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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

CV 11 80 184 MISC

JOHN DOE,

Movant,

vs.

**UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE
COMMISSION,**

Respondent.

**JOHN DOE'S NOTICE OF MOTION
AND MOTION TO QUASH
SUBPOENA; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: TBD
Time: TBD

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MISC. CASE NO.

**JOHN DOE'S NTC OF MTN. & MTN. TO
QUASH SUBPOENA**

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that as soon as this matter may be heard in the above-
3 titled Court of the United States District Court, Northern District of California, located at
4 450 Golden Gate Avenue, San Francisco, California 94102, anonymous Movant John
5 Doe will move, and does respectfully move, this Court for an order quashing the
6 subpoena issued by the United States of America Securities and Exchange Commission
7 ("SEC") to Google, Inc.

8 The Court should grant the motion because the SEC has impermissibly sought to
9 lift the anonymity of Movant without providing Movant with any evidence supporting its
10 claims, without notifying Movant of the subpoena, without demonstrating that Movant's
11 identity is necessary to the SEC's claims, and without showing that the interests of the
12 Movant in remaining anonymous are outweighed by the SEC's interests in investigating
13 or prosecuting its claims.

14 This motion is based on this notice of motion and motion, the memorandum of
15 points and authorities in support of this motion, the declaration of Jeffrey M. Rosenfeld,
16 the declaration of Movant John Doe, and any other evidence that may be adduced at
17 hearing.

18 Dated: August 4, 2011

KRONENBERGER BURGOYNE, LLP

20 By: 
Jeffrey M. Rosenfeld

22 Attorneys for Movant, John Doe

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1 Anonymous Movant John Joe respectfully submits the following memorandum of
 2 points and authorities in support of the motion to quash Respondent the United States of
 3 America Securities and Exchange Commission ("SEC")'s subpoena to Google, Inc.
 4 ("Google").

5 MEMORANDUM OF POINTS AND AUTHORITIES

6 INTRODUCTION

7 Movant hereby appears anonymously to move the Court to quash the SEC's
 8 subpoena to Google. The United States Supreme Court has consistently upheld the right
 9 to anonymous speech. Although the Internet is the latest platform for anonymous
 10 speech, online speech stands on the same footing as other speech. As with other forms
 11 of expression, the ability to speak anonymously on the Internet promotes the robust
 12 exchange of ideas and allows individuals to express themselves freely without fear of
 13 economic or official retaliation or concern about social ostracism. Movant has used the
 14 Internet to speak anonymously on the Internet.

15 For unknown reasons, the SEC has served Google with a subpoena seeking to
 16 reveal Movant's identity. The SEC has provided neither Google nor Movant with any
 17 evidence linking Movant to the SEC's investigation or the alleged misconduct that serves
 18 as a basis for the SEC's investigation. In fact, the SEC's Investigative Order does not
 19 mention Movant at all.

20 The First Amendment requires a person seeking to use discovery to reveal an
 21 anonymous speaker's identity to satisfy certain prerequisites. The SEC has failed to
 22 satisfy any of these prerequisites where a) the SEC did not notify Movant of the
 23 Subpoena, b) the SEC has not—and cannot—submit evidence supporting all elements of
 24 the legal claims identified in the Investigative Order, c) the SEC has not—and cannot—
 25 demonstrate that Movant's identity is necessary to its legal claims, and d) the SEC has
 26 not—and cannot—establish that the harm to Movant in revealing his identity is
 27 outweighed by the SEC's investigative needs. Thus, the Court should quash the SEC's
 28 subpoena.

1 **STATEMENT OF FACTS**

2 Movant is the registrant of the email address "aurorapartners@gmail.com" (the
3 "Email Address"). (Declaration of Movant John Doe in Support of John Doe's Motion to
4 Quash Subpoena ("John Doe Decl.") ¶1.) Movant uses the Email Address as a
5 pseudonym, and Movant has not disclosed his personal information in connection with
6 the Email Address. (*Id.* ¶3.) Specifically, Movant uses the Email Address to publish his
7 opinions pseudonymously on the Internet. (*Id.*)

8 On June 30, 2011 the SEC issued a subpoena to Google requiring Google to
9 produce documents that identified Movant (the "Subpoena"). (Declaration of Jeffrey M.
10 Rosenfeld in Support of John Doe's Motion to Quash Subpoena ("Rosenfeld Decl.") ¶2 &
11 Ex. A.) The SEC did not notify Movant of the Subpoena before or after it was served on
12 Google. (John Doe Decl. ¶4.) On July 19, 2011 Google sent Movant an email notifying
13 Movant of the Subpoena. (*Id.* ¶5 & Ex. A.) Upon learning of the Subpoena, Movant
14 engaged counsel. (*Id.* ¶6.) Movant's counsel immediately notified the SEC that they
15 represented Movant and requested (both orally and in writing) that the SEC produce a
16 copy of the Subpoena. (Rosenfeld Decl. ¶3.) The SEC never did so. (*Id.*)

17 On August 2, 2011, Movant's counsel requested that the SEC produce a copy of
18 the SEC's order of investigation. (Rosenfeld Decl. ¶5.) Later that day, the SEC
19 produced a copy of that investigative order (the "Investigative Order") (*Id.* & Ex. B). The
20 Investigative Order in no way references Movant or the Email Address or otherwise links
21 Movant to the alleged misconduct. (*Id.* ¶5 & Ex. B.)

22 **ARGUMENT**

23 **A. Before the SEC can subpoena Movant's identity, the SEC must produce**
24 **evidence supporting all of the elements of its claim.**

25 The United States Supreme Court has consistently upheld the right to anonymous
26 speech. See *McIntyre v. Ohio Elections Comm'n*, 415 U.S. 334, 357 (1995); *Buckley v.*
27 *Am. Constitutional Law Found.*, 525 U.S. 182, 192 (1999); *Talley v. California*, 362 U.S.
28 60, 64 (1960); *Watchtower Bible & Tract Soc'y of New York v. Village of Stratton*, 536

1 U.S. 150, 166-67 (2002). This fundamental right enjoys the same protections whether
2 the speech occurs in an anonymous political leaflet, an Internet message board, or a
3 video-sharing website. See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870
4 (1977) (finding that there is “no basis for qualifying the level of First Amendment scrutiny
5 that should be applied to” the Internet); see also *Doe v. 2themart.com*, 104 F. Supp. 2d
6 1088, 1092 (W.D. Wash. 2001) (finding that anonymous speech promotes the free
7 exchange of ideas).

8 The concern driving these decisions—*i.e.* that discovery processes not be
9 misused to stifle speech on the Internet—applies directly to this motion. Where, as here,
10 an anonymous speaker moves to quash a subpoena issued to discover his identity,
11 courts will require the party seeking discovery to make an evidentiary showing to survive
12 the motion. Specifically, before a party can use a subpoena to obtain the disclosure of
13 an anonymous speaker’s identity, that party must submit evidence establishing its legal
14 claims, which evidence must be sufficient to overcome a limited motion for summary
15 judgment. See *In re Anonymous Online Speakers*, 09-71265, 2011 WL 61635 (9th Cir.
16 Jan. 7, 2011); *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1212
17 (D. Nev. 2008); *Highfields Capital mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969, 970-71 (N.D.
18 Cal. 2005). While the Ninth Circuit has not adopted on a specific test for determining
19 whether an anonymous speaker’s identity should be revealed, the Ninth Circuit and its
20 district courts have adopted the following prerequisites:

- 21 1. First, the subpoenaing party must undertake reasonable efforts to give the
22 anonymous speaker adequate notice of the attempt to discover his or her identity,
23 and provide a reasonable opportunity to respond;
- 24 2. Second, the subpoenaing party must allege a facially valid legal claim and must
25 produce prima facie evidence supporting all elements of that legal claim within its
26 control;
- 27 3. Third, the subpoenaing party must demonstrate that the specific information
28 sought by the subpoena is necessary to identify the anonymous speaker and that

1 the anonymous speaker's identity is relevant to the subpoenaing party's legal
2 claim;

- 3 4. Finally, where the preceding three factors do not present a clear outcome, a court
4 should balance the interests of the parties. In doing so, a court should assess and
5 compare the magnitude of the harms that would be caused to the competing
6 interests by a ruling in favor of the subpoenaing party and by a ruling in favor of
7 the anonymous speaker. See *SaleHoo Group, Ltd. v. ABC Co.*, 722 F. Supp. 2d
8 1210, 1217 (W.D. Wash. 2010); *USA Technologies, Inc. v. Doe*, 713 F. Supp. 2d
9 901, 907 (N.D. Cal. 2010).

10 Moreover First Amendment rights may be implicated where an administrative
11 agency serves an investigative subpoena. See *Marshall v. Stevens People & Friends for*
12 *Freedom*, 669 F.2d 171, 177-79 (4th Cir. 1981) (finding that investigative subpoenas
13 issued by the Department of Labor seeking information about efforts to persuade
14 employees about their collective bargaining rights impermissibly had the potential to
15 encroach on First Amendment right and could not be justified by a mere showing of some
16 legitimate governmental interest); *Brock v. Local 375, Plumbers Int'l Union of Am., AFL-*
17 *CIO*, 860 F.2d 346, 349 (9th Cir. 1988) (finding that Department of Labor subpoenas
18 were subject to First Amendment scrutiny); *Friends Soc. Club v. Sec'y of Labor*, 763 F.
19 Supp. 1386, 1393 (E.D. Mich. 1991) (applying First Amendment analysis to investigatory
20 subpoena issued by Department of Labor); cf *In re Grand Jury Subpoena: Subpoena*
21 *Duces Tecum*, 829 F.2d 1291, 1297 (4th Cir. 1987) (the fact that grand juries have broad
22 investigative powers does not allow them to use subpoenas that result in violations of
23 First Amendment rights).

24 Thus, the First Amendment concerns raised in the Ninth Circuit cases cited above
25 apply equally to subpoenas issued in government investigations. To wit, the SEC laws
26 and regulations authorize the SEC to engage in investigatory practices with far fewer
27 Constitutional safeguards and far less transparency than in judicial proceedings. For
28 example, the SEC's regulations authorize the SEC to open an investigation without filing

1 any publicly available documents. The SEC laws and regulations authorize the SEC to
2 issue subpoenas without any judicial oversight—including subpoenas to identify
3 anonymous speakers. See 15 U.S.C. §§77t, 78u; 17 C.F.R. §§203.2, 203.5. Moreover,
4 the SEC laws and regulations do not provide any clear mechanism for third parties
5 affected by investigative subpoenas to challenge the subpoenas. Compare 17 C.F.R.
6 §203 *et seq.* (containing rules relating to SEC investigations and subpoenas in such
7 investigations) with 17 C.F.R. §201.232(e) (identifying process to move to quash
8 subpoena issued in adversary adjudications). Given these concerns, the Constitutional
9 justifications for the Ninth Circuit's test for revealing an anonymous speaker's identity
10 apply equally to the SEC's investigative subpoenas.

11 Thus, in order to survive this motion to quash, the SEC must: a) establish that it
12 notified Movant of the Subpoena, b) submit evidence supporting all elements of the legal
13 claims identified in the Investigative Order, c) demonstrate that Movant's identity is
14 necessary to its legal claims, and d) establish that the harm to Movant in revealing his
15 identity is outweighed by the SEC's investigative needs. As explained below, the SEC
16 cannot establish any of these elements.

17 **B. The SEC's Investigative Order does set forth the elements of a viable claim.**

18 As discussed above, before the SEC may use a subpoena to compel the
19 disclosure of an anonymous speaker's identity, the SEC must submit evidence
20 supporting all of the elements of its legal claims. The SEC cannot do so here.

21 The only document produced by the SEC to Movant is the Investigative Order.
22 The Investigative Order is completely generic, conclusorily stating that unnamed parties
23 may have violated sections 5(a), 5(c), and 17(a) of Securities Act of 1933 and sections
24 10(b) of the Securities Exchange Act of 1934. The Investigative Order does not mention
25 Movant—let alone identify Movant's connection with the alleged misconduct, let alone
26 provide any evidence establishing the SEC's claims against Movant or any other party.
27 In fact, based on the documents submitted by the SEC to Movant, it's unclear what the
28 bases for the SEC's claims are at all, and how these bases implicate Movant.

1 Moreover, the SEC has relied on its opaque investigative procedures in issuing
2 the Subpoena. The SEC, without filing any documents publicly, opened the Jammin
3 Java Investigation. Without filing any documents publicly or seeking approval of the
4 courts, the SEC issued the Subpoena to identify Movant. The SEC failed to make any
5 effort to notify Movant of this Subpoena; Movant only learned of the Subpoena
6 coincidentally by receiving a notice from Google. When, after Movant made a formal
7 demand to the SEC, and the SEC produced the Investigative Order, it was revealed that
8 the Investigative Order contained only the most generic of allegations and did not
9 reference Movant.

10 In summary, the SEC has not disclosed any evidence supporting a legal claim, let
11 alone a legal claim involving Movant. In light of these facts, the First Amendment
12 prevents the SEC from using the Subpoena to reveal Movant's identity, and the Court
13 should quash the SEC's Subpoena.

14 **C. The SEC failed to notify Movant of the Subpoena.**

15 As discussed above, before the SEC may use a subpoena to lift an anonymous
16 speaker's identity, the SEC must notify the anonymous speaker and provide him or her
17 with an opportunity to challenge the subpoena. Here, the SEC failed to notify Movant of
18 the Subpoena, even though the SEC had Movant's contact information. (John Doe Decl.
19 ¶4.) Movant learned of the Subpoena coincidentally through Google, after Google was
20 served with the Subpoena. (*Id.* ¶5.) Once Movant learned of the Subpoena and
21 engaged counsel, counsel for Plaintiff contacted the SEC and requested (both orally and
22 in writing) that the SEC produce a copy of the Subpoena. (*Id.* ¶6; Rosenfeld Decl. ¶3.)
23 The SEC's counsel still failed to produce a copy of the Subpoena. (Rosenfeld Decl. ¶3.)

24 Given the SEC's failure to notify Movant of the Subpoena, the Subpoena does not
25 survive basic Constitutional scrutiny and should be quashed.

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1 **D. The SEC has not explained why Movant's identity is essential to its**
2 **investigation or how the SEC's need outweighs the harm to Movant.**

3 In addition to submitting evidence supporting its claims and demonstrating that it
4 notified Movant of the Subpoena, the SEC must demonstrate that revealing Movant's
5 identity is necessary to the SEC's legal claims, and that the harm to Movant is
6 outweighed by the SEC's investigative needs. The SEC cannot do so here.

7 The Investigative Order does refer to Movant or Movant's contact information.
8 The Investigative Order contains no allegations that Movant engaged in any misconduct
9 or was involved in the misconduct of others. Nor does the Investigative Order contain
10 any allegations that Movant is related to the company that is the subject of the
11 investigation, Jammin Java Corp. In fact, other than legal conclusions, the Investigative
12 Order contains essentially no factual allegations at all. Thus, The SEC has not—and
13 cannot—make a showing that revealing Movant's identity is necessary to its legal claims,
14 let alone that the SEC's need for Movant's identity outweighs the harm that would be
15 caused to Movant if his identity were revealed. Thus, the Court should quash the
16 Subpoena.

17 **CONCLUSION**

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

20 Dated: August 4, 2011

KRONENBERGER BURGOYNE, LLP

21 By: 
22 Jeffrey M. Rosenfeld

23 Attorneys for Movant, John Doe

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