Matthew Zimmerman, Esq. (SBN 212423)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993
Email: mattz@eff.org

David M. Given, Esq. (SBN 142375)
Nicholas A. Carlin, Esq. (SBN 112532)
PHILLIPS, ERLEWINE & GIVEN LLP
50 California Street, 35th Floor
San Francisco, California 94111
Telephone: (415) 398-0900
Facsimile: (415) 398-0911

Attorneys for Defendant-Movant JOHN DOE "STOKKLERK"

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CV 09 80275 MISC SI

USA TECHNOLOGIES, INC., Plaintiff-Respondent, vs. JOHN DOE, a.k.a. "STOKKLERK" Defendant-Movant.	Docket No. _____ MISC **NOTICE OF MOTION AND MOTION OF DEFENDANT-MOVANT JOHN DOE "STOKKLERK"'S MOTION TO QUASH THE SUBPOENA TO YAHOO! INC. SEEKING IDENTITY INFORMATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH** DATE: TBD TIME: TBD COURTROOM: TBD

NOTICE OF MOTION AND MOTION

TO PLAINTIFF-RESPONDENT USA TECHNOLOGIES, INC., AND ALL COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that Defendant-Movant John Doe, a.k.a "stokklerk," hereby moves the District Court in the Northern District of California to quash the Subpoena issued by Plaintiff-Respondent USA Technologies on or around September 24, 2009, to non-party company Yahoo! from the Northern District of California (in which Yahoo! is located) seeking stokklerk's identity and other related information. The subpoena was issued in support of a civil action filed in the District Court for the Eastern District of Pennsylvania on or around August 27, 2009, captioned USA Technologies v. John Doe and Jane Doe Anonymous Bloggers Operating as Michael_Moore_Is_Fat and Stokklerk, Case No. 09-3899. A hearing date and time at which the Motion will be heard are to be determined.

As discussed in the Memorandum below, USA Technologies' Subpoena fails to meet the First Amendment requirements demanded of litigants attempting to use the discovery process to obtain identity-related information regarding anonymous online speakers. This Motion, made pursuant to FED. R. CIV. P. 45(c) and CAL. CIV. PROC. CODE § 1987.1, is based this Notice; on the attached Memorandum of Points and Authorities; all accompanying declarations and exhibits; and on such argument as may be received by this Court. Defendant-Movant stokklerk respectfully requests that this Court grant its Motion and quash the Subpoena of September 24, 2009, issued by Plaintiff-Respondent USA Technologies.

DATED: October 15, 2009

By _____

Matthew Zimmerman, Esq. (SBN 212423)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

Attorneys for Defendant-Movant
JOHN DOE "STOKKLERK"

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

I. INTRODUCTION

Pursuant to FED. R. CIV. P. 45(c) and CAL. CIV. PROC. CODE § 1987.1, a pseudonymous online speaker ("stokklerk," "Defendant-Movant," or "Defendant") who criticized the consistently poor performance of the stock and management of a publicly traded company (USA Technologies Inc.) hereby moves to quash the company's discovery subpoena issued from this Court on or around September 24, 2009,[1] to Yahoo!, Inc., ("Yahoo!") which seeks the speaker's identity and other related information.

Plaintiff USA Technologies Inc. ("USA Technologies," "Plaintiff-Respondent," or "Plaintiff") is, according to its 2009 annual Securities and Exchange Commission report ("Annual Report"),[2] a corporation in ghastly financial shape. The company, which has never been profitable, has been losing more than $10 million annually for several years in a row, has an accumulated deficit of more than $170 million, and has seen its stock price plunge more than 99% over the last decade. See, e.g., Annual Report at p. 21. Moreover, USA Technologies indicates in its Annual Report that there is little reason to believe that it will be profitable in the future. Id. Despite this poor performance, and its acknowledgement that it has no plans to ever issue stock dividends, USA Technologies persists in paying its top personnel lavish salary, bonus, and option packages. See, e.g., Annual Report at pp. 26, 44-60. As expected, USA Technologies has been heavily criticized in public for its poor performance and its generous executive compensation package, including on messages boards such as those made available by Yahoo!. Instead of taking the criticisms to heart, or at the very least treating the attacks as the constitutionally-protected opinions that they are, USA Technologies chose to sue in order to use the Court's subpoena power to obtain the identities of its critics. As discussed below, the First Amendment provides a clear prohibition against such fishing expeditions aimed at outing critics.

---

[1] As USA Technologies attached a blank proof of service to the subpoena issued to Yahoo!, the date and manner of service on Yahoo! is not clear. The (unsigned) subpoena is dated September 24, 2009. See Exhibit B to the Declaration of Matthew Zimmerman ("Zimmerman Decl.").

[2] USA Technologies' 2009 Form 10-K Annual SEC Report, http://www.sec.gov/Archives/edgar/data/896429/000118811209002061/t66291_10k.htm.

II. PROCEDURAL HISTORY

On August 27, 2009, Plaintiff USA Technologies filed a Complaint in the U.S. District Court for the Eastern District of Pennsylvania, Case No. 09-3899, against two pseudonymous speakers who criticized the company on an online message board[3] hosted by Internet company Yahoo! and dedicated to Plaintiff's company.[4] See Exhibit A to Zimmerman Decl. The Complaint identified two causes of action. In Count I, a claimed violation of the Securities Exchange Act, 15 U.S.C. § 78j(b), and its corresponding regulation, 17 C.F.R. § 240.10b-5, Plaintiff alleges that Defendant "stokklerk"[5] made "false and fraudulent misrepresentations and statements in an attempt to manipulate the stock market price of USAT stock." Id. at ¶ 13. In Count II, Plaintiff alleges stokklerk made certain "false and defamatory" statements. Id. at ¶ 22.

On or around September 24, 2009, Plaintiff issued a subpoena[6] to non-party company Yahoo! from the Northern District of California, in which Yahoo! is located, seeking the identities of the two pseudonymous speakers implicated in its Complaint. Specifically, the subpoena seeks the following information:

> All documents which will identify the individual(s) operating as user identification "michael_moore_is_fat" and "stokklerk," who have posted messages on Yahoo!'s email message board for USA Technologies, Inc., including but not limited to the following for each of the individuals: names, addresses, email addresses, instant messenger client information, telephone numbers, protocol internet logs and internet service provider addresses.

Exhibit B to Zimmerman Decl.

On or around September 30, 2009, Yahoo! notified stokklerk of its receipt of the subpoena, indicating that if the user did not file a motion to quash within "15 days from the date of this notice" that it would respond to the subpoena. Accordingly, and because the statements attributed

---

[3] "Yahoo! Finance offers message boards for more than 6,000 stocks." See Introducing the New Yahoo! Finance Stock Message Board, YAHOO!, http://biz.yahoo.com/promo/mbbeta.html (last visited October 9, 2009).

[4] The Yahoo! message board dedicated to Plaintiff USA Technologies is located at http://messages.finance.yahoo.com/mb/usat.

[5] This motion to quash is brought only on behalf of Defendant stokklerk.

[6] Plaintiff filed a motion before the District Court in the Eastern District of Pennsylvania seeking permission to issue a subpoena to non-party Yahoo! Inc. ("Yahoo") before the holding of the Rule 26(f) conference. On September 10, 2009, the Court granted the motion. See Exhibits C and D to Zimmerman Decl.

to him[7] are not actionable, stokklerk now files his motion to quash Plaintiff's subpoena in order to protect his identity.

III. LEGAL STANDARD

Under the Federal Rules, a court may quash a subpoena if the subpoena "requires disclosure of privileged or other protected matter" or "subjects a person to undue burden." FED. R. CIV. P. 45(c)(3)(A)(iii), (iv). See, e.g., Mattel, Inc. v. Walking Mountain Productions, 353 F.3d 792, 814 (9th Cir. 2003). Similarly, under CAL. CIV. PROC. CODE § 1987.1, a court may quash a subpoena and "make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person." See, e.g., Rittenhouse v. Superior Court, 235 Cal. App. 3d 1584, 1587 (Cal. App. Ct. 1991). CAL. CIV. PROC. CODE § 1987.1(b)(5) specifically authorizes "[a] person whose personally identifying information ... is sought in connection with an underlying action involving that person's exercise of free speech rights" to bring a motion to quash under section 1987.1.[8]

This Court is the appropriate venue for this motion because subpoenas must be challenged before the issuing court, not the court that oversees the underlying litigation. See FED. R. CIV. P. 45(c)(3)(A) ("On timely motion, the issuing court must quash or modify a subpoena . . .") (emphasis added). See also, e.g., Highfields Capital Management, L.P. v. Doe, 385 F. Supp. 2d 969, 972 (N.D. Cal. 2005) (quashing subpoena issued under color of the Northern District of California for civil action filed in District of Massachusetts).

---

[7] For simplicity's sake, stokklerk will be referred to for the remainder of the brief using the masculine pronoun "him." This should not be taken as an admission as to "his" gender.

[8] While technically procedural, the specifically articulated protection for anonymous speakers found in CAL. CIV. PROC. CODE § 1987.1 – and the corresponding attorney's fees provision set forth in section 1987.2 for movants who successfully quash discovery subpoenas seeking identity information – are undoubtedly substantive and are based on the same free speech concerns which animate California's anti-SLAPP statute. See, e.g., United States ex rel Newsham v. Lockheed Missiles and Space Co., 190 F.3d 963, 973 (9th Cir. 1999) (holding that California's state anti-SLAPP suit, while procedural, was manifestly substantive in design and intent and thus not barred in federal court under Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)). To the extent that Plaintiff seeks discovery in support of at least one non-federal claim challenging his exercise of his First Amendment rights, stokklerk's motion to quash is appropriate under not only FED. R. CIV. P. 45 but also CAL. CIV. PROC. CODE § 1987.1.

IV. ARGUMENT

A. The Right to Engage in Anonymous Speech is Protected By the First Amendment.

Under the broad protections of the First Amendment, speakers have not only a right to publicly express criticism – especially regarding matters of concern such as publicly traded companies – but also the right to do so anonymously. Accordingly, the First Amendment requires that those who seek to unmask vocal critics demonstrate a compelling need for such identity-related information before obtaining such discovery. No such need is implicated in this case.

1. The Right to Speak Anonymously Is Constitutionally Guaranteed.

The United States Supreme Court has consistently defended the right to anonymous speech in a variety of contexts, noting that "[a]nonymity is a shield from the tyranny of the majority . . . [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation . . . at the hand of an intolerant society." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995). See also, e.g., id. at 342 ("[A]n 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."); Talley v. California, 362 U.S. 60, 64 (1960) (finding a municipal ordinance requiring identification on hand-bills unconstitutional, noting that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."). Anonymity receives the same constitutional protection whether the means of communication is a political leaflet or an Internet message board. See Reno v. ACLU, 521 U.S. 844, 870 (1997) (there is "no basis for qualifying the level of First Amendment protection that should be applied to" the Internet). See also, e.g., Doe v. 2theMart.com, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas."). And as discussed below, these fundamental rights protect anonymous speakers from forced identification, be they from overbroad statutes or unwarranted discovery requests.

2. Anonymous Speakers Enjoy a Qualified Privilege Under the First Amendment.

Because the First Amendment protects anonymous speech and association, efforts to use the power of the courts[9] to pierce anonymity are subject to a qualified privilege. Courts must "be vigilant . . . [and] guard against undue hindrances to . . . the exchange of ideas." Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 192 (1999). This vigilant review "must be undertaken and analyzed on a case-by-case basis," where the court's "guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue." Dendrite Int'l v. Doe No. 3, 775 A.2d 756, 761 (N.J. App. 2001). Just as in other cases in which litigants seek information that may be privileged, courts must consider the privilege before authorizing discovery. See, e.g., Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004) ("Against the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns."); Grandbouche v. Clancy, 825 F.2d 1463, 1466 (10th Cir. 1987) (citing Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977)) ("[W]hen the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure."). As this Court described in an early Internet anonymity case, "[p]eople who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity." Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

The constitutional privilege to remain anonymous is not absolute. Plaintiffs may properly seek information necessary to pursue meritorious litigation. Id. at 578 (First Amendment does not protect anonymous Internet users from liability for tortious acts such as defamation); Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005) ("Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection."). However, litigants may not use the discovery

[9] A court order, even if granted to a private party, is state action and hence subject to constitutional limitations. See, e.g., New York Times v. Sullivan, 376 U.S. 254, 265 (1964); Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

power to uncover the identities of people who have simply made statements the litigants dislike. Accordingly, courts evaluating attempts to unmask anonymous speakers in cases similar to the one at hand have adopted standards that balance one person's right to speak anonymously with a litigant's legitimate need to pursue a claim.

The seminal case setting forth First Amendment restrictions upon a litigant's ability to compel an online service provider to reveal an anonymous party's identity is Dendrite Int'l, Inc. v. Doe No. 3, supra, in which the New Jersey Appellate Division adopted a test for protecting anonymous speakers that has been followed by courts around the country[10] (including by this Court in Highfields Capital Management, 385 F. Supp. 2d at 974-76):

> (1) make reasonable efforts to notify the accused Internet user of the pendency of the identification proceeding and explain how to present a defense;
>
> (2) set forth the exact statements that Petitioner alleges constitutes actionable speech;
>
> (3) allege all elements of the cause of action and introduce prima facie evidence within the litigant's control sufficient to survive a motion for summary judgment; and,
>
> (4) "[f]inally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."

Dendrite, 775 A.2d at 760-61.

As this decision accurately and cogently outlines the important First Amendment interests raised by the Defendant, and as this Court has already endorsed this approach in the past, the holding and reasoning of Dendrite and its progeny should be applied here.

[10] See, e.g., Independent Newspapers, Inc. v. Brodie, 966 A.2d 432, 457 (Md. 2009); Mobilisa, Inc. v. John Doe 1, 170 P.3d 712, 717-721 (Ariz. App. 2007); Greenbaum v. Google, Inc., 845 N.Y.S.2d 695, 698-99 (N.Y. Sup. Ct. 2007); Cahill, 884 A.2d at 459-60 (applying a modified Dendrite test).

B. As Plaintiff's Subpoena Cannot Survive the Scrutiny Required By the First Amendment, It Must Be Quashed Under F.R.C.P. 45 and C.C.P. 1987.1.

The Plaintiff fails at least three of the four steps of the Dendrite/Highfields First Amendment test demanded of litigants seeking the disclosure of the identities of anonymous speakers; consequently, the subpoena should be quashed.

1. Plaintiff Has Not Identified the Specific Allegedly Actionable Speech At Issue.

First, Plaintiff has not precisely identified the specific allegedly actionable speech at issue. Assuming Doe's statements are lawful, they (and the identities of the speaker(s)) would be afforded Constitutional protection under the First Amendment. "Accordingly, the discovery of [Doe's] identity largely turns on whether his statements were defamatory or not." Dendrite, 775 A.2d at 766. This conclusion applies not only to Plaintiff's defamation claim but also to its Securities Exchange Act claim as well as the claim depends on the existence of alleged "false and fraudulent misrepresentations and statements." Complaint at ¶ 13. Only by examining the allegedly actionable statements will the Court be able to determine whether or not the Plaintiff has a valid cause of action at all, let alone whether he can meet the other First Amendment requirements. While in the Complaint Plaintiff identifies specific posts in their entirety alleged to contain defamatory statements (some posts include over 500 words: see, e.g., Exhibit E to Zimmerman Decl. at pp. 15-16 (see Exhibit E generally for all posts alluded to by Plaintiff)), it has not narrowed down any specific statements and thus has not provided the Defendants with sufficient notice of their precise claims. As the context of allegedly actionable statements is essential for a court to evaluate the legality of not only a discovery request but also of the adequacy of the underlying lawsuit, Plaintiff must at minimum provide more specificity if it wishes to enforce its discovery request. See, e.g., Baker v. Lafayette College, 532 A.2d 399, 402 (1987) ("The court must view the allegedly defamatory statements in context.").

2. Plaintiff Has Not Provided Prima Facie Evidence in Support of the Elements of Its Claims.

(a) None of the Allegedly Defamatory Comments Alluded to By the Plaintiff are Defamatory Under Pennsylvania Law.

Second, and fatal to not only its subpoena but also its Complaint, Plaintiff cannot provide prima facie evidence in support of its claims as required under the First Amendment test discussed

above. To begin with, none of the statements alluded to by Plaintiff in its Complaint are defamatory in nature, a determination that the Court must make as a matter of law. See, e.g., Thomas Merton Center v. Rockwell International Corp., 442 A.2d 213, 215-16 (Pa. 1981). Pursuant to the limitations imposed by the First Amendment, only a statement of fact that is provably false can be subject to defamatory meaning. Moreover, only statements with generally recognized meaning, in context, can be found defamatory. See, e.g., Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) ("[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection."); Seelig v. Infinity Broadcasting Corp., 97 Cal. App. 4th 798, 809-10 (Cal. App. Ct. 2002) (a phrase that is "too vague to be capable of being true or false" and "has no generally recognized meaning" is not actionable). Under this rigorous First Amendment standard, "rhetorical hyperbole," "vigorous epithet[s]," "lusty and imaginative expression[s] of . . . contempt," and language used "in a loose, figurative sense" have all been afforded First Amendment protection by the U.S. Supreme Court. See, e.g., Greenbelt Pub. Assn. v. Bresler, 398 U.S. 6, 14 (1970) (finding the use of the word "blackmail" in a debate to be constitutionally protected); Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 284, 286 (1974) ("Letter Carriers") (use of the word "traitor" and "scab" to protest anti-union workers held not to be actionable). Plaintiff's defamation claim improperly targets exactly this kind of speech.

Plaintiff's allegation that stokklerk "accused USAT's Chief Executive Officer of 'fleecing humanity'" is not actionable because the statement[11] clearly constituted "rhetorical hyperbole." Greenbelt Co-op. Pub. Ass'n, 398 U.S. at 14 ("[E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole" and is therefore a protected expression of opinion under the First Amendment). Similarly, Plaintiff's allegation that stokklerk "accused Jensen of being a known liar" is at worst hyperbole and is not in any case actionable because the context of the statement explains the specific basis for stokklerk's opinion: that Jensen had

[11] The actual statement made by stokklerk alluded to in Plaintiff's Complaint is apparently this one from a 503-word post dated August 6, 2009: "Penultimately, as regards sleeping at night: Jensen has no trouble sleeping. He's a caricature of any number of characters in Dickens or Shakespeare whose worldview is that humanity exists to be fleeced. They sleep well, that type." Exhibit E to Zimmerman Decl. at pp. 15-16.

"assured investors that USAT would be profitable in [2005 or 2006]. The company didn't even come close. No apologies, no explanations, no nothing. Just more spin." Exhibit E to Zimmerman Decl. at p. 11. See, e.g., Global Telemedia Intern., Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1270 (C.D. Cal. 2001) ("[W]hile [the online poster's] sentiments are not positive, the statement [indicating that the plaintiff lied] contains exaggerated speech and broad generalities, all indicia of opinion. Given the tone, a reasonable reader would not think the poster was stating facts about the company, but rather expressing displeasure with the way the company is run."); Parano v. O'Connor, 641 A.2d 607 (Pa. 1994) (statements that plaintiff was adversarial, less than helpful, and uncooperative were non-actionable opinion where based on disclosed facts that plaintiff failed to return phone calls and provide necessary information). Accusing Plaintiff of "legalized highway robbery," as Plaintiff further alleges as the third basis for its defamation claim against stokklerk, does not satisfy Plaintiff's burden as the statement is clearly on its face a protected opinion. Expressing strong dissatisfaction with the Plaintiff's behavior while explicitly conceding its legality provides no basis for a defamation claim.

Plaintiff's fourth allegation of defamation, that stokklerk "accused USAT of being a Ponzi scheme," similarly cannot help Plaintiff meet its burden. As an initial matter, none of the stokklerk statements alluded to in the Complaint include such a factual statement as alleged by the Plaintiff at all. Instead, the cited posts pose, in the form of a repeated message "footer" that appeared at the bottom of the posts, the same or a similar question: "USAT: soft Ponzi?" In order to be defamatory under Pennsylvania law, a communication must be a "statement," not an inquiry. See, e.g., Bakare v. Pinnacle Health Hospitals, Inc., 469 F. Supp. 2d 272, 298 (M.D. Pa. 2006) ("A defamatory statement is one that presents untrue facts tending to 'harm the reputation of another . . .'") (quoting Remick v. Manfredy, 238 F.3d 248, 261 (3d Cir. 2001)). Moreover, in context,[12] stokklerk's question asking whether USA Technologies is a "soft Ponzi" can only reasonably be interpreted to communicate the same meaning expressed in the other (protected) messages

[12] See, e.g., Savitsky v. Shenandoah Valley Pub. Corp., 566 A.2d 901, 904 (Pa. Super. Ct. 1989) (in order for a statement to be subject to defamatory meaning, its meaning must be readily discernible by its intended audience) (quoting Boyer v. Pitt Publishing Co., 324 Pa. 154, 157 (Pa. 1936)).

identified by the Plaintiff: USA Technologies' performance, while legal, has been abysmal.[13] See, e.g., Letter Carriers, 418 U.S. at 284 ("Such words were obviously used here in a loose, figurative sense to demonstrate the [defendant's] strong disagreement with the views of those . . . who oppose [their position].").

(b) Plaintiff Has Not Provided Prima Facie Evidence That the Allegedly Defamatory Statements are False.

In order for Plaintiff to satisfy its burden under the First Amendment, not only must the meaning of the alleged statements be readily discernible as defamatory, Plaintiff must also present evidence that the statements are not true as stokklerk's criticism of the performance of USA Technologies – a publicly traded company – are by definition matters of public concern. "If the statement in question bears on a matter of public concern . . . First Amendment concerns compel the plaintiff to prove, as an additional element, that the alleged defamatory statement is in fact false." Lewis v. Philadelphia Newspapers, Inc., 833 A.2d 185, 191 (Pa. Super. Ct. 2003) (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986)). Plaintiff has not done so. Indeed, the statements are not readily susceptible to this kind of proof exactly because they are non-actionable opinion.

(c) Plaintiff Has Not Provided Prima Facie Evidence Supporting the Other Elements of a Defamation Claim Brought Under Pennsylvania Law.

Assuming that the Complaint implicates Pennsylvania's defamation statue (42 PA. CONS. STAT. § 8343),[14] Plaintiff has not yet provided prima facie evidence in support of other elements of its defamation claim. "Generally, a defamatory action must allege: 1) the defamatory character of the communication; 2) publication; 3) that the communication refers to the plaintiff; 4) the third

---

[13] The notion that stokklerk's comments amount to factual statement that Plaintiff was engaging in a traditional "Ponzi scheme" – providing artificially high stock returns by funneling new investments to existing investors and labeling them profits – is belied by the readily apparent fact that USA Technologies is not profitable and never has been. In addition to the stock trading now and over the past decade at a vanishingly small fraction of its high in December of 1999, USA Technologies does not now and apparently never has provided a dividend for its stock. See Annual Report at pp. 21, 26. This argument is also belied by the fact that stokklerk stated that a "soft Ponzi" was, although unsavory, by definition legal. Exhibit E to Zimmerman Decl. at p. 27.

[14] Plaintiff's failure to private prima facie evidence in support of each element of each of its claims is obvious at the outset as Plaintiff has not even identified which state's defamation law applies, let alone what the elements of that claim may be.

party's understanding of the communication's defamatory character; and 5) injury." Raneri v. DePolo, 441 A.2d 1373, 1375 (Pa. Commw. Ct. 1982). In addition to the failure to provide evidence for the first and fourth elements ("defamatory character of the communication" and "the third party's understanding of the communication's defamatory character" as discussed above), Plaintiff fails to provide prima facie evidence in support of the third and fifth requirements.

A plaintiff corporation may not, for example, bring a defamation claim in its own name on behalf of its employees or officers. See, e.g., Powers v. Ohio, 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties."). Yet here, Plaintiff purports to do so for two of the four types of statements alluded to in the Complaint, pointing to posts accusing CEO Jensen of "fleecing humanity" (Complaint at ¶ 10(a)) and posts accusing CEO Jensen of being a "known liar" (Complaint at ¶ 10(b)).

Moreover, under 42 PA. CONS. STAT. § 8343, a plaintiff must plead specific factual allegations in its Complaint regarding any special harm resulting from stokklerk's statements, yet Plaintiff here has not done that either. See, e.g., Synygy, Inc. v. Scott-Levin, Inc., 51 F. Supp. 2d 570, 580 (E.D. Pa. 1999) ("Once a court determines that the statement is capable of defamatory meaning, one of the requirements under the Pennsylvania defamation statute is that the plaintiff prove that it suffered special harm. . . . Special harm requires proof of a specific monetary or out-of-pocket loss as a result of the defamation.").[15] While Plaintiff nakedly asserted that "special harm resulted to USAT from [the] publication" of stokklerk's allegedly defamatory statements, that of course does not constitute prima facie evidence that Plaintiff suffered harm. Indeed, the mere assertion of harm does not even satisfy the notice pleading requirement under the Federal Rules, particularly in light of the Supreme Court's decisions in Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (holding that a complaint must plead "enough facts to state a claim to relief that is plausible on its face"); Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) ("A pleading that offers 'labels and conclusions' or 'a

[15] Even if it alleged that stokklerk's statements were defamatory per se, which it did not, Plaintiff would still be obligated to prove general (e.g., reputational) damages – which it additionally did not allege. Synygy, 51 F. Supp. 2d at 581 (citing Walker v. Grand Cent. Sanitation, Inc., 634 A.2d 237, 242 (Pa. Super. Ct. 1993)).

formulaic recitation of the elements of a cause of action will not do.' . . . Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"). Accordingly, Plaintiff's "formulaic recitation of the elements" of the defamation cause of action has not and cannot meet its obligation to provide prima facie evidence in support of its defamation claims.

(d) Plaintiff Has Not Provided Prima Facie Evidence Supporting the Elements of its Securities Exchange Act Claims.

Plaintiff's Securities Exchange Act claim (and accompanying claim of a violation of the corresponding Securities Exchange Commission regulation) similarly fail as Plaintiff's Complaint does not even satisfy the post-Twombly notice pleading standard, let alone satisfy the First Amendment requirement to provide prima facie evidence in support of each of the elements of the asserted claims. Both 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5 ban certain deceptive behavior made "in connection with the purchase or sale" of a registered security. Plaintiff does not, however, even allege (and in any event presents no evidence) that stokklerk now owns or has ever owned any of Plaintiff's stock, a necessary showing if Plaintiff hopes to prevail. The assertion that stokklerk, for example, somehow "employed devices, schemes, and artifices" "in an effort to enrich [himself] through undisclosed manipulative trading tactics" (Complaint at ¶ 15) fails to constitute prima facie evidence of stock purchase or sale and does not meet the requirements of FED. R. CIV. P. 8.[16] See supra, discussions of Twombly and Iqbal. These allegations similarly constitute "formulaic recitation of the elements" of the asserted claims and cannot satisfy the demands the First Amendment places on litigants seeking to unmask anonymous critics.[17]

---

[16] Note that in its Complaint, in apparent violation of FED. R. CIV. P. 8(a)(1), the Plaintiff has not articulated any basis for the District Court in the Eastern District of Pennsylvania exercising jurisdiction over the claims alleged in the Complaint. Presumably, especially given the absence of any allegations regarding the amount in controversy or the domicile of either Defendant, Plaintiff will argue that the District Court has federal question jurisdiction over the Securities Exchange Act claims and supplemental jurisdiction over the defamation claim under 18 U.S.C. § 1367. If Plaintiff's Securities Exchange Act (i.e. federal) claims cannot survive a motion to dismiss as seems likely given (among other things) the FED. R. CIV. P. 8 and 9 shortcomings discussed herein, the District Court in Pennsylvania, and therefore this Court, will not be able to exercise jurisdiction over any aspect of this case. If any material questions remain about the Court's exercise of jurisdiction, those questions must further weigh against compelling the disclosure of stokklerk's identity.

[17] The Securities Exchange Act claims additionally fail the requirements of FED. R. CIV. P. 9(b) as the claims, explicitly alleging fraud, fail to "state with particularity the circumstances constituting fraud." FED. R. CIV. P. 9(b) "requires the identification of the circumstances constituting fraud so

(footnote continued on following page)

When put to the test, Plaintiff's allegations (such that they can be discerned) plainly collapse. The Securities Exchange Act claims and the defamation claim depend on a factual allegation that the statements made by the defendants somehow "distorted" "the market price of USAT's stock." Complaint at ¶ 18.[18] However, when examined in light of USA Technologies' historical stock prices, there is clearly no relationship whatsoever between the utterance of stokklerk's statements and the price of the stock: the stock prices alternatively rose, dropped, or stayed roughly the same after successive statements, displaying no apparent pattern or trend compared with days in which no such statement was made.[19] Plaintiff's mere speculation cannot serve as the basis for the invasive discovery it seeks.

3. Any Balancing Test Weighs In Favor of Defendant Stokklerk and Against Requiring Disclosure of His Identity.

As discussed above, not only has Plaintiff USA Technologies not made a strong prima facie case supported by evidence, they have not made any such a showing at all. Defendant stokklerk's right to engage in strong criticism of the performance a publicly-traded company and its officers far outweighs any "need" of the Plaintiff to utilize the subpoena process to out its critics. See, e.g., Treppel v. Biovail Corp., 233 F.R.D. 363, 375 (S.D.N.Y. 2006) ("such matters affect the financial markets and are plainly of public concern").

V. CONCLUSION

Plaintiff's Securities Exchange Act claims amount to little more than speculation, while Plaintiff's defamation claim merely represents a distaste for strong – though protected – criticism. In neither case are the vague allegations backup up by specific factual allegations. The First Amendment plainly demands more. As this Court stated in Highfields Capital Management, "It is

---

(footnote continued from preceding page)
that the defendant can prepare an adequate answer from the allegations." Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1400 (9th Cir. 1986) (internal citations omitted) (quoting Bosse v. Crowell Collier & Macmillan, 565 F.2d 602, 611 (9th Cir. 1977)). See also, e.g., 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1297 (3d ed. 2009) (one reason for FED. R. CIV. P. 9(b)'s heightened pleading standard is to prevent baseless claims).

[18] Plaintiff alleges no other discernable basis for its claim of "special harm" as a result of the allegedly defamatory statements.

[19] USA Technologies' historical stock price history can be found on the Yahoo! Finance message board dedicated to USA Technologies, found at http://finance.yahoo.com/q?s=usat.

not enough for a plaintiff simply to plead and pray" in a transparent attempt to obtain the identity of a critic. 385 F. Supp. 2d at 975-76. Plaintiff's subpoena, seeking Defendant stokklerk's personal information because he vocally criticized the publicly-traded company for its poor performance, is unreasonable and oppressive, running afoul of both Federal rules and California state statute passed specifically to discourage litigants from engaging in such behavior. Defendant respectfully requests that this Court quash Plaintiff's subpoena and protect Defendant stokklerk's First Amendment right to engage in vigorous criticism about this matter of public concern.

DATED: October 15, 2009

By _____

Matthew Zimmerman, Esq. (SBN 212423)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

Attorneys for Defendant-Movant
JOHN DOE "STOKKLERK"