Nos. 11-17827, 11-17830, 11-17834

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOES,

Appellants - Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent - Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
(Hon. Charles R. Breyer, United States District Judge)
No. 3:11-mc-81208-CRB
No. 3:11-mc-80184-CRB
No. 3:11-mc-80209-CRB

CONSOLIDATED OPENING BRIEF OF DOE APPELLANTS

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REQUEST FOR ORAL ARGUMENT

Appellants request oral argument in this matter.

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I. JURISDICTIONAL STATEMENT

A. Jurisdiction in the District Court

On August 18, 2011, Doe[1] filed his Motion to Quash Administrative Subpoena. (ER 96.) The District Court had jurisdiction under 28 U.S.C. § 1331 (federal question) and § 1346(a)(United States as defendant.) Doe's requested relief was only that the District Court quash the SEC's subpoena. (Id.)

B. Jurisdiction in the Appellate Court

On November 17, 2011, the District Court entered its Order Denying Motion to Quash, terminating the case. (ER 10-18.) Doe timely filed a notice of appeal on November 21, 2011. (ER 95.) This Court has jurisdiction under 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Before intruding into a constitutionally protected area with an administrative subpoena, the SEC must demonstrate a compelling

[1] The facts presented here are drawn from the lead case, *Doe v. Securities and Exchange Commission*, No. 11-17827. Because the three cases are substantively identical and the Does are now represented by one counsel, this briefing is adopted in Case Nos. 11-17830 and 11-17834 without addition. Even though three Doe cases are pending, the singular form of "Doe" is used throughout the brief. Further, "he" and "his" are used because "John Doe" was chosen as a pseudonym, not to indicate Doe's gender.

governmental interest and prove that the information requested furthers that interest. The SEC asserted investigating potential securities-law violations as its interest. But it has not proven that invading Doe's right to anonymous free speech would further that interest. Should the subpoena be quashed?

2. If an agency obtains material improperly, then it must return the material and cannot use it when proceeding with an investigation. The SEC obtained Doe's identity using an improper subpoena. Should this Court enjoin the SEC from releasing Doe's identity and using any information derived from the improper subpoena in any further investigation?

III. STATEMENT OF THE CASE

Doe uses an anonymous Google "gmail" email address to communicate his protected-speech opinion on the Internet. The SEC served an administrative subpoena demanding Doe's identity, and Doe moved to quash. In support of its subpoena, the SEC claimed it was investigating potential securities-law violations concerning the Jammin Java corporation. But rather than present evidence that there was a legal violation, and that Doe had information to assist the investigation, the SEC presented only conjecture and opinion.

Specifically, the SEC presented just three evidentiary items. First, a chart showing that Jammin Java's stock price rose and fell. Second, the

company's quarterly report stating that Jammin Java acquired the right to use the name "Marley", and was planning to market coffee. Third, SEC-attorney testimony—without attaching support or citing a source—asserting (i) that someone made communications about Jammin Java before the stock rose, and (ii) conjecture that Doe's address "*potentially* belongs to a touter" in the Jammin Java "scheme".

The District Court denied Doe's motion to quash. The court noted that Doe demonstrated a free-speech right to keep his identity secret. But it found that the SEC demonstrated a compelling governmental interest sufficient to overcome that right because the SEC claimed it was investigating potential fraud.

Doe asks this Court to reverse the District Court's Order and quash the subpoena. Doe also asks this Court to clarify *Brock v. Local* 375, 860 F.2d 346, 350 (9th Cir. 1988), which held that a government agency cannot seek information about anonymous First-Amendment conduct without a compelling governmental interest. But the *Brock* court did not set forth a standard for determining when a compelling governmental interest outweighs First-Amendment rights. This Court should find that a government agency cannot invade First-Amendment rights unless it presents admissible evidence showing (1) a substantial possibility that a legal

violation occurred, and (2) a substantial relationship between the subpoena's object and that violation.

Doe also asks this Court to enjoin the SEC from using Doe's identity, including sharing it with any other government agency or person, and from using it or information gleaned from it in this or any subsequent investigation.

IV. STATEMENT OF FACTS

A. Doe uses an anonymous gmail account to communicate protected speech over the Internet.

Doe is the owner of <marketingacesinc@gmail.com>, a free email address from Google. (ER 55.) Doe uses the email address to communicate anonymously on the Internet, including publishing his free-speech protected opinions in online fora. (ER 55.) To protect his privacy, Doe chose not to use his real name or publish his identifying information in connection with the email address. (ER 55-56.)

In June 2011, the SEC sent Google an administrative subpoena. (ER 56.) The subpoena demanded that Google produce Doe's identity, and indicated that it issued the subpoena as part of the SEC's "Jammin Java" investigation. (ER 58-60.)

B. The SEC presented only speculation and an unsupported conclusion in support of its subpoena.

Doe moved to quash the subpoena. In opposition, the SEC produced only:

- its Order Directing Private Investigation in the Jammin Java matter;
- a declaration from its attorney;
- a chart showing the Jammin Java company's stock price; and
- the Jammin Java corporation's SEC quarterly report. (ER 63-94.)

The SEC order alleges—without any factual support—that certain persons may have violated the 1933 Securities Act. (ER 66-68) The SEC order does not mention either Doe or the email account at issue. (Id.) Similarly, the declaration from the SEC's attorney states—without any support—that the "SEC has obtained information indicating that the email address 'marketingacesinc@gmail.com' potentially belongs to a touter" in the Jammin Java "scheme". (ER 65.)

The SEC alleges that Doe's identity might be relevant to a "pump and dump" securities-law violation. (ER 63-66.) In a pump-and-dump scheme, a "touter" purchases an inexpensive stock and then publicizes it, in a manner that violates securities laws, in an effort to cause unwary investors to buy the stock—thereby increasing its value. (ER 63-66.) After the stock price rises,

the touter sells its stock at a significant profit. (ER 63-66.) Consequently, the stock's value falls and the unwary investors suffer a significant loss. (ER 63-66.)

The SEC has not shared any allegedly unlawful communications with Doe or the court. The SEC did not present any evidence other than its attorney's conjecture that Doe's gmail account *might* be involved with communications about Jammin Java. (ER 65.) The SEC did not identify the basis for its belief that Doe's gmail account is relevant to the investigation.

V. SUMMARY OF ARGUMENT

The First Amendment to the United States Constitution guarantees the right to *anonymous* free speech. The Internet allows citizens to anonymously communicate matters of public concern that they would likely not express at all if the Government could intrude on a whim. This Court held that an administrative agency cannot use a subpoena to invade a constitutionally-protected area—including anonymous speech—without identifying a compelling governmental interest. But this Court has not considered the evidentiary standard for determining when a compelling governmental interest exists and is sufficient to permit a free-speech invasion.

The SEC interprets this Court's precedent to allow the government to override freedom of expression by merely *alleging* a compelling government

interest. But this Court could not have intended a form-over-substance standard that the government can meet by simply making an allegation. Doe urges this Court to hold that a subpoena is not valid unless the government proves, with admissible evidence, that there is a substantial possibility a violation of law occurred, and that Doe's identity is substantially related to its investigation of that violation.

In the lower court, the SEC presented evidence only that a coffee company's stock rose and fell, that communications were made about that stock, and the opinion of a government attorney that Doe's address "potentially belongs to a touter" in a "scheme". Doe asks this Court to reverse the District Court's finding and quash the subpoena. Because the SEC obtained Doe's identity through the subpoena after the District Court denied the motion to quash, Doe seeks injunctive relief that the SEC must return all documents to Google, may not release Doe's identity, and may not use information gleaned from Doe's identity in connection with its investigation.

VI. STANDARD OF REVIEW

The Court reviews de novo a district court's decision regarding enforcement of an agency subpoena. *FDIC v. Garner*, 126 F.3d 1138, 1142 (9th Cir. 1997). But the district court's findings of fact are entitled to

deference. *EEOC v. Konica Minolta Bus. Solutions U.S.A., Inc.*, 639 F.3d 366, 368 (7th Cir. 2011).

VII. ARGUMENT

A. Doe established a First Amendment right to anonymity.

This Court established a two-part test to determine when an administrative subpoena must be quashed for invading a constitutionally-protected right. *Brock v. Local* 375, 860 F .2d 346, 349-350 (9th Cir. 1988). First, the person challenging the subpoena must demonstrate a "prima facie showing of arguable First Amendment infringement" to trigger constitutional protection. *Id.* Then, the burden shifts to the government to demonstrate (1) that "the information sought through the subpoenas is rationally related to a compelling governmental interest" and (2) that the subpoena is the least restrictive means possible to obtain it. *Id.*at 350.

The First Amendment protects the right to speak anonymously on the Internet. *Anonymous Online Speakers v. U.S. Dist. Court (In re Anonymous Online Speakers)*, 661 F.3d 1168, 1173 (9th Cir. 2011). As the Supreme Court recognizes:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.

Talley v. California, 362 U.S. 60, 64 (1960). The right to anonymous discourse stems from the Federalist Papers. *Reno v. ACLU*, 521 U.S. 844, 870 (1997). But the Internet has amplified the need to protect this critical right in the 21st Century because it allows anyone to"become a town crier with a voice that resonates farther than it could from any soapbox." *Id.*

This Court should protect anonymous speech on the Internet or citizens risk the "tyranny of the majority" silencing the vocal few. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). If the government can intrude into anonymous speech on the Internet, then the government can investigate critical, but lawful, voices on a whim. *See Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963) (reversing contempt finding in legislative investigation of communism in the NAACP because subpoenas violated First-Amendment rights).

A person can meet the first part of the test—a prima facie showing of arguable First-Amendment infringement—by showing that a subpoena would have a "chilling effect" on the free exercise of expression. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010). Specifically, that "governmental action 'would have the practical effect of discouraging the exercise of constitutionally protected political rights.'" *Id.* (quoting *NAACP*

v. Alabama. ex rel. Patterson, 357 U.S. 449, 461 (1958) (internal citations omitted).

The district court found that Doe satisfied his burden of proving arguable First Amendment infringement by showing that he sought anonymity in order to express protected speech on the Internet. (ER 13-14.) That factual finding is entitled to deference. *Marshall v. Stevens People & Friends for Freedom*, 669 F.2d 171, 176 (4th Cir. 1981).

The SEC argued below that Doe can still express protected speech even if his identity is revealed. But its argument misses the point. Doe has the right to *anonymous* speech. *Anonymous Online Speakers*, 661 F.3d at 1173. The SEC's argument recognizes only the right to speech, but does not respect the tradition that our citizens may express views without revealing their identity. For that reason, the district court properly found that the subpoena could have a chilling effect on free speech. Now the burden shifts to the government.

B. The SEC cannot meet its burden because it has not proven that it needs Doe's identity to further a compelling governmental interest.

Even when pursuing a legitimate interest, the government does not have a "general power to expose where the predominant result can only be an invasion of the private rights of individuals." *Watkins v. United States*,

354 U.S. 178, 200 (1957). Instead, where the government claims to be investigating legal violations, it must demonstrate a "probable cause or nexus" between the information sought and proof of illegal activities. *Gibson*, 372 U.S. at 546.

With administrative subpoenas, the government may only intrude into protected information if it identifies a compelling governmental interest requiring it to do so. *Brock*, 860 F.2d at 349-50. Even then, the government may only intrude by using the least-restrictive means necessary to obtain information. *Id.*, *see also Buckley*, 424 U.S. 1, 68 (1976). If the government can obtain information without invading First-Amendment rights, then it cannot meet its burden and the subpoena must be quashed. *Brock*, 860 F.2d at 349-50.

The SEC asks this Court to give the government a pass as to its burden if it can merely identify a governmental interest in the abstract—rather than prove that the information it seeks will further its specific investigation. Here, the SEC believes it met its burden by asserting that it is investigating potential fraud, and that deterring fraud is a compelling interest. But the SEC must do more than simply assert a general interest in law enforcement.

In *Brock*, this Court reviewed a Labor Department subpoena that sought records from a funding organization related to a labor union. The Labor Department—like the SEC in this case—said that the subpoena would assist it in investigating a potential legal violation. This Court remanded the matter to the district court with instructions that if the subpoena would infringe First-Amendment rights, then the court should require the government to "demonstrate that the information sought through the subpoenas is rationally related to a compelling governmental interest". *Brock*, 860 F.2d at 350 (citing *Buckley*, 424 U.S. at 64). Only if the government could make that showing, then the district court would "determine if the government's disclosure requirements are the 'least restrictive means' of obtaining the desired information." *Id.*

If the SEC were correct that it need only *allege* a possible legal violation, then there would not have been any reason for this Court to remand the *Brock* case. The Labor Department in *Brock*, like the SEC here, claimed to be investigating a possible violation of law. No party challenged whether the Department of Labor was entitled to conduct such an investigation, or that there was a compelling governmental interest in ensuring labor-law compliance. Instead, this Court required the Department

of Labor to present evidence about the substance and merits of its specific investigation.

The Supreme Court rejected the argument that a government agency may proceed with a subpoena that intrudes into First-Amendment rights by merely alleging a general law-enforcement investigation. In *Gibson*, 372 U.S. 539, the Court quashed a legislative subpoena requiring production of the NAACP's membership list as part of an investigation into communist-party activity. Legislatures have a broader grant of investigative authority than administrative agencies like the SEC. *Id.* at 545. A legislature may compel testimony related to "the administration of existing laws as well as proposed or possibly needed statutes, [including] surveys of defects in our social, economic or political system[.]" *Id.*

But the Court held that the legislature was not "free to inquire into or demand all forms of information." *Id.* Instead, a legislature must "show a substantial relation between the information sought and a subject of overriding and compelling state interest." *Id.* at 546. The Court assumed that the Communist Party was subversive and that investigation of Communists was a compelling governmental interest, but held that absent a demonstrated nexus between the NAACP and the Communist Party, there was an insufficient basis to obtain the identity of NAACP members.

By contrast, in *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989), the First Circuit found a compelling governmental interest in protecting nuclear safety sufficient to overcome First-Amendment rights. In that case, an employee told the Nuclear Regulatory Commission that another employee revealed confidential information to a private citizen, and that the conversations were tape recorded. After an Administrative Law Judge reviewed some of the tapes, the Court upheld an administrative subpoena seeking the remainder of the tapes.

This case is distinguished from *Comley* because, here, the SEC presented nothing more than speculation that a legal violation might have occurred. Unlike *Comley*, there is no basis to conclude that the government is engaged in a legitimate investigation, and no basis to determine whether the government's investigative needs outweigh Doe's First-Amendment rights. If this Court follows the public policy underlying *Comley*, then it will protect Doe's civil rights by not allowing the SEC to delve into his private email affairs.

The lower court adopted the SEC's view that the government can overcome First Amendment protections by merely stating that it is investigating fraud. In doing so, the district court relied on *S.E.C. v. Jerry T. O'Brien, Inc.,* 467 U.S. 735, 745 (1984), *United States v. Morton Salt Co.*,

338 U.S. 632, 642-43 (1950), and *EEOC v. Elrod*, 674 F.2d 601, 603 (7th Cir. 1982). But those cases address the scope of an administrative agency's authority to investigate generally, rather than the evidence necessary to intrude into constitutionally-protected areas. (ER 13-14.)

In this case, Doe does not contest the SEC's investigation right. Rather, he challenges the government's intrusion into constitutionally-protected areas without an adequate evidentiary basis. Doe's appeal does not take issue with the SEC's right to investigate, but instead asks this Court to find that the SEC did not present a sufficient reason to invade Doe's First-Amendment right.

The SEC also relied below on *Dole v. Service Employees Union*, 950 F.2d 1456 (9th Cir. 1991) to argue that it may fish for any possible legal violation based on its mere assertion that a subpoena will aid its investigation. In *Dole*, the Department of Labor sought a labor union's records relating to credit-card misuse and altered financial records. At issue was the first part of the test—whether the subpoena's reach would impermissibly chill union members' First Amendment rights, as well as whether the subpoena was overbroad. The *Dole* court did not weigh whether the government met its burden to establish a compelling governmental interest sufficient to overcome an established First Amendment right. Thus,

Dole provides no guidance on the inquiry here: whether the SEC provided sufficient proof of a government interest, and whether there is a substantial relation between that interest and Doe's identity.

Further, the *Dole* court relied on *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972), which undercuts the SEC's position that minimal evidence is required to justify a First Amendment intrusion. In *Branzburg*, the Supreme Court upheld grand-jury subpoenas requiring newspaper reporters to testify about crimes they had witnessed. *Id.* at 700. Here, the SEC presented no evidence that a crime occurred, nor presented any proof that Doe either witnessed or participated in it.

Neither *Brock*, *Comley*, nor any other appellate decision appear to establish what quantum of proof the government must produce before it invades a constitutionally-protected area with an administrative subpoena. In *Anonymous Online Speakers*, 661 F.3d at 1173, this Court approved a summary judgment standard in the closely-related context of civil discovery subpoenas.

Doe does not ask this Court to adopt the summary judgment standard. But this Court should adopt a standard for administrative subpoenas so that the government, citizens, and district courts can determine whether invading a First-Amendment right is appropriate. The Court should require the SEC to

produce admissible evidence that demonstrates a substantial possibility that a violation of law occurred, and that the information sought is rationally related to the investigation of that law violation.

This standard is consistent with the Court's holding in *Brock*, the First Circuit's holding in *Comley*, and other decisions evaluating administrative subpoenas. *Brock*, 860 F.2d 346; *Comley*, 890 F.2d 539; *see also EEOC v. Univ. of Notre Dame Du Lac*, 715 F.2d 331, 338 (7th Cir. 1983)(EEOC can only obtain the identity of academic personnel submitting peer reviews on a particularized showing of need for each identity); *Fed. Election Comm'n. v. La Rouche Campaign*, 817 F.2d 233, 235 (2d Cir. 1987)(FEC prohibited from obtaining identity of campaign contribution solicitors because FEC did not demonstrate rational relationship to investigation of campaign finance fraud). This standard strikes a balance between the SEC's desire to investigate legal violations and the First Amendment right to be free of any intrusion into anonymous free speech.

The SEC's task to establish a foundation for a subpoena in a pump-and-dump scheme is not difficult. The SEC claims that a series of communications violated securities laws. Those communications only did so if they misrepresented a fact, failed to disclose a conflict of interest, or withheld material information. *See United States v. Zolp*, 479 F.3d 715, 717

n.1 (9th Cir. 2007). These are objective facts that the SEC can establish before invading the right to speak anonymously.

The SEC presented evidence only that the Jammin Java stock rose and fell, that communications were made before the rise, and a declaration from one of the SEC's attorneys that Doe's gmail address may have been involved. (ER 63-94.) The SEC did not prove that the communications were false or omitted material information. Indeed, the SEC did not produce the communications at all, let alone produce evidence questioning their contents.

The SEC also failed to establish a nexus between Doe's identity and its investigation. The SEC must establish not only that it is pursuing a legitimate governmental interest, but also that Doe's identity is necessary to that pursuit. *Brock*, 860 F.2d at 350. The SEC's sole evidence that Doe was connected to Jammin Java was a declaration from its attorney that "the SEC has obtained information indicating that the email address 'marketingacesinc@gmail.com' potentially belongs to a touter" in the Jammin Java "scheme" (ER 65.) The attorney's declaration is inadmissible because it does not supply the source of the attorney's belief or the evidence underlying it. The SEC attorney testimony either relies on hearsay, without establishing any exception, or is based on documents without supplying those documents for the court's review in violation of the best evidence rule.

See Fed. R. Evid. 802, 1002. But even if it were admissible, the SEC's evidence is insufficient to allow intrusion into Doe's right to anonymity.

In *Gibson*, the Court reviewed a legislature's intrusion into First-Amendment rights based upon a declaration from an attorney. *Gibson*, 372 U.S. 539. The government lawyer in that case claimed that 14 known communists were members of the NAACP, had participated in meetings, or had contributed money to the NAACP, and that one communist had given a "talk" at an NAACP meeting. 372 U.S. at 552-53.The Supreme Court found the government's declaration insufficient to require production of the NAACP's membership roll to determine if the Communist Party had infiltrated the organization.

Similarly, in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d at 338, the EEOC served an administrative subpoena on a university seeking access to professors' personnel files. After finding a First Amendment interest in peer reviews contained in the personnel files, the Seventh Circuit required the university to redact the names and identifying information of staff members, but allowed the EEOC to obtain redacted information on a showing of need. The court noted that "'exploratory' searches will not be condoned . . . the mere fact that certain information may be relevant or useful does not establish a 'particularized need' for disclosure." *Id*. at 338. .

In this case, the SEC has only shown that it would like to conduct exploratory searches. Like the court in *University of Notre Dame Du Lac*, this Court should not allow that fishing expedition.

Likewise, in *Federal Election Comm'n v. La Rouche Campaign*, 817 F.2d at 235, the Federal Election Commission sought First Amendment protected information while investigating campaign-finance-fraud allegations.The FEC asserted that the LaRouche campaign falsified donation records in order to fraudulently increase its share of federal matching donations. The FEC sought access to the identities of both the persons who made the allegedly false donations, and the names of the persons who solicited them. Although the FEC presented evidence that a fraud occurred and that the solicitor's identity was relevant to the investigation, the Second Circuit held that the FEC failed to demonstrate that its need outweighed First Amendment rights. This Court should find that Doe's First-Amendment rights outweigh the SEC's interest.

The SEC presents no basis for this Court to evaluate whether Doe's identity is relevant. It asserts only conclusion; that Doe *may* be a "touter", without explaining precisely what Doe is alleged to have done, why that is relevant to the SEC's investigation, or the factual basis for the government's belief. Like *Gibson*, *LaRouche*, and *University of Notre Dame*, the SEC has

provided an insufficient evidentiary basis connecting Doe to a legitimate investigation and this Court should instruct the district court to quash the subpoena.

C. The proper remedy is an injunction preventing disclosure of Doe's identity and exclusion of evidence gained from its discovery.

The SEC served a subpoena without a proper basis. This Court has broad discretion to fashion effective relief. *See, e.g., Reich v. Mont. Sulphur & Chem. Co.*, 32 F.3d 440, 443 n.4 (9th Cir. 1994)(noting that return of documents or dismissal of citations issued as a result of improperly-obtained information were potential remedies.) In *FTC v. Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 903 (5th Cir.1978) the Fifth Circuit recognized that exclusion of documents obtained by an administrative subpoena would be a proper remedy if the subpoena was found to be invalid. ("If this case were decided in Gibson's favor, relief would be available by an order requiring the FTC to return the subpoenaed documents and to forbid use of the material in the adjudicatory hearing.") Here, the SEC's subpoena infringed Doe's First Amendment rights when the government seized his anonymity.

Although the SEC can be ordered to return any documents it received from Google, the crucial item obtained is not a document, but rather Doe's

identity. Doe can only be made whole by an order enjoining the SEC from releasing or using his identity, and preventing the SEC from any further investigation based on Doe's identity or the fruit therefrom.

Significant deterrence is required to stop the SEC from violating others' rights in a similar fashion. Government agencies regularly issue subpoenas seeking anonymous email account information without notice to the account holder. Only through the good citizenship of Google did Doe discover the subpoena at all; unknown numbers of other Internet users have had their anonymity stripped on similar improper bases, and countless others may face a similar deprivation if the government can proceed with information obtained through this subpoena.

Alternatively, this Court can remand the matter to the District Court for further fact-finding regarding the SEC's basis to believe securities laws have been violated, and that Doe is involved.

VIII. CONCLUSION

Doe does not dispute the SEC's mandate to pursue securities-fraud investigations. But the government should not be able to invade First-Amendment protections by merely alleging a violation of law. This Court should require the SEC to present admissible evidence that demonstrates a substantial possibility that a violation of law occurred, and that the

information sought is rationally related to the investigation of that legal violation. The SEC's attempt to fish in protected waters without providing a viable evidentiary basis should be denied, and the fruits of that unlawful fishing expedition enjoined.

DATED this 14th day of March, 2012.

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STATEMENT OF RELATED CASES

There are no known related cases.

CERTIFICATE OF COMPLIANCE

I CERTIFY THAT:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 4, 610 words.

DATED this 14th day of March, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 14, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 14th day of March, 2012.

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