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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT

SAN FRANCISCO DIVISION

USA TECHNOLOGIES, INC.,

Plaintiff-Respondent,

v.

JOHN DOE, a.k.a., "STOKKLERK," et al.,

Defendant-Movant.

Case No. CV 09-80 275 MISC (SI)

USA TECHNOLOGIES INC.'S OPPOSITION TO DEFENDANT JOHN DOE, A.K.A. STOKKLERK'S MOTION TO QUASH THE SUBPOENA TO YAHOO! INC. SEEKING IDENTITY INFORMATION

Date: December 18, 2009
Time: 9:00 a.m.
Courtroom: 10, 19th Floor
Judge: Hon. Susan Illston

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TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW USA Technologies, Inc., ("USAT"), Plaintiff in the above-entitled action, and opposes the Motion to Quash The Subpoena To Yahoo! Inc. ("Yahoo!") Seeking Identity Information filed by Defendant John Doe, a.k.a. Stokklerk ("Stokklerk"), and in support states as follows:

I. SUMMARY OF OPPOSITION

Contrary to Stokklerk's argument, USAT does not seek to deny anonymous speakers their First Amendment rights. (In fact, Stokklerk continues to post messages on Yahoo!'s Message Board about USAT and the Motion To Quash.)[1] But there is no absolute right to post false and defamatory statements about an individual or company, and hide behind the veil of a fictitious name. Stokklerk attempts to portray his postings as legitimate criticism of USAT's "profitability" and "generous executive compensation." Stokklerk's own words betray his true aim, which is to damage USAT's reputation and lower its stock price by accusing it of embezzlement, investor fraud, and operating a Ponzi scheme in 23 separate anonymous posts. The postings are especially egregious since at the time the postings were made, there was extensive publicity concerning the Bernard Madoff Ponzi scheme. While Stokklerk maintains his anonymity should be protected, he has asserted no basis to believe that he could suffer prejudice by revealing his identity. This is not a case where revealing an anonymous poster's identity could cause embarrassment or lead to the disclosure of highly sensitive information. Nor is this a case of a regrettable statement made in the heat of the moment. Rather, Stokklerk has engaged in a deliberate, systematic and ongoing effort to defame USAT.

USAT must learn Stokklerk's identity to proceed with its defamation case pending before the United States District Court for the Eastern District of

[1] *See* Declaration of Alex P. Catalona ("Catalona Dec."), Exh. A.

Pennsylvania. Stokklerk's Motion should be denied because: 1) USAT has stated a valid defamation claim based upon Stokklerk's public accusations that USAT has committed embezzlement, investor fraud and operated a Ponzi scheme, and 2) any Constitutional interest in shielding Stokklerk's identity is greatly outweighed by USAT's interest in pursuing the legal remedies available to it to protect its reputation. For these reasons discussed in detail below, Stokklerk's Motion should be denied.

II. STATEMENT OF FACTS

From April to August of 2009, two anonymous internet website bloggers, identified only as "Stokklerk" and "Michael_Moore_is_fat," engaged in a pattern of making defamatory postings regarding USAT on a Yahoo! Finance web page operated by Yahoo! and dedicated to USAT.[2] Only Stokklerk has chosen to move to quash this subpoena. Rather than criticizing USAT's stock performance or some other protected activity, Stokklerk accused USAT of operating a Ponzi scheme in 23 separate postings. The term Ponzi scheme, on its face, accuses USAT of fraudulent and illegal activity.

> **"Ponzi" Schemes**
>
> Ponzi schemes are a type of illegal pyramid scheme named for Charles Ponzi, who duped thousands of New England residents into investing in a postage stamp speculation scheme back in the 1920s. Ponzi thought he could take advantage of differences between U.S. and foreign currencies used to buy and sell international mail coupons. Ponzi told investors that he could provide a 40% return in just 90 days compared with 5% for bank savings accounts. Ponzi was deluged with funds from investors, taking in $1 million during one three-hour period—and this was 1921! Though a few early investors were paid off to make the scheme look legitimate, an investigation found that Ponzi had only purchased about

[2] See Catalona Dec., Exh. B, p. 1-48.

> $30 worth of the international mail coupons.
>
> Decades later, the Ponzi scheme continues to work on the "rob-Peter-to-pay-Paul" principle, as money from new investors is used to pay off earlier investors until the whole scheme collapses.[3]

In addition to the multiple accusations that USAT is a Ponzi scheme, Stokklerk states: "The top two people of USAT have skimmed over $30M from this hugely unprofitable venture."[4] In another, Stokklerk accuses USAT's CEO of being a "known liar" and refers to USAT as "legalized highway robbery."[5] These postings, which constitute defamation by their terms, are provided here in full to give a complete picture of the pattern of conduct engaged in by Stokklerk:

April 15, 2009 *Re: Any vending industry guys out there?*

> I would argue that USAT knows how to make money—for top management and insiders. That, in fact, is its core business. USAT exists to transfer assets to its insiders and liabilities to shareholders of common stock. The occasional smoke about new accounts is nothing more than the mechanism by which it maintains the illusion of prosperity being just over the horizon.
>
> The observer will take note that for insiders prosperity arrived a long time ago.
>
> USAT: "soft Ponzi"?

July 8, 2009 *Re: Game, Set, Match*

> Fear not, MEI is doomed. USAT's portfolio of patents will ride to the rescue.
>
> Sure they will.
>
> USAT: soft Ponzi?

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[3] **"Ponzi" Schemes**, published by the U.S. Securities and Exchange Commission, http://www.sec.gov/answers/ponzi.htm. *See also Black's Law Dictionary* 1278 (9th Ed. 2009.)

[4] *Id.*, Exh. B, p. 7.

[5] *Id.*, Exh. B, p. 11.

Follow the money and judge for yourself.

July 21, 2009 *Re: Rights Offering*

"Not 1 penny profit in this fugly company's sad history, yet millions have been paid in bonuses and directors' fees."

USAT: soft Ponzi?

A strong argument can be made that it's the very definition.

If it's proof you desire, ask the less-than-theoretical question, Could this company have survived as long as it has if it had been privately held? Answer: not a chance. Private equity demands performance. The doors would have closed years ago.

The NASDAQ exchanges, especially the Small and Micro, are crawling with soft Ponzis. It's a completely legal path to executive enrichment. Just add hype & a stream of investors who fall for same.

Caveat emptor.

August 3, 2009 *Re: shareholder letter should end with*

"The top two people at USAT have skimmed over $30M from the hugely unprofitable venture. Management, with little to nothing at risk, promotes a "story" to lure investors and then the board approves massive pay packages which are in no way tied to company performance."

Definition of "soft Ponzi"?

August 4, 2009 *Re: The road is littered with Wanna BE's*

Slvfx excuses extraordinary executive compensation/multi-year sequential losses/stock dilution. A medium-sized fortune has been transferred from shareholders of common stock to insiders.

USAT: soft Ponzi?

August 4, 2009 *Re: $14.7M is AMAZING!!!*

A hallmark of a stock scam is the position in the sky of the company's success: it's just over the horizon—eternally over the horizon.

Another hallmark of a scam is exorbitant executive compensation in the period that the company, whose success is just over the horizon (see above for time frame), is

hemorrhaging shareholder money.

The NASDAQ Small and Micro Cap exchanges are lousy with scam companies that, if they were limited partnerships, would have closed their doors in short order. USAT is a failure. It always was; it always will be. Jensen is a known liar. Several years ago (my memory fails; approx 2005-06; perhaps someone can nail down the exact year), he assured investors that USAT would be profitable in the same fiscal year. The company didn't even come close. No apologies, no explanations, no nothing. Just more spin.

Caveat emptor. No limited partner would have tolerated USAT's losses q after q. At a minimum, the top executives would have been shown the door. Use your head: if it's not good enough for a limited partnership, it's not good enough for a public partnership.

USAT: soft Ponzi?

August 5, 2009 *Re: The road is littered with Wanna BE's*

Millions of dollars transferred from shareholders to executives while the company hemorrhaged money, while the stock price tumbled, while success was just over the horizon. Always just over the horizon.

http://finance.yahoo.com/q/bc?s=USAT&t=m...

USAT: soft Ponzi?

August 6, 2009 *Re: Michael Moore Motive*

MM,

Jensen's a hustler, a former stockbroker. His skills are not computer science or networking; his skill is working the publicly listed company. He took USAT public to capitalize on the internet boom that was alive and well in 2000. Wired vending machines! Can't miss! Well, they missed. Never mind; a 1-100 reverse split will keep the chump money coming in. Stock price tanking? Need cash? Warrants, that's the ticket. Sell warrants to the chumps. Sell any effing thing, just so long as we maintain the illusion that we're a viable company with a brilliant future.

For me, it's all statistics. Everything else is white noise. By now, most readers have seen the chart of USAT's performance

since inception. For those that have not beheld it:

http://finance.yahoo.com/q/bc?s=USAT&t=m...

Nothing that can be expressed in words trumps the chart.

8-k's? I could paper the walls of my house with glowing 8-k's from crap stocks I've owned. Agreements in principle; patents...USAT doesn't have the money to defend against patent infringement.

SAC? Does anyone really think Steve Cohen took a look at USAT and said, This is the future? Doubt it. USAT was desperate for money. Cohen probably shorted against his own stock to insure profit.

Wellington? A drop in the bucket for them—but nevertheless, what makes me think they regretted their investment and have been writing it down by just marking to the market? There is no evidence that they're pleased with their investment, and some evidence that they're remorseful: they are not buyers.

MA? VISA? Big effing deal. They place best on dozens of small caps every day. Sure, they're interested in wireless, coinless vending. They problem is, they have 100% of the leverage vs USAT's 0%. USAT has to give away the ranch in order to get the 8-k announcing a few thousand machines. Q. where are the 8-k's to announce that the deals didn't go anywhere? Where are the 8-k's that declare USAT's deal with Coke flamed out? I don't see those 8-k's.

Absent much more leverage on the part of USAT vs the behemoth companies in the credit and vending fields (it's inconceivable), there is no evidence that the business model will produce wealth worth talking about for average shareholders. There is ample evidence that the business model has already produced considerable wealth for USAT executives. They took, and continue to take, outsized compensation out of a failing company that, ten years after inception is still in startup mode, that has continuously hemorrhaged money, with a greediness that is a hallmark of a scam.

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.
	Finally: watch out for slvfx. He's in the tank. His strenuous effort to discredit posters by deflecting the argument toward who posts what and why—it tells more about him than he probably wished it did.
	USAT: soft Ponzi?
August 10, 2009	*Re: $800,000,000 market*
	Slvfx is in the tank.
	USAT: soft Ponzi?
August 11, 2009	Re: Anyone want to take bets on the Rights offering being fully subscribed to?
	Slvfx has a lifetime exclusive with George Jensen.
	Caveat emptor.
	USAT: soft Ponzi?
August 14, 2009	*Re: Accounting Omissions?*
	MM, you've done a thorough, factual job of debunking "death panel" slvfx's rationales in favor of buying and holding USATP—his disassociation with the common stock duly noted and laughable. He'll be back with more distortions. His ox is being gored. Suckering potential investors into USAT is so small a price to pay to remedy the situation, the needle doesn't budge on his ethics-o-meter.
	He learned from a master.
	USAT: soft Ponzi?
August 14, 2009	*Re: Accounting Omissions?*
	Didn't take "death panel" slvfx long.
	He sees value in the patents. If that were the case, USAT would be highly profitable as a patent leasing company. It's not.
	He takes the cashless vending sector very seriously. That statement is pure "death panel," nothing but unquantifiable white noise.
	All an investor needs to know about USAT are in the consistent negative earnings/exhorbitant executive compensation since the company's inception. Quantifiable. Non-negotiable.

	Unsusceptible to "death panel" arguments.
	USAT: soft Ponzi?
August 16, 2009	*Re: The road is littered with Wanna BE's*
	If you'll permit me...
	Re USAT: "This is legalized highway robbery."
	I think that's the very definition of a so-called soft Ponzi, vs. a, shall we say, hard Ponzi, which is, by definition illegal. I don't recall where I got the definition. A scholar of economics. Rubini, maybe. No matter. It seems to fit.
	I think we're on the same page, different paragraph.
August 17, 2009	*Re: Rights offering*
	I charge you with being the same poster as slvfx. Prove you're not him. Prove you're not with USAT.
	Okay? Get it?
	USAT: soft Ponzi?
August 17, 2009	*Re: Rights offering*
	"Badges? We don't need no stinking badges!"
	Since when is it necessary to have "legitimate reasons" to post on this or any other Yahoo stock chatroom?
	What are "legitimate reasons"? Are they what you say they are?
	The poster Michael Moore has said nothing that isn't in the public record for USAT. The uninterrupted negative earnings, the market share, the executive compensation: it's all a matter of public record.
	A reader who has a suspicious turn of mind—not I, of course—might see the situation as you trying to intimidate Moore with the threat of a suit. That's not especially smart. The discovery process might bear some interesting fruit. For all anyone knows, you could be with USAT.
	Interesting, no?
	USAT: soft Ponzi?
August 18, 2009	*Re: Eport Connect*

USAT is “mostly profit” for Mssrs. Jensen and Herbert, most of the work already having been done. To keep the plates spinning, they occasionally have to concoct a scheme to take in new money. But that aside...So far, so good, no?

The impartial observer wonders if and when profit will accrue to the company, and be reflected in the share price. If history is a factor—

http://finance.yahoo.com/q/bc?s=USAT&t=m...

—corporate profits don’t seem to be around the corner or just over the horizon.

By golly, I think that I’ve inadvertently mentioned three characteristics of a soft Ponzi scheme: outsized payments in the form of executive compensation in a failing enterprise; interesting schemes to take in new money; the notion that success is just over the horizon.

USAT: soft Ponzi?

August 18, 2009 *Re: Eport*

Slvfx post, dated 31-Dec-2007:

[*Stokklerk quotes from another poster.*]

USAT: soft Ponzi?

August 18, 2009 *Re: Redbox*

I don’t give a hoot what their business model is. You stick a credit card in the slot, a video pops out. Video, cup of coffee: makes no difference. The machines have to be stocked and re-stocked.

At the end of the day, the fact remains that Redbox did a wireless workaround USAT and stuck the patents up USAT’s ass. You try again.

USAT: soft Ponzi?

August 19, 2009 *Re: USA Technology maintains Credit card security*

This coming from someone who would sell his soul for a 12% dividend.

You might want to look at yourself in a mirror and ask the question, “How do I sleep at night when I know full well that

	I'm trying to talk investors into buying a company that has already drained the pockets of investors north of $100 million, and shows no sign of ever making a profit?"
	http://finance.yahoo.com/q/bc?s=USAT&t=m...
	USAT: soft Ponzi?
August 19, 2009	*Re: Put some skin on the table*
	Sauce for the goose is sauce for the gander. What stopped you from shorting USAT?
	Nine years of steady decline. Nine years of losses.
	http://finance.yahoo.com/q/bc?s=USAT&t=m...
	The money was lying in the street waiting to be picked up. A big short of USAT on your part would have buried one-hundredfold any potential profits you seek to make from your long position, the latter profits remaining completely theoretical, while the short money was real as real can be. You left the money sitting in the street. Yet you have no trouble faulting others for doing the same. I don't think you'll be winning prizes for ethics or financial acuity any time soon.
	USAT: soft Ponzi?
August 24, 2009	*Re: USAT closes Compass for big start of adoption.*
	USATP: "Avg Vol: N/A"
	Zero liquidity. Two trades in two weeks. Wonderful investment. Thanks for recommending it.
	USAT: soft Ponzi?
August 24, 2009	*Re: USAT closes Compass for big start of adoption.*
	Otherwise known as no liquidity. First rule of investing: no liquidity, no consideration as an investment opportunity.
	USAT: soft Ponzi?
August 24, 2009	*Re: Why did Compass pick USAT?*
	There is one problem, and it's insurmountable: the perfectly inverse relationship between your pitching of USAT for the myriad terrific reasons one should invest in it, and the company's performance over the same period of time. Behold:
	http://finance.yahoo.com/q/bc?s=USAT&t=m...

> The problem is insurmountable for the reason that, to anyone who considers himself a decent investor, your words cannot be quantified, they're just white noise, easily ignored, while the horrific performance of the company over the same period of time that you saw gold in USAT—see above chart—can be quantified down to the dollar.
>
> USAT: soft Ponzi?
>
> (btw: are you educated beyond high school? Your spelling is atrocious. Today it's "earliar.")[6]

III. PROCEDURAL HISTORY

On August 27, 2009, USAT filed suit in the United States District Court for the Eastern District of Pennsylvania against John Doe and Jane Doe, Anonymous Internet Website Bloggers Operating as Michael_Moore_Is_Fat and Stokklerk.[7] Since USAT did not know the identity of the individuals posting as Michael_Moore_Is_Fat and Stokklerk, USAT filed a Motion For Issuance Of Subpoena *Duces Tecum* Directed to Yahoo!, Inc. Prior to the F.R.C.P. 26(F) Conference.[8] On September 11, 2009, District Judge Jan E. Dubois signed an order permitting USAT to subpoena Yahoo! for the disclosure of the identity and related information about Stokklerk and Michael_Moore_is_fat.[9] USAT served its

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[6] *Id.*, Exh. B, pp. 1, 3, 5, 7, 9, 11, 13, 16, 18, 20, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47.

[7] *Id.*, Exh. C.

[8] Typically the blogger does not provide his or her real name to Yahoo, and instead Yahoo will only have information about the blogger's IP address. USAT will then have to request leave to serve a Subpoena on the Internet Service Provider for identifying information for the blogger.

[9] *Id.*, Exh. E. Michael_Moore_Is_Fat did not file a motion to quash to prevent the disclosure of his identifying information. USAT does not address Michael_ Moore_Is_Fat's postings which are not subject to Stokklerk's motion to quash.

subpoena on Yahoo! via certified mail on September 24, 2009.[10] On October 15, 2009, Stokklerk filed his motion to quash Yahoo's disclosure of his identity and related information.[11]

IV. ARGUMENT

A. The Constitutional Framework.

1. The First Amendment Does Not Protect Defamation.

The First Amendment provides qualified protection for the identities of anonymous online speakers in case where disclosure may cause "embarrassment" or create some harm to the anonymous speaker. *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D.Cal. 1999). While legitimate criticism is protected, postings which constitute defamation are not. *Ibid.*; *see also Chaker v. Crogan*, 428 F.3d 1215, 1223 (9th Cir. 2005). The Supreme Court has explicitly held that "defamation…[is] 'not within the area of constitutionally protected speech.'" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (*quoted in Chaker, supra*, 428 F.3d 1215, 1223 (9th Cir. 2005)). "A publication is defamatory if it tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule, or injure him to public hatred, contempt, or ridicule, or injure him in his business or profession." *Green v. Minzer*, 692 A.2d 169, 172 (Pa.Super. 1997). This applies to corporations and their business reputations. *Centennial School Dist. v. Independence Blue Cross*, 885 F.Supp. 683 (E.D.Pa. 1994). *See also, e.g., Digiorgio Fruit Corp. v. AFL-CIO*, 215 Cal. App. 2d 560, 570-71 (Cal. Ct. App. 1963).

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[10] *Id.*, Exh. D. USAT's service of its subpoena via certified mail is a valid method of service authorized by Federal Rule of Civil Procedure No. 45. *See, e.g., In re Shur*, 184 B.R. 640 (Bankr. E.D.N.Y. 1995).

[11] Both for simplicity and to maintain consistency with Stokklerk's brief, USAT uses the masculine pronoun "him" to refer to Stokklerk.

2. Courts Must Balance A Defamation Plaintiff's Right To Redress Against The Defendant's Interest In Posting Anonymously Online.

Victims of anonymous defamation online must also be protected because without this Court's consideration, it would be virtually impossible to identify the culpable parties and obtain justice:

> With the rise of the Internet has come the ability to commit certain tortious acts, such as defamation, copyright infringement, and trademark infringement, entirely on-line. The tortfeasor can act pseudonymously or anonymously and may give fictitious or incomplete identifying information. Parties who have been injured by these acts are likely to find themselves chasing the tortfeasor from Internet Service Provider (ISP) to ISP with little or no hope of actually discovering the identity of the tortfeasor.

Columbia Ins. Co., supra, 185 F.R.D. 573, 578 (N.D. Cal. 1999). Courts have formulated various legal tests to balance these competing interests. Stokklerk relies on *Dendrite International, Inc. v. Doe No. 3*, where the New Jersey Supreme Court required defamation plaintiffs to pass a four-part test to learn the identity of anonymous online speakers and related information. Under this test, plaintiffs must (1) establish the anonymous speaker received notice of, and had the opportunity to challenge, the plaintiff's subpoena by filing a motion to quash, (2) identify each challenged statement made anonymously online, (3) establish a *prima facie* case of action against the anonymous defendant, and (4) establish that plaintiff's interest in protecting its reputation from defamation outweighs the defendant's qualified privilege to speak anonymously online. *Dendrite International, Inc., supra*, 775 A.2d 756, 760 (N.J. 2001). In *Highfields Capital Management L.P. v. Doe*, 385 F. Supp.2d 969 (2005) ("*Highfields*"), this Court appears to have streamlined this approach by requiring plaintiffs to establish a "prima facie claim of actionable harm." *Highfields, supra*, at 970-71.

Because USAT meets the requirements of either test, this Court should deny Stokklerk's Motion To Quash as outlined below.

B. USAT Has Proven A Prima Facie Case Of Actionable Defamation Under Pennsylvania Law.

1. Pennsylvania Defamation Law Governs.

Stokklerk does not dispute the application of Pennsylvania law, and indeed cites extensively to Pennsylvania defamation law.[12] Moreover, in defamation cases, the Court should apply the law of the plaintiff's domicile as required by choice of law rules: "In cases of defamation, these [the relevant governmental interest] factors normally would call for application of the law of the plaintiff's domicile . . . where the plaintiff has suffered the greatest injury by reason of his loss of reputation." *Hanley v. Tribune Publishing Co.*, 527 F.2d 68, 70 (9th Cir. 1975); *see also Tucci v. Club Mediterranee, S.A.*, 89 Cal.App.4th 180, 194 (Cal. App. 2001) (*accord*), and *Fitzpatrick v. Milky Way Productions, Inc.* 537 F.Supp. 168, 171 (E. D. Pa. 1982) (*accord*). Accordingly, this Court applied the law of the plaintiff's domicile in *Highfields Capital Management L.P., supra*, 385 F.Supp.2d at 979, fn. 15. Here, Stokklerk made defamatory statements against USAT, a Pennsylvania Corporation headquartered in Malvern, Pennsylvania.[13] Especially since USAT has no information about Stokklerk's domicile, this Court should apply the law of USAT's domicile, Pennsylvania.[14]

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[12] Motion To Quash, pp. 7-13.

[13] Catalona Dec., Exh. C, p. 1, Parties, ¶ 1.

[14] These same requirements defeat Stokklerk's attempt to apply California's Anti-SLAPP statute and companion Motion To Quash provisions that must not apply to USAT's lawsuit under Pennsylvania law. Stokklerk must acknowledge that his authority, *Newsham v. Lockheed Missles & Space Co., Inc.* 190 F.3d 963 (9th Cir. 1999), arose in California and has no bearing on the underlying claims which arose, and are being prosecuted, in Pennsylvania.

2. Stokklerk's Statements Constitute Defamation *Per Se*.

The Pennsylvania Supreme Court has held that accusations of business misconduct constitute defamation *per se*, actionable without proof of special harm or pecuniary loss. *Brinich v. Jencka*, 757 A.2d 388, 397 (Pa. 2000) (citing Restatement (Second) of Torts § 573 (1977)).

In *Brinich*, property owner Jencka (Defendant) hired general contractor Brinich (Plaintiff) to construct his home. Dissatisfied with Plaintiff's performance of the contract, Defendant insinuated to other construction workers and subcontractors that Plaintiff had a drug problem and paid for drugs with project funds because he had been absent from the project site and had nose bleeds which he attributed to drug use. *Id.*, 396-397. During trial, Defendant moved for nonsuit on the grounds that his comments did not constitute slander, and because Plaintiff failed to prove any pecuniary loss. *Ibid.* The trial court denied Defendant's motion and the Supreme Court affirmed, holding that because Defendant insinuated business misconduct, his comments constituted slander *per se* and Plaintiff was not required to prove pecuniary loss: "When a communication constitutes slander *per se*, a plaintiff is not required to prove special harm, *i.e.*, pecuniary loss." *Id.*, at p. 397.

In *Cornell Companies, Inc. v. Borough of New Morgan*, Plaintiff Cornell Companies, Inc. ("Plaintiff") planned to reopen the New Morgan Academy, a previously-closed detention facility and school in the Borough of New Morgan, Pennsylvania. Defendants, the Borough of New Morgan, and its officials intended to block Plaintiff from reopening the Academy so that a third party could develop the property. To further their plans, Defendants falsely stated to state licensing agencies that Plaintiff (1) violated local zoning ordinances, (2) did not operate the Academy as a school, (3) did not have a functioning sewage system, and (4) had previously closed down the Academy. 512 F.Supp.2d 238, 252-253 (Ed. Pa. 2007).

Plaintiff acknowledged that it had previously closed its facility due to "problems with discipline and improper conduct by the staff" and was in a long-standing fee dispute over its sewage treatment plant. *Id.*, at 250-251. Although Plaintiff eventually obtained all necessary licenses to reopen the facility and was therefore arguably unharmed by Defendants' statements, Plaintiff claimed that Defendants' statements nevertheless constituted defamation *per se*. *Id.*, at 252, fn. 5.

The District Court overruled Defendants' motions to dismiss because Plaintiff had sufficiently pled defamation *per se*, for which no pecuniary harm was required:

> The special harm element is eliminated, however, where the words constitute defamation per se. Defamation per se can be either 'words imputing (1) criminal offense, (2) loathsome disease, (2) business misconduct, or (4) serious sexual misconduct.'" [Citations omitted.]
>
> * * * * *
>
> The remaining issue is whether the August 2006 letter falls under the category of defamation per se because Cornell has failed to plead special harm. The only per se category that applies under the alleged facts is business misconduct. In *Synergy, Inc. v. Scott-Levin, Inc.* [51 F.Supp.2d 570, 580 (Ed. Pa. 1999)], the court explained what is needed to allege business misconduct:
>
> "A statement is defamatory per se as an accusation of business misconduct if it 'ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business.' The statement must be more than mere general disparagement. It must be of the type that would be particularly harmful to an individual engaged in the plaintiff's business or profession."
>
> 51 F. Supp. at 580 (quoting Restatement (Second) of Torts § 573 (1977).) The defendants' statements to the state included accusations that: (1) the Academy violated zoning ordinances; (2) the Academy did not operate as a school; (3) the Academy did not have a functional sewage

> system; and (4) the state had previously closed down the Academy. Cornell runs a facility that provides juvenile services to the state and requires licensing by the state. Such statements could have easily resulted in the state not licensing the Academy and may result in other government entities not contracting with Cornell for future business.

Cornell Companies, Inc. v. Borough of New Morgan, 512 F.Supp.2d 238 (Ed. Pa. 2007), at 271-272.[15]

In this case, Stokklerk stated that USAT operated as a Ponzi scheme in 23 separate postings. Stokklerk also accuses management of embezzlement: the "*top two people at USAT have skimmed over $30M from this hugely unprofitable venture*."[16] While inflicting maximum harm on USAT, Stokklerk argues in his Motion to Quash that his postings were not defamatory because he put a question mark after the reference to Ponzi scheme.[17] Stokklerk cannot avoid liability by inclusion of a question mark after accusing USAT of being a Ponzi scheme, "USAT: soft Ponzi?," in a poorly-concealed attempt to disguise what he is doing—accusing the management of USAT of defrauding investors. In only one posting does Stokklerk explain what he means by "soft Ponzi":

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[15] Stokklerk quotes *Synergy, Inc. v. Scott-Levin, Inc.*, 51 F.Supp.2d 570 (E.D. Pa. 1999) for the proposition that "one of the requirements under the Pennsylvania defamation statute is that the plaintiff prove that it suffered special harm [which] requires proof of a specific monetary or out-of-pocket loss as a result of the defamation." *Mot. To Quash*, p. 11, lines 12-18. This case does not so hold since the Court held that the plaintiff was "relieved of the requirement of proving special damages however, where spoken words constitute defamation (slander) *per se*." *Synergy, Inc., supra,* at 580. Stokklerk also cites cases arising in California and other jurisdictions that require proof of special harm but which lack allegations of defamation *per se*. USAT submits that it has sufficiently alleged defamation *per se* under Pennsylvania law which applies in this case. To the extent that this Court requests additional evidence or allegations, USAT requests leave to provide it.

[16] *Id.*, Exh. B, p. 7.

[17] Motion To Quash, p. 9.

> Re USAT: 'This is legalized highway robbery.' I think that's the very definition of a so-called soft Ponzi, vs. a, shall we say, hard Ponzi, which is, by definition illegal. I don't recall where I got the definition. A scholar of economics. Rubini, maybe. No matter. It seems to fit.[18]

Stokklerk's definition of a soft Ponzi is not controlling, nor does it exculpate him from liability. The other twenty-two postings refer to USAT as a soft Ponzi, without any limiting or defining language. Since the postings are read independently of each other by the common viewer, over a more than four month period, a person reading Stokklerk's accusations that USAT is a soft Ponzi would justifiably understand that Stokklerk is accusing USAT of the common understanding of a Ponzi scheme, i.e., fraudulent and illegal activity.

There is also no mistaking Stokklerk's repeated accusations of business misconduct, including charges of outright fraud, which he levels 23 separate times. Under Pennsylvania law, stating that a company has committed "business misconduct" amounts to defamation *per se*. Defendants who engage in this activity may not shield their identify based on protections afforded Constitutionally protected speech.

Stokklerk attempts to avoid responsibility for his postings by arguing that many of his references to USAT as a Ponzi scheme are in the footer of the message.[19] The placement of the Ponzi scheme reference in the footer actually highlights the reference and makes it more prominent, and hence more defamatory.

Stokklerk also argues that USAT may not bring a defamation claim on behalf of its officers.[20] USAT is not doing so. Rather, Pennsylvania law recognizes that

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[18] Catalona Dec., Exh. B, p. 27.

[19] Motion To Quash, p. 9.

[20] Motion To Quash, p. 11. Stokklerk relies on *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, (U.S.Ohio, 1991), a case that is not relevant since it addresses race-based peremptory challenges, not defamation.

the "party need not be specifically named in defamatory statements as long as 'the defamatory communication may reasonably be understood as referring to the plaintiff.'"[21] Each of the defamatory statements that refers to USAT's officers is made in connection with accusing USAT of being a Ponzi scheme, and therefore the statements should be considered in determining if a prima facie case for defamation has been alleged.

Fundamentally, Stokklerk's accusations are much more damaging than the charges of violating a zoning ordinance and not having a functioning sewage system that were found to be actionable in *Cornell Companies, Inc., supra,* 512 F.Supp.2d at 271-272. By making his accusations in a public investors' forum run by Yahoo! and dedicated to USAT stock, Stokklerk made certain his statements would be "particularly harmful" to USAT and its stock value.[22] Just as in *Cornell Companies*, Stokklerk's statements could have resulted in USAT losing "future business," as they were designed to turn away the very investment needed for USAT to survive. *Ibid.* Under Pennsylvania law, USAT need not prove, or even allege, that it has suffered pecuniary injury or special harm. Stokklerk's 23 separate postings each constitute defamation *per se*, and he must now defend them in Court.

3. It Is Stokklerk's Burden To Establish The Defense Of "Truth."

To establish defamation, USAT is not required to negate Stokklerk's charges of business misconduct. By statute, Pennsylvania has codified the burdens of plaintiffs and defendants in defamation actions, 42 Pa. C.S.A. § 8343, and it is the *defendant's* burden to prove a defamatory statement is in fact true. *Simms v. Exeter*

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[21] *Weinstein v. Bullick,* 827 F.Supp. 1193 (E.D.Pa., 1993).

[22] In addition to its defamation claims, USAT has alleged violations of the Securities Exchange Act Of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5. USAT does not address these claims here because it has established an actionable defamation claim under Pennsylvania law which by itself must defeat Stokklerk's motion.

Architectural Products Inc., 916 F. Supp. 432, 436-37 (M.D. PA 1996). Stokklerk has cited no authority to support his position that all statements about publicly traded companies may be deemed matters "of public concern" warranting heightened Constitutional protection. Stokklerk's example where a court shifted the defendant's burden to the plaintiff involved a City-wide newspaper detailing a Grand Jury's investigation of specific elected officials selling influence to a reputed mafia figure. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). The case and its holding were explicitly limited to the sub-set of media defamation law not applicable here. Stokklerk's rants do not qualify as media publications or touch on any matter of public concern requiring heightened Constitutional protection.

4. Accusing USAT Of Operating A Ponzi Scheme Is Actionable Defamation At Common Law.

This Court should also consider the facts and holding from a non-Pennsylvania case, *Levesque v. Kings County Lafayette Trust Company*, because it may be the only published authority to address whether specifically accusing someone of running a Ponzi scheme constitutes actionable defamation. 293 F. Supp. 1010 (E.D.N.Y. 1968). In *Levesque*, plaintiff Real Levesque sued his former employer Lafayette Trust Company and its Vice-President, William T. Vance (Vance), for defamation. After forcing Plaintiff to resign, Vance stated that Plaintiff had approved loans that "were a Ponzi operation." *Id.*, at 1011. Defendants moved for summary judgment on the ground that Vance made his statement in his official capacity as a Company officer engaged in legal proceedings, and it was therefore privileged. *Ibid.* The Court, however, denied summary judgment and held that Vance's accusation of a "Ponzi operation" constituted defamation, as well as malice sufficient to defeat Defendants' claimed privilege. *Levesque, supra*, 293 F.Supp. at 1012-1013.

5. Stokklerk Does Not Escape Liability By Claiming His Defamatory Postings Are "Opinion."

Nor does Stokklerk escape liability by arguing that his defamatory postings are mere opinion. First, none of the objectionable postings state that they are only Stokklerk's opinion. Also, a statement that is couched as an opinion may still be actionable:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.' " [Citation omitted.] It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, § 566, Comment a (1977).

Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19 (1990) (citations omitted). As this example from the United States Supreme Court makes clear, labeling someone a "liar" may be actionable, even when couched as opinion. Even if considered statements of opinion, Stokklerk's statements that USAT's CEO George Jensen is a "known liar," and the numerous references to Ponzi scheme and fraud are actionable as an opinion that "impl[ies] a false assertion of fact," and are not mere rhetorical flourish or hyperbole.

6. USAT's Complaint Meets The Pleading Requirements Of The Federal Rules Of Civil Procedure.

Any technical pleading challenges to USAT's complaint should be addressed to the Eastern District of Pennsylvania, and are not directly relevant to this Court's decision on Stokklerk's motion to quash USAT's subpoena. In any event, USAT's complaint adequately sets forth a cause of action for defamation. "[F]or a defamation claim brought in federal court, the plaintiff does not have to plead the precise defamatory statements as long as the count provides sufficient notice to the defendant." *Roskos v. Sugarloaf Tp.*, 295 F.Supp.2d 480, 492 (M.D.Pa. 2003). USAT's complaint meets all Federal notice pleading requirements since it alleged the specific postings and the date.

V. CONCLUSION

This Court should deny Stokklerk's motion to quash under the factors of *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. 2001) as well as this Court's more streamlined approach in *Highfields Capital Management L.P. v. Doe*, 385 F. Supp.2d 969 (2005). USAT has met each requirement and should be permitted to pursue its legal remedies in court in Pennsylvania and seek to repair its reputation.

Under *Dendrite International, Inc.*'s four-part test: (1) USAT has provided Stokklerk with adequate notice of USAT's subpoena to which Stokklerk has filed a timely motion to quash, (2) USAT has specifically identified and attached each defamatory posting made by Stokklerk, (3) USAT has established a *prima facie* defamation cause of action arising under Pennsylvania law, and (4) USAT has established that Stokklerk's interest in speaking anonymously online is greatly outweighed by USAT's right to seek legal redress for defamation 775 A.2d 756, at 760 (N.J. 2001) Under the more streamlined approach of *Highfields Capital*

Management, USAT has established a "prima facie claim of actionable harm." 385 F. Supp.2d 969, at 970-71 (2005).

Stokklerk's claim that he has merely criticized USAT for its allegedly "poor performance and its generous executive compensation package" is belied by his postings.[23] Stokklerk's accusations of business misconduct and fraud are actionable defamation that is not protected by the First Amendment. USAT seeks to determine Stokklerk's identity to obtain a fair hearing of its defamation claim. Stokklerk seeks to shield his identity so that he may continue his defamation with impunity. Notably, Stokklerk has made no showing that revealing his identity will cause any harm, embarrassment or legally-recognized prejudice. On balance, the Court should deny Stokklerk's motion and permit USAT to proceed with its lawsuit.

WHEREFORE, USA Technologies, Inc. prays that the Court deny Defendant John Doe, A.K.A. Stokklerk's Motion To Quash The Subpoena To Yahoo! Inc. Seeking Identity Information.

DATED: December 4, 2009

Respectfully submitted,
SCHIFF HARDIN LLP

By: /s/ Alex Catalona
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USA TECHNOLOGIES, INC.

[23] Mot. To. Quash, p. 1, line 18.

Certificate of Service

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service were served the 4th day of December, 2009, with a copy of **USA TECHNOLOGIES INC.'S OPPOSITION TO DEFENDANT JOHN DOE, A.K.A. STOKKLERK'S MOTION TO QUASH THE SUBPOENA TO YAHOO! INC. SEEKING IDENTITY INFORMATION** via the Court's CM/ECF system. I certify that all parties in this case are represented by counsel who are CM/ECF participants.

DATED: December 4, 2009

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