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Lefkoe v. Jos. A. Bank Clothiers, Inc.

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LEFKOE V. JOS. A. BANK CLOTHIERS, INC.

Anonymity has always been an important tool in the United States.[1] Great historic figures and beloved authors have used pseudonyms to hide their true identities.[2] In fact, the ability to voice opinions anonymously is so valued that the First Amendment protects it.[3] However, when anonymity is potentially detrimental to a party in an ongoing lawsuit, how is that right to secrecy balanced against the discovery process? The United States Court of Appeals for the Fourth Circuit recently addressed this question.[4]

Last year, in *Lefkoe v. Jos. A. Bank Clothiers, Inc.*,[5] the Fourth Circuit upheld a Maryland district court's order that modified a Massachusetts district court's protective order by allowing disclosure of the identity of a nonparty witness to the parties involved in a securities fraud action; originally, the Massachusetts district court's order had allowed disclosure to only the parties' attorneys.[6] In that case, a nonparty witness[7] sent a letter, through his or her counsel, to Jos. A. Bank that described concerns regarding the "public communications and financial reporting" of the company.[8] After the letter caused a delay in an earnings report and the plaintiffs subsequently filed a class action lawsuit, Jos. A. Bank's counsel was able to discover the identity of the nonparty witness.[9] The Massachusetts district court, however, issued a protective order instructing the attorney not to disclose the nonparty witness's identity to anyone other than his partners.[10] When Jos. A. Bank was successful in modifying that protective order, the nonparty witness filed an interlocutory appeal to the Fourth Circuit.[11]

The case began with a single letter sent from the nonparty witness to Jos. A. Bank that included general allegations and "allegations suggest[ing] specific, nonpublic knowledge" about the company's inventory.[12] The nonparty witness "request[ed] that [the] letter be shared with the [c]ompany's auditors, Deloitte & Touche LLP."[13] The company hired a law firm and an accounting firm to investigate the claims in the letter.[14] The investigation resulted in the conclusion that the letter's allegations were "without substance."[15] However, because of the

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1. *See* Talley v. California, 362 U.S. 60, 64–65 (1960).
2. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341 & n.4, 343 & n.6 (1995).
3. *Id.* at 342.
4. *See* Lefkoe v. Jos. A. Bank Clothiers, Inc., 577 F.3d 240, 242 (4th Cir. 2009).
5. 577 F.3d 240 (4th Cir. 2009).
6. *Id.* at 242.
7. The court refers to the nonparty witness throughout the case as "the Doe Client." *Id.*
8. *Id.* (internal quotation marks omitted).
9. *Id.* at 243–44.
10. *Id.* at 244.
11. *Id.* at 244–45.
12. *Id.* at 242.
13. *Id.*
14. *Id.* at 243.
15. *Id.* (internal quotation marks omitted).

time taken to perform the investigation, Jos. A. Bank delayed its earnings report by ten days.[16] When Jos. A. Bank announced this delay, its stock dropped 5.8%.[17]

Months later, after the stock had dropped a total of 29%, plantiffs filed a class action lawsuit in the District of Maryland, alleging that "Jos. A. Bank and insiders issued a series of false and misleading statements about the company's earnings, profits, and inventory" and that these statements caused the plaintiffs' losses.[18] Hoping the nonparty witness could shed some light on the pending litigation, Jos. A. Bank had a subpoena issued from a Massachusetts district court to compel the nonparty witness's attorneys to attend a deposition and reveal the identity of the nonparty witness.[19] After a failed motion to quash, the Massachusetts district court allowed Jos. A. Bank to depose the nonparty witness.[20] The Massachusetts district court then ordered for the deposition to be sealed and for the attorneys not to disclose the nonparty witness's identity to anyone "absent an order of the judge presiding in the lawsuit."[21]

Anxious to reveal the newly discovered identity of the nonparty witness to his client, Jos. A. Bank's attorney requested he be allowed to do just that; however, the Massachusetts district court denied the request and directed him to argue his point before the presiding judge in Maryland.[22] After an investigation of "all publicly available information," Jos. A. Bank's attorneys learned that the nonparty witness was a short seller and that he or she may have taken purposeful action to drive down Jos. A. Bank's market price.[23] With this information, Jos. A. Bank's "counsel filed a motion in the Maryland district court to unseal the deposition of the [nonparty witness]."[24] The Maryland district court, against the nonparty witness's opposition, modified the protective order and allowed the nonparty witness's identity to be available to both the attorneys and the clients in the lawsuit.[25] Because of that order, the nonparty witness filed an interlocutory appeal with the Fourth Circuit.[26]

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16. *Id.*
17. *Id.*
18. *Id.* at 242.
19. *Id.* at 243. The subpoena was issued pursuant to FED. R. CIV. P. 45. *Id.*
20. *Id.*
21. *Id.* (internal quotation marks omitted).
22. *Id.* at 244.
23. *Id.*
24. *Id.*
25. *Id.* at 245.
26. *Id.* In filing the appeal, the nonparty witness invoked the collateral order doctrine. *Id.* "[A]n appellate court may only review a 'final order' of a lower court." Shipbuilders Council of Am., Inc. v. U.S. Coast Guard, 578 F.3d 234, 239 (4th Cir. 2009) (citing 28 U.S.C. § 1291 (2006)). However, an exception to this limitation is the collateral order doctrine, which allows an appellate court to hear an appeal from a lower court on certain decisions that "'(i) conclusively determine the disputed question; (ii) resolve an important issue completely separate from the merits of the action; and (iii) [are] effectively unreviewable on appeal from a final judgment.'" *Id.* (alteration in original) (quoting Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375 (1987)).

The nonparty witness's first argument to the Fourth Circuit against the modification of the protective order was "that the Maryland district court lacked statutory authority to unseal, even partially, the deposition that the Massachusetts court had ordered sealed."[27] The Fourth Circuit rejected this argument and stated that "both the Massachusetts court and the Maryland court recognized the division of authority anticipated by the Federal Rules of Civil Procedure"[28] and that the Massachusetts court left the matter open so that the Maryland court could "make the final call."[29] In regards to the Massachusetts district court's order, the Fourth Circuit noted that it expressly "allowed the Maryland district court to modify it."[30] Thus, with the Massachusetts district court possessing only "'a small piece of [the] dispute,'" the Fourth Circuit found that "the Massachusetts court expressly contemplated that the Maryland court could determine to unseal the deposition."[31]

For the two district courts' contrasting procedural roles, the Fourth Circuit noted that Rule 45(c) of the Federal Rules of Civil Procedure authorized the Massachusetts district court to enforce or modify the subpoena.[32] However, the Maryland district court controlled the use of the deposition, where the action was pending, pursuant to Rule 32(a).[33] Furthermore, the Fourth Circuit stated that the nonparty witness had a "range of options in seeking protection," including seeking a protective order in the Maryland court or the Massachusetts court under Rule 26(c),[34] or specifically from the Massachusetts court under Rule 45(c).[35] Thus, the Fourth Circuit held that not only was the Maryland district court authorized to modify the protective order under the specific language of the order, but the Federal Rules of Civil Procedure also provided the Maryland court the authority to take the action it did.[36]

The nonparty witness then argued that the Maryland district court violated its "fundamental First Amendment right to speak anonymously" because the letter was protected speech and the modification of the protective order to allow

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27. *Lefkoe*, 577 F.3d at 245.
28. *Id.* at 245–46.
29. *Id.* at 246 (internal quotation marks omitted).
30. *Id.* at 247.
31. *Id.* at 245–46.
32. *Id.* at 246; *see also* FED. R. CIV. P. 45(c) (stating a court's authority to enforce and modify subpoenas).
33. *Lefkoe*, 577 F.3d at 246; *see also* FED. R. CIV. P. 32(a) (regulating the use of depositions).
34. *Lefkoe*, 577 F.3d at 246. Rule 26(c) of the *Federal Rules of Civil Procedure* states that "[a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken." FED. R. CIV. P. 26(c).
35. *Lefkoe*, 577 F.3d at 246; *see also* FED. R. CIV. P. 45(c)(3)(B) (establishing when an issuing court may modify a subpoena "[t]o protect a person subject to or affected by [the] subpoena").
36. *Lefkoe*, 577 F.3d at 247.

further disclosure violated the nonparty witness's right to anonymity.[37] After recognizing that "[t]he First Amendment does appear to include some aspect of anonymity in protecting free speech," the Fourth Circuit rejected this argument and held that the nonparty witness's letter constituted commercial speech.[38] Thus, because the letter "demanded . . . action of a commercial nature," any right to anonymous speech was entitled to only "'a limited measure of protection.'"[39]

As a result of the lesser protection afforded to commercial speech, the Fourth Circuit noted that the "right to anonymity is subject to a substantial governmental interest in disclosure so long as disclosure advances that interest and goes no further than reasonably necessary."[40] In this case, the government had a substantial interest in "providing Jos. A. Bank a fair opportunity to defend itself in court" with the useful and relevant information provided by the deposition, including the identity of the nonparty witness.[41] Rule 26 of the Federal Rules of Civil Procedure "explicitly expresses this interest," the court noted, by "providing that Jos. A. Bank 'may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including . . . the identity and location of persons who know of any discoverable matter.'"[42] Thus, with the rejection of both of the nonparty witness's contentions, the Fourth Circuit affirmed the Maryland district court's order.[43]

From civil procedure to the First Amendment, this case touches upon multiple areas of the law that intertwine to uphold the decision to disclose the identity of the nonparty witness. Not only did the nonparty witness, whose name shall remain anonymous to the general public, lose a battle over procedure, but the Fourth Circuit also struck down the nonparty witness's First Amendment argument.[44] Because the Fourth Circuit held that the revelation of the nonparty witness's identity served a "substantial governmental interest" and thus took precedence over the right to anonymity,[45] it is important to analyze the potential effects of this opinion.

Once the court settled the statutory authority issue with a mere reading of the original order and the Federal Rules of Civil Procedure,[46] the more controversial and contentious issue in the case arose in the form of a First Amendment argument.[47] The United States is no stranger to the use of anonymous speech.[48]

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37. *Id.* (internal quotation marks omitted). The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

38. *Lefkoe*, 577 F.3d at 248.

39. *Id.* (quoting Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989)).

40. *Id.* at 249.

41. *Id.*

42. *Id.* (quoting FED. R. CIV. P. 26(b)(1)).

43. *Id.*

44. *See id.* at 245–49.

45. *Id.* at 249.

46. *See id.* at 245–47.

47. *See id.* at 247.

Through a comment on a website or a letter without a return address, speakers utilize anonymity in many situations to speak their minds and convey ideas.[49] Thus, it is of no surprise that the United States Supreme Court has held that "an 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."[50] The Fourth Circuit admitted that there is an "aspect of anonymity in protecting free speech."[51] However, the roadblock the nonparty witness faced was that, according to the Fourth Circuit, the letter was commercially oriented[52] and thus enjoyed less protection than other forms of speech.[53]

Specifically, the language that constituted commercial speech was the portion of the letter demanding that Jos. A. Bank's "Audit Committee take action of a commercial nature."[54] The fact that this constitutional issue turns on such few words reveals the importance and relevance of this case to future anoymous tipsters. Particularly, individuals with valauble information who wish to remain anonymous may hesitate before taking action that could result in involvement in a lawsuit. In the past, those who wished to express "controversial or unpopular viewpoints" have found solace in the tool of anonymity.[55] Because of the lesser protection afforded to anonymous nonparty witnesses who use commercial language in their communications, this case has the potential to produce a chilling effect on future similar speech.[56] For example, the potential lack of absolute anonymity may deter individuals seeking to disclose corrupt business practices or actions that could damage shareholders.[57] Therefore, although this

48. Jennifer B. Wieland, Note, *Death of Publius: Toward a World Without Anonymous Speech*, 17 J.L. & POL. 589, 589 (2001). For example, "[d]uring colonial times, pamphleteers sought the shield of anonymity while expressing ideas disfavored by the British government." *Id.*

49. *See id.* (stating that speakers seek a "shield of anonymity").

50. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995).

51. *Lefkoe*, 577 F.3d at 248.

52. *Id.* Commercial speech is "expression related solely to the economic interests of the speaker and its audience." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980) (citing Friedman v. Rogers, 440 U.S. 1, 11 (1979); Bates v. State Bar of Ariz., 433 U.S. 350, 363–64 (1977); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)).

53. *Lefkoe*, 577 F.3d at 248 (citing Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989)). The limited protection given to commercial speech is consistent with Supreme Court precedent. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 562–63 ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978))).

54. *Lefkoe*, 577 F.3d at 248.

55. Wieland, *supra* note 48, at 589.

56. *See id.* at 597 (noting the "chilling effect that mandatory disclosure laws . . . have on speech"); *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995) (stating that a "decision in favor of anonymity may be motivated by fear of economic or official retaliation" or "by concern about social ostracism").

57. *See* Memorandum in Support of Foley & Lardner LLP's Motion to Quash Subpoena at 9, 17–18, Lefkoe v. Jos. A. Bank Clothiers, Inc., No. 06-cv-1892 (D. Mass. Apr. 1, 2008).

case may be sound in its reasoning, the ruling could have the consequence of deterring future individuals who have valuable information but wish to remain anonymous from revealing that information.

In conclusion, with issues like subpoenas, free speech rights, and an anonymous tipster who may in fact be making a profit from his or her allegations,[58] *Lefkoe v. Jos. A. Bank Clothiers, Inc.* sounds like the next best-selling legal thriller. However, in reality, the Fourth Circuit merely determined that the modification of a protective order was both statutorily proper and constitutionally valid.[59] In short, the Fourth Circuit has provided sound reasoning on an issue that might give future anonymous tipsters pause before they draft accusing letters.

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58. *See Lefkoe*, 577 F.3d at 242–44, 247.
59. *Id.* at 242.