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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN DOE,

Movant,

vs.

UNITED STATES OF AMERICA SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Case No.: 3:11-MC-80184-CRB (NJV)

JOHN DOE'S REPLY IN SUPPORT OF MOTION TO QUASH SUBPOENA; OBJECTIONS TO U.S. SECURITIES AND EXCHANGE COMMISSION'S EVIDENCE

Date: TBD
Time: TBD

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Anonymous Movant John Joe ("Movant") respectfully submits the following reply brief in support of his motion to quash Respondent the United States Securities and Exchange Commission ("SEC")'s subpoena to Google, Inc. ("Google").

I. INTRODUCTION

On June 30, 2011 the SEC issued a subpoena to Google requiring Google to identity the registrant of the email account "aurorapartners@gmail.com." Movant has used this email address for anonymous online speech, including political criticism. To preserve his anonymity, Movant moved this Court to quash the SEC's subpoena.

While the standard for evaluating the lawfulness of the SEC's subpoena may be unclear, the SEC's subpoena fails under any standard. Even under the SEC's proposed standard, the SEC must demonstrate that the subpoena only seeks information that is rationally related to a compelling government interest. The SEC has failed to satisfy this standard where it has presented no evidence connecting Movant to the SEC's investigation.

In fact, the only connection that the SEC offers between Movant and the SEC's investigation is the vague, hearsay statement that the SEC "has obtained information indicating that an individual using the email address 'aurorapartners@gmail.com' may be involved in the touting activity at issue in this investigation." Even if this statement were admissible evidence—and it is not—it would be insufficient to overcome Movant's First Amendment challenge to the SEC's subpoena. Thus, the Court should grant Movant's motion to quash the subpoena.

II. ARGUMENT

A. The SEC's legal standard does not apply to anonymous speech protected by the First Amendment.

The SEC argues that in determining whether its subpoena is lawful, the Court must find that the subpoena is rationally related to a compelling government interest and uses the least restrictive means available. In support of this standard, the SEC cites to a single authority, *Brock v. Local 375, Plumbers Int'l Union*, 860 F.2d 346, 349-50 (9th Cir.

1988). While *Brock* addresses the lawfulness of a subpoena that infringes First Amendment rights, it does not address the use of a subpoena to identify an anonymous speaker. In the context of anonymous speech, courts employ a more rigorous standard.

The use of subpoenas to identity anonymous speakers is a subset of First Amendment jurisprudence, and one that courts within the Ninth Circuit have addressed on multiple occasions. The Ninth Circuit has found that before a party can use a subpoena to identify an anonymous speaker, that party must submit evidence establishing its legal claims, which evidence must be sufficient to overcome a limited motion for summary judgment. *See In re Anonymous Online Speakers*, 09-71265, 2011 WL 61635 (9th Cir. Jan. 7, 2011); *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1212 (D. Nev. 2008); *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969, 970-71 (N.D. Cal. 2005).

The SEC argues that *Anonymous Online Speakers* applies only in the context of civil subpoenas and does not apply to governmental investigative subpoenas. (Opp. at 7:14-8:8.) This argument makes no sense. Why should the government be held to a lower standard when it uses its authority to strip a speaker's anonymity? In fact, the danger of government misuse of an anonymous speaker's identity is far greater in a clandestine investigative proceeding, overseen solely by the agency conducting the investigation, than in a judicial proceeding, where an impartial court can ensure compliance with First Amendment protections. Thus, the SEC's reliance on *Brock*, which does not address anonymous speech, is misplaced.[1] Rather, the Court should apply the

[1] The SEC also argues that the Electronic Communications Privacy Act, 18 U.S.C. §2703(c)(2) ("ECPA"), does not require a government agency to provide any notice to a subscriber of an online service before the government obtains the subscriber's identity. As an initial matter, this point is moot, as Google notified Movant of the subpoena. However, to the extent that the ECPA allows the SEC, in its sole discretion, to compel the disclosure of an anonymous speaker's identity, without allowing the speaker an opportunity to seek court relief, the statute violates the First Amendment.

With regard to facial First Amendment challenges of a statute, the challenger need only show that a statute or regulation might operate unconstitutionally under some conceivable set of circumstances. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d

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standard set forth in *Anonymous Online Speakers*, which specifically addresses the use of subpoenas to reveal an anonymous speaker's identity. As the SEC concedes, it cannot comply with the standard set forth in *Anonymous Online Speakers*, and thus the Court should quash the SEC's subpoena.

B. The SEC has submitted no evidence explaining how the subpoena is related to the SEC's investigation.

Even if the Court applies the SEC's proposed standard for evaluating the lawfulness of the subpoena, the SEC's subpoena still fails. Specifically, the SEC has submitted no evidence explaining how Movant's identity is related to the SEC's investigation, let alone how Movant's identity is rationally related to a compelling government interest.

In its opposition, the SEC argues that it "has obtained information indicating that an individual using the email address 'aurorapartners@gmail.com' may be involved in the touting activity at issue in this investigation." (Opp. at 2:20-23.) The only evidentiary support the SEC offers for this statement is Paragraph 10 of the De Jong declaration. Paragraph 10 is completely circular, stating only that the "SEC has obtained information indicating that an individual using the email address 'aurorapartners@gmail.com' may be involved in the touting activity at issue in this investigation." Even if this statement were admissible evidence—and it is not, *see infra* Part C—it is so vague and conclusory that it

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655, 662 (5th Cir. 2006). As discussed above, anonymous speech is protected by the First Amendment. *Justice For All v. Faulkner*, 410 F.3d 760, 764 (5th Cir. 2005). A court will strike down laws restricting the right to anonymous speech where necessary to preserve the ability of persecuted groups and sects to criticize oppressive practices and laws. *See id.*, *quoting Talley,* 362 U.S. 60, 64 (1960). As the Court and the SEC are aware, the Internet is frequently used by persons maintaining unpopular political opinions to express those opinions anonymously.

If the ECPA operates as the SEC suggests, then it would permit the SEC, or any other government agency, to force the disclosure of an anonymous speaker's identity without even providing the speaker an opportunity to seek court relief. In other words, as interpreted by the SEC, the ECPA gives the government the ability to discover an anonymous speaker's identity without any checks or balances. Such a construction of the ECPA cannot survive facial First Amendment scrutiny.

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could never support a fundamental intrusion on the First Amendment right to speak anonymously. Yet, this is the entirety of the SEC's evidence.

Because the SEC has offered no admissible evidence demonstrating that the Movant's identity is related to a compelling government interest, the Court should quash the subpoena.

C. Paragraph 10 of the De Jong Declaration is inadmissible under the Federal Rules of Evidence.

As discussed above, the sole evidence that the SEC offers to explain the connection between the Movant and the SEC's investigation is Paragraph 10 of the De Jong Declaration. However, Paragraph 10 is inadmissible under the Federal Rules of Evidence.

Paragraph 10 vaguely refers to information that the SEC has obtained, which supposedly links Movant to the SEC's investigation. The SEC does not explain what this supposed information is. Nor does the SEC explain whether this information was a written communication, an oral communication, or whether it exists in some other medium. Regardless of the form of this information, De Jong's description of it is inadmissible. The inadmissibility is particularly glaring where it is being used to justify an intrusion into a fundamental First Amendment liberty—*i.e.* the right to speak anonymously.

If De Jong's information is based on an oral communication, Paragraph 10 constitutes hearsay. Federal Rule of Evidence 802 prohibits the admission of hearsay, except when it falls within a specific exception. The SEC has not identified any exception that might exempt Paragraph 10 from the ban on hearsay. If De Jong's information is based on a written communication, then not only is Paragraph 10 inadmissible hearsay, it also violates the best evidence rule. *See* Fed. R. Evid. 1002. The best evidence rule excludes secondary evidence offered to prove the contents of a writing. Thus, to the extent Paragraph 10 of the De Jong Declaration is based on a writing, De Jong has failed to produce that writing, and the SEC cannot rely on De Jong's testimony about that

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writing without violating the best evidence rule or the hearsay rule. Based on these several flaws, the Court should exclude Paragraph 10 of the De Jong declaration and quash the SEC's subpoena.

CONCLUSION

For the foregoing reasons, the Court should grant Movant's motion to quash the SEC's subpoena to Google, Inc.

Dated: August 26, 2011

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