent, and all of its agents, servants, employees, and representatives, are enjoined from displaying, posting, publishing, distributing, linking to and/or otherwise providing any information for the access or other dissemination of copies of and/or images of a 2007 Loan Chart and any information or data contained therein, including on the website operated at www.ml-implode.com and any other websites under respondent's ownership and control;

2. The respondent is ordered to immediately disclose the identity of the individual and/or entity that provided it with the 2007 Loan Chart;

3. The respondent is ordered to immediately produce all documents that concern petitioner that it received from the individual or entity that provided it with the 2007 Loan Chart;

4. The respondent is ordered not to re-post or re-publish the October 4, 2008, and October 7, 2008, false and defamatory postings by "Brianbattersby;" and

5. The respondent is ordered to immediately disclose the identity of "Brianbattersby," including his full name, address, email address, phone number, and any other personal information respondent possesses.

Hopefully the parties will, upon reflection, understand that there is a good faith basis for the Court's ruling herein. This ruling should not be considered to be an attack on the press. Rather it should send the following message. If persons or entities choose to provide legitimate publishers with information they know or should have known is either unauthorized or defamatory, they may be subject to legal process even though the publisher of the information may not. The maintenance of a free press does not give a publisher the right to protect the identity of someone who has provided it with unauthorized or defamatory information. At its core this is not even a press issue; this Court has not concluded that the press has any responsibility to "police" the information it is given. Rather the issue here is notice to individuals that they may well have to accept the responsibility of their actions in a civil court if they elect to seek to disseminate through the press any unauthorized or defamatory material. They cannot attempt to invoke the power of the press to hide their improper actions.

So Ordered.

DATED: March 11, 2009

Kenneth R. McHugh
Presiding Justice