RECORD NO. 08-2059

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROY T. LEFKOE, *ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED*, THE HAVERHILL RETIREMENT SYSTEM, LEFKOE/YANNUZZI, CEFERINO FAJARDO, AND MASSACHUSETTS LABORERS' ANNUITY FUND,

PLAINTIFFS-APPELLEES,

v.

JOS. A. BANK CLOTHIERS, INCORPORATED, ROBERT N. WILDRICK, R. NEAL BLACK, AND DAVID E. ULLMAN,

DEFENDANTS – APPELLEES,

v.

THE DOE CLIENT,

MOVANT – APPELLANT.

ON APPEAL FROM AN ORDER BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

BRIEF OF APPELLANT, THE DOE CLIENT
PUBLIC VERSION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Caselaw **Page**

Constitution, Statutes, Rules, and Other Authorities

Constitution

Legislation, Statutes Regulations

Rules

Other Authorities

I. STATEMENT OF JURISDICTION

This appeal is taken by the Doe Client (the "Client"), a nonparty to a putative class action securities litigation (the "Securities Action") pending below in the United States District Court for the District of Maryland, Northern Division (the "Maryland District Court"). The Securities Action asserts claims against defendant Jos. A. Bank Clothiers, Inc. ("Jos. A. Bank") and certain insiders (collectively, the "Insider Defendants") under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), thereby vesting the Maryland District Court with subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and Section 27 of the Exchange Act, 15 U.S.C. § 78aa.

This appeal, which was timely filed on September 17, 2008, concerns an order of the Maryland District Court entered on September 3, 2008 (the "Order"). The Order permits the partial unsealing of a deposition transcript that was previously sealed by the United States District Court for the District of Massachusetts (the "Massachusetts District Court"). This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 and the *Cohen* collateral order doctrine. (See 4CCA Docket Entry 26 at 7-13, The Doe Client's Opposition to Consider Appeal as Petition for Mandamus and to Expedite).

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Maryland District Court had authority to reconsider the merits of the final order issued by the Massachusetts District Court?

2. Whether the Maryland District Court, if it had authority to reconsider the merits of the order of the Massachusetts District Court, erred by applying the incorrect standard of review?

3. Whether the Maryland District Court erred in not recognizing and protecting the Client's right of anonymous speech under the First Amendment?

4. Whether the Maryland District Court's partial unsealing order – which has a significant potential chilling effect on future whistleblowers – is contrary to the stated public policy of Sarbanes-Oxley of protecting whistleblowers so that corporate wrongdoing may be better detected?

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal concerns First Amendment and statutorily-based protections afforded to anonymous whistleblowers of actual or perceived misconduct of public companies and the authority of district courts to reconsider decisions of other district courts. The Client is a whistleblower who sent a private, discreet letter to Jos. A. Bank's audit committee raising concerns about what it believed to be material false and misleading public statements by Jos. A. Bank.

Two years later, Jos. A. Bank served the Client's counsel – Foley & Lardner LLP ("Foley") – with a subpoena issued out of the Massachusetts District Court

seeking, *inter alia*, the Client's identity. Foley commenced a miscellaneous proceeding in which it filed a motion to quash the subpoena.

The Massachusetts District Court granted Foley's motion in significant part, allowing a brief and extremely limited deposition of the Client (not Foley). The deposition was held under the court's direct supervision and ordered sealed.

Jos. A. Bank never appealed the decision of the Massachusetts District Court to the First Circuit. Instead, Jos. A. Bank subsequently moved in the Maryland District Court to unseal the deposition transcript. By Order dated September 3, 2008, the Maryland District Court ordered the transcript partially unsealed.

The Client contends that the Maryland District Court (1) overstepped its authority by impermissibly reconsidering a final order of another district court; (2) compounded its error by applying an incorrect standard of review; (3) violated the Client's First Amendment right to anonymous speech; and (4) disregarded the public policy behind Sarbanes-Oxley, thereby encouraging aggressive companies such as Jos. A. Bank to pursue baseless discovery against otherwise anonymous whistleblowers as a subterfuge to set the stage for a retaliatory litigation, with the ultimate effect of chilling speech and undermining the integrity of the stock market.

B. COURSE OF PROCEEDINGS

This Securities Action has been pending since July 24, 2006. (A.13.) Jos. A. Bank and the Insider Defendants moved to dismiss and moved for judgment on the pleadings, but their motions were denied. (A.20; A.24.) On March 28, 2008, the plaintiffs moved for class certification. (A.24.) That motion is pending. (A.32.)

1. PROCEEDINGS BEFORE THE MASSACHUSETTS DISTRICT COURT

On March 18, 2008, Jos. A. Bank served a subpoena upon Foley & Lardner LLP ("Foley") issued by the Massachusetts District Court, seeking, *inter alia*, the Client's identity. (S.A.2-9.) Foley commenced a miscellaneous action (No. 08-MC-10089) seeking to quash the subpoena. (S.A.24-45.) The case was assigned to the Honorable William G. Young ("Judge Young"). (S.A.89.)

On May 29, 2008, following full briefing, Judge Young conducted a brief hearing during which he observed that almost all of the discovery sought by the subpoena was not relevant to the underlying litigation, and found that there was "only one ground, only . . . one ground on which I ought to enforce the subpoena . . . of some third party uninvolved." (S.A.20 at 2:20-24.) That sole ground was whether "the client is fit with the named plaintiffs and this is all part of a cabal, if you will, to affect stock price and then sue." (S.A.346; S.A.20 at 2:25-3:4.) Accordingly, Judge Young granted Foley's motion to quash in significant part,

albeit noting that the Maryland District Court might be called upon to revisit the issue. (S.A.20 at 2:20-3:4; 4:7-16.)

Judge Young made clear that he based his ruling on the standards governing discovery under the Federal Rules of Civil Procedure, not on constitutional or public policy grounds. (S.A.349; S.A.99 at 28:1-4; S.A.21 at 6:10-15.) Based on this analysis, Judge Young ordered a Rule 30(b)(6) deposition of the Client. Judge Young's order limited the Client's deposition to the one issue of whether there was any relationship between the Client and any of the plaintiffs. (S.A.346-47; S.A.20 at 2:20-3:4; 4:7-16; S.A.95-96 at 12:14-13:1.) Judge Young instructed that the deposition would be conducted under his supervision and would be sealed. (Id.)

Pursuant to Judge Young's order, the deposition took place on June 2, 2008. The deposition established that there was no relationship between the Client and any of the plaintiffs or their representatives, and quickly ended. (S.A.348-349; S.A.96-98 at 14:10-23:9.)

During the deposition, Judge Young reiterated:

> [J]ust in an effort for guidance, understand I've now adhered to the line that I planned to adhere to with respect to this deposition.
>
> The deposition as I've earlier ordered will be entirely sealed without prejudice to application being made to the presiding judge for whatever treatment, and that also means application made to the presiding judge to call for additional depositions or expand the scope of this deposition; I express no opinion on that.

> I have a small piece of this dispute, and I've tried to balance the interests of the entity that wished to remain anonymous against the justified interests under Rule 45 of Jos. A. Bank of obtaining discovery.
>
> My ruling is based upon what seems to me the appropriate limits of discovery, not any privilege as I said when we were in open court. But I am willing that the presiding judge who has the lawsuit under his care make the final call as to all of these matters and Foley may find itself before that . . . presiding judge, defending or seeking to modify the limits that I've put on it.

(S.A.99 at 27:7-28:10 (emphasis added).)

2. PROCEEDINGS BEFORE THE MARYLAND DISTRICT COURT

On June 18, 2008, Jos. A. Bank moved in the Maryland District Court to unseal the transcript and continue the deposition. (S.A.350; S.A.232-47.) The Client appeared specially for the limited purpose of moving for a protective order and opposing Jos. A. Bank's motion. (S.A.350; S.A.257.)

The Client argued: (1) the Maryland District Court lacked jurisdiction to compel discovery from the Client, who had never been subpoenaed in the Securities Action and is [redacted]; (2) the Maryland District Court lacked authority to reconsider issues previously decided by the Massachusetts District Court; (3) Judge Young's ruling was the law of the case; (4) the discovery sought was not relevant to the Securities Action; (5) unsealing the deposition and permitting discovery would be contrary to the public policies expressed in Sarbanes-Oxley; (6) unsealing the deposition would violate the Client's First Amendment right to speak anonymously; and (7) further discovery would lead to

the disclosure of the Client's confidential and proprietary business information. (S.A.248-81; S.A.320-42.) In opposition to the Client's motion for a protective order, Jos. A. Bank and the Insider Defendants made the very same arguments that the Massachusetts District Court had previously considered and rejected. (S.A.50-60; S.A.232-47; S.A.291-309.)

C. DISPOSITION BELOW

On September 3, 2008, the Maryland District Court granted in part and denied in part Jos. A. Bank's motion to unseal. (S.A.359.) The Client's motion for a protective order was denied as premature. (Id.)

The Maryland District Court acknowledged that it lacked jurisdiction to compel further discovery because no subpoena had been issued to the Client. (S.A.350-51.) Nevertheless, the Maryland District Court determined that it did have authority to reconsider the Massachusetts District Court's order sealing the deposition. (S.A.350-55.)

Holding that the Client's identity was not protected under the First Amendment or otherwise, the Maryland District Court ordered the Client's identity partially unsealed. (S.A.355-56.) The September 3, 2008 Order permitted the Client's identity to be revealed to the parties to the litigation, while remaining protected from disclosure to the public. (S.A.356.) The Order was stayed for ten days by its express terms. (S.A.356; S.A.359.) After the Client filed an

emergency motion to continue the stay (A.31), the Maryland District Court continued the stay pending full briefing on the motion. (Id.) As of this writing, October 24, 2008, the Client's motion to stay remains pending. (A.32.)

IV. STATEMENT OF THE FACTS

A. THE CLIENT'S LETTER

The origin of this appeal is a letter dated March 15, 2006 (the "Letter") sent by Foley on behalf of the Client, who was at the time a shareholder of Jos. A. Bank stock.[1] (S.A.344; S.A.449-52.) The Letter was sent privately to Jos. A. Bank's audit committee and did not disclose the Client's identity. (Id.) The Letter did, however, raise specific concerns regarding certain identified actual or perceived public misrepresentations made by Jos. A. Bank in its public disclosures. (Id.) The letter also raised questions about the propriety of certain stock sales by Jos. A. Bank's CEO, Robert Wildrick – one of the Insider Defendants in the Securities Action. (Id.)

As indicated in the Letter, the issues came to light largely as a consequence of two things. First, Jos. A. Bank had made inconsistent public statements in its corporate disclosures and earnings reports. (Id.) Second, Mr. Wildrick had sold

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[1] The "Client" refers to [redacted] (S.A.311-14.) The Client generally holds both long and short positions in a wide variety of public securities. (S.A.318-19.)

approximately 75 percent of his stock in Jos. A. Bank – at a time when the documentary evidence suggests that the stock was artificially inflated by corporate wrongdoing. (Id.)

Jos. A. Bank immediately assumed that the Client was a short seller and demanded that Foley provide the Client's identity, claiming that "both the substance and timing of the [Letter] raise serious concerns . . . ." (S.A.345; S.A.454.) Foley refused to provide the name of the Client, or to respond to the allegation that the Client was a short seller. (S.A.345; S.A.28-29.) Nevertheless, the audit committee apparently believed that the materials identified in the Letter – which Jos. A. Bank recently acknowledged "relied principally on public information disclosed by the Company itself" (4CCA Docket Entry 25 at 10, Jos. A. Bank's Opposition to the Doe Client's Motion to Seal All Party Filings (*hereinafter* "4CCA Docket Entry 25")) – established a sufficient factual predicate for concern, and thus launched an investigation. (S.A.345; S.A.456-60.)

Starting several days after receiving the Letter, Jos. A. Bank spent about a week gathering documents and assembling a team to investigate the allegations. (S.A.457.) The investigators then spent two days interviewing witnesses, touring Jos. A. Bank headquarters and distribution center, and only three days reviewing documents. (S.A.457-58.) The investigation concluded on or before March 31, 2006. (S.A.460.) The audit committee claimed that the investigation "uncovered

no areas of vulnerability." (S.A.460.) It implicitly acknowledged, however, that at least some of the allegations in the Letter were indeed correct. For example, the investigation determined that Jos. A. Bank had "re-tick[ed]" and "re-age[d]" merchandise (S.A.459) – a practice which would quite obviously result in materially overstating the value of Jos. A. Bank's inventory on its financial statements. Curiously, the audit committee also elected to not even investigate the central concern of the Letter: Jos. A. Bank's inventory levels. (S.A.457.)

Despite that the audit committee had reached its conclusions by March 31, 2006, Jos. A. Bank now claims that the Letter caused it to delay its earnings call, which had been scheduled for April 3, 2006. (S.A.54-56; S.A.237-38.) Moreover, Jos. A. Bank also now emphatically speculates that the Client somehow knew and intended that this would be the result. (Id.)

B. THE CLIENT'S SEALED DEPOSITION CONFIRMED NO "CABAL"

On June 2, 2008, pursuant to Judge Young's order, the Client's deposition proceeded in Judge Young's chambers, and under Judge Young's direct supervision. (S.A.348; S.A.93-101.) Although Foley had objected to questions seeking the Client's identity or information that could eventually lead to the determination of the Client's identity, Judge Young overruled such objections and ordered the witness to answer each of the questions. (S.A.347-48; S.A.93-95 at 4:9-9:2.) As Judge Young had previously noted, the deposition was sealed, which

thus protected the Client's privacy interests. (S.A.349; S.A.99-100 at 27:11-18; 29:11-17; S.A.20-21 at 4:18-5:10.)

Through thorough questioning (primarily by Judge Young himself), the deposition confirmed that the Client had *no* relationship whatsoever with any of the class action plaintiffs or their attorneys. (S.A.348-349; S.A.96-98 at 14:10-23:9.) There was, thus, no cabal, and therefore, according to the Massachusetts District Court's reasoning, no other relevant line of inquiry or justification to further burden the Client. (S.A.98-99 at 23:10-26:19.)

C. JOS. A. BANK'S ULTERIOR PURPOSE

Notwithstanding the foregoing, Jos. A. Bank continued to pursue discovery from the Client by moving to unseal the June 2, 2008 deposition transcript in the Maryland District Court. (S.A.232.) Instructively, Jos. A. Bank has finally admitted that its ultimate goal is not to discover facts relevant to any claims or defenses that have been asserted in the Securities Action. Rather, Jos. A. Bank hopes to try to find facts that would support some cause of action against the Client. (See 4CCA Docket Entry 25 at 11.)

In support of its crusade, Jos. A. Bank has improperly sought to vilify the Client based on pure speculation concerning the Client's purported motivations in sending the Letter, misstatements concerning the factual record, and unsupported accusations of some untenable theory of "market manipulation." The central

theme of Jos. A. Bank's position throughout the proceedings in both Massachusetts and Maryland has been its suspicion that the Client "held a short position in the Company's shares"[2] and therefore necessarily "took steps that unlawfully influenced the market price of the stock" or otherwise "manipulated" Jos. A. Bank's stock price. (S.A.51-52; S.A.55-56; S.A.58; S.A.232; S.A.234; S.A.241-44; S.A.297-302.)

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[2] The basic mechanics of short positions and how they differ from long positions are set out in the SEC's fact sheet explaining its short sale regulations:

> A short sale is generally the sale of a stock you do not own (or that you will borrow for delivery). Short sellers believe the price of the stock will fall, or are seeking to hedge against potential price volatility in securities that they own.
>
> If the price of the stock drops, short sellers buy the stock at the lower price and make a profit. If the price of the stock rises, short sellers will incur a loss. Short selling is used for many purposes, including to profit from an expected downward price movement, to provide liquidity in response to unanticipated buyer demand, or to hedge the risk of a long position in the same security or a related security.

For example, an investor believes that there will be a decline in the stock price of Company A. Company A is trading at $60 a share, so the investor borrows shares of Company A stock at $60 a share and immediately sells them in a short sale. Later, Company A's stock price declines to $40 a share, and the investor buys shares back on the open market to replace the borrowed shares. Since the price is lower, the investor profits on the difference – in this case, $20 a share (minus transaction costs such as commissions and fees). However, if the price goes up from the original price, the investor loses money. Unlike a traditional long position – when risk is limited to the amount invested – shorting a stock leaves an investor open to the possibility of unlimited losses, since a stock can theoretically keep rising indefinitely. (S.A.367.) This latter situation is called a "short squeeze." (S.A.318-19; see also S.A. 541.)

While it is by no means clear that the Client even held an overall short position in Jos. A. Bank at the relevant time,[3] even if it had, the "vast majority" of short sales – contrary to Jos. A. Bank's insinuations and innuendoes – are legal and proper. (S.A.367.) While short sellers are unpopular with many companies, short sellers are widely considered to be an essential part of an efficient market. (S.A.545-46; S.A.560-63; S.A.576-78; S.A.580-81; S.A.583-85; S.A.590-92.) Indeed, they are often credited with exposing the truth about overpriced securities (like those of Jos. A. Bank). (Id.)

Notwithstanding Jos. A. Bank's theories, Judge Young expressly found that the nature of the Client's interest in Jos. A. Bank stock – long or short – is irrelevant. (S.A.95 at 11:24-13:1.) Judge Young also unequivocally rejected Jos. A. Bank's theory that the Letter was somehow "manipulative" of Jos. A. Bank's stock price, finding it to be "completely speculative" absent evidence of the one point that he found relevant, *i.e.* whether the Client had "something to do with this lawsuit." (S.A.20 at 3:21-25.)

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[3] The Client frequently holds both short and long positions in companies. (S.A.318-19.) The Client holds information concerning such positions strictly confidential, however, because short positions entail great risks, including the risk of a "short squeeze." (Id.) Short sellers also risk retaliatory litigation from aggressive companies that seek to shift blame for stock losses or otherwise have something to hide. (S.A.545-46; S.A.560-63; S.A.590-92.) Accordingly, the Client takes great care to protect its anonymity and the confidentiality of its information. (S.A.318-19.)

D. THERE WAS NO "MARKET MANIPULATION"

In the Maryland District Court, Jos. A. Bank renewed the same allegations of "market manipulation" against the Client, which the Massachusetts District Court had previously rejected as speculative and irrelevant. Samples of the positions advanced before both Courts are set forth in the following chart.

Defendant's Opposition to Foley's Motion to Quash filed in the Massachusetts District Court	**Defendant's Motion to Unseal filed in the Maryland District Court**
"Did Shareholder's actions distort the market for the Company's shares, thereby foreclosing the finding of 'market efficiency' necessary to warrant certification of a shareholder class?" (S.A.57.)	"To what extent did [Shareholder's] actions distort the market for the Company's shares, thereby foreclosing the finding of 'market efficiency' necessary to warrant certification of a shareholder class?" (S.A.244.)
"Does Shareholder fall within the class definition as articulated by the pending motion for class certification? And, if so, is inclusion of Shareholder in the class otherwise appropriate…" (S.A.57.)	"To what extent does [Shareholder] fall within the class definition as articulated by the pending motion for class certification? And, is inclusion of [the Shareholder] in the class otherwise appropriate…" (S.A.244.)
"What contact did Shareholder have with other persons or entities who may have held a short position in the Company's shares?" (S.A.57.)	"What contact did [Shareholder] have with other persons or entities who may have held a short position in the Company's shares during the relevant time period?" (S.A.244.)
"What contact did Shareholder have with any persons formerly employed by the Company, and what information did those ex-employees provide?" (S.A.57.)	"What contact did [Shareholder] have with any persons formerly employed by the Company, and what information did those ex-employees provide?" (S.A.245.)
"From what sources did Shareholder obtain the information underlying the alleged 'concerns' expressed in the LeFevre Letter?" (S.A.57.)	"From what sources did [Shareholder] obtain the information underlying the alleged 'concerns' expressed in the LeFevre Letter?" (S.A.245.)
"That Shareholder waited until March	"The timing of the LeFevre Letter

Defendant's Opposition to Foley's Motion to Quash filed in the Massachusetts District Court	**Defendant's Motion to Unseal filed in the Maryland District Court**
15, 2006 to raise its alleged 'concerns' is even more curious in light of the fact that all of the inventory data cited in the LeFevre Letter was available to the public as of December 5, 2005…" (S.A.53-54.)	is…curious…particularly in light of the fact that all of the inventory data cited in the LeFevre Letter was available to the public as far back as of December 5, 2005." (S.A.244.)
"Why would a presumably sophisticated holder of 'several hundred thousand shares' of the Company's stock (worth millions of dollars), acting in good faith, send such a letter, which appears to have been calculated to impose significant costs on the Company and/or to interfere with the timely filing of the Company's annual report on form 10-K, either of which would almost certainly have precipitated a significant decline in the market price of the Company's stock?" (S.A.56.)	"Why would a presumably sophisticated holder of 'several hundred thousand shares' of the Company's stock (worth millions of dollars), acting in good faith, send such a letter, which appears to have been calculated to impose significant costs on the Company and/or to interfere with the timely filing of the Company's annual report on form 10-K, either of which would almost certainly have precipitated a significant decline in the market price of the Company's stock?" (S.A.243-244.)

In Maryland, Jos. A. Bank submitted three "new" pieces of "evidence" that it alleges support its allegations of "manipulative short-selling":

1. A [redacted] article dated [redacted], which profiles the Client's CEO, [redacted] and identifies [redacted] of short selling. (S.A.549-51.) Ironically, however, the article focuses primarily on [redacted] great success with long positions, most notably in [redacted]. (Id.)

2. A [redacted] article dated [redacted] reporting on [redacted] prediction that "[redacted]" due to excessive subprime mortgage exposure and a housing bubble. (S.A.565-67.)

3. The Client's [redacted] showing [redacted] puts (options) on Jos. A. Bank stock and [redacted] shares of common stock (the "[redacted]"). (S.A.471-74.)

The [redacted] articles make no mention of Jos. A. Bank or its stock. (S.A.549-51; S.A.565-67.) The [redacted] article is simply a very general profile [redacted]. (S.A.549-51.) The [redacted] article regarding [redacted] shows only [redacted] was prescient regarding the current market crisis. (S.A.565-67.)

Jos. A. Bank's assertion that the [redacted] reflects short positions is simply wrong. It is incontrovertible – as expressly explained by [redacted] in unequivocal language – that [redacted] only ***long*** positions.[4] (S.A.383-85.)

In the proceedings before the Maryland District Court, Jos. A. Bank speculated that Judge Young would have ruled differently had he been aware of the foregoing "evidence." (S.A. 245-246). In fact, the so-called "evidence" adds nothing. More importantly, the record reveals that Judge Young was well-aware of Jos. A. Bank's "short-seller market manipulation" allegations and simply found

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[4] According to the [redacted] "[redacted]," *available at* [redacted] are advised that they "[redacted]." (S.A.384, [redacted].) In addition, "[redacted]." (S.A.384-85, [redacted].)

them to be irrelevant. (S.A.51; S.A.55-59; S.A.20 at 2:20-3:25; S.A.95-96 at 11:24-13:1; S.A.98-99 at 24:4-26:19.)

V. SUMMARY OF THE ARGUMENT

By permitting the partial unsealing of the identity of the Client – a corporate whistleblower that, through counsel, merely submitted a confidential, anonymous communication to the audit committee of Jos. A. Bank – the Maryland District Court made a number of errors, both substantive and procedural.

As a threshold matter, the Maryland District Court lacked the authority to, in effect, sit as a court of appeals, reviewing a final order of another district court. By reversing a final order of the Massachusetts District Court – from which Jos. A. Bank and the Insider Defendants never appealed to the First Circuit – the Maryland District Court usurped the prerogatives of the Massachusetts District Court and the First Circuit alike. To the extent that the Maryland District Court had any authority to review the ruling of the Massachusetts District Court, its review was subject to the law of the case doctrine. The Maryland District Court, however, ignored the law of the case doctrine, instead revisiting issues that had previously been decided and giving credence to arguments by Jos. A. Bank that the Massachusetts District Court had already considered but rejected.

On the merits, the Maryland District Court erred in holding that the Client's anonymity is not protected by the First Amendment qualified privilege on the

grounds that the Letter was a private communication. The Supreme Court has expressly recognized First Amendment protections in the context of private communications. Moreover, numerous courts have applied the precise First Amendment doctrine at issue here – the qualified privilege for anonymous speech – to private communications.

The Maryland District Court also erred by permitting Jos. A. Bank to strip the Client of its First Amendment right to engage in anonymous speech based on nothing more than Jos. A. Bank's unsubstantiated and inflammatory allegations of "market manipulation." Courts that have addressed the First Amendment qualified privilege for anonymous speech agree that litigants who seek to bring claims against anonymous speakers must submit competent evidence to support their claim. Moreover, courts also agree that even where the anonymous party is not the target of a lawsuit, the litigant seeking discovery of an anonymous speaker's identity must demonstrate an extraordinarily compelling need for the information that outweighs First Amendment anonymity interests.

Jos. A. Bank has not shown, and cannot meet its burden to show, that its alleged "need" for the information outweighs the Client's First Amendment rights. To the contrary, Jos. A. Bank's expert has already opined about the extent to which the market for Jos. A. Bank stock supposedly was not "efficient," and that opinion does not require access to the investment strategies of one shareholder, the Client.

As it turns out, Jos. A. Bank has finally "come clean" about why it seeks further discovery from and about the Client: it hopes to discover some evidence – which it now lacks – that would justify making the Client a party to this litigation.

Jos. A. Bank's attempt to punish the Client for attempting to blow the whistle on questionable practices of Jos. A. Bank and the Insider Defendants alike violates the spirit if not the letter of Sarbanes-Oxley. If Jos. A. Bank is permitted to succeed in this effort, the adverse effects will not be limited to the Client. Rather, shareholders and the public in general will suffer as the Maryland District Court's Order chills whistleblowing by employees and the public alike.

VI. STANDARD OF REVIEW

Whether the Maryland District Court had authority to reconsider the Massachusetts District Court's order is properly reviewed *de novo*. United States v. Moussaoui, 483 F.3d 220, 234 (4th Cir. 2007) (question of district court's authority is a question of law reviewed *de novo*); Finn v. Schiller, 72 F.3d 1182, 1187 (4th Cir. 1996); Charter Fed. Savings Bank v. Office of Thrift Supervision, 976 F.2d 203, 208 (4th Cir. 1992). Whether the Maryland District Court applied an incorrect standard of review in reconsidering the merits of Judge Young's order is reviewed for abuse of discretion. American Canoe Ass'n, Inc. v. Murphy Farms, Inc., 326 F.3d 505, 516 (4th Cir. 2003).

Whether the Maryland District Court erred in not recognizing the Client's right of anonymous speech under the First Amendment is reviewed *de novo*. Bose Corp. v. Consumers Union, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502, 515 (1984) ("In cases raising First Amendment challenges, an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression."); In re Morrissey, 168 F.3d 134, 137 (4th Cir. 1999) (quoting Bose).

Whether the Maryland District Court's partial unsealing order is contrary to the policy behind Sarbanes-Oxley is reviewed *de novo*. See MidMichigan Reg'l Med. Ctr.-Clare v. Prof. Employees Div. of Local 79, 183 F.3d 497, 501 (6th Cir. 1999); Reeder v. Am. Econ. Ins. Co., 88 F.3d 892, 894 (10th Cir. 1996).

VII. ARGUMENT

A. THE MARYLAND DISTRICT COURT LACKED AUTHORITY TO RECONSIDER THE ORDER OF THE MASSACHUSETTS DISTRICT COURT SEALING THE DEPOSITION

1. THE MASSACHUSETTS DISTRICT COURT ISSUED A FINAL DECISION, LEAVING NOTHING TO CEDE TO THE MARYLAND DISTRICT COURT

The litigation in the Massachusetts District Court was a miscellaneous action commenced by Foley. (S.A.24-25.) The sole issue in that action was Foley's motion to quash the subpoena issued to Foley by Jos. A. Bank out of the Massachusetts District Court. (S.A.89-91.) The Massachusetts District Court

granted Foley's motion in part; ordered a limited, sealed deposition of the Client; and then supervised the deposition. (Id.; S.A.20-21 at 2:20-4:16; 5:4-10.) Accordingly, the Massachusetts District Court resolved all issues before it, and thus that case was fully adjudicated. (S.A.89-91; S.A.20-21 at 2:20-4:16; 5:4-10; S.A.99-100 at 27:11-28:10; 29:12-17; Moussaoui, 483 F.3d at 230-31; cf. Church of Scientology v. United States, 506 U.S. 9, 18 n.11, 113 S.Ct. 447, 452, 121 L.Ed.2d 313, 322 (1992) ("[U]nder the . . . Perlman doctrine, a discovery order directed at a disinterested third party is treated as an immediately appealable final order . . . .") (internal citation omitted)).

Judge Young's "willing[ness] to let the presiding judge [in the Maryland District Court] who has the lawsuit under his care make the final call" (S.A.99 at 28:4-7) did not change the finality of his order. This Court's decision in Moussaoui, 483 F.3d 220 (2007), is instructive in this regard. Specifically, in Moussaoui, victims of the September 11 attacks (the "Civil Plaintiffs") moved to intervene in Moussaoui's criminal case in the Eastern District of Virginia to obtain nonpublic discovery materials that they sought for use in their civil suits pending in the Southern District of New York. 483 F.3d at 227-33. The Virginia District Court allowed the Civil Plaintiffs to intervene, ordered that they be provided access to certain materials, and granted the New York District Court authority to alter the Virginia District Court's orders. Id. at 225-26. In considering the Government's

appeal, this Court held that, notwithstanding the purported ceding of authority to the New York District Court to revise the Virginia District Court's orders, the order was final. Id. at 230-31.

Like the order of the Virginia District Court at issue in Moussaoui, the Massachusetts District Court's ruling was a final discovery order, fully resolving all issues before the court. Accordingly, any attempt to cede "final" decision was a nullity, as there was nothing left for the Massachusetts District Court to do. Thus, the Maryland District Court erred by "revisiting" the Massachusetts District Court's Order.

2. THE MASSACHUSETTS DISTRICT COURT DID NOT TRANSFER THE MOTION TO QUASH

Notwithstanding the foregoing, the Maryland District Court, relying primarily on United States v. Star Scientific, Inc., 205 F. Supp.2d 482 (D. Md. 2002), determined that it had authority to review the Order. (S.A.353.) Star Scientific, however, does not support the court's decision.

Star Scientific involved a motion to compel discovery under a non-party subpoena. 205 F. Supp.2d at 487-88. The Maryland District Court transferred consideration of that motion to the District of Columbia. Id. at 488. The circumstances under which the Maryland District Court ceded its authority, however, were fundamentally different from those present here. First, there, the motion was transferred to a coordinate court ***before*** a decision was made on the

merits.[5] Id. at 487-88. Second, the party resisting the discovery consented to the transfer. Id. at 487. In contrast, here, as Judge Nickerson observed, "Judge Young ***did not transfer*** the motion to quash the subpoena, but rather, ruled upon it while explicitly inviting this Court to ***revisit*** that ruling." (S.A.353 (emphasis added).) Moreover, unlike in Star Scientific, the Client has not consented to a transfer, not only because there was in fact no transfer, but because the Client has opposed all proceedings in the Maryland District Court at every turn. (S.A.350; S.A.248-79; S.A.291-310.) Accordingly, Star Scientific is inapposite.[6]

To overcome these important distinctions between this case and Star Scientific, the Maryland District Court reached and relied on two conclusions: (1) that the Client waived any objections to the Maryland Court's review of the Order;

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[5] Transfer was particularly appropriate in Star Scientific due to the extraordinary complexity of the case, which involved "potential damages in the hundreds of billions of dollars." Id. at 488-89. In contrast, not only does the underlying litigation against Jos. A. Bank lack that kind of complexity, but it also bears mention that Judge Young has particular expertise in analyzing how barriers to short selling affect the efficiency analysis in connection with a motion to certify a class in a securities litigation, one of Jos. A. Bank's primary justifications for the discovery it seeks from the Client. (S.A.58; S.A.242-243); see In re Polymedica Corp. Sec. Litig., 453 F. Supp. 2d 260, 270-78 (D. Mass. 2006) (Young, J.).

[6] Instructively, the Client is unaware of any cases holding that a district court has authority to *reconsider* a final discovery order made by a coordinate district court in another case in a different jurisdiction. Indeed, courts are split on even the question of whether they have authority to rule on a motion that was transferred to them in the first instance, *i.e.*, in the absence of a ruling on the motion by the transferring court. Star Scientific, Inc., 205 F. Supp. 2d at 486 n.4.

and (2) that Foley's motion to quash the subpoena was somehow converted by the Massachusetts District Court into a motion for a protective order by the Client, over which the Maryland District Court would supposedly have jurisdiction. (S.A.354.) Neither of these conclusions is correct.

a. THE CLIENT DID NOT WAIVE "OBJECTIONS" TO RECONSIDERATION

The Maryland District Court's conclusion that the Client "waived any objection it had [to reconsideration] by neither objecting to nor appealing that transfer" (S.A.354) is incorrect for several reasons. As a threshold matter, waiver requires an intentional relinquishment of a known right. Holder v. Maaco Enter., 644 F.2d 310, 312 (4th Cir. 1981). Here, there was none.

Further, the Client was not even a party to the Massachusetts District Court proceeding. The subpoena was issued to Foley, and it was Foley that moved to quash. (S.A.346; S.A.2.) Second, counsel is unaware of any requirement in the District of Massachusetts or the First Circuit that would have required an objection under the circumstances. Third, there was nothing to appeal, as Judge Young's ruling sealed the deposition and did not in fact order the case transferred. (S.A.349-50; S.A.99 at 27:11-28:10 (Judge Young did not order a transfer, but, rather gave Jos. A. Bank the *option* of petitioning the Maryland District Court); S.A.349-50; see also S.A.353 ("Judge Young ***did not transfer*** the motion to quash the subpoena . . . ." (Emphasis added.)).)

Accordingly, any appeal to the First Circuit would have been based on the hypothetical possibility that Jos. A. Bank might, at some point, petition the Maryland District Court to review Judge Young's Order. Thus, there was no case or controversy, and an appeal would not have been ripe. Miller v. Brown, 462 F.3d 312, 316 (4th Cir. 2006) (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298; 99 S.Ct. 2301, 2308; 60 L.Ed.2d 895, 906 (1979) (a dispute must be "definite and concrete, not hypothetical or abstract").)

b. THE MASSACHUSETTS DISTRICT COURT'S ORDER DID NOT SUB SILENTIO CONVERT THE MOTION TO QUASH INTO A MOTION FOR PROTECTIVE ORDER

The Maryland District Court's second conclusion was as follows:

> Judge Young denied the motion to quash, in that he allowed the deposition to go forward, but essentially sua sponte granted [redacted] a protective order under Rule 26 of the Federal Rules of Civil Procedure by ordering the deposition sealed. Unlike a motion to quash, a motion for protective order related to a deposition may be filed in either the court in the district where the deposition will take place or in the court presiding over the underlying litigation.

(S.A.354.) The Maryland District Court concluded that because the Massachusetts District Court had acted under Rule 26, the Maryland District Court had "authority to reconsider the protective order issued by Judge Young." (Id.) This analysis, however, is erroneous because Judge Young did not *sub silentio* convert Foley's Rule 45 Motion into a Rule 26 motion by the Client and because the applicable law was misapplied.

As a threshold matter, Judge Young simply did not convert Foley's motion. Rather, as the Massachusetts District Court's docket expressly states, the "Court grants in part and denies in [1] Motion to Quash." (S.A.191.) There is *no* reference to a motion – *sua sponte* or otherwise – under Rule 26.

Second, not only is there no objective indication that Judge Young intended to convert Foley's Rule 45 motion to quash into a Rule 26 motion by the Client, but there was no need for any such conversion, given that the relief afforded under Rule 45 is coextensive with Rule 26. As the comments to the 1991 Amendments to the Federal Rules of Civil Procedure state, Rule 45(c)(3) "tracks the provisions of Rule 26(c) . . . ." (Add.53). Thus, "a nonparty may seek from the court protection from discovery via the overlapping and interrelated provisions of both Rules 26 and Rule 45. A nonparty moving to quash a subpoena, in essence, is the same as moving for a protective order that such discovery not be allowed." Mannington Mills, Inc. v. Armstrong World Indus., 206 F.R.D. 525, 529 (D. Del. 2002); see also London-Sire Records, Inc. v. Doe 1, 542 F.Supp.2d 153, 162 (D. Mass. 2008); Star Scientific, 205 F. Supp. 2d at 484 n.2; accord Hickman v. Taylor, 329 U.S. 495, 505; 67 S.Ct. 385 391; 91 L.Ed. 451, 459 (1947) (the discovery rules are "integrated procedural devices"); Mortgage Info. Servs., Inc. v. Kitchens, 210 F.R.D. 562, 566-67 (W.D.N.C. 2002) (collecting cases for the proposition that the rules are to be read *in pari materia*). Accordingly, the

Maryland District Court did not adhere to this fundamental precept by creating an artificial distinction between Rule 45 and Rule 26. (See S.A.354.)

Similarly, the Maryland District Court erred in relying on the following comment to the 1970 Amendments to Rule 26: "[T]he court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending." (S.A.354; Add.46). This comment has been interpreted – consistent with Star Scientific – to mean only that a district court in an ancillary jurisdiction "may stay its action on the motion [to quash], permit *the deponent* to make a motion for a protective order in the court where the trial is to take place, and then defer to the trial court's decision." In re Sealed Case, 141 F.3d 337, 342 (D.C. Cir. 1998) (emphasis added). Reading the comment literally, the scenario that it describes is not what happened here. Here, Judge Young ruled on Foley's motion to quash and the Maryland District Court "revisited" that ruling. The comment does not apply to a district court revisiting a ruling issued in another district court.

B. EVEN IF IT HAD AUTHORITY TO RECONSIDER THE MERITS OF THE ORDER, THE MARYLAND DISTRICT COURT APPLIED THE WRONG STANDARD OF REVIEW

Even if the Maryland District Court had authority to reconsider Judge Young's ruling on some theory that the proceedings in Maryland were a continuation of the Massachusetts District Court miscellaneous proceeding, any

alteration of that ruling was foreclosed under the law of the case doctrine. That doctrine precludes relitigation of issues already decided in an earlier phase of the same case[7] except under very narrow circumstances not present here. See United States v. Aramony, 166 F.3d 655, 661 (4th Cir. 1999).

1. THE LAW OF THE CASE DOCTRINE APPLIES TO THE MASSACHUSETTS DISTRICT COURT ORDER

Although any order can constitute the law of the case, it is "well-settled" that a trial court's order becomes the law of the case when a party had the opportunity to challenge the order by appeal but failed to do so. United States v. Henry, 472 F.3d 910, 913 (D.C. Cir. 2007); Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc., 974 F.2d 502, 505 (4th Cir. 1992); Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243, 250 (D.C. Cir. 1987); In re Vernon-Williams, 2007 Bankr. LEXIS 3253, at *37 (E.D. Va. Sept. 21, 2007).

Here, assuming the Maryland District Court had authority to revisit the Massachusetts District Court's Order, the law of the case doctrine would apply to relitigation of issues resolved by the Order – particularly given that Jos. A. Bank

[7] Although arising in different contexts from the present circumstances, the law of the case applies with equal force to the rulings of coordinate courts. See, e.g., Moussaoui, 483 F.3d at 232; Dow v. Jones, 311 F. Supp.2d 461, 465 (D. Md. 2004) (doctrine preserves rulings of state court following removal to federal court); Allfirst Bank v. Progress Rail Servs. Corp., 178 F. Supp.2d 513, 517 (D. Md. 2001) (whether a case is transferred between federal courts, the transferee court "should accept the ruling of the transferor court as the law of the case").

elected not to appeal Judge Young's sealing of the Client's deposition or denial of further discovery. In this regard, while discovery orders are interlocutory and not usually considered final for purposes of appeal, *denials* of discovery in *ancillary* proceedings are immediately appealable because the party seeking the discovery has no other effective means of review.[8] See Nicholas v. Wyndham Int'l, Inc., 373 F.3d 537, 542 (4th Cir. 2004) (accepting jurisdiction to hear appeal of order in ancillary proceeding denying discovery where the underlying proceeding was in the Third Circuit); Cusumano v. Microsoft Corp., 162 F.3d 708, 712 (1st Cir. 1998) (accepting jurisdiction in ancillary proceeding to hear the appeal of a denial of discovery where the underlying action was in the DC Circuit). Jos. A. Bank had the opportunity to appeal Judge Young's denial of discovery to the First Circuit,

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[8] In contrast, appellate review of an interlocutory order *granting* discovery is generally available only by taking the drastic step of disobeying the discovery order and appealing a subsequent citation for contempt. MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116, 121-22 (4th Cir. 1994); Corporacion Insular De Seguros v. Garcia, 876 F.2d 254, 256-57 (1st Cir. 1989). Thus, the only avenue the Client had to appeal Judge Young's *grant* of discovery would have been for it to disobey the order and allow itself (and Foley) to be cited for contempt.

While the Client was foreclosed from seeking an appeal in the First Circuit for all practical purposes, Jos. A. Bank was permitted to relitigate this matter in Maryland even though it had waived its right to appeal in the First Circuit. The law of the case doctrine exists in part to avoid this bizarre result. See Omni Outdoor Adver., Inc., 974 F.2d at 505 ("It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost"); see also Moussaoui, 483 F.3d at 232 (the law of the case doctrine halts the "vicious circle of litigation" that may follow where there is a lack of any meaningful path for review).

but chose not to do so. As a result, Judge Young's ruling became law of the case and Jos. A. Bank forfeited any right to seek *de novo* review of issues already decided by Judge Young.

2. THE MARYLAND DISTRICT COURT DID NOT APPLY THE LAW OF THE CASE DOCTRINE IN REVISITING ISSUES ALREADY DECIDED IN MASSACHUSETTS

In contrast to the *de novo* review that Jos. A. Bank sought, under the law of the case doctrine, prior orders must be adhered to unless: (1) a subsequent trial produced new and substantially different evidence; (2) subsequent controlling authority made a contrary decision of law applicable to the issue; or (3) the prior decision was clearly erroneous and would work manifest injustice. American Canoe Ass'n, Inc., 326 F.3d at 515. These exceptions are "narrowly configured and seldom invoked." United States v. Connell, 6 F.3d 27, 31 (1st Cir. 1993).

The Maryland District Court concluded that it would "reach the same result" regardless of whether it reviewed Judge Young's order *de novo* – the standard proposed by Jos. A. Bank – or under the law of the case standard, which the Client contends should have been applied. (S.A.355.) To the extent that the court applied the *de novo* standard, it was wrong as a matter of law. To the extent that it applied the law of the case standard, it abused its discretion. Either way, reversal is warranted.

a. JOS. A. BANK OFFERED NO NEW AND SUBSTANTIALLY DIFFERENT EVIDENCE

A party must produce new evidence that is "substantially different" in order to justify an exception to the law of the case doctrine. Aramony, 166 F.3d at 661. Yet, in seeking to relitigate issues already decided by the Massachusetts District Court, Jos. A. Bank presented the Maryland District Court with the exact same grounds and arguments considered – and rejected – by Judge Young as to the putative relevance of sought-after information. (*Supra*, Part IV.D.)

In its papers below, Jos. A. Bank stressed that the independent research it conducted after the deposition revealed that the Client is "a well-known short seller." (S.A.239; S.A.297-304.) That evidence, however, is not the kind of "substantially different" evidence required to defeat application of the law of the case doctrine. See, e.g., Richmond Med. Ctr. v. Gilmore, 55 F.Supp.2d 441, 459 (E.D. Va. 1999) (law of the case doctrine did not apply where an ensuing bench trial "supplemented substantially" the preliminary injunction record). As is evident from the record, Jos. A. Bank espoused its "short seller market manipulation" theory in great detail before Judge Young, who was well aware of Jos. A. Bank's theories regarding the nature of the Client's stock interests and its intentions. (*Supra*, Part IV.D.) Jos. A. Bank's supposed "new" evidence merely

supplemented what had already been put before Judge Young, *i.e.*, Jos. A. Bank's belief that the Client held a short position in Jos. A. Bank stock. (Id.)

Jos. A. Bank's resurrection of arguments already made in the Massachusetts District Court was an insufficient basis to justify revisiting Judge Young's order. See Piedmont Envtl. Council v. Strock, 394 F.Supp.2d 803, 811 (N.D. W. Va. 2005) ("under the law of the case doctrine, Plaintiffs cannot now argue that they are permitted to make the exact same arguments that were previously rejected by this Court"); see also Mahon v. Crown Equip. Corp., 2008 U.S. Dist. LEXIS 38232, at *5 (E.D. Cal. May 8, 2008) ("[n]either the rehashed arguments, nor the clarifications, constitute new evidence" under the law of the case doctrine).

b. THERE WAS NO INTERVENING CHANGE IN THE LAW, AND JUDGE YOUNG'S RULING DID NOT CONTAIN ANY MANIFEST ERRORS OF LAW OR FACT

In addition to having failed to establish any new facts, Jos. A. Bank failed to show any intervening change in the law; that Judge Young's final order reflected clear error or manifest injustice; or that there was any other possible justification for revisiting Judge Young's order. (S.A.295-97.) In fact, Jos. A. Bank offered no opposition on these points whatsoever. (Id.) Accordingly, none of the extraordinary circumstances that might preclude application of the law of the case doctrine applies, and, thus, the Maryland District Court's Order should properly be reversed.

C. THE CLIENT'S IDENTITY IS PROTECTED BY THE FIRST AMENDMENT

1. THE CLIENT HAS A FIRST AMENDMENT RIGHT TO SPEAK ANONYMOUSLY, WHICH THE MARYLAND DISTRICT COURT FAILED TO RECOGNIZE

The right to speak anonymously is "an aspect of the freedom of speech protected by the First Amendment."[9] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42; 115 S.Ct. 1511, 1516; 131 L.Ed.2d 426, 436 (1995). As a general matter, the First Amendment protects freedom of speech in part by ensuring that speakers suffer "no harassment or retaliation for the content of their speech" and serves as a "catalyst for speech." Peterson v. Nat'l Telecomm., 478 F.3d 626, 632 (4th Cir. 2007).

The Maryland District Court erred in failing to recognize the existence of the Client's right to anonymous speech. Specifically, the court reached this conclusion by holding that: (1) speech must "'facilitate [] the rich, diverse, and far ranging exchange of 'ideas' or 'foster robust debate" in order to be deserving of protection; and (2) private speech is not protected by the First Amendment. (S.A.355.) Both premises are incorrect.

[9] A court order constitutes state action subject to constitutional limitations. New York Times v. Sullivan, 376 U.S. 254, 265; 84 S.Ct. 710, 718; 11 L.Ed.2d 686, 697-98 (1964).

a. THE FIRST AMENDMENT PROTECTS MORE THAN CORE POLITICAL SPEECH

First Amendment protections extend far beyond the kind of core political speech that is most likely to facilitate robust debate. See, e.g., McIntyre, 514 U.S. at 346; 115 S.Ct. at 1518-19; 131 L.Ed.2d at 439-40 (First Amendment protections are not limited to "the exposition of ideas," quoting Winters v. New York, 333 U.S. 507, 510; 68 S.Ct. 665, 667; 92 L.Ed. 840, 847 (1948)); Schad v. Mt. Ephraim, 452 U.S. 61, 65; 101 S.Ct. 2176, 2181; 68 L.Ed.2d 671, 678 (1981) (the First Amendment protects nude dancing); Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, 425 U.S. 748, 762; 96 S.Ct. 1817, 1826; 48 L.Ed. 2d 346, 358 (1976) (the First Amendment protects commercial advertising that may be far removed from the "exposition of ideas"). The Supreme Court has even recognized "a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 559; 105 S.Ct. 2218, 2230; 85 L.Ed.2d 588, 606 (1985) (emphasis in original)).

Moreover, the First Amendment has also been applied in contexts which are not traditional speech. London-Sire Records, 542 F.Supp.2d at 163 (online file-sharers are protected by the qualified privilege for anonymous speech because file-sharing has expressive aspects); Sony Music Enter. Inc. v. Does 1-40, 326 F.Supp.2d 556, 564 (S.D.N.Y. 2004) (same); accord Peterson, 478 F.3d at 632

(issue of disclosure of domain name registration fell under the First Amendment right to anonymous speech, but the plaintiff lacked standing to assert the right because he had already voluntarily disclosed his identity). Accordingly, the Maryland District Court's conclusion that speech must directly and forcefully "foster robust debate" to be deserving of First Amendment protection is mistaken, and the Client – and the Letter – is deserving of First Amendment protection.

b. THE FIRST AMENDMENT PROTECTS PRIVATE COMMUNICATIONS

Private speech – like the Letter here – has routinely been held to be protected by the First Amendment. Private communications encourage "the uninhibited exchange of ideas and information" that is essential to the operation of a democratic society. Bartnicki v. Vopper, 532 U.S. 514, 532-33; 121 S.Ct. 1753, 1764; 149 L.Ed.2d 787, 805 (2001) (warning that "the fear of public disclosure of private conversations might well have a chilling effect on private speech"). For example, in analyzing whether a public employee was entitled to First Amendment protection in connection with a private memorandum that he sent to his supervisor, the Supreme Court held as follows: "That [defendant] expressed his views inside his office, rather than publicly, is not dispositive." Garcetti v. Ceballos, 547 U.S. 410, 420; 126 S.Ct. 1951, 1959; 164 L.Ed.2d 689, 700 (2006) (because the speech was determined to be part of the employee's official duties, he was not entitled to protection on that basis).

Significantly, the qualified privilege for anonymous speech that is directly pertinent here has been applied to private communications in various contexts. For example, in Mobilisa, Inc. v. Doe 1, 217 Ariz. 103, 106; 170 P.3d 712, 715-16 (Ariz. App. 2007), the CEO of Mobilisa, Inc. ("Mobilisa") used his corporate email account to sent an intimate message to his girlfriend. Id. The email was intercepted and subsequently sent by anonymous persons to "an unknown number of individuals, including members of Mobilisa's management team" with the comment, "Is this a company you want to work for?" Id. Mobilisa brought suit against the anonymous persons alleging causes of action for violations of federal laws relating to electronic communications and trespass to chattels. Id. Even though there was no apparent public distribution of the email on the Internet or otherwise, the issue of whether the identities of the anonymous persons who sent the email could be identified fell squarely within the First Amendment qualified privilege for anonymous speech. Id. Whether the email was ever publicly distributed was of so little import that it was not even addressed by the court. Id.; see also Solers, Inc. v. Doe, 2006 D.C. Super. LEXIS 4 at *1-6 (Aug. 16, 2006) (holding that the First Amendment qualified privilege protected the anonymity of a person who made a private report to a private trade association).

The scope of the distribution of the Mobilisa email and the Client's Letter are identical. Specifically, like the communications in Mobilisa (and Solers), the

Client's Letter was sent privately to a private entity – namely, the Jos. A. Bank audit committee. Thus, the Maryland District Court erred in stripping the Client of its First Amendment rights based on a private/public distinction that simply does not exist.

Instructively, had the Client relayed the information online instead of in a letter to Jos. A. Bank's audit committee, the constitutional privilege would apply regardless of how many people viewed it. See, e.g., Highfields Capital Mgmt. v. Doe, 385 F.Supp.2d 969, 973-75 (N.D. Cal. 2004), aff'd 385 F.Supp.2d 969, 970-71 (N.D. Cal. 2005); Dendrite Int'l, Inc. v. Doe, 342 N.J. Super 134, 158-59; 775 A.2d 756, 772 (N.J. Super. 2001); Doe v. 2TheMart.Com, Inc, 140 F. Supp. 2d 1088, 1092-93 (W.D. Wash. 2001) (quashing subpoenas seeking the identity of anonymous speakers on Internet financial message boards on First Amendment grounds). Logic dictates that a communication should not be privileged simply because it was placed on what may prove to be an obscure message board, but unprivileged when conveyed to the audit committee of a public company, which is required by law to publicly correct any corporate misconduct brought to its attention. Plainly, the latter communication, like the Client's Letter, has far more potential to have a significant impact on the public discourse.

2. THE CLIENT'S FIRST AMENDMENT RIGHT TO SPEAK ANONYMOUSLY CANNOT BE ABROGATED ABSENT A SUBSTANTIAL LEGITIMATE REASON

Having failed to recognize the existence of the Client's First Amendment rights, the Maryland District Court never reached the issue of under what circumstances that right may be abrogated. (S.A.355-56.) The First Amendment right to anonymity may be pierced only where the party seeking to determine the identity of the speaker can demonstrate a legitimate basis for the request and that its needs outweigh the speaker's First Amendment rights. Krinsky v. Doe 6, 159 Cal.App.4th 1154, 1165-72 (2008) (collecting cases); see generally Andrew B. Serwin, Information Security and Privacy, A Practical Guide, 2d ed. West, Ch. 26, §§ 26:26-29.75 (2008). (Add.55-68). However, there is little uniformity in the courts regarding the precise standard that applies. In Cahill, the Delaware Supreme Court noted:

> Before this Court is an entire spectrum of "standards" that could be required, ranging (in ascending order) from a good faith basis to assert a claim, to pleading sufficient facts to survive a motion to dismiss, to a showing of *prima facie* evidence sufficient to withstand a motion for summary judgment, and beyond that, hurdles even more stringent.

884 A.2d at 457.

Based on the concern that "setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously" (id. at 457), Cahill held that plaintiffs must support their claims with "facts sufficient to

defeat a summary judgment motion" in order to unmask anonymous speakers through the discovery process. Id. at 461. In McMann v. Doe, 460 F.Supp.2d 259 (D. Mass. 2006), the Massachusetts District Court suggested that an even stronger standard may be necessary to protect First Amendment rights because under Cahill "a public figure could unmask anonymous critics without meeting an essential step in the *prima facie* case, a showing of actual malice." Id. at 267.

In Dendrite Int'l, Inc. v. Doe, 342 N.J. Super 134; 775 A.2d 756 (N.J. Super. 2001), the plaintiff sought to ascertain the identity of persons who had made anonymous comments about the plaintiff's stock performance on Yahoo! Finance message boards. Id. at 140-41, 762. The court held that the plaintiff was required to satisfy a heightened motion to dismiss standard in order to obtain the identity of a doe defendant, including by producing "sufficient evidence supporting each element of its cause of action, on a *prima facie* basis." Id. at 145, 760. The plaintiff submitted affidavits averring that the comments were "categorically false" (id. at 157, 763) and a verified complaint that the appeals court acknowledged "would survive a traditional motion to dismiss" (id. at 157-79, 771). Despite affording the plaintiff "every reasonable inference of fact" (and that the complaint would ordinarily survive a motion to dismiss), the trial court refused to "take the leap to linking messages posted on an internet message board regarding individual opinions, albeit incorrect opinions, to a decrease in stock prices without something

more concrete." Id. at 156, 769. Accordingly, the plaintiff was denied discovery of the doe defendant's identity. Id. at 157-79, 771-72. In so deciding, the court explicitly sought to ensure that "plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics." Id. at 157-79, 771. Finally, once a litigant has met its evidentiary burden, Dendrite requires a balancing of the respective interests of the parties. Id. at 140-41, 760-61; see also Mobilisa, 217 Ariz. at 111-12; 170 P.3d at 720-21 (adopting balancing test as part of the analysis).[10]

[10] The balancing test articulated in Dendrite and Mobilisa tracks the test governing the qualified privilege for anonymous speech which has been applied in the context of protecting confidential sources and information. See, e.g., Ashcraft v. Conoco, Inc., 218 F.3d 282, 287 (4th Cir. 2000); Cusumano v. Microsoft Corp., 162 F.3d 708, 713 (1st Cir. 1998); LaRouche v. NBC, 780 F.2d 1134, 1139 (4th Cir. 1986); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 596 (1st Cir. 1980). The test involving balancing (1) relevance; (2) whether the information can be obtained by alternative means; and (3) whether there is a compelling interest in the information. Ashcraft, 218 F.3d at 287.

Under this balancing test, the party seeking the discovery must demonstrate a truly compelling need before an anonymous speaker's identity may be disclosed. Bruno, 633 F.2d at 596-97 (Rule 26 must be applied with "heightened sensitivity . . . the court should be satisfied that a claim is not frivolous, a pretense for using discovery powers in a fishing expedition"); Rancho Publ'ns v. Superior Court, 68 Cal.App.4th 1538, 1549 (1999) ("[m]ere relevance is not sufficient . . . the party seeking discovery must make a higher showing of relevance and materiality than otherwise would be required"); accord 2TheMart.Com, 140 F. Supp. 2d at 1093 ("If Internet users could be stripped of [] anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect . . . on basic First Amendment rights.").

There is an emerging consensus that a litigant must prove that the anonymous speech caused legally cognizable harm before unmasking an anonymous speaker's identity, *i.e.*, the litigant must satisfy standards modeled on Cahill or Dendrite.[11] See, e.g., Quixtar, Inc. v. Signature Mgmt. Team, LLC, 566 F.Supp.2d 1205, 1216 (D. Nev. 2008); Doe v. Individuals, 561 F.Supp.2d 249, 254-55 (D. Conn. 2008); Krinsky, 159 Cal.App.4th at 1172; Mobilisa, Inc., 217 Ariz. at 111; 170 P.3d at 720; Greenbaum v. Google, Inc., 845 N.Y.S.2d 695, 698; 18 Misc.3d. 185, 186-87 (N.Y. Sup. 2007); In re Does 1-10, 242 S.W.3d 805, 821-23 (Tx. App. Ct. 2007); Solers v. Doe, 2006 D.C. Super Lexis at *5-6; Highfields Capital Mgmt., 385 F. Supp. 2d at 974.

The Cahill/Dendrite standard simply ensures that litigants show that their claims are more than a pretext for retaliation or another improper purpose. See, e.g., 170 F.3d at 720 (Cahill ensures that compelled identification may only be used "as a means to redress legitimate misuses of speech rather than as a means to retaliate against or chill legitimate uses of speech"); cf. Leatherman v. Tarrant County, 507 U.S. 163, 168-69; 113 S.Ct. 1160, 1163; 122 L.Ed.2d 517, 524 (1993)

[11] The advent of the Internet has led to an explosion of cases in this area in recent years. While numerous state court and federal district court decisions provide substantial authority, the Client is unaware of any federal circuit court decisions addressing this precise issue.

("federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later").

In one of the earlier cases to consider the issue, the United States District Court for the Western District of Washington adopted a multi-factored approach to determining whether a legitimate basis exists for unmasking an anonymous speaker. Specifically, in Doe v. 2TheMart.Com, Inc., the court quashed a subpoena that sought the identity of 23 anonymous Internet speakers in connection with a class action securities litigation. The class action defendants argued that learning the identity of the anonymous speakers would support their defense that "changes in stock prices were not caused by the defendants but by the illegal actions of individuals who manipulated the stock price using the Silicon Investor message boards." 140 F.Supp.2d at 1095.

The court adopted the following standard to determine whether such a subpoena should be enforced:

> whether: (1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.

Id. at 1095.

Applying its four factors, the 2TheMart.Com court ultimately quashed the subpoenas because, *inter alia*: the identity of the Internet users was not central to a

core defense, as the speakers were nonparties and their identity was not needed for the litigation to proceed (id. at 1096); the identifying information was not directly and materially relevant since, even assuming the postings "did influence the stock price, they did so without anyone knowing the identity of the speakers" (id. at 1097); and the defendant "failed to demonstrate that the information it needs to establish its defense is unavailable from any other source" (id.). The court reasoned that, if anonymous speakers on the Internet "could be stripped of [] anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect . . . on basic First Amendment rights." Id. at 1093.

3. JOS. A. BANK HAS FAILED TO DEMONSTRATE A LEGITIMATE BASIS FOR STRIPPING THE CLIENT OF ITS FIRST AMENDMENT RIGHT TO ANONYMITY UNDER ANY OF THE APPLICABLE STANDARDS

The Order requiring the partial unsealing of the Client's identity should be reversed because it contravenes the Client's fundamental First Amendment right to speak anonymously. The First Amendment protections for anonymous speakers who are the target of a lawsuit or discovery – as exemplified by cases such as Cahill, Dendrite, Mobilisa, and 2TheMart.Com – are applicable here.

a. JOS. A. BANK DOES NOT STATE A PRIMA FACIE CASE TO ABROGATE THE CLIENT'S FIRST AMENDMENT RIGHTS

Even under the most lenient standard enunciated to date, Jos. A. Bank has failed to make a *prima facie* case showing that the Client's conduct was unlawful in any manner, and, thus, there is no legitimate basis for the Maryland District Court to strip the Client of its First Amendment anonymity. Moreover, Jos. A. Bank has flatly stated that it is seeking the discovery from the Client so that it may institute suit. (4CCA Docket Entry 25 at 11.) Jos. A Bank's discovery therefore – which is intended to "harass, intimidate or silence critics" – is the very activity against which the First Amendment protections are intended to shield. See, e.g., Dendrite Int'l, Inc., 342 N.J. Super at 156; 775 A.2d at 771; Peterson, 478 F.3d at 632; Rancho Publ'ns, 68 Cal.App.4th 1538, 1550 (1999) (quashing subpoena as retaliatory where one of the purposes of the discovery was to add "potential new claims against additional defendants").

It appears that Jos. A. Bank has embarked on its fishing expedition because it sees a no-lose opportunity to try to misuse discovery to gain information it hopes might make it possible to survive a motion to dismiss its putative market manipulation claim against the Client.[12] In place of evidence establishing

[12] It bears mention in this regard that regardless of the precise nature of Jos. A. Bank's putative "market manipulation" claim, any such claim would certainly require Jos. A. Bank to satisfy the heightened pleading standard of Federal Rule of

wrongdoing by the Client by verified evidence, Jos. A Bank relies upon baseless speculation, insinuations, and innuendoes that an alleged short position by the Client in Jos. A. Bank's stock, in combination with the delivery of the Letter, is somehow unlawful.[13] Indeed, other than stating that it seeks to bring claims against the Client "under Section 9 of the Securities and Exchange Act" (4CCA Docket Entry 25 at 11) and attacking the Client with a barrage of unsubstantiated allegations of "market manipulation" (see *supra* Part IV.D), Jos. A. Bank has never even identified its precise claim, let alone come forward with *any* particularized evidence that could possibly support such a claim. See Dendrite Int'l, 342 N.J.

Civil Procedure 9(b). Rule 9(b) serves numerous purposes, including by deterring "the use of complaints as a pretext for fishing expeditions." Banca Cremi, S.A. v. Alex. Brown & Sons, Inc., 132 F.3d 1017, 1036 n.25 (4th Cir. 1997); see also Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (Rule 9 "eliminate[s] fraud actions in which all the facts are learned after discovery"); cf. Tellabs, Inc. v. Makor Issues & Rights Ltd., __ U.S.__, 127 S. Ct. 2499, 2513, 168 L.Ed.2d 179, 196 (2007) (holding that allegations of fraud in a §10(b) action must render "an inference of scienter *at least as likely as* any plausible opposing inference" under the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995). "Rule 9(b) encapsulates the goal of sorting out early stage 'strike suits'" in the context of securities litigation. Teachers' Ret. Sys. v. Hunter, 477 F.3d 162, 171 (4th Cir. 2007) (citing 5A Charles A. Wright & Arthur M. Miller, Federal Practice and Procedure § 1296 (3d. ed. 2004)). Jos. A. Bank should not be permitted to trample the Client's First Amendment rights so that it may attempt to circumvent the heightened pleading standard which exists in part to dispose of meritless litigation at an early stage. Teachers' Ret. Sys., 477 F.3d at 171.

[13] The anonymous speakers in the 2TheMart.Com were nonparties to a class action litigation, who, like the Client, were threatened with retaliatory litigation by the class action defendant in the form of "innuendos of stock manipulation." 140 F.Supp.2d at 1097.

Super. at 157-58; 775 A.2d at 772 (despite plaintiff's submission of evidence that "would survive a traditional motion to dismiss," doe defendant's anonymity was left intact where the plaintiff failed to provide concrete evidence linking defendant to a decrease in stock prices).

In sum, Jos. A. Bank has failed to articulate the basis for its putative market manipulation claim or to even identify it. It has not produced any evidence that could satisfy even the most lenient standard for exposing the identity the Client, let alone the kind of evidence required to show that its claim has merit.

b. JOS. A. BANK DOES NOT SATISFY ANY ADDITIONAL RELEVANT CRITERIA TO WARRANT ABROGATING THE CLIENT'S FIRST AMENDMENT RIGHTS

Even if Jos. A. Bank had some legitimate, non-retaliatory purpose for investigating its speculative allegations (which it does not), it still would not be able to demonstrate that the information sought relates to, and is "directly and materially relevant" to, a core claim or defense. 2TheMart.Com, Inc., 140 F. Supp. 2d at 1095 (applying the standard most favorable to the party seeking discovery).

(i) DISCOVERY INTO THE CLIENT'S INTERNAL INVESTMENT STRATEGIES IS IRRELEVANT TO JOS. A. BANK'S DEFENSES IN THE LITIGATION

The bulk of the information sought by Jos. A. Bank is proprietary and confidential information regarding the Client's investment strategies, which supposedly bears some undefined relationship to the impact of the Letter on the

market. (S.A.103-11.) Such information is, however, plainly irrelevant. Either the Letter had the alleged impact or it did not. Cf. 2TheMart.Com, 140 F.Supp.2d at 1097 (rejecting the company's causation justification because if the "messages did influence the stock price, they did so with anyone knowing the identity of the speakers"). Accordingly, the details regarding the Client's internal investment opinions, strategy, and analysis have no bearing on Jos. A. Bank's defenses.

This type of discovery was also squarely rejected by the Northern District of California in Visto Corp. v. Smartner Info. Sys., Ltd., 2007 WL 218771 (N.D. Cal. Jan. 29, 2007). There, the court held that discovery seeking a non-party's internal investment strategies was simply not relevant:

> [Defendant] fails to explain how or why discovery into a venture capital firm's internal investment analyses is "reasonably calculated to lead to the discovery of admissible evidence" on either [of its defenses in the underlying cases]. What might be relevant is the *actual* "commercial success" that [plaintiff] has enjoyed (or not enjoyed), as well as the *actual* data on other facts that may be considered when calculating a "reasonable royalty." The documents [plaintiff] is seeking conceivably reflect a venture capital firm's *opinions* about and *analysis* of such information, but there is no reason to believe that Meritech possesses any such information not publicly available or available in the documents produced by [plaintiff], or that Meritech's opinions and analysis are independently relevant.

Id. at *4 (emphases in original).

As in Visto, Jos. A. Bank has never explained how the Client's internal information could possibly be relevant to Jos. A. Bank's defenses. Jos. A. Bank's bare (albeit repeated) assertions that details regarding the Client's internal

investment decisions and the Client's private conclusions regarding those decisions are somehow relevant does not make them so.

Notwithstanding this failure of Jos. A. Bank to identify any legitimate need for the requested discovery, the Maryland District Court abrogated the Client's First Amendment Rights simply because the Court dismissed out of hand the notion that the Client had any such rights. (S.A.355.)

(ii) JOS. A. BANK'S CAUSATION THEORY IS EXTRAORDINARILY ATTENUATED

Despite the private nature of the communication, Jos. A. Bank speculates that the Client must have foreseen that sending the Letter (1) would cause a delay in the earnings call, which purportedly "prompted" a five-percent one-day decline in Jos. A. Bank stock price on April 3, 2006[14] and (2) would cause Jos. A. Bank to spend "in excess of $600,000," which would in turn "contribut[e] directly" to a June 8, 2006 drop in Jos. A. Bank's stock price, which would then lead to the Securities Action. (S.A.54-55; S.A.237-38.)

Jos. A. Bank's conjecture regarding the timing of the Letter is simply without merit. As a preliminary matter (and as Jos. A. Bank itself admits), the only

[14] The great significance that Jos. A. Bank places on the five percent decline in stock price after it missed the April 3, 2006 self-imposed target date is specious when viewed in context. Specifically, a review of historical stock charts reveals that Jos. A. Bank stock frequently fluctuated by five percent (or more) both before, during, and after the proposed class period. (S.A.518-533.)

actual delay was in Jos. A. Bank's earnings call, which was to take place on April 3, 2006. There is, however, no factual support for Jos. A. Bank's speculation that the Letter – rather than something else – caused Jos. A. Bank to miss its self-imposed target date of April 3, 2008. Nor is there any proof that the total purported $600,000 cost of the investigation was even reflected in Jos. A. Bank's June 7, 2006 public filing (a point that, at best, remains unclear), or how a one-time cost of even that full amount would have any impact on the stock price on June 8, given that Jos. A. Bank had over $96 million in net sales for just the *three-month* period ending April 30, 2005 and over $113 million in net sales for the same quarter in fiscal year 2006. (S.A.482.) Indeed, Jos. A. Bank's total expenses during that period exceeded $59 million, with its sales/marketing and general/administrative expenses increasing by approximately $10.5 million year-over-year – dwarfing a one-time charge of $600,000, which, in this context, is simply a cost of doing business.[15]

[15] If Jos. A. Bank truly believed that the approximately $600,000 investigation costs materially influenced its decrease in earnings, it would have been obligated to include that fact in its June 7, 2006 10-Q explanation of its earnings drop – which it did not. (S.A.478-513.) Moreover, Jos. A. Bank's Form 10-Q indicates that the decline in market price of Jos. A. Bank's stock was *admittedly* attributable to other factors. (S.A.492-494.)

Accordingly, the facts demonstrate there is no basis for even suggesting that the purported drop in earnings had anything to do with the Client's Letter, much less somehow set in motion a series of events leading to the Securities Action.

(iii) THERE IS NO AUTHORITY FOR AN INDIVIDUALIZED INQUIRY INTO MARKET EFFICIENCY

Jos. A. Bank has also sought to justify discovery by speculating that the Client "illicitly attacked the market price for the stock" which would in some unspecified way be relevant to market efficiency for purposes of class certification. (See, e.g., S.A.243.) Securities class action plaintiffs must show that the market was "efficient" during the relevant time to certify the class and an efficient market must fully reflect all publicly available information. Gariety v. Grant Thornton LLP, 368 F.3d 356, 367 (4th Cir. 2004); see also In re Polymedica Corp. Sec. Litig., 432 F.3d 1, 33-37 (1st Cir. 2005). An analysis of market efficiency, however, involves evaluating patterns of stock price movements using detailed statistical analysis and expert testimony. In re Polymedica Corp Sec. Litig., 453 F.Supp.2d 260, 270-78 (D. Mass. 2006) (Young, J.).[16]

[16] It is well-established that short selling is an ordinary part of an efficient market. See, e.g., Sullivan & Long, Inc. v. Scattered Corp., 47 F.3d 857, 862 (7th Cir. 1995) (Posner, J.) (short sellers are arbitrageurs who "identify and eliminate disparities between price and value" through the elimination of artificial price differences).

In its Opposition to Lead Plaintiff's Motion for Class Certification, Jos. A. Bank argues that the class should not be certified because market was not efficient based on "an extraordinary high level of short interest" in the Company's stock. (S.A.196-98.) According to Jos. A. Bank's expert, Dr. Meir Statman, 25 percent to 50 percent of all total shares outstanding were held short during the proposed class period, rendering the market for JOSB stock inefficient. (S.A.197; S.A.131-32; S.A.144-45.) Dr. Statman apparently had no problem identifying the percentage of total shares of Jos. A. Bank stock that were held short at any given time. (S.A.144-45.) Yet, Jos. A. Bank demands that the Client be singled out and interrogated on such private matters as its profits (or losses) on the Company's stock. (S.A.103-11; S.A.240-41.)

It would be untenable, however, to suggest that defendants in securities class actions have the right to demand discovery from any person or entity who has done nothing more than participate in the public stock markets – which, as Judge Young ruled, includes the right to write to the company in which the person or entity has invested. (S.A.20 at 3:9-20.) Yet, that is exactly what Jos. A. Bank is suggesting here. Further, discovery into such highly individualized topics as the Client's "motivations" can add nothing to a statistical analysis of market efficiency. (S.A.144-145); accord In re Polymedica Corp Sec. Litig., 453 F.Supp.2d at 270-78 (Young, J.).

D. THE CLIENT'S IDENTITY MUST BE PROTECTED AS A MATTER OF PUBLIC POLICY

In the wake of the Enron scandal, the United States Congress added a new section 10A(m)(4) to the Securities and Exchange Act of 1934 as part of the Sarbanes-Oxley legislation. 15 U.S.C. § 78j-1(m) (Add.23-27). The implementing regulations adopted procedures to ensure the confidential, anonymous submission of questionable accounting and auditing matters by employees to a company's audit committee. 17 C.F.R. 240.10A-3 (SEC Rule 10A-3) (Add.28-33).

While these whistleblower protections were focused on the protection of employees from retaliation, they were clearly intended to accomplish the overriding purpose of Sarbanes-Oxley, *i.e.*, to ensure that "corporate fraud and greed may be better detected, prevented and prosecuted." 107 S. Rep. No. 146 (2002) (Add.3-22). Congress specifically intended "to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." Id. Such anonymous reporting of corporate misconduct is a matter of great public concern, regardless of whether the tip is provided by an employee or a member of the public. Cf. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 78; 126 S.Ct. 1503, 1509; 164 L.Ed.2d 179, 187-88 (2006) (the "magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.").

Thus, the Client's Letter is exactly the kind of communication that Congress intended to encourage and protect. Jos. A. Bank's conduct in relentlessly seeking to shift blame to a non-party uninvolved is a perfect example of why the public policy expressed in Sarbanes-Oxley of encouraging detection of corporate fraud should be applied to protect the Client.

Finally, it bears noting that while the public policies expressed in Sarbanes-Oxley provide an entirely independent basis for protecting the Client from the retaliation sought by Jos. A. Bank, these policies are also relevant to the First Amendment analysis, tipping the scales even farther in the Client's direction.

VIII. CONCLUSION

WHEREFORE, for the foregoing reasons, the Client respectfully requests that this Court reverse the Maryland District Court's Order and require the permanent sealing of the Client's deposition transcript and identity.

IX. REQUEST FOR ORAL ARGUMENT

The Client believes that Oral Argument will assist the Court in evaluating the merits of the parties' arguments in that this appeal involves serious and

complicated issues of first impression.

Dated: October 24, 2008

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2059 **Caption:** In re The Doe Client

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(s) Russell Beck

Attorney for The Doe Client

Dated: October 28, 2008

CERTIFICATE OF SERVICE

I hereby certify that on Tuesday, October 28, 2008, I electronically filed the **OPENING BRIEF OF APPELLANT, THE DOE CLIENT** (CORRECTED VERSION) (filed under seal) with the Clerk of Court using the CM/ECF system. The events used to file sealed documents in the Fourth Circuit restrict electronic document access to court users only and conventional service is required. Accordingly, I further certify that the **OPENING BRIEF OF APPELLANT, THE DOE CLIENT** (CORRECTED VERSION) was served upon counsel listed below via electronic mail. I further certify that on October 29, 2008, copies of the foregoing will be served via UPS Ground to all counsel listed below.

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