1 MELINDA HARDY (Admitted to DC Bar)
   SARAH HANCUR (Admitted to DC Bar)
2 U.S. Securities and Exchange Commission
   Office of the General Counsel
3 100 F Street, NE, Mailstop 9612
   Washington, DC 20549
4 Telephone: 202.551.5194
   Facsimile: 202.772.9263
5 hardym@sec.gov
   hancurs@sec.gov
6

7 *Attorneys for Respondent*

8

9   **IN THE UNITED STATES DISTRICT COURT**
               NORTHERN DISTRICT OF CALIFORNIA
10   **SAN FRANCISCO DIVISION**

11

12 JOHN DOE,   Case No. 3:11-MC-80184-CRB (NJV)

13   Movant,   **U.S. SECURITIES AND EXCHANGE**
                                                 COMMISSION'S OPPOSITION TO JOHN
14   v.   **DOE'S MOTION TO QUASH SUBPOENA**
                                                 AND MEMORANDUM OF POINTS AND
15 U.S. SECURITIES AND EXCHANGE   **AUTHORITIES IN SUPPORT THEREOF**
    COMMISSION,
16   Date: TBD
            Respondent.   Time: TBD
17   Place: Eureka Courthouse - 205A, 2nd floor

18

19

20

21

22

23

24

25

26

27

28

CASE NO. 3:11-MC-80184-CRB (NJV)

1   **I.   Introduction.**

2   Respondent U.S. Securities and Exchange Commission ("SEC") hereby opposes Movant John

3   Doe's motion to quash the administrative subpoena issued on June 30, 2011 to Google, Inc.

4   ("Google") in connection with the SEC's investigation of Jammin Java Corp. ("Jammin Java") and

5   trading in its securities. In the course of the investigation, the SEC issued a subpoena to Google

6   seeking subscriber information for an email account linked to an apparent "pump and dump" scheme.

7   Subscriber information is a crucial element of investigations into the use of websites, newsletters,

8   blogs, and other online media used to facilitate fraud. The SEC's information request is narrowly

9   tailored to elicit only subscriber information and is authorized by Section 2703(c)(2) of the Electronic

10   Communications Privacy Act (the "ECPA").

11   In his motion, Movant misstates the applicable legal standard and seeks to prevent Google

12   from providing information that the SEC has reason to believe will aid its investigation of potential

13   securities law violations. In doing so, Movant ignores the relevant statutory framework of the ECPA

14   and argues that the SEC's subpoena should be quashed because he has a First Amendment right to

15   anonymous speech. However, the First Amendment right to anonymous speech does not provide a

16   basis to quash the SEC's subpoena because the SEC is conducting a legitimate law enforcement

17   investigation, the limited information it seeks is rationally related to a compelling governmental

18   interest, and it is using the least restrictive means available. *See Brock v. Local 375, Plumbers Int'l*

19   *Union*, 860 F.2d 346, 349-350 (9th Cir. 1988).

20   **II.   Statement of Facts.**

21   On May 13, 2011, the SEC issued a formal order of private investigation entitled *In the*

22   *Matter of Jammin Java Corp.*, Commission File No. C-07826 (the "Formal Order"). De Jong Decl. ¶

23   2. The Formal Order directs the staff of the SEC (the "Staff") to investigate potential violations of

24   Sections 5(a), 5(c), 17(a), and 17(b) of the Securities Act of 1933 ("Securities Act") (15 U.S.C. §§

25   77e(a),(c), 77q(a),(b)), and Section 10(b) and of the Securities Exchange Act of 1934 ("Exchange

26   Act") (15 U.S.C. § 78j(b)), and Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5), by Jammin Java and

27   its officers, directors, employees, partners, subsidiaries, consultants, partners, and affiliates as well as

28   "other persons or entities" relating to their involvement in an apparent "pump and dump" scheme.

1   De Jong Decl. ¶¶ 3-4. "Pump and dump" schemes generally "involve the touting of a company's

2   stock (typically microcap companies) through false and misleading statements to the marketplace.

3   After pumping the stock, fraudsters make huge profits by selling their cheap stock into the market."

4   *United States v. Zolp*, 479 F.3d 715, 717 n.1 (9th Cir. 2007) (citing SEC, Fast Answers: Pump and

5   Dump, at http://www.sec.gov/answers/pumpdump.htm).

6   The Staff is investigating whether, through the instant scheme, thousands of investors were

7   defrauded out of millions of dollars when they purchased shares of Jammin Java securities at

8   artificially inflated prices based upon online newsletters that were widely disseminated through blast

9   emails, websites, and investor message boards. De Jong Decl. ¶ 5. Specifically, Jammin Java's share

10 price rose from $0.17 in December 2010 to $6.35 on May 12, 2011, after which it plummeted to less

11 than a dollar per share. De Jong Decl. ¶ 6. The increase in Jammin Java's share price occurred

12 notwithstanding the fact that Jammin Java's public filings during that time period reflected that

13 Jammin Java was a shell company that had generated no revenues and had an accumulated deficit of

14 $511,760. De Jong Decl. ¶ 7.

15   The rapid increase in Jammin Java's share price coincided with the wide dissemination of

16 online newsletters touting Jammin Java's stock. De Jong Decl. ¶ 8. The Staff is investigating

17 whether the online newsletters contained materially misleading information about Jammin Java and

18 its stock and/or failed to accurately disclose the disseminators' financial interests in Jammin Java and

19 the compensation paid to them by Jammin Java, its affiliates, and/or others. De Jong Decl. ¶ 9.

20   The Staff is seeking information about who sent and is responsible for the newsletters that

21 touted Jammin Java's stock and has obtained information indicating that an individual using the

22 email address "aurorapartners@gmail.com" may be involved in the touting activity at issue in this

23 investigation. De Jong Decl. ¶ 10. To identify that person and his/her role in the "pump and dump"

24 scheme, on June 30, 2011, the Staff issued an administrative subpoena in accordance with the ECPA

25 to Google requesting identifying information regarding the subscriber with the address

26 "aurorapartners@gmail.com." De Jong Decl. ¶ 11. The ECPA does not require notice to the

27 subscriber when the government seeks only subscriber information. 18 U.S.C. § 2703(c)(2). The

28 subpoena requires Google to produce:

1. Documents sufficient to identify the subscriber's name, account number, current residential or billing address(es), telephone number(s), credit card numbers and checking account numbers, and other subscriber number or identity, including, but not limited to, the Internet Protocol addresses used by the subscriber when registering for the e-mail address "aurorapartners@gmail.com", and when sending and retrieving messages from that address.

2. All documents that relate to, refer to, or concern communications between Gmail and the subscriber to the e-mail address "aurorapartners@gmail.com" where Gmail was the sender or intended recipient of the communication.

See Exhibit A to Rosenfeld Decl. in support of Movant's Motion to Quash. The subpoena does not seek the content of any email sent to or from "aurorapartners@gmail.com" except those sent to or from Google. *Id.* In the subpoena, the Staff cautions Google that under the ECPA, 18 U.S.C. §§ 2510 *et seq.*, Google should "not provide certain wire or electronic communications such as the contents of e-mails of your customers, subscribers, or other users, unless you are either the sender or intended recipient of the communication."

On July 1, 2011, Google sent a letter to the Staff advising it that Google intended to provide notice of the subpoena to its customer on July 6, 2011. De Jong Decl. ¶ 12. Google also advised the Staff that it intended to give the customer 20 days to either object or file a motion to quash. *Id.* On July 28, 2011, counsel for Movant contacted the Staff and requested a copy of the subpoena issued to Google. De Jong Decl. ¶ 13. Before the Staff responded, on July 29, 2011, Movant's counsel sent the Staff a letter indicating that Google had already provided Movant with a copy of the relevant subpoena and requesting a copy of the Formal Order.[1] De Jong Decl. ¶ 14. On August 2, 2011, the Staff provided Movant's counsel with a copy of the Formal Order. De Jong Decl. ¶ 15. On August 4, 2011, Movant filed the instant motion to quash, arguing that the subpoena violates Movant's First Amendment right to anonymous speech.

---

[1] Movant suggests that the SEC refused to provide him with a copy of the subpoena issued to Google. *See* Doe Memorandum at 3, 7. This is simply not true. Less than one day after requesting a copy of the subpoena – before the Staff had an opportunity to respond – Movant informed the Staff that he had already obtained a copy of the subpoena from Google, thereby rendering moot the request he had previously made to the Staff.

1 **III.   Argument.**

2   **A.   The SEC Properly Issued an Administrative Subpoena to Google under the
          Electronic Communications Privacy Act.**

3

4   The subpoena to Google for Movant's subscriber information is authorized by the ECPA.

5 Title II of the ECPA, 18 U.S.C. §§ 2701-12, allows a "governmental entity," such as the SEC, to

6 obtain certain types of information from providers of electronic communications and storage services.

7 The ECPA provides that the government may use an administrative subpoena when seeking to obtain

8 basic subscriber information, such as the SEC seeks here. 18 U.S.C. § 2703(c)(2). Pursuant to

9 Section 2703(c)(2), a "provider of electronic communication service or remote computing service

10 shall disclose to a governmental entity" the:

11   (A)   name;
           (B)   address;
12   (C)   local and long distance telephone connection records, or records
                   of session times and durations;
13   (D)   length of service (including start date) and types of service
                   utilized;
14   (E)   telephone or instrument number or other subscriber number or
                   identity, including any temporarily assigned network address;
15   and
           (F)   means and source of payment for such service (including any
16   credit card or bank account number),

17   of a subscriber to or customer of such service when the governmental
           entity uses an administrative subpoena authorized by a Federal or State
18   statute. . . .

19   The statute then explicitly provides that a "governmental entity receiving records or

20 information under this subsection is *not required to provide notice* to a subscriber or customer." 18

21 U.S.C. § 2703(c) (emphasis added); s*ee also SAMS v. Yahoo!, Inc.*, No. CV-10-5897, 2011 U.S. Dist.

22 LEXIS 53202, at *20 (N.D. Ca. May 18, 2011) (non-content-based information may be obtained

23 under the ECPA without customer notice). At least one district court has held that customers and

24 subscribers do not have standing to challenge a subpoena that only requests subscriber identifying

25 information. *See In re Section 2703(d) Order*, 10-GJ-3793, 2011 U.S. Dist. LEXIS 25322, at *7

26 (E.D. Va. Mar. 11, 2011). By failing to address the ECPA, Movant implicitly concedes that the

27 subpoena complies with its provisions.

28

1

2

B. **The Disclosure of Movant's Subscriber Information Would Not Violate the First Amendment.**

3   Movant has not argued, and no court has found, that any provision of the ECPA violates the

4 First Amendment. Further, Movant's claim that the disclosure of his identity to the SEC would

5 violate his First Amendment right to anonymous speech does not outweigh the government's interest

6 in obtaining identifying information to further, what Movant does not contest to be, a legitimate

7 investigation into potentially fraudulent conduct. "The Supreme Court has recognized that some

8 governmental interests are sufficiently compelling to outweigh the infringement of [F]irst

9 [A]mendment rights." *Brock v. Local 375, Plumbers Int'l Union*, 860 F.2d 346, 349-350 (9th Cir.

10 1988) (citing *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)). In particular, "the First Amendment does not

11 shield fraud," *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003), and

12 cannot be used to "escape lawful governmental investigation." *Brock*, 860 F.2d at 349.

13   More specifically, the Ninth Circuit has held that with respect to an administrative subpoena

14 issued during the course of an investigation, an individual who believes his First Amendment rights

15 may be violated by compliance must make a "prima facie showing of arguable first amendment

16 infringement." *Id.*   Once a prima facie case is established, the burden shifts to the government to

17 show (1) "that the information sought through the subpoena[] is rationally related to a compelling

18 governmental interest," and (2) that "the government's disclosure requirements are the 'least

19 restrictive means' of obtaining the desired information." *Id.* at 350. Courts are "willing to tolerate

20 some chilling effect if it is necessary to do so in order to protect a compelling governmental interest."

21 *Dole v. Serv. Employees Union*, 950 F.2d 1456, 1461 (9th Cir. 1991).[2]

22

23

24 [2] This standard is similar to that required in grand jury investigations. Courts employ various tests when confronted with motions to quash grand jury subpoenas raising First Amendment issues. For example, courts will reject a First Amendment challenge to a grand jury subpoena provided the

25 subpoena (i) serves a compelling state interest, (ii) requests evidence that is substantially related to the investigation, and (iii) does not unduly burden the witness. *See Bursey v. United States*, 466 F.2d

26 1059, 1083 (9th Cir. 1972). Thus, grand juries often obtain information that may raise First Amendment issues. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) ("Citizens generally are

27 not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information

28 that he has received in confidence.").

1   As a preliminary matter, Movant has failed to establish a prima facie case that the SEC's

2 subpoena to Google infringes upon his First Amendment right to anonymous speech.[3] Movant

3 asserts that he uses the "aurorapartners@gmail.com" email address "to publish his opinions

4 pseudonymously on the Internet," Doe Memorandum at 3, but fails to explain how this alleged

5 anonymous speech is infringed upon by the SEC's request for *subscriber identifying information* in

6 an ongoing, confidential law enforcement investigation relating to an apparent "pump and dump"

7 scheme.

8   Assuming arguendo that Movant has made his prima facie showing, the motion to quash

9 should be denied because the SEC satisfies its burden. First, the information the Staff seeks is

10 rationally related to a compelling government interest. Sections 21(a) and 21(b) of the Exchange Act

11 authorize the SEC to "make such investigations as it deems necessary to determine whether any

12 person has violated, is violating, or is about to violate any provision of this chapter [or] the rules or

13 regulations thereunder" and to demand to see any papers "the Commission deems relevant or material

14 to the inquiry." 15 U.S.C. §§ 78u(a), (b). The Supreme Court has held that the "provisions vesting

15 the SEC with the power to issue and seek enforcement of subpoenas are expansive." *S.E.C. v. Jerry*

16 *T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984). In the course of the SEC's investigation of Jammin Java

17 and the manipulation of its securities, the Staff identified Movant's email address as one that

18 potentially belongs to a touter in the "pump and dump" scheme and issued an administrative

19 subpoena to determine the identity of the potential touter. Thus, the identity is directly related to the

20 SEC's investigation and could be crucial to taking action to address a multi-million dollar

21

22

23 _____

24 [3] While the Supreme Court has held that the First Amendment protects anonymous speech, that right
    is limited. *Anonymous Online Speakers v. United States Dist. Court*, No. 09-71265, 2011 U.S. App.
25 LEXIS 487, at *6 (9th Cir. Jan. 7, 2011). The nature of the limits depends on the nature of the
    speech; political speech is protected more than commercial speech. *Id.* Fraudulent speech is not
26 protected. *See, e.g., U.S. v. Stevens*, 130 S. Ct. 1577, 1584 (2010). Movant attempts to raise the level
    of protection afforded his speech by claiming he sent political messages using the
27 "aurorapartners@gmail.com" account. *See* Declaration of John Doe, Exhibit B to Motion to Quash.
    But, the Staff did not seek any information regarding Movant's alleged political speech.
28

1 fraud. [4] Movant's only argument addressing this issue is that he was not named in the SEC's Formal

2 Order. *See* Doe Memorandum at 6. However, there is no restriction on the SEC's power to subpoena

3 third parties not named in the order of investigation who may have materials relevant to the inquiry.

4 *See RNR Enters. v. SEC*, 122 F.3d 93, 98 (2d Cir. 1997) ("Neither the securities laws nor the

5 Constitution impose a distinct requirement that, before issuing the subpoena, the SEC issue a Formal

6 Order authorizing by name an investigation of [a particular party]."). In any event, the Formal Order

7 broadly encompasses all "consultants, partners, and affiliates" as well as "other persons or entities"

8 engaged in the apparent fraud and thus authorizes this subpoena. De Jong Decl. ¶ 4.

9   Further, the SEC used the least restrictive means, consistent with the ECPA, to obtain the

10 identity of the holder of the email address by seeking only subscriber information. This information

11 is directly related to the Jammin Java investigation because it will help the Staff determine who sent

12 and is responsible for the newsletters that touted Jammin Java's stock as part of the "pump and

13 dump" scheme. Thus, the SEC has satisfied its burden.

14   **C.   Movant's Arguments Are Inapposite.**

15   Instead of applying the test set forth in *Brock*, Movant claims that in responding to his motion

16 to quash, the SEC must "(a) establish that it notified Movant of the Subpoena; (b) submit evidence

17 supporting all elements of the legal claims identified in the Investigative Order; (c) demonstrate that

18 Movant's identity is necessary to its legal claims; and (d) establish that the harm to Movant in

19 revealing his identity is outweighed by the SEC's investigative needs." Doe Memorandum at 6. We

20 are not aware of any precedent suggesting that a government agency in the early stages of an

21 investigation is required to meet these requirements and Movant does not cite to any such case. It

22 _____

23 [4] Case law relating to private, civil disputes supports the view that First Amendment rights to
    anonymity must give way in certain circumstances. For example, in *London v. Does 1-4*, No. 007-

24 15164, 2008 U.S. App. LEXIS 11428 (9th Cir. May 22, 2008), the Ninth Circuit affirmed the
    Northern District of California's ruling that there was no merit to the defendants' claim that

25 disclosure of email subscriber information violated their First Amendment rights to anonymous
    speech. There, a wife needed to establish adultery in a fault-based divorce proceeding and had reason

26 to believe her husband had used email pseudonyms in the course of his infidelity. In affirming the
    denial of the Does' motion to quash a subpoena directed to an internet service provider, the court

27 reiterated that in the Ninth Circuit, "exposure of some identifying data does not violate the First

28 Amendment." *Id.* at **4-5, citing *People of State of Cal. v. FCC*, 75 F.3d 1350, 1362 (9th Cir. 1996).

1   appears that Movant has cobbled together these factors from various standards applicable in civil

2   actions when a complaint has already been filed. *See Anonymous Online Speakers*, 2011 U.S. App.

3   LEXIS 487, at *13-16. Factors (b) and (c) are particularly inapposite as applied to an administrative

4   investigative subpoena where claims are still in the process of being formulated and evidence being

5   collected. Movant has not pointed to any case that would require the government to have determined

6   that wrongdoing has occurred before it conducts an investigation into that wrongdoing. *See Jerry T.*

7   *O'Brien*, 467 U.S. at 749 (recognizing that the SEC often must undertake investigations into

8   suspicious securities transactions without any specific knowledge of the events or parties at issue).

9   **IV.   Conclusion.**

10   For the foregoing reasons, the SEC requests that this Court deny Movant's motion to quash

11   the administrative subpoena to Google and order Google to comply with the subpoena forthwith.

12   Dated: August 19, 2011

13

14   /s/   Sarah Hancur
                                                            MELINDA HARDY (Admitted to DC Bar)
                                                            SARAH HANCUR (Admitted to DC Bar)
15   U.S. Securities and Exchange Commission
                                                            Office of the General Counsel
16   100 F Street, NE, Mailstop 9612
                                                            Washington, DC 20549
17   Telephone: 202.551.5194
                                                            Facsimile: 202.772.9263
18   hardym@sec.gov
                                                            hancurs@sec.gov
19
                                                            Attorneys for Respondent
20

21

22

23

24

25

26

27

28