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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOES,
Appellants-Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION,
Appellee-Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
(Hon. Charles R. Breyer, United States District Judge)

APPELLEE'S CONSOLIDATED OPENING BRIEF

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. On November 17, 2011, the district court entered orders denying each of the Does' motions to quash. (ER 10-18, 28-36, 46-54).[1] The Does filed timely notices of appeal on November 21, 2011. (ER 95, 137, 183). This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Whether the SEC's investigative need for information identifying the users of email addresses linked to potential violations of the federal securities laws outweighs any First Amendment right in that identifying information?

2. Whether the "exclusionary rule" is applicable to information obtained through an administrative subpoena issued in good faith in the course of a civil investigation if that subpoena is later found to violate a First Amendment right?

COUNTERSTATEMENT OF THE CASE

On August 4, 2011 and August 18, 2011, three parties appearing as "John Doe" filed motions to quash administrative subpoenas that the SEC issued to Google, Inc. (ER 97, 139, 185). The subpoenas sought subscriber identifying

[1] All cites to Excerpts of Record are abbreviated "ER." Pagination of Appellee's supplemental Excerpts of Record begins with the digit following the last page of Appellants' Excerpts of Record. All references to "the Does" are intended to refer collectively to all three Appellant John Does. The Does opening brief is abbreviated "Does Br." and the brief submitted by amicus Electronic Frontier Foundation is abbreviated "Amicus Br."

information associated with email addresses identified by SEC staff as being related to an ongoing securities fraud investigation. (ER 65, 109, 153). The Does objected to production of the requested information on the grounds that it violated their First Amendment rights to anonymous speech.

The motions to quash were related and referred to Magistrate Judge Vadas. On October 4, 2011, Judge Vadas entered orders denying the motions to quash. (ER 1-9, 19-27, 28-45). The Does filed objections to those orders and, on November 17, 2011, District Court Judge Breyer issued an order denying the motions to quash. (ER 10-18, 28-36, 46-54). The district court found that: (1) *Brock v. Local 375, Plumbers Int'l Union*, 860 F.2d 346 (9th Cir. 1988), established the applicable legal standard; (2) the Does' subscriber information implicates a protectable First Amendment interest; and (3) the SEC demonstrated a compelling governmental interest related to the information sufficient to overcome the Does' interests in anonymity and used the least restrictive means of pursuing that interest. *Id*.

On November 21, 2011, each appellant filed a timely notice of appeal seeking review of the district court's order. (ER 95, 137, 183).

On November 28, 2011, the Does asked the district court to enter protective orders or stay enforcement of the administrative subpoenas. (ER 100, 142, 188). The district court orally denied the motions on January 6, 2012, and on January 10,

2012, issued opinions finding that the Does failed to make the necessary showing to justify a stay and that further delay would injure the SEC's investigatory efforts. (ER 196-204, 216-224, 236-244).

On January 10, 2012, the Does filed emergency motions with this Court requesting a stay of discovery to prevent Google's compliance with the SEC's subpoenas. (ER 207, 227, 247). On January 23, 2012, this Court issued an order denying the Does' emergency motion for a stay of discovery. (*Id*.)

In the January 10, 2012 orders denying the Does' motions to stay enforcement of the subpoenas, the district court said it would issue a protective order that would address the protections available to the Does if this Court were to find that the motions to quash should have been granted. Without the benefit of briefing on the matter, the district court stated that it may require the SEC "to demonstrate that all information in the investigation was independently discovered, and not analogous to a 'fruit of the poisonous tree' of the subpoenaed information." (ER 202, 222, 242). On January 13, 2012, the SEC submitted proposed protective orders requiring only that the SEC "return or destroy any document it obtains from Google" in response to the SEC's subpoenas, explaining to the court that the application of the exclusionary rule would be inappropriate under existing precedent. (ER 193-195, 213-215, 233-235). The district court entered the SEC's proposed protective orders as submitted without modifying them

to place any restrictions on information discovered because of the subpoenaed documents. (ER 190-192, 210-212, 230-232). On February 17, 2012, Google produced the subpoenaed subscriber information to the SEC.

COUNTERSTATEMENT OF THE FACTS

On May 13, 2011, the SEC issued a formal order of private investigation entitled *In the Matter of Jammin Java Corp.* (the "Formal Order") directing the SEC staff to investigate potential violations of Sections 5(a), 5(c), 17(a), and 17(b) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder,[2] by Jammin Java and its officers, directors, employees, partners, subsidiaries, consultants, partners, and affiliates as well as "other persons or entities" involved in a possible "pump and dump" scheme in connection with the purchase or sale of Jammin Java securities. (ER 66-68, 108, 154-156).

"Pump and dump" schemes generally "involve the touting of a company's stock (typically microcap companies) through false and misleading statements to the marketplace. After pumping the stock, fraudsters make huge profits by selling their cheap stock into the market." *United States v. Zolp*, 479 F.3d 715, 717 n.1 (9th Cir. 2007) (citing SEC, Fast Answers: Pump and Dump, at http://www.sec.gov/answers/pumpdump.htm).

[2] *See* 15 U.S.C. §§ 77e(a), (c); 77q(a), (b); 78j(b) and 17 C.F.R. § 240.10b-5.

Pursuant to the Formal Order, SEC staff is investigating whether thousands of investors were defrauded out of millions of dollars when they purchased shares of Jammin Java securities at artificially inflated prices based upon potentially fraudulent "touting" in online newsletters that were widely disseminated through blast emails, websites, and investor message boards. (ER 64, 108, 152). The staff is investigating whether the online newsletters touting Jammin Java's stock contained materially misleading information about Jammin Java and its stock and/or failed to accurately disclose the disseminators' financial interests in Jammin Java and the compensation paid to them by Jammin Java, its affiliates, and/or others. (ER 65, 109, 153).

The SEC's investigation has identified several factors indicative of a possible "pump and dump" scheme, including that: (1) Jammin Java is a shell company with no revenue, limited assets, and significant debt (ER 63-94, 107-136, 151-182); (2) between December 1, 2010 and May 13, 2011, Jammin Java's stock price increased from $0.17 per share to $6.35 per share (approximately 3600%), then fell back to $0.65 per share by August 1, 2011 (*id*.); and (3) the increase in Jammin Java's stock price coincided with apparent "touting" of Jammin Java's stock in online newsletters distributed by blast emails, websites, and investor message boards. (ER 64, 108, 152). The SEC, via a declaration and supporting materials submitted by an SEC attorney with personal knowledge of the

investigation, submitted this information to the district court in support of its opposition to the motions to quash the subpoenas. (ER 63-94, 107-136, 151-182).

The SEC is seeking to identify the person or persons responsible for the content and distribution of the online newsletters that touted Jammin Java's stock. (ER 65, 109, 153). During the course of its investigation, the SEC obtained information indicating that individuals using the email addresses "marketingacesinc@gmail.com," "jeffreyhooke@gmail.com," and "aurorapartners@gmail.com" were involved in the touting activity at the heart of the investigation. (*Id.*)

To identify those persons, the SEC, on June 20, 2011, issued an administrative subpoena to Google requesting identifying information for the customer associated with the email address "marketingacesinc@gmail.com." (ER 58-60). Similar subpoenas were issued on June 21, 2011 and June 30, 2011 requesting information identifying the customers associated with the email addresses "jeffreyhooke@gmail.com" (ER 149-150) and "aurorapartners@gmail.com." (ER 109). The subpoenas were issued in accordance with the Electronic Communications Privacy Act ("ECPA"), *see* 18 U.S.C. § 2703(c)(2), requested only specified subscriber information, and did not seek the content of any email messages except those between the Does and Google. (ER 58-60, 109, 149-150).

The user(s) of "marketingacesinc@gmail.com" and "jeffreyhooke@gmail.com" stated in declarations that those email addresses are used "to communicate anonymously over the Internet, including publishing my opinions in online fora." (ER 55, 146). The user of "aurorapartners@gmail.com" stated in a declaration that he uses that email address to "speak anonymously on the Internet," and to "post my opinions on various political blogs, including about policies of specific members of the U.S. Congress." (ER 103). None of the Does has provided further information regarding past or future use of their respective email addresses.

SUMMARY OF ARGUMENT

The parties agree that *Brock v. Local 375, Plumbers Int'l Union of America*, 860 F.2d 346 (9th Cir. 1988), sets forth the analytical framework for evaluating whether an administrative subpoena that potentially infringes on a protected First Amendment interest should be enforced. The *Brock* analysis proceeds in two steps: first, the party opposing enforcement must demonstrate prima facie infringement of a protected First Amendment interest; second, if that showing is made, the burden shifts to the government to demonstrate that the subpoenaed information is rationally related to a compelling governmental interest and that the disclosure requirements are the least intrusive means available to obtain the requested information. *Id*. at 350. The Does have failed to demonstrate the

"chilling" of their speech rights necessary to state a prima facie case. Without this showing of infringement, the Does cannot satisfy their burden under *Brock*.

Even if the Does were able to demonstrate infringement, the SEC has demonstrated the existence of a legitimate investigation into possible securities fraud related to the trading of Jammin Java's common stock, and investigating potential wrongdoing is a "compelling governmental interest." *Dole v. Service Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1461 (9th Cir. 1991). Additionally, the SEC established a nexus between its interest in investigating fraud in the trading of Jammin Java's securities and the email subscriber information sought in its Google subpoenas: information linking the Does' Gmail addresses to media used to tout Jammin Java's stock. By seeking only subscriber information, the SEC has also used the least intrusive means available.

The Does fail to justify their contention that, in order to satisfy *Brock*, the SEC should provide evidence that a violation of the law occurred and should provide additional evidence of the relationship between the information sought and its investigation. This requirement would impose inappropriate and unnecessary burdens on the SEC because the SEC has the clear authority to investigate *possible* violations of the federal securities laws and has established the necessary link between its investigation and the subpoenaed information.

Finally, the Does ask this Court to take the unprecedented step of precluding the SEC from using any information obtained in response to the subpoenas to further its ongoing Jammin Java investigation if this Court reverses the district court decision. This request should be denied because it is inconsistent with established law and contrary to the limited deterrent purpose underlying the "exclusionary rule."

STANDARD OF REVIEW

"The Ninth Circuit 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).

ARGUMENT

I. THE SEC'S SUBPOENAS SHOULD NOT BE QUASHED BECAUSE THE DOES HAVE NOT SHOWN THAT THE SUBPOENAS INFRINGE ON ANY FIRST AMENDMENT RIGHTS AND, IN ANY EVENT, THE SEC ESTABLISHED THAT THE SUBPOENAS ARE RATIONALLY RELATED TO A COMPELLING GOVERNMENTAL INTEREST.

The SEC serves a critical role in maintaining investor confidence in U.S. securities markets. One aspect of this role is investigating and prosecuting fraud committed in the purchase or sale of securities. Administrative subpoenas issued in the course of an SEC investigation into such fraud are presumptively enforceable where the investigation is conducted "pursuant to a legitimate purpose," the "inquiry [is] relevant to th[at] purpose," and statutory procedures are

followed in issuing the subpoena. *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *see also Garner*, 126 F.3d at 1142-43 (subpoena enforceable where (1) Congress has granted authority to investigate, (2) procedural requirements have been followed, and (3) the evidence sought is "relevant and material to the investigation").

In the Ninth Circuit, this presumption is subject to additional scrutiny when an administrative subpoena potentially infringes on a protected First Amendment right. *See Brock*, 860 F.2d 346. Under the *Brock* analysis, the party opposing enforcement must demonstrate prima facie infringement of a protected First Amendment interest; if that showing is made, the burden shifts to the government to demonstrate that the subpoenaed information is rationally related to a compelling governmental interest and the disclosure requirements are the least intrusive means available to obtain the requested information. *Id*. at 350.

A. The Does Have Not Made A Prima Facie Showing of Infringement of Their First Amendment Rights.

Under *Brock*, an individual who believes that an administrative subpoena issued during an agency investigation will infringe on his First Amendment rights must make a "prima facie showing of arguable first amendment infringement." *Brock*, 860 F.2d at 349. In determining whether infringement may occur, a court first decides whether a protectable First Amendment right exists. Once a protectable First Amendment right is found to exist, the individual's prima facie

showing of infringement must be established with "objective and articulable facts, which go beyond broad allegations or subjective fears." *Id.* at 350 n.1. The individual must demonstrate that governmental action would discourage the exercise of First Amendment rights. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1159-1160 (9th Cir. 2010) (noting that the Constitution provides protection "when governmental action would have the practical effect of discouraging the exercise of constitutionally protected political rights" (internal quotations omitted)).

This Court has recently recognized that anonymous speech on the Internet is a protectable First Amendment right. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011). Here, the Does claim that they use the Gmail addresses at issue to communicate anonymously on the Internet (ER 55, 103, 146), and the district court found this showing sufficient to establish that the Does "articulated a free speech interest in the subscriber information." (ER 14, 32, 50).

The district court did not, however, make any finding with respect to whether the Does made a showing that enforcement of the subpoenas would infringe their First Amendment rights. It apparently conflated the recognition of a protectable right with the infringement of that right. (ER 13-14, 31-32, 49-50).[3]

[3] The Does argue that the district court found that they established a prima facie case of First Amendment infringement, but this argument is not supported by the district court's order. (ER 13-14, 31-32, 49-50). The court merely concluded that the Does showed a First Amendment interest. *Id.* In addition, the Does also wrongly assert that this alleged "finding" is a factual, rather than a legal,

But *Brock* makes clear that these are two separate considerations. In *Brock*, the government served subpoenas seeking information about an entity, and that entity challenged the subpoenas on the ground that the subpoenas would chill the First Amendment rights of free association of the entity's members. This Court held that the entity was "an association to which first amendment rights attach," but before finding that enforcing the subpoenas would infringe on those rights, the Court required the entity to show that "enforcement of the subpoenas w[ould] result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest[ed] an impact on, or 'chilling' of, the members' associational rights." *Brock*, 860 F.2d at 349-50; *see also Dole*, 950 F.2d at 1460 (describing detailed information provided to support prima facie case of infringement).

Here, far from presenting "objective and articulable facts" to substantiate their infringement claims, each of the Does provides only broad allegations that they "desire to protect [their] privacy" (ER 55, 146) and "made political statements under the belief that [their] anonymity w[ould] be protected." (ER 103). The Does are silent as to how the disclosure of their subscriber information would lead to "consequences which objectively suggest an impact on, or 'chilling' of" their First

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conclusion entitled to deference. Does Br. at 10. Because the determination by a district court that a prima facie case has been established is a legal determination, it should be reviewed de novo by this Court. *Garner*, 126 F.3d at 1142.

Amendment rights. *Brock*, 860 F.2d at 349-50. They do not state any objective fears (or even subjective fears for that matter) concerning the possible consequences that could occur if their subscriber information were provided to the SEC. That is, they have not identified how Google's compliance with the subpoenas would lead to harassment as a result of any prior statements they have made or would prevent or discourage them from making future statements, either through these email addresses or others they could easily acquire. It is not surprising that the Does have not shown such potential harm as the SEC seeks the information in connection with a non-public investigation (*see* 17 C.F.R. § 203.5), and the SEC's interest in the Does' email addresses relates only to their connection to possible securities fraud. Thus, the Does cannot show that Google's compliance with the SEC's subpoenas would infringe on any First Amendment interests.

In the absence of any evidence suggesting infringement of the Does' First Amendment interests from enforcement of the SEC's subpoenas, the Does have failed to satisfy the first prong of the *Brock* analysis.

B. The SEC's Subpoenas Seek Information that Is Rationally Related to A Compelling Governmental Interest and Are Narrowly Tailored.

Even if the Does had made a prima facie showing of First Amendment infringement, the district court correctly denied the motions to quash. Once a prima facie case is established, the burden shifts to the government to show

(1) "that the information sought through the subpoenas is rationally related to a compelling governmental interest," and (2) that "the government's disclosure requirements are the 'least restrictive means' of obtaining the desired information." *Brock*, 860 F.2d at 350. The SEC provided evidence that satisfies this burden.

1. The information being sought by the SEC is rationally related to a compelling governmental interest. As this Court recognized in *Dole*, 950 F.2d at 1461, "there is little doubt that . . . investigating possible [statutory violations] serves a compelling governmental interest." *See also United States v. Comley*, 890 F.2d 539, 545 (1st Cir. 1989) ("The requirement of a compelling interest is met by the NRC's mission to promote nuclear safety.").[4] Here, the SEC is investigating possible violations of the Securities Act and the Exchange Act. The Exchange Act empowers the SEC to "make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter [or] the rules or regulations thereunder" and to demand to see any papers "the Commission deems relevant or material to the inquiry." 15

[4] The Does assert that if investigating possible legal violations were sufficient to demonstrate a "compelling governmental interest," the *Brock* Court would not have remanded that case to the district court to determine whether the parties had met their burdens under the newly-announced standard. *See* Does Br. at 11-12. The Does, however, provide no reason to believe that the district court had addressed the compelling governmental interest prong, or that the parties had raised that issue on appeal. To the contrary, it appears that the only issue before the *Brock* Court was whether the movant could assert a First Amendment right. It was proper for this Court to remand the case to the district court to evaluate the compelling governmental interest prong in the first instance.

U.S.C. § 78u(a),(b); *see also* 15 U.S.C. § 77s(c) (authorizing all investigations that "are necessary and proper" for enforcement of the Securities Act). Importantly, the SEC may properly investigate even when it has only a *suspicion* of wrongdoing. The Supreme Court has held that the "provisions vesting the SEC with the power to issue and seek enforcement of subpoenas are expansive," and the "SEC often undertakes investigations into suspicious securities transactions without any knowledge of which of the parties involved may have violated the law." *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743, 749 (1984).

Pursuant to this investigative power, the SEC issued its Formal Order directing SEC staff to investigate possible violations of the Securities Act and the Exchange Act related to the suspicious trading of Jammin Java's securities. (ER 66-68, 108, 154-56). As stated in the declaration of an SEC attorney with personal knowledge of the investigation,[5] the SEC identified, and submitted to the district

[5] The Does claim that the declaration violates the hearsay rule and/or the best evidence rule because it does not include the underlying testimony or documents collected in the course of the SEC's investigation. This contention is incorrect. The declaration describes, based on the attorney's personal knowledge, relevant information about the SEC's investigation and the subpoenas issued to Google; it does not purport to establish any violations of the securities laws or that the Does are the touters. Thus, the underlying documents are not necessary to address the issue the declaration seeks to establish, and neither the hearsay rule nor the best evidence rule is implicated. *See, e.g.*, *Garner*, 126 F.3d at 1142-43 (affidavit from a government official is sufficient to make prima facie showing that the investigation is authorized, the information sought is relevant to the investigation, and that procedural requirements have been followed); *Comley*, 890 F.2d at 541 (same).

court, evidence indicating possible fraudulent activity, including that: (1) Jammin Java is a shell company with no revenue, limited assets, and significant debt; (2) between December 1, 2010 and May 13, 2011, Jammin Java's stock price increased from $0.17 per share to $6.35 per share (an increase of approximately 3600%), then declined to $0.65 per share (down nearly 90% from its peak) by August 1, 2011; and (3) the increase in Jammin Java's stock price coincided with apparent "touting" of Jammin Java's stock in online newsletters distributed by blast emails, websites, and investor message boards. (ER 63-94, 107-136, 151-182). Additionally, during the Magistrate Judge's October 4, 2011 hearing, in response to a question from Judge Vadas, the SEC provided information about the investigative steps that led from the newsletters used to tout Jammin Java's stock to the Does' Gmail addresses. (ER 262, Tr. at 13:9-19). No additional information was requested by Judge Vadas or Judge Breyer.[6] Thus, as the district court found, the SEC has demonstrated a compelling governmental interest in investigating possible securities fraud.

Equally important to satisfying *Brock*, the SEC demonstrated, and the district court found, a rational relationship between the SEC's Jammin Java investigation and the email subscriber information sought by its Google subpoenas. (ER 15, 33, 51); *Brock*, 860 F.2d at 350. In the course of their investigation, SEC

[6] The SEC offered to provide supplemental information to the district court *in camera*; however, no such request was made.

staff identified the Does' Gmail accounts as email addresses potentially used by individuals involved in touting Jammin Java's stock. These email links are critical because the fraud under investigation is an Internet-based "pump and dump" scheme, facilitated in part by dissemination of potentially misleading information via email. To identify the individuals behind "marketingacesinc@gmail.com," "aurorapartners@gmail.com," and "jeffreyhooke@gmail.com," the SEC issued the administrative subpoenas at issue in this appeal. Therefore, the customer identifying information for those Gmail addresses is directly related to a core element of the SEC's investigation.

2. The SEC also used the "least restrictive means" to obtain the requested information. *Brock*, 860 F.2d at 350. The SEC's subpoena requests only the email subscriber information specified in Title II of the Electronic Communications Privacy Act (18 U.S.C. § 2703(c)(2)) and does not seek the content of any email sent to or from "marketingacesinc@gmail.com," "aurorapartners@gmail.com," or "jeffreyhooke@gmail.com," except those sent to or from Google. (ER 58-60, 109, 149-150). This identifying information will assist the SEC in uncovering the identities of persons who may be responsible for the creation or dissemination of online newsletters used to facilitate the alleged fraud.

In light of the evidence provided by the SEC supporting issuance of the subpoenas, the district court correctly denied the motions to quash.

C. The SEC Is Not Required to Provide Additional Evidence.

1. The Does Fail to Explain Why Additional Evidence Is Necessary.

In light of the evidence provided by the SEC, the Does cannot dispute that the SEC is conducting a legitimate investigation of possible violations of the federal securities laws relating to an apparent "pump and dump" scheme. They also do not provide any facts that call into doubt the fact that the SEC issued the subpoenas to Google because the SEC has information indicating that the Gmail addresses may belong to potential touters. In addition, the Does acknowledge that under *Brock* the SEC can obtain the information it seeks, regardless of any First Amendment interest, if that information is rationally related to a compelling governmental interest and the SEC has used the least restrictive means of obtaining the information. Does Br. at 8.

The Does nonetheless argue that the subpoenas should be quashed. They argue that to show a compelling governmental interest and a rational relationship between the information sought and that interest, the SEC must provide additional evidence showing a substantial possibility that a violation of the federal securities laws has occurred and detailing the relationship between the email addresses and the violation of the law. Does Br. at 16-17.

The Does, however, fail to establish that any additional evidence is necessary in this case. They argue that the government cannot satisfy *Brock* by

simply making an allegation of potential wrongdoing (Does Br. at 7), but the SEC has provided more than general allegations; it has described its basis for investigating potential wrongdoing and has provided a declaration from an attorney conducting the investigation stating that the SEC has evidence that the Gmail addresses may belong to touters. The Electronic Frontier Foundation amicus brief suggests that evidence is needed "to ensure that allegations of misconduct are not used as a pretext to intrude upon constitutionally-protected spaces" (Amicus Br. at 2), but the information the SEC has provided is more than sufficient to show that its need for the subpoenaed information is not pretextual. Indeed, the Does have never contended that the SEC has any reason other than conducting a legitimate investigation for seeking subscriber information about the Does. The Does also have not argued that the touts are protected speech that cannot be investigated, nor could they, as the First Amendment does not protect fraudulent speech, *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003), and cannot be used to "escape lawful governmental investigation," *Brock*, 860 F.2d at 349.

2. Additional Evidence Demonstrating that A Violation of Law Has Occurred Is Not Required Where A Government Agency Has Authority to Investigate Potential Violations of Law.

The Does initially contend that the SEC should be required to provide evidence "that demonstrates a substantial possibility that a violation of law occurred." Does Br. at 17. Such evidence is not necessary here because, as

explained above, the SEC has authority to investigate to determine *whether* a violation has occurred, and there is a compelling governmental interest in allowing such investigations to occur. Moreover, were this the standard, government investigations of all kinds would be thwarted because staff would rarely be in the position at the early stages of their inquiries to establish the violations they are investigating. Thus, it is only necessary that the SEC show a legitimate basis for an investigation.

In addition, requiring the SEC to provide evidence of wrongdoing at the investigative stage could compromise its investigation. SEC investigations are non-public, and disclosing just what information the SEC has and what its theories of wrongdoing are could allow witnesses to impede or obstruct that investigation. *See Jerry T. O'Brien, Inc.*, 467 U.S. at 750 (disclosing the progress of an SEC investigation "would enable an unscrupulous target to destroy or alter documents, intimidate witnesses, or transfer securities or funds so that they could not be reached by the Government"); *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998) (public disclosures about investigation could result in destruction of evidence and chilling and intimidation of witnesses).

Further, the relevant case law does not support the Does' argument. The Does' suggestion that the SEC provide evidence that a violation of law has occurred does not come from cases regarding subpoenas issued in government

investigations but rather from cases between private litigants where the plaintiff is seeking the identity of someone who has anonymously posted information on the Internet or sent emails criticizing that person. *See* Amicus Br. at 9 & n.3 (citing defamation and similar types of cases where courts have required plaintiffs to provide an evidentiary basis to support their legal theories). Those cases address the concern that people who have anonymously stated their opinions without engaging in any wrongdoing should not be subject to frivolous lawsuits by persons, generally the subjects of the statements, who may wish to harass or embarrass the speakers as a result of the statements. *See id.* at 7-8 (quoting *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999)).

The situation in this case is very different. First, the cases relied on by the Does involve civil discovery, which courts oversee. A court's role is different when a government agency issues an investigative subpoena. *See Powell*, 379 U.S. at 57 (because a federal agency can "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not," federal law enforcement agencies are different than civil litigants engaging in discovery); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 72 n.26 (1984) (stating, in a case concerning enforcement of an EEOC subpoena, "any effort by the court to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error"). Second, and more importantly, the SEC is not

interested in any protected speech of the Does; it is interested in potentially fraudulent touts, and the Does have not alleged that they are seeking to protect a right to make those touts. The subpoenas at issue seek subscriber information and do not seek the content of any email other than email between Google and the Does.

The Does also contend that requiring evidence that a violation of the law occurred is "consistent" with several cases addressing administrative subpoenas. Does Br. at 17. But those cases establish no such principle. In three of the cases – *Brock*, *Comley*, and *Federal Election Comm'n v. LaRouche Campaign* – there is nothing suggesting that anything more than a declaration from a government official explaining the basis for the investigation is necessary.[7] The fourth and final case, *EEOC v. University of Notre Dame Du Lac*, 715 F.2d. 331, 338-39 (7th Cir. 1983), suggests that the Equal Employment Opportunity Commission ("EEOC") should have some evidence of wrongdoing before it can obtain

[7] *See Brock*, 860 F.2d at 350 (requiring that the government "demonstrate" relationship of information sought to compelling governmental interest; no discussion of providing evidence of a violation); *Comley*, 890 F.2d at 542 (the evidence submitted in support of a Nuclear Regulatory Commission subpoena was an affidavit from a government official stating that "the information he has received thus far leads him to *suspect* that the NRC employee under investigation *may* have received relevant information from Comley") (emphasis added); *Federal Election Comm'n v. LaRouche Campaign*, 817 F.2d 233, 235 (2d Cir. 1987) (stating that the government was investigating a "campaign's *suspected* use of credit card fraud to obtain loans and contributions that may not have been authorized at all") (emphasis added).

information from academic peer reviews protected by a qualified privilege. However, that case is not a First Amendment case and is based on a premise – that a peer review privilege exists – later rejected by the Supreme Court. *See University of Pennsylvania v. EEOC*, 493 U.S. 182, 190-192 (1990) (refusing to recognize a privilege for peer review process). The Supreme Court also subsequently held that courts must be deferential in reviewing subpoenas issued by the EEOC, suggesting that the *Notre Dame* court's treatment of the EEOC's investigative subpoena was not proper. *See Shell Oil Co.*, 466 U.S. at 68-72.

3. Additional Evidence Regarding the Subpoenaed Information and the SEC's Investigation Is Not Necessary to Supplement the Rational Relationship the SEC Has Demonstrated.

The Does also argue that the SEC should provide more evidence to prove that the subscriber information it seeks is rationally related to its investigation. Does Br. at 17. However, none of the cases they cite demonstrates additional information is needed here.

In *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963), the Supreme Court considered whether a subpoena that the Florida state legislature issued to the Miami chapter of the N.A.A.C.P. ordering it to produce membership records was enforceable. The legislature's concern was that the Communist party had infiltrated the N.A.A.C.P. The Court held that the subpoena should not have been enforced because the legislature did not provide any reason

to believe that the Communist party had infiltrated the N.A.A.C.P. *Id*. at 555. The Court's decision not to enforce the subpoena was not based on the quantum of evidence proffered, but on the fact that the evidence did not demonstrate the necessary connection between the N.A.A.C.P. and Communist activities. In addition, the quantum of information considered in *Gibson* reveals nothing about what is necessary here because the two situations are entirely different.

The second case on which the Does rely is *Notre Dame*, which, as discussed above, is of limited relevance here. In any event, in *Notre Dame*, the EEOC was seeking extensive documentation relating to tenure decisions at a university, and the Seventh Circuit held that the EEOC had not established a particularized need for the documentation it sought; the EEOC seemed to be engaged in a fishing expedition. *Notre Dame*, 715 F.2d at 338-39. That concern does not apply here, where the SEC is seeking subscriber information for three specific Gmail accounts and has explained that those Gmail accounts could belong to the touters.

The final case on which the Does rely is *LaRouche*. In that case, the Federal Election Commission ("FEC") was investigating whether a political campaign used credit card fraud to obtain loans and contributions that were not authorized. *LaRouche,* 817 F.2d at 235. The court allowed the FEC to obtain a list of contributors to the campaign because the contributors could say whether they made the claimed donations. *Id.* The court, however, did not allow the FEC to obtain

the names of people who had solicited contributions because the FEC had not explained its need for those names if it had the contributors' names. *Id.* Nothing in the opinion suggests that the FEC needed to do anything more than the SEC has done here to establish a rational relation between the information sought and the matter being investigated.

The Does also cannot justify a request for more information on the ground that they need to verify the truth of the investigator's assertions. As addressed above, the Does have not pointed to any authority showing that evidence other than a declaration from a government official familiar with the case is required. In addition, the Does have not pointed to any reason to question the information provided by the SEC. Affidavits of government officials are generally accorded a presumption of good faith until some evidence is presented to support a contention of a lack of good faith. *See, e.g.*, *Fortney v. United States*, 59 F.3d 117, 121 (9th Cir. 1995) (finding that the IRS could support a petition to enforce a subpoena by submitting the sworn declaration of a revenue agent, and no additional evidence was needed unless the taxpayer submitted evidence demonstrating a lack of good faith); 12 U.S.C. § 3410(b) (providing that a customer challenge to a government subpoena to a bank can generally be determined on the basis of a "sworn response" from the government). The government declarations here are similarly entitled to a presumption of good faith, and there is no need for the SEC to provide additional

evidence regarding the investigative steps it took and information it gathered to find a link between the Gmail addresses and the touts it is investigating.

II. THE "EXCLUSIONARY RULE" DOES NOT APPLY TO AN ADMINISTRATIVE SUBPOENA ISSUED IN GOOD FAITH IN A CIVIL ENFORCEMENT INVESTIGATION.

The Does ask this Court, should they prevail in this appeal, to take the unprecedented step of precluding the SEC from using any information obtained as a result of its subpoenas. The district court previously considered and rejected a similar restriction, and this Court should do the same because it is not supported by established precedent and is contrary to public policy.

The Does' sole basis for asking this Court to preclude the SEC's use of the subpoenaed information is their oft-stated but unsupportable contention that the SEC's subpoenas lack sufficient evidentiary support. Does Br. at 21. Even if this Court ultimately determines that the SEC failed to satisfy the *Brock* analysis, the SEC's actions – issuing civil subpoenas in good-faith reliance on long-standing precedent – do not represent the type of harm at which the exclusionary rule is directed.

The Does do not cite a single precedent supporting application of the exclusionary rule to a First Amendment violation. Likewise, while the rule has been applied to address violations of Fourth, Fifth and Sixth Amendment rights, counsel for the SEC has found no authority for its application to an alleged First

Amendment violation. *See United States v. Alvaredo-Torres*, 45 F. Supp.2d 986, 994 (S.D. Cal. 1999) (exclusionary rule applies to violations of the Fourth, Fifth and Sixth Amendments); *United States v. Korbe*, 2010 WL 2776337, at *6 (W.D. Pa. July 14, 2010) (same; rejecting application of exclusionary rule to alleged First Amendment violation).

In addition, the Supreme Court has "generally held the exclusionary rule to apply only in criminal trials," and has repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials. *See Pennsylvania. Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363-65 n.4 (1998) (listing examples). While this Court has applied the exclusionary rule in a civil deportation matter, it did so only upon finding that the law enforcement personnel had committed "egregious" Fourth Amendment violations. *See Lopez-Rodriquez v. Mukasey*, 536 F.3d 1012, 1018 (9th Cir. 2008).

In determining the reach of the exclusionary rule, the Supreme Court has "held it to be applicable only where its deterrence benefits outweigh its 'substantial social costs,'" including the cost of "preclud[ing] consideration of reliable, probative evidence." *Pennsylvania. Bd. of Probation and Parole*, 524 U.S. at 363-364 (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)). Thus, the exclusionary rule does not apply where law enforcement personnel reasonably believe their actions to be lawful. *See Leon*, 468 U.S. at 906 (refusing to apply rule

where law enforcement personnel reasonably relied on a search warrant that was later deemed invalid); *Illinois v. Krull*, 480 U.S. 340, 349-350 (1987) (refusing to apply rule where law enforcement personnel reasonably relied on a statute later deemed unconstitutional).

Here, there is no misconduct to deter. The SEC issued its subpoena pursuant to Section 2703(c)(2) of the ECPA, 18 U.S.C. § 2703(c)(2). Additionally, the district court's denial of the motions to quash at a minimum shows that SEC staff has reason to believe seeking the subscriber information is constitutional and in accord with controlling Ninth Circuit precedent. (ER 10-18, 28-36, 46-54). Under these circumstances, applying the exclusionary rule to preclude the SEC from using the subpoenaed information "'will not further the ends of the exclusionary rule in any appreciable way.'" *Krull*, 480 U.S. at 349 (quoting *Leon*, 468 U.S. at 920).

The Does have failed to provide any support for their requested relief, proffering only a single case, *FTC v. Gibson Products of San Antonio, Inc.*, 569 F.2d 900 (5th Cir. 1978). In *Gibson Products*, the court stated that an appeal from an order declining to quash a subpoena was not mooted by compliance with the subpoena because, theoretically, the requested documents could be returned or the FTC could be precluded from using them in an enforcement action. *Id*. The court did not address the application of the exclusionary rule or suggest that it would

apply in civil contexts. Moreover, *Gibson Products* pre-dates the Supreme Court's current approach to application of the exclusionary rule, and imposition of the rule in the context of a civil administrative adjudication does not comport with the prevailing limited, deterrence-based doctrine. *See, e.g., Leon,* 468 U.S. at 907; *Krull,* 480 U.S. at 349-350.

CONCLUSION

For the reasons set forth above, the SEC asks this Court to affirm the district court's denial of the Does' motions to quash the administrative subpoenas issued to Google.

Dated: May 4, 2012

/s/ Melinda Hardy

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STATEMENT OF RELATED CASES

Appellee is not aware of any 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 proportionally spaced, has a typeface of 14 points or more and contains 6,821 words.

DATED this 4th day of May, 2012.

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