UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Roy T. Lefkoe, Plaintiff, v. Jos. A. Bank Clothiers, Inc., et al., Defendants.	District of Maryland Northern Division Case No. 06-cv-1892 (WMN) District of Massachusetts, Miscellaneous Business Docket, Case No. 08-MC-10089 (WGY) ***Leave To File Reply granted by Electronic Order on April 18, 2008***

REPLY MEMORANDUM IN SUPPORT OF
FOLEY & LARDNER LLP'S MOTION TO QUASH SUBPOENA

INTRODUCTION

The issue before the Court is the propriety of a subpoena issued by Jos. A. Bank Clothiers, Inc. ("Jos. A. Bank" or the "Company") to Foley & Lardner LLP ("Foley") seeking the identity of one of Foley's clients (the "Client" or the "Shareholder") and certain information considered by the Client and Foley in connection with alleged wrongdoing of the Company. The subpoena, however, serves no legitimate purpose.

Rather, Jos. A. Bank – which is being sued for market manipulation in a putative class action in Maryland (the "Maryland Litigation") – attempts to divert attention from its own wrongdoing by seeking to blame the Maryland Litigation on the Client, who did nothing more than have its counsel send a letter (the "Letter") to the Company, privately raising concerns about what the Client believed to be improper business practices of the Company. Jos. A. Bank argues that the Letter precipitated the Maryland Litigation because the Company spent $632,000 investigating the concerns expressed in the Letter, which "contributed" to reduced earnings per share reflected the Company's Form 10-Q, which led to a precipitous drop in share price, which led to the lawsuit – all of which the Client should have foreseen. Not only is the Company's

position highly speculative, but even its factual predicate – that the pre-Maryland Litigation public disclosure of the reduction in earnings per share was allegedly caused in part by the $632,000 – is substantially overstated, as revealed by an affidavit of Jos. A. Bank's CFO.

Simply put, as demonstrated in Foley's principal brief and below, the Company's claims are false, attenuated, speculative, and designed to justify a vindictive, retaliatory subpoena. The law does not countenance discovery under such circumstances – particularly where the information is sought from a non-party, is not relevant to the underlying dispute, and is protected from disclosure by the First Amendment and public policy. Accordingly, this Court should grant Foley's motion and quash the subpoena.

ARGUMENT[1]

As set forth below, Jos. A. Bank's arguments maligning Foley's Client, a non-party to the Maryland Litigation – in addition to being inappropriate, and without basis – are misleading and the information sought is irrelevant and otherwise protected from disclosure.

I. JOS. A. BANK'S WHOLLY UNSUPPORTED AND DIVERSIONARY INSINUATIONS REGARDING THE SHAREHOLDER'S MOTIVATIONS ARE NOT CREDIBLE

The thrust of the Jos. A. Bank's opposition is that the Company purportedly needs discovery to understand the motivation of Foley's client (the "Client" or the "Shareholder"), which – without a scintilla of evidence of any kind, let alone evidence of legally actionable conduct – the Company (erroneously) asserts was to "unlawfully" manipulate the market (*i.e.*, to engage in the very same type of conduct that both the Client and the Maryland plaintiffs have

[1] Exhibits previously filed with Foley's Motion to Quash are cited as "Foley Ex. __." Exhibits previously filed with Jos. A. Bank's Opposition to Foley's Motion to Quash are cited as "JAB Ex. __." Exhibits filed with this Reply in support of Foley's Motion to Quash are cited as "Reply Ex. __."

asserted the Company was engaged in).[2] (Op. at 9.) The manipulation that the Company hypothesizes, however, does not come from public allegations against the Company or even from the inevitable consequences of the Company being forced to publicly correct prior false public statements. Rather, the Company asserts that the Client must have known that sending a discrete, private letter to the Company's audit committee would cause the Company to spend an inordinate amount of money investigating the allegations, which would impact the Company's value and/or "interfere with the timely filing of the Company's annual report on form 10-K" (which the Company admits did not happen – see Op. at 5-6), and ultimately lead inexorably to a precipitous drop in the Company's stock price.[3] (Op. at 7.)

Presumably recognizing the incredibly-attenuated nature of its accusations – particularly as against a non-party to the Maryland Litigation – the Company attempts to buttress its allegations through a series of misleading distortions, half-truths, and, in some cases, flat-out lies. Most egregiously, the Company suggests that the supposed $632,000 cost of the internal investigation that took place during the two weeks following Jos. A. Bank's receipt of the Letter "contributed" to the Company's year-over-year decline in quarterly net earnings, which led to a "swift and severe" market dip, which led in turn to the Maryland Litigation. (Op. at 6.)

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[2] Although not expressly stated, the Company's real purpose is not to obtain discovery for the Maryland Litigation, but rather to bully and intimidate the Shareholder. This tactic is also reflected in the Company's initial response to the Letter which threatens that "if in fact you are representing, directly or indirectly, the interests of a short seller, both the substance and the timing of your letter raise serious concerns for your client as well as for your firm." (Foley Ex. E.) Moreover, Jos. A. Bank implies that it will seek to recover the costs of the investigation from the Shareholder for sending the Letter. (Id.)

[3] The opposition also feebly hypothesizes that the Shareholder may have had "access to non-public information about the company's inventory situation" based on the comment in the Letter that "[t]here are instances where sales tags that reflect dating of individual inventory items have been replaced with new tags showing more current dating after unsold inventory was sent from retail stores back to the corporate warehouses and then back again to the retail stores." (Op. at 8-9.) These comments reflect nothing more than knowledge of industry custom. Anyone with a basic knowledge of the clothing industry could have walked into a Jos. A. Bank retail location on any given day and come to similar conclusions.

Instructively, the opposition remains conspicuously silent as to when exactly the $632,000 was in fact incurred and whether it was even reflected in the public filings that immediately followed and purportedly triggered the "swift and severe" market response. The reason for the Company's silence is that the implication that the Company tries so hard to create is in fact false. As indicated by the affidavit of the Company's CFO, David Ullman, the $632,000 reflects not only the two weeks from March 16, 2006 to the March 31, 2006 date of the audit committee report, but includes April, May, June, and all of July as well. (JAB Ex. 6 at ¶ 7) ("Between March 16, 2006 and July 31, 2006, the Company incurred approximately $632,200 in professional fees and expenses related to the investigation performed by the WilmerHale/E&Y team, including charges for work performed by the Company's outside auditors."). Accordingly, also contrary to the clear implication in the Company's papers in this Court, at most, only a portion of such fees were reflected in the Form 10-Q.

Exacerbating such improper misrepresentations, left unsaid is that a one-time cost of even the full $632,000 is hardly significant for a large company like Jos. A. Bank, with over $96 million in net sales in fiscal year 2005 and over $113 million in net sales in fiscal year 2006. (JAB Ex. 8 at 3.) Indeed, the Company's total expenses exceeded $59 million, with its sales/marketing and general/administrative expenses increasing by approximately $10.5 million year-over-year (id.) – dwarfing a one-time charge of $632,000, which, in this context, is simply a cost of doing business.[4]

[4] Jos. A. Bank's Form 10-Q (filed on June 7, 2006) further belies the Company's effort to blame its problems on the Client's Letter. Specifically, although the Company would ascribe the decrease of its earnings per share to the Client's Letter and then use the decrease in earnings as some bellwether of market reaction, the Form 10-Q indicates that the decline was in fact *admittedly* attributable to other factors:

- A 140 basis point decrease in gross profit margins, "primarily due to increased sales of promotional fall products during the first quarter of fiscal 2006."

It bears mention in this regard that, if Jos. A. Bank truly believed that the $632,000 investigation costs materially influenced its decrease in earnings, it would have been obligated to include that fact in its 10-Q explanation of its earnings drop – which it did not. (JAB Ex. 8.) Accordingly, the Company's effort to overstate the impact of the purported cost of investigation was plainly fabricated in a poor effort to cloak Jos. A. Bank's retaliatory discovery threats in the garb of legitimacy.[5]

Similarly, the Company also skirts the truth when it tries to bolster the claim of improper motivation by stating that the investigation following the receipt of the Letter "concluded that there was no truth to the allegations." (Op. at 5.) The actual conclusions of the internal investigation – as reflected in the Audit Committee meeting minutes – reveal a different story. (See Foley Ex. K; JAB Ex. 3.) By way of example, the report acknowledges that the Letter was correct in that the Company does "re-ticket" and "re-age" merchandise. (Id. at 4.) While the report found that these processes were "not inappropriate," this does not excuse the opposition's misleading presentation of the contents of the internal investigation.

Nor is the Company's imagined illicit motivation supported by its false accusation that "Foley has now declined two separate opportunities to confirm that the Shareholder did not hold

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- A 70 basis point increase in store employee payroll as a percentage of net sales and increases due to the opening of 57 new stores. Specifically, the Company experienced a $7.5 million increase in sales and marketing expenses which related "primarily to the opening of 57 new stores since the end of the first quarter of fiscal 2005 and consists of a) $3.2 million additional occupancy costs; b) $3.4 million of additional store employee compensation costs; and c) $0.9 million of additional other variable selling costs."
- A $3.0 million increase in general and administrative expenses related to higher employee compensation and benefits (including medical costs) and professional fees.

(JAB Ex. 8 at 11-13.)

[5] Jos. A. Bank's theory regarding the timing of the Letter fares no better. Not only is it also based on wild speculation, but as the Company has admitted, the Company filed its 10-K on time on or before April 13, 2006. (Op. at 5-6.)

a short position in the Company's shares . . . most recently as an alternative to the filing of the pending motion to quash." (Op. at 7.) Putting aside that Foley has no such obligation to take that "opportunity" and that the answer is in any event irrelevant to the Maryland Litigation, no such second offer was made – whether to obviate the motion to quash or otherwise.

II. JOS. A. BANK HAS NOT, AND CANNOT, SHOW HOW THE SUBPOENAED INFORMATION IS RELEVANT

Even if Jos. A. Bank had some legitimate, non-retaliatory purpose for investigating whether its speculation and misleading insinuations about the "means, motivation, intent, and other particulars" concerning the Client has any truth to it, Jos. A. Banks has not, and cannot, show that such information is relevant to those aspects of the Maryland Litigation for which the discovery is purportedly sought: (1) the Company's efforts to defeat class certification and (2) to prove causation on the merits. (Op. at 2-3.)

A. JOS. A. BANK HAS NOT MET ITS BURDEN OF SHOWING GOOD CAUSE FOR DISCOVERY UNDER THE SUBJECT MATTER STANDARD OF RULE 26

Jos. A. Bank's position that it is entitled to an extremely broad range of discovery under Rule 26 is fatally flawed. Historically, Rule 26 allowed for discovery of all matter "relevant to the subject matter of the action." However, the 2000 amendments to the Federal Rules created two categories of discoverable information. The first category, discovery that is available as a matter of right, applies when the information sought is "relevant to any party's claim or defense." F.R.C.P. 26(b)(1). In contrast, matters that merely have some bearing on the "subject matter" involved (the second category) are discoverable only upon a showing of "good cause." Id. The party seeking discovery under the "subject matter" standard has the burden of showing "good cause" for the information. Quality Aero Tech., Inc. v. Telemetrie Elektronik, GmbH, 212 F.R.D. 313, 317 (E.D.N.C. 2002).

As explained below, none of the sweeping discovery Jos. A. Bank seeks from the Shareholder is any way relevant to its causation and class certification defenses. Therefore, Jos. A. Bank's reliance on the narrow "claim or defense" standard under Rule 26 is unavailing. Given that the subpoena – at best – seeks information that is merely related to the "subject matter" of the Maryland litigation, Jos. A. Bank must show that there is "good cause" justifying discovery of the information.

Of particular note, as previously discussed in Foley's memorandum in support of its Motion to Quash (MTQ at 8-9), as a general rule, justifications for discovery based on mere speculation are insufficient to establish that the material sought is relevant and thus discoverable. See e.g. Heidelberg Americas, Inc. v. Tokyo Kikai Seisakusho, Ltd., 333 F.3d 40, 41 (1st Cir. 2003) (litigants may not engage in merely speculative inquiries in the guise of relevant discovery); United States v. Concemi, 957 F.2d 942, 949 (1st Cir. 1992) ("mere speculation as to the content of documents is hardly a showing of relevance"); Mack v. Great Atlantic & Pacific Tea Co., 871 F.2d 179, 187 (1st Cir. 1989) (litigants may not "undertake wholly exploratory operations in the vague hope that something helpful will turn up); Micro Motion,Inc. v. Kane Steel, 894 F.2d 1318, 1326 (Fed. Cir. 1990) (inquiry seeking information cannot be based on the party's mere suspicion or speculation); Collens v. City of New York, 222 F.R.D. 249, (S.D.N.Y. 2004) ("courts should not grant discovery requests based on pure speculation that amount nothing more than a 'fishing expedition' into actions or past wrongdoing not related to the alleged claims or defenses"). *A fortiori*, "the good cause standard is not satisfied by conclusory statements and allegations but requires the movant to point to specific facts." Surles v. Air France, 2001 U.S. Dist. LEXIS 15315, at *5-6 (S.D.N.Y. 2001), *aff'd* 210 F.Supp.2d 501

(S.D.N.Y. 2002); see also Quality Aero Tech., Inc, 212 F.R.D. at 315 n.2 ("the 2000 amendments implicitly seek to farm out the 'fishing expeditions' previously allowed").

Jos. A. Bank, however, relies on nothing but conclusory statements and speculation. Significantly, the opposition never explains or even addresses why Jos. A. Bank should be granted an exception to this basic black letter rule that requires its justifications for the information to be based on something more than speculation.

Simply put, and as detailed below, Jos. A. Bank has not only failed to meet its burden of showing relevance under the more lenient "claim or defense" standard, but *a fortiori* has failed to establish the good cause necessary to justify the discovery demanded by the subpoena.

B. JOS. A. BANK HAS NOT MET ITS BURDEN OF SHOWING THAT THE SHAREHOLDER'S IDENTITY IS RELEVANT TO THE MARYLAND LITIGATION

Striking in its omission, Jos. A. Bank fails to explain how the Shareholder's identity (the primary subject of the subpoena[6]) could possibly be relevant to the Company's causation and class certification defenses – and indeed, Jos. A. Bank admits as much. (Op. at 18 (the Shareholder's identity "is not itself independently relevant"); Op. at 2 (the Company intends to seek discovery addressing a variety of issues only "once the Shareholder's identity is revealed").) As a consequence, the Company can only obtain the identity of the Client if the identity is likely to lead to the discovery of admissible evidence. However, the information that the Company claims it will need is – despite the Company's smear campaign – not relevant.

C. JOS. A. BANK HAS NOT MET ITS BURDEN OF SHOWING THAT THE BROADER DISCOVERY IT SEEKS IS RELEVANT TO ITS DEFENSES

[6] In the last two document requests, the subpoena expands the scope to materials related to the basis for the Client's concerns expressed in the Letter. As previously indicated, that material was all public record, and has been investigated by the Company's audit committee at, apparently, significant expense.

Even though the underlying discovery Jos. A. Bank demands is breathtakingly broad in scope, it too is irrelevant to the Company's causation and class certification defenses. Specifically, Jos. A. Bank contends that the discovery is relevant to (1) its efforts to disprove the efficiency of the market at the class certification stage; (2) whether the lead plaintiff in the Maryland Litigation can serve as class representative; (3) whether the Client should be allowed to be a member of the class; and (4) causation on the merits. None is correct, and each is addressed in turn below.

1. The Information Sought By The Subpoena Is Irrelevant To An Analysis Of Market Efficiency

Securities class action plaintiffs are afforded a rebuttable presumption of reliance on a misrepresentation under the fraud-on-the-market theory. In re Polymedica Corp. Sec. Litig., 432 F.3d 1, 16-17 (1st Cir. 2005) ("Polymedica 2005"). Such plaintiffs must justify the presumption of reliance at the class certification stage by demonstrating that the market was "efficient" during the relevant time. In re Xcelera.com Sec. Litig., 430 F.3d 503, 505 (1st Cir. 2005). The market efficiency analysis avoids "individual questions of reliance [which] would inevitably overwhelm the common ones under Rule 23(b)(3)." Polymedica 2005, 432 F.3d at 16-17; Gariety v. Grant Thornton LLP, 368 F.3d 356, 368 (4th Cir. 2004).

As this Court has explained, the most widely accepted indicators of market efficiency are the five non-exclusive "Cammer factors":

> 1) the stock's average trading volume; 2) the number of securities analysts that followed and reported on the stock; 3) the presence of market makers and arbitrageurs; 4) the company's eligibility to file a Form S-3 Registration Statement; and 5) a cause-and-effect relationship, over time, between unexpected corporate events or financial releases and an immediate response in stock price.

In re Polymedica Corp. Sec. Litig., 453 F.Supp.2d 260, 265 (D. Mass. 2006) ("Polymedica 2006") (*on remand from* Polymedica 2005); Gariety, 368 F.3d at 368. An efficient market will

fully reflect all publicly available information. Polymedica 2005, 432 F.3d at 33-37; Gariety, 368 F.3d at 367. An analysis of market efficiency typically requires expert testimony and detailed statistical analysis. Polymedica 2006, 453 F.Supp. 2d at 270 n.8.

As a threshold matter, Jos. A. Bank fails to explain how the testimony of the Client can in any way be relevant to the five Cammer factors. Simply put, it cannot. Whether the "Shareholder's actions distort[ed] the market for the Company's shares, thereby foreclosing the finding of 'market efficiency'" (Op. at 8) is a matter to be addressed by expert witnesses in the Maryland Litigation. The Shareholder's "means, motivations, intent, and other particulars" can add nothing to an expert's analysis of the Cammer factors or any other aspect of market efficiency.

Instructively, the Company fails to cite a single case in support of its position and instead, again, relies on unsupported attacks and rank speculation about "steps that unlawfully influenced the market price of the stock" in connection with a "short position." Nevertheless, although Jos. A Bank's theory of market manipulation[7] is entirely unsupported, the Company clearly seeks to force the Client to address its speculative allegations on the merits. The Client should not be dragged into the Maryland Litigation on nothing but innuendo and insinuations.[8]

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[7] Jos. A. Bank's vague allegations that short sales distort the market is wrong. It is well-established that short sellers are 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); Polymedica 2006, 453 F.Supp.2d at 275 n.18 ("low or nonexistent barriers to short selling" are an essential component of an efficient market).

[8] The opposition repeatedly seeks to divert the Court's attention by intimating that the Client must have been a short seller and there is something inherently improper about short selling. To the contrary and as the SEC has acknowledged in its publication, "Key Points About Regulation SHO" (which governs short sales), the "vast majority" of short sale transactions, including many naked short sale transactions, are perfectly proper. (Reply Ex. 1.) The Company obscures this fundamental fact and instead makes vague allusions about "unscrupulous shorts" and provides the Court with commentary from the New Yorker and Forbes.com detailing so-called "short and distort" campaigns. (Op. at 7; JAB Ex. 9

2. Jos. A. Bank Does Not Need Discovery From The Shareholder To Address The Adequacy of the Class Representative

The Company speculates, "Was/is Shareholder in league with the named plaintiff who is pursuing the Class Action, or with the plaintiff's counsel? And if so, should the named plaintiff and its counsel be permitted to represent the purported class?" (Op. at 8.) This demand for information is so far outside of the scope of allowable discovery under Rule 26[9] that it only further reveals that the entire subpoena is nothing more than a ruse to seek retaliation against the Client. If Jos. A. Bank wants to attempt to prove up its suspicions, it can and should ask the lead plaintiff and its counsel. There is no need to drag the Shareholder into the action to obtain this information.

3. The Requested Discovery Is Irrelevant To Whether The Shareholder Should Be Allowed To Be A Member Of The Class

The opposition never explains why the discovery it seeks is relevant to whether the Shareholder may be part of the class. Presumably, Jos. A. Bank raises this point because it wishes to exclude short sellers from the class, an argument commonly raised by defendants in

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& 10.) However, other commentators hold the diametrically opposed view that short sales provide important checks and balances on unscrupulous companies. See e.g. Gary Weiss, *Enron Changed Nothing*: *In The Breeding Grounds of Executive Crime, Greed Still Rules. The Only Lesson Corporate America Has Learned Is How To Blame Everybody Else*, SALON.COM, May 31, 2006, *available at* http://www.salon.com/opinion/feature/2006/05/31/enron/ ("Shorts are always on the lookout for a good stock fraud, which makes them almost universally despised, particularly by corporations with something to hide. Short-sellers were the earliest naysayers concerning Enron, with short-seller James Chanos acknowledged to be a source for Bethany McLean's early groundbreaking article in Fortune…But…if a company has some kind of difficulty, whether it be a massive fib on its balance sheet or simple tendency to lose money, the problem is not the company, and heaven forbid not the CEO or the board of directors. It is *them*. (emphasis in original) The objects of blame can be short-sellers, 'Wall Street,' journalists, independent analysts [] or sometimes all of the above working in cahoots."). (Reply Ex. 2.)

[9] Under circumstances such as these, Rule 26 prohibits discovery of matters (1) that can be obtained from some other source that is more convenient, less burdensome or expensive; (2) that the party seeking discovery has had ample opportunity to obtain; or (3) where the burden or expenses of the proposed discovery outweighs its likely benefit. Rule 26(b)(C)(i)-(iii). These provisions are addressed in Foley's principal brief at pages 7-9.

securities class actions. See e.g. In re Polymedica Corp. Sec. Litig., 224 F.R.D. 27, 45 (D. Mass) (Polymedica 2004) (*rev'd on other grounds by* Polymedica 2005, 432 F.3d 1 (1st Cir. 2005); Ganesh, LLC v. Computer Learning Cntrs., Inc., 183 F.R.D. 487, 490 (E.D. Va. 1998). The total number of shares sold short is a significant factor in determining whether short sellers should be excluded from a class action. In re CMS Energy Sec. Litig., 236 F.R.D. 338, 344 (E.D. Mich. 2006). Thus, the individualized inquiry Jos. A. Bank demands is irrelevant to the issue of whether the Shareholder may join the class. In the event the Maryland Court determines short sellers should be excluded, their identification can be ascertained through other means – rather than, as the Company would seek to do, one shareholder deposition at a time. See Polymedica 2004, 224 F.R.D. at 48 ("the identification of short sellers is a problem for which able counsel can develop an efficient solution").

4. The Discovery Sought Is Irrelevant To Jos. A. Bank's Causation Defense

Jos. A. Bank's position that it needs extensive discovery from the Client to prove its theory that the Shareholder held a "unique causative role in the decline of the Company's share price" is entirely without merit. Quite simply, Jos. A. Bank's causation defense that "the drop in earnings and stock price decline was the result of actions by persons or entities with a vested interest in the decline of the market price" does not depend on whether those persons or entities had "good" or "bad" motives or who those persons or entities were. In addition, the Jos. A. Bank's Audit Committee did not disclose the Letter or its contents to the public. Thus, the Letter could hardly have held a "unique causative role in the decline of the Company's share price."[10]

[10] Jos. A. Bank also fails to acknowledge the lengthy substantive allegations contained in the class action complaint in this regard. (See Foley Ex. A.)

Moreover, given that the Company's own CFO revealed that the purported $632,000 investigative costs could not have been reflected in the Form 10-Q that supposedly caused the "swift and severe" market reaction, there is no basis for even suggesting that the drop in earnings – as reported – had anything to do with the Client's Letter, much less somehow set in motion a series of events leading to the class action.

III. JOS. A. BANK'S THINLY VEILED THREATS OF RETALIATORY LITIGATION SHOW THAT THE SHAREHOLDER MUST BE PROTECTED AS A MATTER OF PUBLIC POLICY

Jos. A. Bank's conduct is a perfect example of why the public policy expressed in Sarbanes-Oxley of encouraging detection of corporate fraud should protect the Client in this instance. Notably, the Company primarily relies the contention that the public policies behind Sarbanes-Oxley should not extend "to those who appear to be acting to the detriment of the Company in raising what have been twice shown to be meritless, specious 'concerns.'" (Op. at 19.) Putting aside that Senate Report No. 107-146 shows that Sarbanes-Oxley is actually addressed toward wrongful conduct of a company, the results of the Company's own internal investigation are by no means determinative. Whether or not the Audit Committee was correct in its determination that the Letter did not identify any improper conduct is for the factfinder in the Maryland Litigation to decide.

Likewise, Jos. A. Bank's argument that the protection of anonymity afforded to employee whistleblowers should not be applied by analogy to other anonymous whistleblowers is based on a gross distortion of the purposes of Sarbanes-Oxley. Specifically, the Company argues that "the overarching goal of the legislation was to restore public confidence in the integrity of the public markets, a goal that is threatened if short sellers are afforded a free pass to ply their particular brand of market manipulation." (Op. at 19, n. 11.) This statement reflects either a highly manipulative distortion of the purposes behind Sarbanes-Oxley or a truly fundamental lack of

understanding of the Act. Sarbanes-Oxley was enacted in the wake of the Enron scandal to protect *investors*. Contrary to Jos. A. Bank's assertion, Sarbanes-Oxley does not seek to impose greater accountability on short sellers, it seeks to impose greater accountability on companies.[11] In enacting Sarbanes-Oxley, Congress sought to encourage whistleblowers to come forward. Exposing the Shareholder to the retaliatory discovery sought by Jos. A. Bank would have a chilling effect on the reporting of real and perceived corporate misconduct, an effect contrary to the stated goals of Sarbanes-Oxley.

Finally, the Jos. A. Bank's claim that it is not seeking retaliation against the Shareholder (Op. at 19) is simply not credible in light of the overall theme of the opposition. Curiously in this regard, the Company inexplicably blames Foley for making "no attempt to explain how the Company might retaliate against Shareholder." (Op. at 19.) It should be self-evident that Foley and its Client should not be placed in the position of having to provide Jos. A. Bank with a roadmap of potential theories of litigation. Regardless, the bullet point list on page eight of the opposition needs no further explanation. The only conceivable purpose of the discovery Jos. A. Bank desires is for retaliation against the Shareholder. Accordingly, the subpoena should properly be quashed.

IV. THE SUBPOENA VIOLATES THE CLIENT'S RIGHT TO SPEAK ANONYMOUSLY

A. JUSTICE SCALIA'S DISSENT IN MCINTYRE V. OHIO ELECTIONS COMM'N ACKNOWLEDGED THAT THE MAJORITY OPINION IDENTIFIED A GENERAL FIRST AMENDMENT RIGHT TO ANONYMOUS SPEECH

[11] Moreover, it has been widely acknowledged that short sellers spotted the fraud at Enron far ahead of the curve. See e.g. Benak v. Alliance Capital Mgmt. LP, 435 F.3d 396, 398 n.7 (3d Cir. 2006) ("very smart short sellers" spotted trouble at Enron well before its collapse); In re Enron Corp. Sec., Derivative, & ERISA Litig., 284 F.Supp.2d 511, 563 n.64 (S.D. Tex. 2003) (citing Wall Street Journal article dated November 6, 2001 entitled "Short Seller Spotted Trouble Ahead of the Crowd."); See also testimony of James Chanos, *Lessons Learned From Enron's Collapse: Auditing The Accounting Industry: Hearing Before The House Committee On Energy And Commerce*, 107th Cong. 107-83, February 6, 2002, *available at* http://republicans.energycommerce.house.gov/107/action/107-83.pdf. (Reply Ex. 3.)

The opposition relies heavily on Justice Scalia's dissent in McIntyre v. Ohio Elections Comm'n, 415 U.S. 334 (1995), to argue that "the Supreme Court has rejected the existence of a generalized constitutional right of anonymity." (Op. at 14). However, Justice Scalia's dissent explicitly criticized the majority opinion for recognizing a generalized First Amendment right to anonymous speech. See McIntyre, 415 U.S. at 464 (Scalia, J., dissenting) ("to strike down the Ohio law in its general application…on the ground that all anonymous communication is in our society traditionally sacrosanct, seems to me a distortion of the past"). Moreover, while McIntyre was decided in the familiar context of political speech, Jos. A. Bank is mistaken when it seeks to confine the widely-accepted principles of First Amendment jurisprudence to discrete subcategories. Not surprisingly, Jos. A. Bank fails to cite a single case which would support its proposition that the rights afforded to anonymous speakers are more limited than other First Amendment rights and its attempt to discredit the Client's First Amendment right to anonymous speech is therefore misplaced.

B. THE QUALIFIED FIRST AMENDMENT PRIVILEGE EXTENDS BEYOND THE REPORTER'S PRIVILEGE TO PROTECT THE SHAREHOLDER'S IDENTITY

The opposition also errs in its attempt to confine the broad qualified First Amendment privilege to the context of the reporter's privilege. As noted by the District Court of New Hampshire, the First Circuit never intended the qualified privilege to be applied in a limiting fashion: "Bruno & Stillman, Inc. and its progeny set a minimal protection for First Amendment guarantees that arise not only for the press, but for all matters involving free Speech." Howard v. Antilla, 191 F.R.D. 39, 42 (D.N.H. 1999).

The Company has also failed to provide any legitimate basis for not applying here the standard articulated in Doe v. 2TheMart.com, 140 F.Supp.2d 1088 (W.D. Wash. 2001). The First Amendment protects speech that affects matters of public concern – and the integrity of the

stock market is most assuredly a matter of public concern. Moreover, the protection of First Amendment rights is particularly important when an anonymous speaker has reason to fear retaliation. See e.g. Ranco Publ'ns v. Superior Court, 68 Cal.App.4th 1538, 1550-51 (1999) (quashing a subpoena where the party seeking the discovery admitted that one of the purposes of the subpoena was to "add potential new claims against additional defendants").[12]

Finally, the Company's superficial analysis of the 2TheMart.com factors (Op. at 18) lacks merit in light of the retaliatory purpose of the subpoena, the complete lack of the relevance of any of the matters sought by the subpoena, and the fact that all of the information Jos. A. Bank needs to establish its defenses is available from other sources. The subpoena violates the Shareholder's First Amendment right to speak anonymously and should be quashed.

V. THE SUBPOENA SHOULD BE QUASHED BECAUSE IT IS UNDULY BURDENSOME

As noted above, the Company largely sidesteps the threshold subject matter sought by the subpoena, *i.e.* the Shareholder's identity. Instead, the opposition focuses, almost exclusively, on Jos. A. Bank's demands for discovery it intends to wage against the Shareholder on an extremely broad range of topics on the Shareholder is identified. Thus, it is particularly disingenuous for Jos. A. Bank to suggest that the subpoena imposes no burden because the discovery sought is merely "one modest file" and because the principal piece of information sought is "Shareholder's identity."[13] (Op. at 12.) Furthermore, as discussed in Foley's memorandum in support of its Motion to Quash, the burden on non-parties is a special factor that weighs strongly against

[12] This certainly appears to be what the Company is fishing for with its subpoena, as supported by the threats made early on in its response to the Client's Letter. See Foley Ex. E.

[13] While it is true that the principal focus of the subpoena is the identity of the Client, the analysis of the burden of the subpoena must include the other materials sought by the subpoena – as well as the inevitable discovery that will follow ineluctably and undeniably from the Client.

discovery when balancing the potential benefit of the desired discovery against its burdens. Yet, at no point does the opposition even address the special burden on non-parties.

Not only is the Shareholder a nonparty to the Maryland litigation, but the discovery Jos. A. Bank seeks is extraordinarily broad, contentious, invasive, and oppressive. Moreover, as explained above, the Shareholder's First Amendment right to anonymous speech should be upheld. Enforcement of the subpoena would chill speech on matters affecting the integrity of stock market, a matter of great public concern. Accordingly, the constitutional and public policy rationales supporting the protection of the Client's identity greatly outweigh Jos. A. Bank's highly speculative and conclusory rationales for the discovery demanded by the subpoena. Accordingly, the subpoena should be quashed as unduly burdensome in accordance with the plain language of Rule 26(b)(C)(iii).

CONCLUSION

WHEREFORE, for the foregoing reasons, and the reasons stated in Foley's memorandum in support of its Motion to Quash, Foley respectfully requests that the subpoena be quashed.

Respectfully submitted,

FOLEY & LARDNER, LLP on behalf of SHAREHOLDER,

/s/ Russell Beck
Russell Beck BBO # 561031
rbeck@foley.com
Marie Scheibert BBO # 668919 (application pending for admission to the MA federal bar)
mscheibert@foley.com
Foley & Lardner LLP
111 Huntington Avenue
Boston, Massachusetts 02199
617-342-4000

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Russell Beck