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. _____

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

INTRODUCTION

Foley & Lardner LLP ("Foley") hereby moves to quash a subpoena served upon it which seeks the identity (and related materials) of a non-party client who seeks to remain anonymous. Foley's client is a shareholder of defendant, Jos. A. Bank Clothiers, Inc. ("Jos. A. Bank" or the "Company"), who, on an anonymous basis, raised various corporate governance concerns directly to the Company. In response, the defendants served the subpoena – a punitive measure designed to punish Foley's client for reporting what it perceived as corporate misconduct and to chill any similar future reporting. Indeed, the defendants' subpoena directly conflicts with its own policies designed to foster such reporting, which prohibit the defendants from requiring the disclosure of the reporter's identity in other contexts. As such, the subpoena should be quashed.

Defendants' improper motivations in derogation of its salutary policies aside, the subpoena should be quashed as it is manifestly irrelevant and makes unreasonable and unduly burdensome demands for information for which the defendants have no legitimate need. Indeed, because the identity of Foley's client and the client's right to speak anonymously are

indisputably privileged under the First Amendment and federal common law, the defendants must satisfy a heightened relevance standard that is significantly more difficult to meet than the ordinary "likely to lead to the discovery of admissible evidence" standard. Thus, and as demonstrated in detail below, given that the defendants cannot even satisfy the ordinary relevance standards, let alone the demanding standard that applies here, this Court should quash the subpoena.

BACKGROUND FACTS

PLAINTIFFS' CLASS ACTION COMPLAINT

The above-entitled securities class action is currently proceeding in the United States District Court for the District of Maryland (the "Maryland litigation"). The consolidated class action complaint (the "Complaint") was filed on behalf of all purchasers of the publicly traded securities of Jos. A. Bank between December 5, 2005 and June 7, 2006 (the "Class Period"). (Ex. A, at ¶ 1.)[1] The Complaint alleges that Jos. A. Bank and three of its executives, including Robert N. Wildrick ("Wildrick") (collectively, the "Defendants"), violated federal securities laws by knowingly issuing false and misleading statements during the Class Period, which over-inflated the financial strength of the Company. Specifically, Defendants allegedly failed to disclose during the Class Period that Jos. A. Bank had (1) accumulated an unprecedented surplus of its Fall/Winter 2005 inventory; (2) resorted to very aggressive promotional pricing in early 2006 to clear the excess inventory; and (3) experienced severe erosion of its gross profit margins as a result of the deep discounts. (Id. at ¶¶ 6-8.) Plaintiffs also maintain: "Wildrick unloaded over 74% of his Jos. A. Bank common stock holdings at artificially inflated prices during the Class Period for proceeds of nearly $36 million." (Id. at ¶ 11.) The Complaint contends that Jos.

[1] All exhibits are authenticated in the Scheibert affidavit, Ex. N.

A. Bank's shares fell "approximately 29% . . . causing tens of millions of dollars of investor losses" following the June 7, 2006 release of the Company's first quarter earnings report. (Id. at ¶ 10.)

FOLEY'S LETTER TO THE JOS. A. BANKS AUDIT COMMITTEE

By letter dated March 15, 2006 (the "Letter"), Foley relayed certain concerns of its anonymous client, a Jos. A. Bank shareholder (the "Shareholder"), to the Jos. A. Bank audit committee regarding the Company's public communications and financial reporting. (Ex. B.) The audit committee has an internal code of conduct encouraging submission of "confidential, anonymous concerns regarding questionable accounting, internal accounting controls or auditing matters. (Ex. C.) Annexed to the Letter was the Shareholder's analysis of Jos. A. Bank's inventory, based on publicly available data. (Ex. B.) The Letter informed the audit committee that the Shareholder believed "the value of the Company's inventory has been materially misstated." Id. The Letter also questioned why Wildrick had sold of approximately 75% of his personal common stock (valued in excess of $36 million) between 12/23/05 and 3/02/06. (Id.)

The Shareholder asked Foley to send the Letter so that the concerns expressed in the letter would be taken seriously. (Ex. D at ¶ 2.) The Shareholder believed that if the anonymous letter was sent directly, without Foley's involvement, the Letter might not be given credibility. (Id.) The Shareholder did not and does not want to be identified, and does not want to be exposed to retaliation for actions that are consistent with the public policy of ensuring that public company financial reports are fair and not misleading. (Id. at ¶ 1.) The Shareholder asked Foley to review and forward the concerns expressed in the letter to the Company with the expectation that the client could rely on the attorney-client privilege and not have to be identified. (Id. at ¶ 3.) Foley received a response letter from Jos. A. Banks dated March 21, 2006 acknowledging receipt of the Letter and demanding Foley reveal the Shareholder's identity. (Ex. E.) Foley

responded in turn by letter dated March 24, 2006, declining to reveal the Shareholder's identity, and further noting:

> The statements relayed in my previous letter can be assessed on their own merit and independent of source. Such concerns should be received, retained and treated in accordance with the procedures of the Company's Audit Committee required by Rule 10A-3 of the Securities Exchange Act of 1934.

(Ex. F.)

CURRENT STATUS OF THE MARYLAND LITIGATION

According to the docket, the consolidated class action complaint was filed on February 23, 2007. (Ex. G.) On November 11, 2007, Defendants moved for judgment on the pleadings. (Id.) On February 15, 2008, the Maryland Court granted Defendants leave to address whether a newly issued Special Litigation Committee Report ("SLC Report") could properly be considered in connection with the motion. (Ex. H.)

On February 21, 2008, Defendants moved for leave to amend their answer to incorporate two new affirmative defenses based on the SLC Report. (Ex. I.) Plaintiffs opposed Defendants' motion to amend and apparently maintain that the SLC Report cannot be considered in connection with Defendants' Rule 12(c) motion. (Ex. J.) On February 25, 2008, Defendants filed a supplemental brief in support of their motion for judgment on the pleadings that summarized the substance of the SLC Report in relevant part:

> [T]he SLC reported that in March 2006 – at the very time when the alleged "fraud" was taking place – the Company's Audit Committee, assisted by the law firm of Wilmer, Cutler, Pickering, Hale & Dorr and the accounting firm of Ernst & Young, conducted an internal investigation into allegations related to the valuation of the Company's inventory made in a letter from an anonymous shareholder. The investigation found no evidence to support the shareholder's claims. (See Exhibit 2, SLC Report at 39, and Exhibit 3, Minutes of Meeting of Audit Committee, March 31, 2006).

(Ex K, at 4.)

Defendants' motion for judgment on the pleadings seeks to use the SLC Report to dispute scienter, a required element of the Plaintiffs' claims. Defendants reply argues that "[t]he mere conduct of the Audit Committee investigation, let alone the fact that it resulted in a complete exoneration of the Company, is inconsistent with any inference of knowing wrongdoing." (Ex. L, at 2.) Defendants' motion for judgment on the pleadings and motion for leave to amend have been fully briefed and the parties are awaiting rulings from the Maryland Court.

The Shareholder is not a party to the Maryland litigation.

DEFENDANTS' SUBPOENA TO DETERMINE THE IDENTITY OF FOLEY'S CLIENT

On March 18, 2008, Defendants issued a subpoena compelling Foley's attendance at an April 4, 2008 deposition and seeking testimony disclosing the identity of the Shareholder. (Ex. M, at 4.) The subpoena also commanded Foley to produce documents in the following categories:

1. Documents or electronically stored information sufficient to identify the Shareholder, including but not limited to any and all billing, fee, retainer, engagement, or accounting records associated with the Shareholder in connection with the matters raised in or addressed by the March 15, 2006 Letter;

2. To the extent that the Shareholder is not a natural person, documents or electronically stored information sufficient to identify, and establish Foley's last known address for, any and all person who, directly or indirectly, at any time since March 1, 2006, controlled, managed operated, or directed the affairs of the Shareholder, whether as owner, member, shareholder, manager, officer, director, trustee, or in any other similar capacity;

3. Any documents or electronically stored information that substantiate or otherwise relate to the concerns expressed or matters addressed in or raised by the March 15, 2006 Letter;

4. Any documents or electronically stored information that reflect communications between Foley and any person or entity other than Shareholder concerning the matters addressed in or raised by the March 15, 2006 Letter;

5. Any documents or electronically stored information that reflect communications between Shareholder and any person or entity other than Foley concerning the matters addressed in or raised by the March 15, 2006 Letter.

(Ex. M, at 6.)

As demonstrated below, the subpoena is punitive, seeks irrelevant information, and violates the Shareholder's right of anonymity as protected by the First Amendment and federal common law. Accordingly, the subpoena should be quashed.

ARGUMENT

This Court has the power and duty to protect the Shareholder, a nonparty, from the improper and unnecessary discovery sought by the defendants through the subpoena. Specifically, rule 45 of the Federal Rules of Civil Procedure provides that the issuing Court must quash or modify a subpoena that "requires disclosure of privileged or other protected matter" or that "subjects a person to undue burden." F.R.C.P. 45(3)(A)(iii)-(iv). A subpoena should not be enforced if the reasons for resisting discovery outweigh the need for the discovery. See e.g. Heidelberg Americas, Inc. v. Tokyo Kikai Seisakusho, Ltd., 333 F.ed 38, 40 (1st Cir. 2003) (quashing subpoena where purported relevance of documents was marginal and speculative); Cusumano v. Microsoft Corp., 162 F.3d 708, 713 (1st Cir. 1998) (quashing subpoena where the need for the information was outweighed by First Amendment concerns); Whittingham v. Amherst College, 164 F.R.D. 124, 127-28 (D. Mass. 1995) (denying motion to compel where the purported need for the information, even if marginally relevant, was outweighed by privacy interests).

The burden on non-parties is a special factor that weighs strongly against disclosure in evaluating the balance of competing needs. Heidelberg, 333 F.3d at 41-42; Cusumano, 162 F.3d at 717; See also Doe v. 2TheMart.Com, Inc., 140 F.Supp.2d 1088, 1095 (W.D. Wash. 2001) ("[N]on-party disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker.").

I. THE SUBPOENA IS UNDULY BURDENSOME AND SEEKS IRRELEVANT INFORMATION

It is well-settled that the scope of discovery under a subpoena matches the scope of discovery under Rule 26. See Cusumano, 162 F.3d at 714 (enforcement of subpoena must be decided against the backdrop of Rule 26). A subpoena that seeks to compel information outside the scope of Rule 26 imposes an undue burden for purposes of Rule 45. Ameristar Jet Charter, Inc. v. Signal Composites, Inc., 244 F.3d 189, 193 (1st Cir. 2001). Rule 26 provides:

> Parties may obtain discovery regarding an non-privileged matter that is relevant to any party's claim or defense…including the identity and location of persons who know of any discoverable matter…if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

F.R.C.P. 26(b)(1).

> [T]he court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

F.R.C.P. 26(b)(2)(C).

A. THE SHAREHOLDER'S IDENTITY AND THE DOCUMENTS SOUGHT ARE IRRELEVANT

As a threshold matter, Defendants' subpoena should be quashed in its entirety for the simple and inescapable reason that the Shareholder's identity is irrelevant to any issue that might arise in the Maryland litigation. Under the express terms of Rule 26, the discovery of a person's identity is permitted only "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." F.R.C.P. 26(b)(1). Moreover, the burden of demonstrating relevance is on the party seeking discovery. Whittingham v. Amherst College, 164 F.R.D. 124, 128 (D. Mass. 1995). The Shareholder's identity has no bearing on any element of any claim or defense

in the Maryland litigation, nor is disclosure of the Sharehold's identity reasonably calculated to lead to the discovery of admissible evidence. Accordingly, disclosure of the Shareholder's identity would not properly be compelled by Defendants' Rule 45 subpoena.

Instructively in this regard, the Shareholder's Letter apparently triggered the Jos. A. Bank audit committee to conduct an internal investigation, thus leading theDefendants to acknowledge that the Letter itself and the Shareholder's opinions are not significant. Indeed, Defendants' briefing in the Maryland litigation focuses exclusively on the audit committee's actions and conclusions following its receipt of the Letter, not on the conclusions and opinions expressed in the Letter. (Ex. K.) Accordingly, Defendants supplemental brief in support of their motion for judgment on the pleadings explains:

> If the Court does decide to consider the existence and conclusions of the SLC and the Audit Committee investigations, then Plaintiff's proposed inference of scienter is even weaker, and the competing inference of non-culpable conduct is even stronger.
>
> The Company's vigorous responses to these allegations of wrongdoing is inconsistent with any inference of deliberate or reckless misrepresentation on the Company's financial results. Rather, the existence of those investigations demonstrates a commitment on the part of the Company to ensuring the accuracy of its financial disclosures and the integrity of its senior management.
>
> The conclusions reached in the two investigations are inconsistent with any inference of scienter. The Audit Committee's investigation was conducted in the second half of March 2006, right in the middle of the alleged class period in this case (December 5, 2005 through June 8, 2006). As a result of the Audit Committee investigation, the Company received advice from counsel and from Ernst & Young to the effect that its inventory was being accounted for properly, and that there was no basis for any suspicion of wrongdoing with respect to Mr. Wildrick's stock sales or any other aspect of the Company's business that was being investigated.

(Id. at 12-13.)

As the identity of the Shareholder and the truth or falsity of the matters addressed in the Letter are entirely irrelevant to any claim or defense in the Maryland litigation, Defendants'

subpoena represents nothing more than a highly invasive and unwarranted fishing expedition. Litigants are not permitted to "undertake wholly exploratory operations in the vague hope that something helpful will turn up." Mack v. Great Atlantic & Pacific Tea Co., 871 F.2d 179, 187 (1st Cir. 1989); See also Heidelberg Americas, Inc., 333 F.3d at 41 ("a litigant may not engage in merely speculative inquiries in the guise of relevant discovery"). The subpoena fails to satisfy even ordinary standards of relevance and therefore is properly quashed on this ground alone.

As a related matter, it bears mention that the Company's own policies permit "[a]ssociates [to] submit confidential, anonymous concerns regarding questionable accounting, internal accounting controls or auditing matters . . . ." (Ex. C.) Putting aside the salutary purpose of permitting anonymous reporting, given that the Company expressly permits such anonymous reporting, it is inconceivable how the Company can then legitimate argue that there is some legitimate, non-retributive purpose in seeking to compel the identity of a shareholder who reports the very same concerns in the very same way.

B. THE SUBPOENA'S DOCUMENT REQUESTS SEEK INFORMATION MORE EASILY OBTAINED FROM OTHER SOURCES

Information relating to Jos. A. Bank's public communications and financial reporting with respect to its inventory during the Class Period is not only in Jos. A. Bank's own possession, but such information can be obtained more easily from other sources. As the Letter explained, the Shareholder's opinion and analysis was based entirely on publicly available information. To the extent any documents and communications related to the matters addressed in the Letter exist, those materials would be merely cumulative and of lesser significance than discovery Defendants have either already obtained or may obtain as the Maryland litigation proceeds. The subpoena plainly seeks discovery that is "unreasonably cumulative or

duplicative" under Federal Rule 26(b)(2)(C). The document requests are unnecessary and improper and should be denied.

II. THE SUBPOENA VIOLATES THE SHAREHOLDER'S FIRST AMENDMENT RIGHTS

A. THE SHAREHOLDER'S IDENTITY IS PROTECTED BY THE FIRST AMENDMENT

It is well-established that the First Amendment protects anonymous speech. See e.g. McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995) (First Amendment violated by state law prohibiting anonymous campaign literature); Talley v. State of California, 362 U.S. 60 (1960) (First Amendment violated by requirement that publicly distributed handbills contain the names of the authors and other involved persons). The Supreme Court has explained:

> The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
>
> Under our Constitution, anonymous pamphleteering is . . . an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights and the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society.

McIntyre, 514 U.S. at 341-42, 357.

In NAACP v. State of Alabama, 357 U.S. 449 (1958), the Supreme Court held that Alabama could not compel the NAACP to disclose the names of its membership. A court order to compel production of identities in a situation that threatens fundamental First Amendment freedoms of speech or assembly "is subject to the closest scrutiny." Id. at 461. The Court further recognized: "It is immaterial whether the beliefs sought to be advanced . . . pertain to political, economic, religious, or cultural matters." Id. at 460-61. To survive "the closest

scrutiny," the interest in subordinating First Amendment rights "must be compelling." Id. at 463. While political speech is entitled to the most "exacting scrutiny," the "normal strict scrutiny analysis" applies to all other non-core speech, as is the case here. 2TheMart.Com, Inc., 140 F.Supp.2d at 1093.

B. THE QUALIFIED CONSTITUTIONAL AND FEDERAL COMMON LAW PRIVILEGE PROTECTS AGAINST COMPELLED DISCLOSURE OF THE SHAREHOLDER'S IDENTITY

A court order constitutes state action that is subject to constitutional limitations. New York Times v. Sullivan, 376 U.S. 254, 265 (1964). The federal subpoena power is subject to a qualified constitutional privilege that applies when the requested discovery impinges on First Amendment rights. Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 596 (1st Cir. 1980). The privilege is grounded both in the First Amendment and in federal common law. Howard v. Antilla, 191 F.R.D. 39, 42-43 (D.N.H. 1999). To determine the extent of the privilege, courts "must balance the potential harm to the free flow of information that might result against the asserted need for the requested information." Bruno, 633 F.2d at 596.

The party seeking the discovery must demonstrate a truly compelling need before an anonymous speaker's identity may be disclosed. The First Circuit recently summarized: "[Our] cases suggest that the disclosure of . . . confidential sources may not be compelled unless directly relevant to a nonfrivolous claim or inquiry undertaken in good faith; and disclosure may be denied where the same information is readily available from a less sensitive source." In re: Special Proceedings, 373 F.3d 37, 45 (1st Cir. 2004) (citing Cusumano, 162 F.3d at 716-17; United States v. LaRouche, 841 F.2d 1176, 1180 (1st Cir. 1988); Bruno, 633 F.2d at 597-98).

The initial burden is on the party seeking the discovery to "make a prima facie showing that his claim of need and relevance is not frivolous." Cusumano, 162 F.3d at 716; Bruno, 633 F.2d at 597 ("the court should be satisfied that a claim is not frivolous, a pretense for using

discovery powers in a fishing expedition"). The threshold for demonstrating relevance is significantly higher when First Amendment concerns are implicated. See Bruno, 633 F.2d at 596 (Rule 26 must be applied with "heightened sensitivity" when First Amendment rights are in jeopardy); See also 2TheMart.Com, Inc., 140 F.Supp.2d at 1092 ("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 Internet communications and thus on basic First Amendment rights."); Rancho Publ'ns v. Superior Court, 68 Cal.App.4th 1538, 1550 (1999) ("mere relevance is not sufficient…the party seeking discovery must make a higher showing of relevance and materiality than otherwise would be required for less sensitive material"). Absent a prima facie showing of heightened relevance, the requested discovery is properly denied. Bruno, 633 F.2d at 597. Only if the party seeking discovery meets its initial burden does the burden shift to the objector to demonstrate the basis for withholding the information. Cusumano, 162 F.3d at 716.

In evaluating the flip side to the balancing test, *i.e.*, the harm to the free flow of information, the court "must assess the extent to which there is a need for confidentiality." Bruno, 633 F.2d at 597. The First Circuit has addressed the contours of this requirement only in the context of the reporter's privilege to protect confidential sources. In that context, the Court identified various factors that affect the strength of a reporter's privilege, including whether the anonymous source had a "reasonable expectation of confidentiality." Id. For example, "carefully bargained-for" confidentiality is entitled to significant First Amendment protection. Id.; Cusumano, 162 F.3d at 717.

The qualified privilege must be applied to preserve First Amendment rights. For example, Cusumano concerned a subpoena that sought to compel two professors' confidential

research materials in connection with their forthcoming book on the "browser war" between Microsoft and Netscape. Microsoft sought the information because it was embroiled in antitrust litigation in which its hegemony over Netscape was a key issue. The professors were not parties to the litigation. In applying the balancing test, the First Circuit first found that "that Microsoft had not embarked on a fishing expedition [and] Microsoft has made a prima facie showing of need and relevance." Cusumano, 162 F.3d at 716. However, while Microsoft's showing of need was "substantial," this factor was somewhat discounted because the same information could have been obtained by direct discovery. Id. Moreover, its need was outweighed by the harm to the free flow of information that would occur if disclosure was compelled. Id. at 717. The First Circuit emphasized that the professors' material had been created with an expectation of confidentiality:

> [T]he execution of a nondisclosure agreement with the corporate entity being studied and the furnishing of personal assurances of confidentiality to the persons being interviewed gives chary corporate executives a sense of security that greatly facilitates the achievement of agreements to cooperate…allowing Microsoft to obtain the notes, tapes, and transcripts it covets would hamstring not only the respondents' future research efforts but also those of other similarly situated scholars. This loss of theoretical insight into the business world is of concern in and of itself. Even more important, compelling the disclosure of such research materials would infrigidate the free flow of information to the public, thus denigrating a fundamental First Amendment value.

Id.

Other jurisdictions testing the strength of the qualified First Amendment privilege in contexts outside the reporter's privilege have clarified that the showing of need for the information must be exceptionally strong before the identity of an anonymous speaker may be compelled. For example, in a line of rapidly developing case law, "most courts" have required plaintiffs who have sued anonymous Internet speakers for defamation to make a prima facie showing on each element of their case in order to overcome a motion to quash a subpoena

seeking the speaker's identity. See Krinsky v. Doe 6, 159 Cal.App.4th 1154, 1165-1172 (2008) (collecting cases); Accord McMann v. Doe, 460 F.Supp.2d 259, 270 (D. Mass 2006) (declining to order the disclosure of an anonymous Internet speaker accused of defamation because the speaker's anonymous Internet postings "do not constitute defamation"). Given that it is well-established that defamatory speech is not protected by the First Amendment, these cases essentially hold that the identity of an anonymous speaker may be revealed only where the party seeking the discovery has demonstrated that the speech is not protected by the First Amendment.

The qualified First Amendment privilege has been applied with equal vigor in protecting the identities of anonymous speakers on Internet message boards. The court in 2TheMart.Com, Inc. quashed a subpoena seeking the identity of 23 nonparty anonymous Internet speakers in connection with a class action securities litigation. The defendants argued that 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." 2TheMart.Com, Inc., 140 F.Supp.2d at 1089-90.

In deciding whether to enforce the subpoena, the court adopted a four factor test addressing whether: (1) the subpoena was issued in good faith and not for any improper purpose; (2) the information relates to a core claim or defense; (3) the identifying information is directly and materially relevant 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. The court found that all four factors militated against disclosure of the Internet users' identities and quashed the subpoena. Id. at 1095-98. First, while the posted messages might be minimally relevant to the defendants' defense that they did not cause the drop in the stock's value, the subpoena's "apparent disregard for the privacy and the First Amendment rights of the online

users, while not demonstrating bad faith per se, weighs against [defendants] in balancing the interests here." Id. at 1095-96. Second, the identity of the Internet users was not central to a core defense as the defendants had raised 27 affirmative defenses, including several that went more "to the heart of the matter" than the defendants' generalized assertion that the postings caused the change in the stock price. Id. at 1096. Third, the identifying information was not directly and materially relevant to a core defense because the identity of anonymous Internet speakers, nonparties to the litigation, was not needed to allow the litigation to proceed. Id. Even assuming that the postings "did influence the stock price, they did so without anyone knowing the identity of the speakers." Id. at 1097. Finally, the defendants "failed to demonstrate that the information it needs to establish its defense is unavailable from any other source." Id.

C. DEFENDANTS CANNOT MAKE THE THRESHOLD SHOWING REQUIRED TO OVERCOME THE PRIVILEGE AND JUSTIFY ENFORCEMENT OF THE SUBPOENA

Weighing the Shareholder's fundamental First Amendment rights against Defendants' request for the Shareholder's identity (and their equally irrelevant and overbroad requests for production) makes it clear that the subpoena should be quashed. As explained above, Defendants cannot even establish that the Shareholder's identity and documents and communications related to the Letter are discoverable under the ordinary rules of discovery, let alone under the elevated standard applicable in this context. Accordingly, Defendants *a fortiori* cannot demonstrate the kind of compelling need that is required to defeat the qualified First Amendment privilege that applies here.

Even assuming that Defendants could theoretically identify a sufficient need for the information to permit discovery under Rule 26, Defendants' subpoena cannot survive the heightened standard for relevance that must be applied when First Amendment rights are at stake. As explained in Krinsky, different courts have applied a wide range of required showings

for heightened relevance, ranging on the low end, from merely requiring a good faith basis for the subpoena to much more stringent standards. In evaluating Defendants' subpoena under the heightened relevance standard, this Court should look to 2TheMart.Com, Inc., which addressed facts substantially similar to the circumstances currently before this Court. Even more importantly, the essential reasoning of 2TheMart.Com, Inc. is entirely consistent with existing First Circuit jurisprudence developed in connection with the reporter's privilege.

The heart of the 2TheMart.Com, Inc. test is whether the information sought to be compelled from the third party is directly and materially relevant to a litigant's core claim or defense. As is evident in Defendants' briefing in connection with its motion for judgment on the pleadings, its argument that the audit committee's actions taken in response to the Shareholder's Letter are "inconsistent with an inference of scienter" demonstrates that the identity of the Shareholder is entirely irrelevant; what was relevant – according to Defendants' own defense – was the conduct of the audit committee in response to the letter. (Ex. K.) Thus, the Shareholder's identity is not only not central to a core defense of the Defendants, it is not even relevant to a core defense. Even more importantly, and exactly as in 2TheMart.Com, Inc., the Shareholder's identity is not directly and materially related to a core defense because even assuming the Letter had some influence, that influence occurred without anyone knowing the identity of the Shareholder. Any purported relevance of the Shareholder's identity, whether in connection with a scienter defense or any other actual or hypothetical defense, is defeated by this fundamental logic. The Shareholder's identity is simply not directly and materially relevant.

D. Any Theoretical Relevance Of The Information Sought Is Greatly Outweighed By The Shareholder's First Amendment Rights

Even if Defendants were somehow able to show that the information sought has some theoretical relevance, the Shareholder's First Amendment right to anonymous speech greatly

outweighs any such showing. The very fact that the Letter was sent by Foley on behalf of an anonymous client, rather than by the client directly, demonstrates that the Shareholder had a reasonable expectation of confidentiality in communicating with the audit committee. Under Bruno and Cusumano, the Shareholder's expectation of privacy is to be given great weight. See Bruno, 633 F.2d at 597-598 (permitting discovery of confidential sources only where the "claimed confidentiality seems unsupported, unlikely, or speculative"); Cusumano, 162 F.3d at 717 (information obtained pursuant to confidentiality agreements and personal assurances of confidentiality deserves "significant protection" under the First Amendment).

More generally, the importance of the Shareholder's First Amendment right to speak anonymously simply cannot be overstated. The compelled disclosure of the Shareholder's identity would have exactly the kind of chilling effect on speech and expression that the First Amendment was designed to prevent. See e.g. NAACP, 357 U.S. at 463 (denying motion to compel NAACP member identities "in that it may induce members to withdraw from the Association and dissuade other from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure"); see also LaRouche Campaign, 841 F.2d at 1181 (compelled disclosure of a reporter's confidential material impermissibly chills speech and violates First Amendment protections).

III. THE SHAREHOLDER'S IDENTITY IS PROTECTED AS A MATTER OF PUBLIC POLICY

The Shareholder is akin to a whistleblower. In addition to the fundamental First Amendment protection of anonymous speech, there is a clear public policy of encouraging protection of anonymous whistleblowers who bring attention to potential securities fraud.

In the wake of the Enron scandal, the United States Congress added new section 10A(m)(4) to the Securities and Exchange Act of 1934. That section adopted procedures to ensure the confidential, anonymous submission of questionable accounting and auditing matters

by employees to a company's audit committee. While the Sarbanes-Oxley whistleblower protections were designed in part to protect employees from retaliation, the overriding purpose of Sarbanes-Oxley was to ensure that "corporate fraud and greed may be better detected, prevented and prosecuted." S. Rep. No. 107-146 (2002). Moreover, Congress specifically intended "to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." Id. Thus, the Shareholder's anonymous Letter is exactly the kind of communication that Congress intended to encourage and protect in enacting Sarbanes-Oxley.

IV. THE DOCUMENTS REQUESTED ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

Documents responsive to Defendants' Requests Nos. 3, 4, and 5 are further protected from compelled disclosure by the attorney-client privilege and the work product doctrine. These three requests seek documents that "substantiate or otherwise relate" to the Letter or that "reflect communications" regarding the matters addressed in the Letter. All of these categories seek documents that would either constitute or reflect confidential communications between an attorney and client for the purposes of securing legal advice and are indisputably protected by the attorney-client privilege. See FDIC v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000) (reciting elements of the attorney-client privilege); Cavallaro v. United States, 153 F.Supp.2d 52, 57 (D. Mass 2001) (same). The categories also seek documents that may properly be categorized as attorney work product. The documents are protected from discovery on this basis as well.

Defendants disingenuously seek to circumvent the Shareholder's objections to the subpoena by seeking to compel documents "sufficient to identify" the Shareholder in Requests Nos. 1 and 2. With rare exceptions, the attorney-client privilege does not generally protect the identity of an attorney's client and the source of payment for legal fees. In re Grand Jury

Subpoena, 925 F.Supp. 849, 855 (D. Mass. 1995). Defendants' tactic fails however, because documents seeking validation of the Shareholder's identity are privileged as described above.

It is unnecessary and inappropriate for the Shareholder to substantiate these claims of attorney-client privilege pursuant to Federal Rule of Civil Procedure 45(d)(2)(A) at this time. The "universally accepted means" of substantiating a claim of privilege is through a privilege log that "should identify the individuals who are parties to the communications." Gail v. New England Gas Co., 243 F.R.D. 28, 33 (D.R.I. 2007). Here, however, it would be nonsensical for the Shareholder to produce a privilege log with identifying information when protection of the Shareholder's identity is the central issue of this motion to quash. Moreover, a privilege log need not be produced at the time of the initial objection a subpoena, but instead must be produced within a "reasonable time." In re Acquisition Corp., 151 F.3d 75, 81 (2d Cir. 1998); Horace Mann Ins. Co. v. Nationwide Mut. Ins. Co., 240 F.R.D. 44, 47 (D. Conn. 2007). Under the circumstances presented here, a reasonable time for production of a privilege log is plainly after this Court has had an opportunity to rule on the instant motion. In the event this motion is denied, the Shareholder will provide Defendants with a complete log of the documents being withheld on the grounds of privilege. Defendants may challenge any assertions of the attorney-client privilege at that point if they wish. Any demand that a privilege log be produced now, before this Court has ruled on this motion to quash, would be unreasonable and contrary to law.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should quash the subpoena in its entirety.

Dated: April 1, 2008

Respectfully submitted,

FOLEY & LARDNER, LLP on behalf of SHAREHOLDER,

By its Counsel,

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