



Issue Date: 05 March 2012

CASE NO. 2012-SOX-00001

In the Matter of

EILEEN FOSTER,
Complainant,

v.

**BANK OF AMERICA CORP. AND
COUNTRYWIDE FINANCIAL CORP.,**
Respondents.

**FINAL PROTECTIVE ORDER CONCERNING
DEPOSITION OF COMPLAINANT**

On February 7, 2012, four business days before Complainant's deposition was to begin, Complainant filed an extensive motion for a protective order. Respondent faxed an opposition later that same day. Without leave, Complainant faxed a supplemental brief, citing authority that she neglected to cite in her opening papers.¹

To accommodate the parties' rapidly upcoming deposition schedule, I took oral argument by telephone on February 8, 2012. All parties were present through counsel of record. Complainant was also present personally and answered certain fact questions that I posed to her.

At the conclusion of the argument, I took the matter under submission. I allowed Respondents to file a supplemental brief as Complainant had done. Given the short time remaining before counsel needed to travel for the deposition, on Thursday, February 9, 2012, I issued a ruling. It did not contain detailed findings or a rationale; I reserved that for a further order. This is that further order; it amplifies and replaces the order of February 9, 2012 but does not change the result.

¹ Except when Sarbanes-Oxley's implementing regulations provide otherwise, proceedings under the Act are conducted under this Office's general rules of practice and procedure codified at 29 C.F.R. §18 (Part A). See 29 C.F.R. §1981.107(a). Our rules require leave of the administrative law judge for any filing on a motion beyond the opening papers and opposition. See 29 C.F.R. §18.6(b).

Facts²

Complainant is a former Executive Vice President of Countrywide, a financial institution that Bank of America acquired several months before the termination of her employment. Complainant's Declaration ¶ 2. Responsible for "fraud risk management," her job duties included (among others): (1) supervising a number of fraud investigators, and (2) receiving information from employees about fraud and fraud-related retaliation. *Id.*

The protective order Complainant seeks pertains to the conversations she had with other employees while working at the Bank. She groups these conversations into two categories. She agrees that, for purposes of her motion, the two categories are analytically distinct and must be examined separately. That aside, Complainant seeks the same protection for all conversations in either category: she wants an order to prohibit the Bank from inquiring at her deposition about the content of any communications with other employees in which the employees had a reasonable expectation of confidentiality – unless those employees waive confidentiality. She offers not to call as a witness any employee whose conversations the order will protect.

The two categories of communications Complainant seeks to protect are:

- *Communications within the course and scope of employment.* This category consists of communications Complainant had as an executive vice president while investigating fraud and retaliation. During oral argument it became clear that this category includes communications with two separate groups of employees: (1) the fraud investigators whom Complainant supervised, and (2) other employees (not Complainant's subordinates) who contacted her to report fraud or retaliation.
- *Communications related to the Bank's alleged retaliation against Complainant.* The second category consists of communications Complainant had with co-workers who were giving her information about the Bank's activities that Complainant now asserts were retaliatory. Although Complainant says these co-workers expected their communications to be confidential, it is not entirely certain why, except perhaps that Complainant gave them her personal assurance.

Complainant is concerned that Respondents will retaliate against her former co-workers.³ Yet, in a very real way, it may be too late to protect them, if in fact they need protection, for Complainant has already identified their names to the Bank. She produced a list of fifty-eight employees, of whom she states ten to twelve are the ones who need protection. She argues that, despite this, the employees' names are effectively "hidden in plain sight" because they are buried in the list of fifty-eight, most of whom have said nothing requiring protection.

² I find these facts based on the limited record available on the motion. These findings are for purposes of this motion only; they are not findings on the merits.

³ Complainant states that Bank of America is planning a broad reduction in force. She argues that it would be easy for the Bank to move any employee from a list of those to be retained onto a list of those to be laid off. This, she asserts, would give the Bank "cover" for retaliatory discharges.

As Complainant's counsel explained at oral argument, her purpose in revealing the names was to allow the Bank to contact the relevant employees (among the numerous extraneous ones) to ask whether they'd had any confidential communications with Complainant, and if so, whether they'd waive confidentiality.⁴ For those who either denied having confidential communications or agreed to waive confidentiality, Complainant would answer all of Respondents' questions. For those who stated that they'd had confidential conversations and would not waive confidentiality, the administrative law judge would then be in a position to protect them.

Discussion

Much as in civil litigation, the scope of discovery under our rules is broad. *See* 29 C.F.R. §18.14. Generally, it extends to "any matter, not privileged, which is relevant to the subject matter involved in the proceeding . . ." *Id.*, §18.14(a). "It is not ground for objection that information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*, §18.14(b). Discovery within this scope is permitted, "unless otherwise limited by order of the administrative law judge in accordance with [our rules of procedure]." *Id.*, §18.14(a).⁵

Thus, Complainant generally must disclose conversations with co-workers so long as the questions posed appear reasonably calculated to lead to admissible evidence, unless the information sought either is privileged (and thus outside the scope of discovery) or is otherwise protected by order of the administrative law judge under the rules.

Consistent with this regime, our rules allow protective orders "for good cause shown . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." 29 C.F.R. §18.15; *see also* Fed. R. Civ. P. 26(c). The order may include (among other relief) that the discovery not be had or that it be had on specified terms and conditions. 29 C.F.R. §18.15 (a)(1), (2); *see also*, Fed. R. Civ. P. 26(c). As the Supreme Court has stated of the analogous civil rule: "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

A party seeking a protective order must show "good cause" by demonstrating the specific harm or prejudice that will result without the order. *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002). "If a court finds particularized harm will result from disclosure of information to the public, then it balances the public and private interests to decide whether a protective order is necessary." *Id.* at 1211.

Here, Complainant argues that questions about her communications with co-workers are outside the scope of discovery because the communications were privileged under three theories: (1) a statutory privilege created by the Sarbanes-Oxley Act; (2) informant's privilege; and (3) a

⁴ Complainant's motion for a protective order makes various other specific requests, such as that Respondents should be required to provide all of the individuals in question with a copy of the protective order and with information about the Sarbanes-Oxley Act whistleblower protection provisions.

⁵ The rules provide for deposition discovery. 29 C.F.R. §§18.13, 18.22

privilege emanating from the First Amendment right of association. Alternatively, she argues that, even if the questions are unprivileged and thus within the scope of discovery, a protective order is appropriate in view of the risk of retaliation against the co-workers.

I. Sarbanes-Oxley Privilege.

Complainant argues that the Sarbanes-Oxley Act creates an evidentiary privilege. Although I will not infer a new evidentiary privilege from the Act, I will find that the Act's purposes are served by a limited protective order under the circumstances presented here. *See* 29 C.F.R. §18.14.

The Act requires that the audit committee of the boards of directors of covered companies establish a channel for “the confidential, anonymous submission by employees . . . of concerns regarding questionable accounting or auditing matters.” 15 U.S.C. § 78j-1(m)(4). Complainant asserts that “while still employed by Bank of America, [she] served as a conduit for disclosures and other protected activity.”⁶ During oral argument she stated that the results of her investigations were included in reports to the audit committee. Although she did not explicitly state that her department was a part of the Bank's confidential or anonymous channel required under Sarbanes-Oxley, she made a sufficient showing that it likely was, and the Bank offered nothing to refute this.

Lacking an express provision in the Sarbanes-Oxley Act or its implementing regulations, I am reluctant to infer an evidentiary privilege where none exists at common law. Courts should be reluctant to recognize novel evidentiary privileges, especially “where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.” *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 189 (1990).

Except as otherwise required by the Constitution of the United States, or provided by Act of Congress, or by rules or regulations prescribed by the administrative agency pursuant to statutory authority, or pursuant to executive order, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

29 C.F.R. § 18.501; *see also* Fed. R. Evid. 501.

Complainant does not argue that there exists any relevant privilege in the common law. In the relevant statutory provision, Congress placed sufficient weight on the need for a confidential or anonymous reporting channel that it mandated audit committees to set one up. Yet it fell short of creating an evidentiary privilege, something that it could have done at the same time. I therefore find no basis for a “Sarbanes-Oxley Act privilege.”

⁶ Complainant's Motion for Protective Order at 6.

Nonetheless, I find that requiring an employee to reveal in discovery communications that the employee made in reliance on the Bank's holding out the reporting channel as confidential could thwart the purposes of the Act: It would chill whistleblowers who otherwise might reveal fraud to responsible Bank officials – the precise conduct Congress sought to foster. I conclude that employees who rely on the Congressionally mandated confidential channel are entitled to protection except when the employer's questions are directly relevant to the issues pending in the litigation. If the information sought is directly relevant (and not merely having the appearance of being reasonably calculated to lead to admissible evidence), the need for the information outweighs the policy reasons to protect it. This protection applies, however, only to employees using the confidential channel to report on what they reasonably believe to be fraudulent activity; the statutory regime requires nothing further.⁷

Here, protection extends to Bank employees who relied on the Bank's promise of confidentiality and reported fraud to Complainant or one of her investigators unless the Bank can show that the information sought is directly relevant to an issue pending in the litigation. At oral argument, the Bank conceded that such reports are not directly relevant. A protective order therefore will issue to prevent the Bank from questioning Complainant at the deposition about the content of these communications if (1) the employee was given to understand that the communication would be confidential, and (2) when asked, states that he or she chooses not to waive confidentiality.

To the same end, Complainant need not identify the employees from whom her investigators received reports of fraud if those employees would have been protected had they spoken directly to her. If the employee, thinking he was reporting fraud through the Bank's confidential channel when he spoke to an investigator then lost confidentiality once the investigator reported up the chain to Complainant, the purpose of the confidential channel would be thwarted just as if direct communications to Complainant were unprotected.

I do not, however, find a basis to extend protection under this rationale to other communications Complainant had with her subordinate investigators about fraud or retaliation. Given the broad scope and important purposes of discovery, so long as the employees blowing the whistle through the confidential channel are protected, I see no basis to go further. The investigators gave their reports to Complainant with the expectation that their findings and observations would be analyzed, evaluated, and reported up the chain, perhaps ultimately to the Board through the audit committee. Congress mandated the confidential or anonymous channel to protect those who would blow the whistle; Congress' purpose at most could relate only tangentially to those whose job is to staff the reporting channel.

II. Informant's Privilege.

Although the "informant's privilege" originated in the government's interest in protecting the anonymity of government informants in criminal cases, the government now regularly asserts it in civil law enforcement cases. It is a privilege extended to the government "to withhold from disclosure the identity of persons who furnish information of violations of law to officers

⁷ I refer only to the confidential – as opposed to the anonymous – channel. An employee reporting anonymously runs no risk of her identity being linked to the substance of the matter reported.

charged with enforcement of that law.” *Dole v. LOCAL 1942, IBEW, AFL-CIO*, 870 F.2d 368, 372 (7th Cir. 1989). *See, e.g., Roviario v. United States*, 353 U.S. 53, 59 (1957); *Mitchell v. Roma*, 265 F.2d 633, 634 (3rd Cir. 1959) (“Involved here is the question of the extent of what has been called the informer’s privilege (in reality the government’s privilege”); *Wirtz v. Governmental Finance & Loan Company of West End*, 326 F.2d 561, 563 (5th Cir. 1964) (discussing “The Government’s qualified privilege not to disclose the names of informers”).

Courts and the Department of Labor have not extended the informant’s privilege to private litigants. *See Malpass v. General Electric*, 1994 WL 897244, at *6 (DOL Office of Admin. Appeals 1994) (“In effect, Complainants would treat interrogatories served on them as interrogatories served on the Department of Labor and attempt to assert the informer’s privilege on behalf of the Wage-Hour Administrator. That privilege is simply not theirs to assert. The informer’s privilege is a governmental privilege, . . . and is assertable only by the government.”) (citations omitted); *cf. United States v. Reynolds*, 345 U.S. 1 (1952) (private party may not assert government’s state and military secrets privilege); *Carr v. Monroe Manufacturing Co.*, 431 F.2d 384 (5th Cir. 1970) (private party may not assert state-created privilege applying to government employers).

Despite this authority, Complainant argues that the privilege has “migrated to private litigation where important public policy goals might be adversely affected.”⁸ For this, she misplaces her reliance on *Does I through XXIII v. Advanced Textiles*, 214 F.3d 1058 (9th Cir. 2000). That case does not involve either the protection of third-party informants or protective orders. Rather, it is a Fair Labor Standards Act case, in which plaintiff garment workers in Saipan sought to pursue their claims anonymously, using pseudonyms (*Does I through XXIII*). *Id.* at 1062. The district court held that they could not proceed anonymously, and when they did not file an amended pleading with their names disclosed, the court dismissed their case. On appeal, the issue was anonymous pleading, not privilege or protective orders. *See id.* at 1067-70. Complainant cites no decision extending *Advanced Textile* to issue of privilege or protective orders.

Even were I to find the underlying rationale in *Advanced Textile* sufficiently analogous, the case wouldn’t support Complainant’s argument. The *Advanced Textile* plaintiffs were filing on behalf of themselves and 25,000 similarly situated textile workers. They filed evidence that recruiters in China charge a “recruitment fee” of several thousand dollars and require a “performance of contract” deposit that the worker forfeits if she doesn’t complete the employment. *Id.* at 1064-65. A guarantor, usually a family member, must assume joint liability for these fees and obligations. *Id.* at 1065.

Several workers testified that they fear the Chinese government will arrest them or their family members if they breach the recruitment contract, or if they are unable to pay the debts acquired under the recruitment contract. Recruiters warn workers, prior to departing China, that they must not complain about working conditions, speak to Americans, or criticize the Chinese government. Recruiters continue to meet with and police the conduct of their recruits after they arrive in Saipan. When workers complained about working conditions, their recruiters

⁸ *See* Complainant’s Motion for Protective Order at 7.

contacted family members in China and demanded that the family members pay fines. Some workers testified that they had been threatened with arrest for filing labor complaints, or that they knew others who had been threatened with arrest for doing so. Numerous workers testified that they fear the Chinese government will arrest them or their family members because they filed a complaint against their employer in Saipan. Plaintiffs also presented evidence that China's state secrets law has been used to prosecute and imprison workers for complaining about their working conditions abroad.

Id. Some also alleged fear of physical violence in retaliation for their complaints. *Id.* at 1060.

The Court held that a party may proceed anonymously “in special circumstances when the party’s need for anonymity outweighs prejudice to the opposing party and the public’s interest in knowing the party’s identity.” 214 F.3d at 1068. The relevant factors in the balance are:

(1) the severity of the threatened harm; (2) the reasonableness of the anonymous party’s fears, see *Stegall*, 653 F.2d at 186; and (3) the anonymous party’s vulnerability to such retaliation, see *id.* (discussing vulnerability of child plaintiffs); *Doe II*, 655 F.2d at 922 n. 1 (recognizing enhanced risks to long-term prison inmate) Finally, the court must decide whether the public’s interest in the case would be best served by requiring that the litigants reveal their identities.

Id. at 1068-69 (citations omitted). Even when plaintiffs make a sufficient showing to proceed anonymously, the Court recognized:

that the balance between a party’s need for anonymity and the interests weighing in favor of open judicial proceedings may change as the litigation progresses. In cases where the plaintiffs have demonstrated a need for anonymity, the district court should use its powers to manage pretrial proceedings, and to issue protective orders limiting disclosure of the party’s name, to preserve the party’s anonymity to the greatest extent possible without prejudicing the opposing party’s ability to litigate the case. It may never be necessary, however, to disclose the anonymous parties’ identities to nonparties to the suit.

Id. at 1069 (citations omitted). 214 F.3d at 1069.

The Court concluded, “based on the extreme nature of the retaliation threatened against plaintiffs coupled with their highly vulnerable status, that plaintiffs reasonably fear severe retaliation, and that this fear outweighs the interests in favor of open judicial proceedings.” In addition, there was no prejudice to defendants because the district court had not yet ruled on whether the case could proceed as to the 25,000 similarly situated employees and because discovery was stayed at the time. *Id.*

Discussing the severity of the threatened retaliation, the Court distinguished a case in which a Title VII plaintiff facing “typical” exposure to retaliation failed to show the “extraordinary” circumstances that would justify proceeding anonymously. 214 F.3d at 1070. The plaintiffs at

bar, however, had shown more than the “typical” “threats of termination and blacklisting by which employers retaliate against employees who assert their legal rights”

As guest workers in Saipan, plaintiffs may be deported if they lose their jobs. Moreover, if plaintiffs are fired, blacklisted, or deported, they will be burdened with debts arising from their contracts with the recruiting agencies. Plaintiffs fear accruing debts because they know Chinese citizens who have been threatened with arrest and incarceration because they could not pay their debts to recruiters.

214 F.3d at 1070.

Complainant in the present action offers nothing similar to the extraordinary circumstances in *Advanced Textile*. She offers no more than the “typical” risk of the employer’s retaliation against her former co-workers that would be presented in an ordinary Title VII case. These workers are exposed to economic risk (perhaps mitigated by the sanctions of their own potential Sarbanes-Oxley claims) and no more. That risk (real or not) is not extraordinary, and it is not joined by vulnerability to deportation, crippling debt, arrest and incarceration, or potential harm to family members.

Moreover, I must consider the prejudice to Respondents at this stage of the litigation. The case is approaching trial. There might have been a time at the Occupational Health & Safety Administration, when the case was still under Agency investigation, that the protection Complainant seeks could have been workable. But, unlike *Advanced Textile*, this is not a case in which discovery is stayed. On the contrary, the parties are engaged actively in discovery, with trial approaching. The evidence that Complainant seeks to exclude from discovery could be directly relevant to Respondent’s contention that it terminated the employment based on Complainant’s interactions with co-workers. It could also be relevant for impeachment or other purposes at trial.

Thus, if anything, *Advanced Textile* demonstrates why no further protection, beyond what I found proper in the first part of the discussion above,⁹ is appropriate. *Advanced Textile* is not a basis on which to extend the informant’s privilege beyond law enforcement officials (criminal and civil) to private persons. As Complainant is a private party, the informant’s privilege is unavailable to her.

III. First Amendment Privilege.

“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” “(An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends

⁹ There is a public interest in protecting the identity of Bank employees who were whistleblowers. This is central to Congress’ purpose in the Sarbanes-Oxley Act. The balance weighs differently when investigators are simply doing their jobs by reporting what they found to their managers. It also differs when co-workers choose to discuss among themselves a disciplinary investigation that an employee is undertaking (here of Complainant).

were not also guaranteed).” Thus, “[t]he First Amendment protects political association as well as political expression,” and the “freedom to associate with others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments.”

“The right to associate for expressive purposes is not, however, absolute.”

“Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”

Perry v. Schwarzenegger, 591 F.3d 1147, 1159 (9th Cir. 2010) (citations omitted).

“A party who objects to a discovery request as an infringement of the party’s First Amendment rights is in essence asserting a First Amendment *privilege*.” *Id.* The Supreme Court has repeatedly upheld a privilege to preclude discovery of the membership lists of political associations such as the National Association for the Advancement of Colored People and the Communist Party. *Id.* at 1160 (The compelled disclosure of political associations can have a chilling effect, discouraging the exercise of “constitutionally protected political rights”); *see also, Brock v. Local 375*, 860 F.2d 346, 349 (9th Cir.1988) (disclosure of the membership list of a fund whose members pool their resources for scholarships, charitable contributions, and political purposes for the “advancement of their beliefs and ideas” would have First Amendment implications);¹⁰ *Grandbouche v. Clancy*, 825 F.2d 1463 at 1465-66 (protecting membership and mailing lists of political groups). “[The First Amendment] privilege applies to discovery orders ‘even if all of the litigants are private entities.’” *Perry* at 1160 n.5 (citation omitted).

As Complainant observes, courts have also applied the First Amendment to protect public employees against discipline for expressing criticism of public officials. *See Pickering v. Board of Education*, 391 U.S. 563 (1968); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Rampy v. Allen*, 501 F.2d 1090 (10th Cir. 1974). But cases such as *Pickering* and *Garcetti* do not consider rights of political association; they focus directly on speech about public officials. *Pickering*, 391 U.S. at 556-57 (public school teacher criticized school board and its expenditure of district funds); *Garcetti*, 547 U.S. at 421-22 (prosecutor wrote internal memo raising concerns about irregularities in a criminal investigation). Even so, in *Garcetti*, the Court held that retaliation against the prosecutor did not violate his First Amendment rights because he wrote the controversial memo as part of his job duties. *Garcetti*, 547 U.S. at 426 (rejecting “the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties”). Although rights of an association were at issue in *Rampy*, again the First Amendment was protecting professors at a state university who were expressing opposition to the administration of a public university – political speech. 501 F.2d at 1098.

The Sarbanes-Oxley Act, of course, reflects Congress’ statement of important public policy determinations. But that, in itself, does not convert private employment-related conversations into speech protected as First Amendment association. *See University of Pennsylvania v. EEOC*,

¹⁰ In *Brock*, the membership list would be protected only on the association’s showing of “(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or “chilling” of, the members’ associational rights.” *Id.*

493 U.S. 182 (1990) (rejecting private university's request for a First Amendment-based protection against disclosure of confidential peer review documents in tenure review); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (no First Amendment privilege for reporters who were posed questions at a grand jury, irrespective of their sources' expectation of confidentiality).

Here, Complainant does not seek to protect a political or any other association. She is not protecting a membership list; indeed, there is no association to have a membership list, and in any event, she has already disclosed the names of the persons she seeks to protect. She is not criticizing public officials. Her attempts to protect her co-workers cannot be grounded in the First Amendment. Any other conclusion under these circumstances would tend to exclude from discovery *any* conversation that one of the participants viewed as "off-the-record" or somehow confidential; it would unduly burden the broad reach of civil discovery and impede its important role in litigation. I therefore conclude that the First Amendment does not extend a privilege that protects Complainant's communications with her co-workers beyond the protections I described above in the first section of this discussion.¹¹

IV. Other Protective Order.

Moving beyond the privileges that take material outside the scope of discovery, Complainant also relies on the provision in our rules allowing generally for protective orders. 29 C.F.R. §18.14. It was this provision on which I relied above in the analysis of the confidential reporting channel to the audit committee and the concomitant need to protect those who make the reports flowing in that channel. As the other considerations that Complainant cites offer nothing more than the routine concerns in any employment discrimination or retaliation litigation, I find no basis for any further restrictions on discovery beyond those I stated above.

Order

Complainant's motion for protective order is GRANTED IN PART and DENIED IN PART as follows:

1. The motion to limit questions going to Complainant's communications with co-workers about Respondents' alleged retaliation against her (including pre-termination investigation of Complainant, if any) is denied.
2. The motion to limit questions going to Complainant's communications with investigators who reported to her while she worked for Respondents is denied with one exception.

¹¹ Even were I to find a First Amendment interest, it would have to be balanced against Respondents' need for the discovery, with an eye toward tailoring a disclosure that would least restrict Complainant's constitutional rights. *Cf. Perry*, 591 F.3d at 1161. Respondents' central defense appears to concern Complainant's relationships with her subordinates. Inquiry into her discussions with those subordinates is directly relevant to the defense. Given that Respondents are not government actors, the centrality of the material sought would overcome whatever limited First Amendment interest Complainant might have. *See Grandbouche*, 825 F.2d at 1467 ("When such associational activities are *directly relevant* to the plaintiff's claim, and disclosure of the plaintiff's affiliations is essential to the fair resolution of the lawsuit, a trial court may properly compel such disclosure [so long as] the compelled disclosure be narrowly drawn to assure maximum protection of the constitutional interests at stake"), quoting *Britt v. Superior Court*, 20 Cal.3d 844 (1978).

Respondents may not inquire, and Complainant need not answer, the portion of any question that would require her to disclose the name (or other identifying information) of any employee of either Respondent whom she would be identifying as having provided to an investigator working for either Respondent information as described in 18 U.S.C. §1514A(a).¹² Complainant should answer such questions, to the fullest extent possible, without identifying the person who provided the information.

3. The motion to limit questions into the substance of any communication Complainant had with any employee of either Respondent (other than the investigators described above) who was providing her, in the course and scope of her employment, with information as described in 18 U.S.C. § 1514A(a)¹³ is granted as follows:

Within 24 hours after the Order of February 9, 2012, Complainant must provide to Respondents' counsel (by email, fax, or any other method of immediate delivery that Respondents' counsel chose) the names of any employee with whom she contends she had confidential communications in which the employee provided such information. The names are for Respondents' counsels' eyes only; Respondents' counsel may not divulge the names to their client.

If Respondents' counsel chooses, she may obtain contact information for these employees by including their names on a list of at least 25 of the 58 potential witnesses named in Complainant's moving papers. Respondents' counsel may then obtain from her clients' records contact information for all 25. The purpose is to make it difficult for Respondents to know which employees are those who are being protected.

If any of the persons whose identity Complainant seeks to protect no longer is an employee of either Respondent, this Order does not apply to such persons, and Complainant must answer questions going to their identity.

As to those who remain an employee of either Respondent, Respondents' counsel may contact any of these individuals. She must ask whether that employee had any communication with Complainant that the employee believed to be confidential. If not, then Complainant must answer questions at the deposition going to her communications with that employee. If so, Respondents' counsel may inquire of the employee whether the employee is willing to waive confidentiality. If so, Respondents' counsel must confirm this in writing at her earliest practical opportunity. And Complainant must answer questions at the deposition going to these communications. But if the employee declines

¹² The information must relate to conduct the employee believed constituted a violation of 18 U.S.C. §§1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.

¹³ The order of February 9, 2012 contained a typographical error: the correct citation is to section 1514A(a), not section 1514(a).

to waive confidentiality, Respondent must not pose (and Complainant need not answer) questions at her deposition going to these communications. In this last circumstance only, Complainant waives the right to call any such employee as a witness at trial.

SO ORDERED.

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STEVEN B. BERLIN
Administrative Law Judge