IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. **MARK CUBAN**, Defendant.	:	Civil Action No.: 3-08-CV-2050-D (SAF)

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO DEFENDANT MARK CUBAN'S AMENDED SECOND MOTION TO COMPEL PRODUCTION OF DOCUMENTS

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INTRODUCTION

The SEC expeditiously has produced to defendant Mark Cuban the materials and documents required by the Federal Rules of Civil Procedure. At the outset of discovery, the SEC produced its entire, non-privileged investigative file for this matter, and it has continued to produce relevant, non-privileged documents obtained during the course of the litigation. There is no relevant, discoverable material that the SEC has not already produced. To the significant extent that Cuban's discovery requests call for the production of materials that are not within the scope of discovery under the Federal Rules, the SEC has objected to the production of those documents and has made clear its objection in multiple teleconferences and through the exchange of numerous letters with Cuban's counsel. At root, the discovery disputes identified in Cuban's motion to compel arise from Cuban's efforts to burden the SEC – and now the Court – with topics that have no bearing on the stated claims or defenses at issue in the litigation and with demands for documents that are plainly privileged. Because the discovery Cuban seeks by his motion is irrelevant or privileged, the motion should be denied in its entirety.[1]

Cuban's motion seeks three categories of documents: (i) all documents obtained in the SEC's unrelated investigation involving Mamma.com, Inc. ("Mamma") and any documents relating to the relationship -- actually the lack of a relationship -- between that investigation and the investigation of Cuban's trading that led to this action, (ii) documents concerning alleged involvement of members of the Kott family in Mamma, and (iii) the SEC's attorneys' interview notes and memoranda protected by the work product doctrine. Cuban claims that these documents are relevant to this litigation because they relate to (i) his state of mind when he sold his Mamma shares and (ii) the credibility of witnesses with knowledge relevant to this case.

[1] In support of this Opposition, the SEC submits herewith as exhibits copies of relevant documents produced in or related to discovery in this case.

Cuban's first contention -- that documents he has never seen have a bearing on his state of mind when he sold his Mamma shares in 2004 -- is illogical. If Cuban, even today, has never seen the documents, how could they have informed his state of mind before he sold his Mamma shares in 2004? These documents clearly have no relevance to Cuban's state of mind before he sold, and Cuban's argument to the contrary should be rejected.

Cuban's second asserted basis for relevance is a retread of his previously-stricken, discredited, and completely speculative assertion that there was some relationship between the SEC's notification of the closing of an unrelated earlier investigation involving Mamma on the one hand and witness testimony in the SEC's investigation of Cuban's trading in Mamma on the other hand. This issue has been repeatedly briefed to the Court, and the SEC has repeatedly established that the decision to close the unrelated investigation involving Mamma was made before the investigation into Cuban's trading even began. In any event, the SEC has already provided discovery responses and produced documents to Cuban concerning the closure of the unrelated Mamma investigation. At this point, there is nothing left to say on this issue, and Cuban should not be permitted more discovery to pursue it.

Cuban also seeks production of the SEC's attorneys' work product-protected interview notes and memoranda. Cuban has failed to demonstrate the requisite compelling need for these documents or any circumstances that would warrant piercing the SEC's work product protection. In particular, there can be no argument that any witnesses are somehow unavailable to Cuban or that he does not already have access to the information he seeks from other, unprotected avenues. In fact, Cuban has already obtained notes of the SEC's attorneys' interviews of employees and former employees of Mamma from Mamma's former counsel. Moreover, the SEC produced to Cuban all sworn transcripts of witness testimony obtained in the investigation that led to the

filing of this action, and Cuban's counsel conducted their own transcribed, unsworn interviews of Mamma witnesses at the time of the investigation as well. Finally, there is every indication that the Mamma witnesses are available for deposition, and some of these depositions have already been scheduled. Under these circumstances -- and where the witnesses' statements have remained consistent throughout -- there is no basis to provide Cuban's counsel access to the SEC's attorneys' interview notes and memoranda protected by the work product doctrine. Because the SEC's documents are protected by the work product doctrine and because the information Cuban seeks therein is widely available elsewhere, Cuban's motion with respect to the SEC's attorneys' interview notes and memoranda should be denied.

Cuban's motion seeks to compel a burdensome production of privilege logs when Cuban himself has repeatedly objected to the SEC's request for a privilege log, and despite the fact that the SEC has already undertaken considerable burden in providing an extensive privilege log that substantially overlaps with the log Cuban now seeks. Cuban's hypocritical position that the SEC is obligated to undertake the burden of creation of additional extensive privilege logs when he has objected to providing a meaningful log for the relevant time period in return is sufficient reason to deny his motion with respect to this request.

BACKGROUND

While the Court is certainly familiar with the background of this litigation, the SEC provides the following relevant history to establish the context in which Cuban has submitted his pending motion to compel. On March 16, 2009, the SEC produced to Cuban its entire, non-privileged investigative file created in its investigation of Cuban's trading in Mamma. See Exhibit 1 (Plaintiff Securities and Exchange Commission's Rule 26(a) Initial Discovery Disclosures ("Initial Disclosures")). This production, as supplemented on May 4, 2009, see

Exhibit 2 (May 4, 2009 Letter from A. Aderton to L. Roberts & P. Coggins), was comprised of more than 11,000 pages and included, among other things, all testimony transcripts the SEC had obtained in its investigation and all documents obtained from non-governmental third parties. See Exhibit 3 (Plaintiff Securities and Exchange Commission's Response to Defendant Mark Cuban's First Request to Plaintiff for Production of Documents). On May 4, 2009, Cuban served his First Requests to Plaintiff for Production of Documents ("First Requests"). See Exhibit 4. Cuban's First Requests contained a number of specific requests calling for production of plainly privileged documents, e.g., documents concerning the Commission's decision to file this action, see id. (Request No. 1, at 9), as well as requests calling, at least in part, for the production of documents the SEC had already produced to Cuban, e.g., a request for production of all documents relating to the SEC investigation entitled In the Matter of Mamma.com Financing Transactions (HO-10576),[2] see id. (Request No. 4, at 10). Cuban's First Requests also included a number of specific requests calling for documents irrelevant to the merits of this action or to any meritorious defense. See id. (Request Nos. 8-12, at 10).

On June 8, 2009, the SEC responded to Cuban's First Requests, raised a number of objections, and reiterated that it had already produced its entire, non-privileged investigative file. See Exhibit 3. On June 22, 2009, the parties held a conference concerning the Commission's responses to Cuban's discovery requests and subsequently exchanged letters further clarifying their positions on individual requests.[3] See, e.g., Exhibit 5 (June 26, 2009 Letter from K.

[2] Cuban's motion disingenuously claims that the SEC has produced no documents responsive to this particular request. See Mem. at 8. In fact, the SEC had produced its entire, non-privileged investigative file for In the Matter of Mamma.com Financing Transactions (HO-10576) with its Initial Disclosures nearly two months before Cuban served the First Requests.

[3] It was during this exchange of letters that Cuban clarified his position that he would not produce a privilege log for essentially the entire period for which he had counsel related to the SEC's investigation because production of such a log would be unduly burdensome given that nearly all documents were likely to be privileged. See Exhibit 5 (June 26, 2009 Letter from K. O'Rourke to H. Asbill & L. Roberts at 1-2). The SEC sought to resolve the impasse, but Cuban did not agree. The SEC objected to, and continues to object to, the production of a privilege log

O'Rourke to H. Asbill & L. Roberts); Exhibit 6 (June 30, 2009 Letter from L. Roberts to K. O'Rourke); Exhibit 7 (July 15, 2009 Letter from K. O'Rourke to H. Asbill & L. Roberts). On July 17, 2009, the Court dismissed the SEC's Complaint, see Memorandum Opinion and Order, Dock. #33, essentially halting merits discovery.

On August 28, 2009, Cuban filed a motion for attorneys' fees, see Motion for Attorney Fees and Expenses, Dock. #41, and, on December 4, the Court ordered discovery related to the motion. See Memorandum Opinion and Order, Dock. #50 ("December 4, 2009 Order"). On December 11, Cuban served Interrogatories and Requests for Production of Documents. See Exhibits 8-9. This discovery included specific requests for documents identical to what he is seeking in this motion. For example, Interrogatory 12 instructed the SEC to "[d]escribe in detail the reasons you opened an investigation of Mr. Cuban that was separate from, or in addition to, your investigation of Mamma.com (HO-09900)."[4] Exhibit 8 (Interrogatory No. 12, at 9). Similarly, Interrogatory No. 13 instructed the SEC to "[i]dentify the person(s) who made the decision to close your investigation of Mamma.com (HO-09900), state when that decision was made, and describe in detail the reasons that decision was made, and when Mamma.com personnel or their counsel were informed of the decision," and Interrogatory No. 14 instructed the SEC to "[i]dentify all communications and documents concerning the closing of your investigation of Mamma.com (HO-09900)." Id. (Interrogatory Nos. 13-14, at 9).

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for precisely the same reason as Cuban. However, unlike Cuban and as described below, the SEC previously undertook to create and produce an extensive privilege log (identifying more than 600 privileged documents) that substantially overlaps with the documents called for by Cuban's requests.

[4] The SEC's responses to Cuban's discovery requests include a direct answer to this interrogatory demonstrating that the investigation into Cuban's trading was in no way derivative of the SEC's unrelated investigation involving Mamma. See Exhibit 10 at 12-13. Cuban knows that the investigation into his trading was unrelated to the previous investigation, and his continuing to suggest otherwise, see Mem. at 9 ("The SEC's investigation into Mr. Cuban appears to have arisen in part out of its investigation into Mamma.com…."), is disingenuous.

On March 9, 2010, the SEC provided a comprehensive response to Cuban's written discovery requests. See Exhibits 10-11. The SEC served narrative responses and identified and produced relevant documents related to those responses. For example, in response to Interrogatory No. 13 concerning the closing of HO-09900, the SEC stated that the SEC staff "were 'plan[ning] on closing the matter' no later than October 17, 2006," that the final decision not to recommend an enforcement action was made in late August-early September 2007, and that the matter was closed because the investigation did not find sufficient evidence of market manipulation or misrepresentations by Mamma. See Exhibit 10 at 13-14.[5] In addition, in response to Interrogatory No. 14, the SEC identified documents concerning the closing of HO-09900 and either produced those documents to Cuban or identified them on a privilege log. See id. at 14. The SEC provided similarly specific and complete responses to Cuban's other interrogatories and requests and produced an additional 4,500 pages of documents responsive to the requests. On March 9, 2010, and after many hours of effort, the SEC provided Cuban with an extensive privilege log covering his discovery requests, which requests substantially overlap with the requests that are the subject of his pending motion.

The parties filed multiple discovery motions related to the requests served pursuant to the Court's December 4, 2009 Order. See, e.g., SEC's Motion to Compel Responses to Interrogatories and Production of Documents, Dock. #64, Cuban's Motion to Compel, Dock. #65-66, SEC's Motion for Protective Order, Dock. #71.[6] On September 21, 2010 -- and while those discovery motions were still pending -- the Fifth Circuit reversed the prior dismissal of the

[5] As evidenced by the SEC's interrogatory response, Cuban's claim that he needs access to the full investigative file in HO-09900 because "[t]he SEC has never fully explained why the Mamma.com investigation was closed or why its closure was communicated…at the particular time that it was," Mem. at 9, is completely meritless.

[6] Because the issues raised by Cuban's instant motion substantially overlap with the issues briefed previously, the SEC, like Cuban, see Mem. at 13 n.8, incorporates its previous briefs, which further support the SEC's position that Cuban's pending motion to compel should be denied.

SEC's Complaint and remanded for further proceedings. See SEC v. Cuban, 620 F.3d 551 (5th Cir. 2010). On the same day, the Court denied Cuban's attorneys' fees motion and the related discovery motions. See Order Denying Without Prejudice Motion for Attorney Fees, Dock. #76.

On February 4, 2011, Cuban's counsel filed an Amended Answer asserting, among other things, an unclean hands affirmative defense. See Amended Answer, Dock. #88. In support of that defense, Cuban made precisely the same kind of speculative allegation he makes in his pending brief: that the unrelated HO-09900 investigation was closed "in an apparent effort to get [Mamma's CEO] to change his earlier testimony…." Amended Answer at 8-9, Dock. #88. The SEC moved to strike Cuban's affirmative defense, see Motion to Strike Amended Answer, Dock. #93, and on July 18, 2011, the Court granted the SEC's motion, with prejudice. Memorandum Opinion and Order, Dock. #104 ("July 18, 2011 Order").

ARGUMENT

Cuban's pending motion seeks production of all non-privileged portions of the investigative file in the unrelated investigation involving Mamma, all documents describing the relationship between the investigation of Mamma and the investigation of Cuban, and a privilege log identifying all privileged documents in the unrelated investigative file, Mem. at 8, all documents concerning the involvement, if any, of the Kotts in Mamma, Mem. at 15, the SEC's work product-protected interview notes and memoranda, Mem. at 18, and the creation and production of an additional privilege log, Mem. at 21, though Cuban has provided no equivalent log in response to the SEC's requests. In support of his request, Cuban articulates two profoundly flawed bases for the relevance of these documents. Moreover, significant subsets of these documents -- for instance, documents showing that there was no relationship between the closing of the unrelated investigation involving Mamma and the investigation of Cuban, and

transcripts reflecting the testimony of key witnesses -- have already been produced to Cuban. Because Cuban fails to provide a basis for which the documents he seeks could be relevant or the Commission's work product protection pierced, his motion should be denied in its entirety.

I. Documents Cuban Has Never Seen Have No Relevance To His Scienter.

Cuban first argues that documents concerning the alleged involvement of the Kotts in Mamma or documents obtained in the unrelated investigation involving Mamma -- documents Cuban has never seen -- are somehow relevant to Cuban's scienter or state of mind when he sold his Mamma shares in June 2004. It is elementary that Cuban's scienter or his then-existing motivation for selling his Mamma stock has nothing to do with whatever was in someone else's mind or in documents that he had not seen when he decided to sell in 2004. The only things relevant to Cuban's scienter at the time he sold are those that Cuban himself thought, saw, heard, observed or stated at the time. Obviously, Cuban's scienter or state of mind is exactly that -- **his** -- not someone else's. See, e.g., Jack B. Weinstein & Margaret A. Berger, 5 Weinstein's Federal Evidence § 803.05[2][a] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2011) ("Statements by one person cannot be offered as proof of another's state of mind."). Facts obtained only in subsequent discovery have no bearing on what Cuban thought or believed when he sold in 2004. Similarly, the purpose of discovery is not to allow Cuban, after the fact, to "substantiate" his now claimed "suspicions." Mem. at 11; see, e.g., U.S. v. Kellar, 394 Fed. Appx. 158, 164 (5th Cir. 2010) (defendant did not demonstrate how subsequent circumstances have any effect on state of mind at time of violation). Nothing Cuban learned or learns after he sold -- including anything he learned or may learn during discovery in this litigation -- is of any relevance to what he knew or believed when he sold his shares in 2004. Accordingly, Cuban's

claim -- that documents he has never seen are relevant to his state of mind when he sold in 2004 -- should be rejected.

Of course, Cuban's motivation for selling his Mamma stock is relevant to this action. Cuban's own contemporaneous statements, as well as his decision to sell just one minute after learning the terms of the PIPE transaction, compellingly demonstrate that Cuban sold because of the Mamma PIPE.[7] In response to a July 2, 2004 inquiry (just four days after he sold), Cuban said he sold his shares because "I hate when companies do 'PIPES' type transactions to raise money. Its [sic] dilutive, and I hate being diluted…that simple[.]" Exhibit 12 (MCSEC0001296). Again, on July 2, 2004, Cuban explained the reason for his Mamma sales: "I sold my stock..[sic] Privates like this are a huge redflag [sic] to me….didnt [sic] like the dilution, or the fact they were raising money …" Id. (MCSEC0001194). Over and over, Cuban repeated that he sold his shares because of the PIPE. See, e.g., id. (July 6, 2004 email wherein Cuban states that "I sold because they were selling additional equity that would dilute my ownership" ((MCSEC0001300); (August 5, 2004 email wherein Cuban states that "When they did a PIPE form of financing, that's an automatic sell for me" (MCSEC0001419)); (August 7, 2004 email wherein Cuban states that "The dilution is why I sold" (MCSEC0001426)); (August 11, 2004 email wherein Cuban states that "Mamma did a PIPE financing, which is an immediate red flag in my book, so I sold" (SEC-MC0001324)); (September 2, 2004 email where, in response to a question if Cuban is done with Mamma, Cuban writes: "Yep I have a rule. When a company does a PIPE financing, sell it if I own it, try to short it if I can…mama fell to [sic] far to short it" (MCSEC0001894)); (September 15, 2004 email wherein Cuban states that "I sold MAMA because they used a financing tool called a PIPE. That is a sell signal so I sold, and it is

[7] Even under Cuban's counsels' theory, Cuban, at most, sold only "in part" because of his alleged concerns about Mamma. Mem. at 11.

completely consistent with what I said in my blog" (MCSEC0001541)); (September 17, 2004 email wherein Cuban states that "I sold [Mamma] when they did a PIPE" (MCSEC0001556)); (October 7, 2004 email wherein, when asked what changed concerning Mamma, Cuban states that "They did a financing using a PIPE offering. I won't own a company that uses them" (SEC-MC0001642)). Finally, in a March 3, 2005 post on his blog, Cuban again reiterated that he sold Mamma because of the PIPE:

> Then [Mamma] did a PIPE financing. Im [sic] not going to discuss the good or bad of PIPE financing other than to say that to me it is a huge red flag and I dont [sic] want to own stock in companies that use this method of financing . [sic] Why ? [sic] Because I dont [sic] like the idea of selling in a private placement, stock for less than the market price, and then to make matters worse, pushing the price lower with the issuance of warrants. So I sold the stock.

Id. (SEC-MC0003068).

In support of his motion, Cuban creates an after-the-fact explanation that he sold his Mamma stock "in part" because of his concerns about individuals allegedly involved with Mamma, but he cites only (i) his own self-serving testimony, taken nearly three years after the trading at issue when he knew that the SEC was investigating this matter, and (ii) an email that he received from a person named Brian Shaddick. Mem. at 11, 17. Close examination shows Cuban's claim that the email from Mr. Shaddick influenced his decision to sell is merely a post hoc rationalization. On June 8, 2004, Cuban had emailed Mr. Shaddick dismissing Mr. Shaddick's concerns about Irving Kott's involvement in Mamma. See Exhibit 13 ("Brian, I have talking to irving, his kids and lawyers and they aren't involved w: [sic] mama…. Even talked to your buddies at the fbi[.] Time for you to get a life[.]" (SEC-MC0001263)). Cuban sent another email to Mr. Shaddick on June 9, 2004, again dismissing Mr. Shaddick's allegations that the Kotts were involved in Mamma. See id. ("You are an idiot brian.. [sic] You need to Get [sic] over it and move on. You are stuck on this for some reason and have zero clue what is going

on." (SEC-MC0001266)). On June 28, 2004, Mr. Shaddick responded to Cuban's June 9 email claiming additional information linking Mr. Kott and Mamma; Cuban responded by requesting that information. See id. (SEC-MC0001276). An email later that day, well after Cuban placed his order to sell his Mamma shares, makes clear that Cuban had still not received the information Mr. Shaddick promised. See id. (SEC-MC0001278). In fact, it appears that Cuban never received the promised information from Mr. Shaddick, and on July 6, 2004 when Mr. Shaddick did provide other supposedly new information, Cuban dismissed that information as "from 5 years ago." Id. (SEC-MC0001306). Cuban's July 6, 2004 response to Mr. Shaddick unequivocally establishes that Cuban's state of mind was entirely contrary to that now claimed by Cuban in his motion.[8]

Cuban's email exchanges with Mr. Shaddick do not justify discovery related to Mr. Kott or the investigation involving Mamma. Instead, the exchanges demonstrate that Mr. Kott was not the reason Cuban sold his stock.[9] When he sold, Cuban did not know whether Mr. Kott was involved with Mamma. Conversely, Cuban sold immediately after learning the details of the Mamma PIPE. Most importantly for purposes of Cuban's pending motion, however, even if Cuban's email exchanges with Mr. Shaddick are relevant to Cuban's state of mind, it is only because he had seen or sent the emails contemporaneously. The emails do not justify -- under claimed relevancy to Cuban's state of mind -- a fishing expedition for documents to which Cuban did not have access at the time. Nothing in the SEC's files from a separate investigation -- whether it confirms or refutes Mr. Kott's involvement in Mamma -- has any bearing on

[8] For obvious reasons, Cuban fails to include the conclusive July 6, 2004 email in his submission to the Court.

[9] Even assuming *arguendo* that a perceived prior connection between Mamma and Mr. Kott was somehow a secondary element of Cuban's motivation -- despite his own pronouncements that overwhelmingly indicate otherwise -- Cuban's desire for verification of his claimed contemporaneous thinking does not justify discovery, as explained supra.

Cuban's state of mind at the time he sold because his state of mind could only be based on information he already had when he decided to sell.[10]

In sum, Cuban's argument that documents he has never seen from some unrelated investigation relates to his state of mind at the time he sold his Mamma shares makes no sense. The argument that the documents Cuban now requests are relevant to assessing his state of mind cannot provide a basis for the production of the documents Cuban seeks.

II. Cuban's Claimed Need For An Entire Unrelated SEC Investigative File Is Meritless.

Cuban argues that he is entitled to the entire investigative file of an unrelated SEC investigation ("HO-09900") because all of the documents from that file somehow relate to the credibility of all the witnesses who were affiliated with Mamma. The asserted relationship to credibility -- Cuban's basis for seeking all documents from HO-09900 -- is that all Mamma witnesses "had ample reason to welcome" the closing of the SEC's separate investigation. Mem. at 9. Cuban's claim concerning an "ample reason to welcome" the closing of a separate investigation hardly can be said to provide an adequate basis to find relevancy of the *entire content*s of a separate investigative file or, for that matter, any part thereof.[11] Similarly, Cuban claims that all of the documents in the separate HO-09900 investigation are relevant because of an imagined *quid pro quo* based on speculation and innuendo, baldly asserting that "questions [about the "closing" or "closure"] cannot be answered without access to the full investigative file." Mem. at 9. Cuban's allegation of an improper *quid pro quo* has already been extensively

[10] Similarly, Mr. Fauré's statement, as related through Cuban's broker, that Mr. Fauré was not risking his reputation and good name with Mr. Kott, see Mem. at 17, would, at best, only be relevant to Cuban's state of mind to the extent Cuban was aware of the statement. Nothing in the SEC's files -- files that Cuban has never seen -- would change the information to which he was privy at the time he made his decision to sell.

[11] Even under Cuban's imagined theory, the *quid pro quo* only took place at the very end of the investigation. See, e.g., December 4, 2009 Order at 8 ("Fauré testified for the second time only two days after the SEC concluded its investigation of Mamma.com, which Cuban argues suggests a *quid pro quo*.").

briefed to the Court,[12] and, while the SEC has introduced conclusive evidence that no such impropriety occurred, Cuban persists even at this late stage in making this speculative argument[13] based on the coincidental timing between when one group of SEC attorneys provided formal notification to Mamma that an investigation was closed and when another group of SEC attorneys took testimony from witnesses in the investigation of Cuban's trading. In any event, there is no reasonable argument that every document obtained in the prior investigation is relevant to Cuban's alleged *quid pro quo*; obsessively longing for documents does not a *quid pro quo* make.

Cuban previously requested and received detailed discovery related to the closing of HO-09900. The responses to Cuban's Interrogatory Nos. 12-14, served by the Commission on March 9, 2010, describe the distinctness of the two investigations, the reasons for the closing of the HO-09900 investigation, and identify documents related to the closing of that investigation.[14] See Exhibit 10 at 12-14. Thus, discovery concerning the closing of HO-09900 is complete, and Cuban has already received answers to the questions he now asks again.[15] Additional fishing concerning this issue is unjustified, especially since, having already conducted extensive

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[12] Despite Cuban's claim, e.g., "[t]he SEC has never fully explained," Mem. at 9, why HO-09900 was closed, in fact the SEC has repeatedly addressed this allegation. See, e.g., Opposition to Fees Motion, Dock. #47, at 21; Opposition to Motion to Compel, Dock. #70, at 7; Memorandum in Support of Protective Order, Dock. #71, at 11-15; Reply in Support of Protective Order, Dock. #75, at 3.

[13] Cuban's argument continues to contain a number of factual errors. For example, despite Cuban's protests, the SEC has expressly described the timing of the closure of the Mamma investigation and identified documents related thereto. See Exhibit 10 at 13-14. Similarly, despite Cuban's mischaracterizations, the SEC has repeatedly detailed that the SEC's investigation into his trading is in no way derivative of the previous, unrelated investigation. See, e.g., id. at 12-13. Cuban has the evidence showing that his characterizations are inaccurate, but continues to make mischaracterizations.

[14] The overreaching nature of Cuban's request for all documents in HO-09900 is clear. A party is not required to provide a detailed privilege log in advance of a determination of relevancy of such a request. Contrary to Cuban's claim, he is not entitled to assess specific claims of privilege for categories of materials that are irrelevant.

[15] Cuban did not obtain the required permission to pursue such discovery as was required by this Court's Order of September 21, 2010. The Court specifically ordered that "no discovery related to the attorney's fees motion may be conducted without leave of court." September 21, 2010 Order at 1-2. As demonstrated herein, Cuban's discovery requests related to the closing of HO-09900 are virtually identical to information he previously sought (and received) in connection with his attorneys' fees motion.

discovery, Cuban has not demonstrated any basis for the alleged *quid pro quo* and instead continues to rely on speculation, conjecture, and rank hearsay.[16] See, e.g., Mem. at 9 (witnesses "*would have had* ample reason to welcome the closing" of HO-09900; timing of closing "*quite possibly* a deliberate attempt to elicit favorable testimony"), 10 ("there *appears to be* a connection" between the closing of HO-09900 and additional investigative work), and 14 (questioning effect closing "*may have had*" on testimony) (emphasis added throughout).

Cuban inappropriately seeks to resurrect the same *quid pro quo* argument that the Court has rejected by striking Cuban's affirmative defense of unclean hands, holding that Cuban could not meet the threshold for raising such a defense and stressing "the intrusive impact that litigating such a defense could have on the SEC's prosecution of this enforcement action."[17] July 18, 2011 Order at 27. Cuban's *quid pro quo* defense was specifically included in the affirmative defense stricken by the Court. See id. at 24-25.

Similarly, without providing any analysis, Cuban also argues that he needs discovery of documents related to the Kotts' alleged involvement in Mamma since such documents are somehow relevant to Mr. Fauré's credibility. Cuban does not claim, nor could he, that Mr. Kott is in anyway related to the alleged conversation between Cuban and Mr. Fauré that is at the center of this case. In fact, the only statement from Mr. Fauré that Cuban identifies, apparently to suggest that it is somehow impeachable and thus may somehow relate to Mr. Fauré's credibility, is a statement purportedly made by Mr. Fauré to, and restated by, Cuban's broker

[16] Cuban's citation to litigation hold notices sent to staff members involved in HO-09900 as purported support for the need for discovery on the *quid pro quo* is misguided. These notices were conservatively sent when Cuban's counsel first began making unsupported allegations against the SEC staff. See Memorandum in Support of Protective Order, Dock. #71, at 14 n.10.

[17] Cuban's persistence in making allegations about the "conduct of various [SEC] attorneys," Mem. at 14, is especially troubling. In granting the SEC's motion to strike Cuban's unclean hands affirmative defense, the Court made clear that such allegations were no longer part of this case. Cuban's continued assertion of these allegations is directly contrary to the Court's Order and results in just the kind of delay and impediment to pursuit of the public's interest in law enforcement that the Court identified. See July 18, 2011 Order at 21.

over three months before the trading at issue. Yet, even the purported statement of belief by Mr. Fauré -- that "his reputation and good name were not being risked with people like Kott," Mem. at 17 -- is entirely unremarkable. In no way does this statement somehow justify otherwise irrelevant discovery about Mr. Kott, either generally or as proper impeachment of Mr. Fauré pursuant to Federal Rule of Evidence 608(b).

Even assuming that Cuban's broker accurately summarized what Mr. Fauré said, an alleged statement about an irrelevant topic that was made months earlier is hardly probative of Mr. Fauré's credibility. For Rule 608(b) purposes, the statement would not be sufficiently probative of Mr. Fauré's character for truthfulness or untruthfulness[18] and, at any rate, could not be proven by extrinsic evidence. A single statement on an unrelated and tangential matter -- even if it was accurately recounted -- does not sanction wide-ranging discovery. Further, any probative value would be outweighed by the danger of unfair prejudice and confusion of issues, and would open the door to harassment of Mr. Fauré.[19] At any rate, a credibility challenge to an irrelevant issue does not justify the extensive discovery that Cuban seeks in his motion to compel.

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[18] The claimed misstatement does not even begin to approach the types of allowed evidence of specific instances of conduct probative of truthfulness under Rule 608(b). See generally Charles Alan Wright & Victor James Gold, 28 Federal Practice & Procedure § 6118 (1993 & 2010 Supp.) ("acts clearly implicating veracity such as insurance fraud, ballot fraud, bank fraud, bribery, forgery, soliciting a bribe, fraudulently passing bad checks, lying on a license application, lying on a job application, lying on a tax return, lying to a government agency….") (citations omitted).

[19] Beginning no later than summer 2007 -- i.e., three years after the events at issue and long after he learned about the SEC's investigation of his trading -- Cuban embarked upon a wide-ranging after-the-fact campaign to attempt to link Irving Kott and Mr. Kott's perceived affiliates to Mamma during a time period relevant to this case. Cuban's 2007 and 2008 activity included directing and using his affiliate Sharesleuth.com and other agents to engage in an obsessive campaign designed to embarrass and harass in an attempt, ultimately unsuccessful, to connect Mr. Kott to Mamma during the time period that they wished. See, e.g., Exhibit 14 (examples of emails related to such activity). In spite of his extensive efforts, Cuban could not establish the hoped-for connection to Mr. Kott. The depth of this activity suggests that Cuban's purpose in pursuing Kott-related discovery in this case is, again, for the sole purpose of embarrassing and harassing one or more Mamma witnesses. Such a purpose is improper and should not be permitted by the Court.

III. SEC Attorneys' Interview Notes And Memoranda Are Protected Work Product.

Cuban seeks to compel production of SEC's attorneys' interview notes and memoranda. These materials are classic attorney work product that is not discoverable. See, e.g., Hickman v. Taylor, 329 U.S. 495, 510-11 (1947) (work product "is reflected, of course, in interviews, statements, memoranda"); Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 622 (7th Cir. 2010) (attorneys' notes and memoranda of oral interviews protected by the work-product doctrine); SEC v. Brady, 238 F.R.D. 429, 442 (N.D. Tex. 2006) ("opinion work product include[s] notes and memoranda created by an attorney"). Indeed, courts have specifically held that "[m]aterials prepared by SEC attorneys in anticipation of litigation that disclose what they learned during witness interviews *undoubtedly constitute attorney work product*." SEC v. Sentinel Mgmt. Group, Inc., No. 07 C 4684, 2010 WL 4977220, at *7 (N.D. Ill. Dec. 2, 2010) (citations omitted and emphasis added).[20]

Production of any attorney's notes or memoranda necessarily discloses the attorney's mental processes and impressions to some degree. See, e.g., Baker v. GMC, 209 F.3d 1051, 1054 (8th Cir. 2000) ("attorney notes reveal an attorney's legal conclusion, because, when taking notes, an attorney often focuses on the facts he deems legally significant"); Sentinel Mgmt. Group, Inc., 2010 WL 4977220, at *9 ("attorney's mental processes are revealed to a certain extent even when the attorney's memorandum is factual in nature, merely summarizing what the witness said"). For this reason, "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored." Upjohn Co. v. United States, 449 U.S.

[20] Without obtaining the required leave of Court and in reliance on the moving papers he submitted as part of his earlier attorney's fees motion, Cuban moves to compel the production of documents covered by the SEC's proper assertions of privilege. See Order Denying Without Prejudice Motion for Attorney Fees, Dock. #76, at 1-2; Mem. at 13-14. However, Cuban has not provided an adequate basis to abrogate the SEC's proper assertions of privilege. This is especially so with respect to documents that Cuban speculates relate to his *quid pro quo* claim, which claim has been demonstrated to be baseless and stricken from the case. The SEC has previously demonstrated Cuban's failure to provide justification for piercing the SEC's properly asserted privileges. See, e.g., Opposition to Motion to Compel, Dock. #70, at 10-23.

383, 399-400 (1981), and such notes and memoranda are generally protected from discovery as opinion work product. See, e.g., Brady, 238 F.R.D. at 442 (citing Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869, 875 (5th Cir. 1991) for the proposition that attorney notes and memoranda constitute opinion work product).

Courts may compel discovery of opinion work product only if the party seeking production demonstrates a compelling need for the information. See Upjohn Co., 449 U.S. at 402 (work product reflecting the attorney's mental processes may be disclosed, if at all, only on a showing of necessity and unavailability by other means); Brady, 238 F.R.D. at 443. The compelling need standard provides "nearly an absolute protection for opinion work product." Brady, 238 F.R.D. at 443 (citations omitted); see also In re Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1240 (5th Cir. 1982) (production of opinion work product requires "even higher" showing).

Even as to those portions of attorney notes and memoranda that may consist of factual work product, such material is not discoverable unless the party seeking production demonstrates, at the very least, "that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(ii); see In re Int'l Sys. & Controls Corp., 693 F.2d at 1240. A requesting party cannot meet his obligation to show undue hardship where he can procure the information sought through other avenues, such as depositions. See In re Int'l Sys. & Controls Corp., 693 F.2d at 1240; Brady, 238 F.R.D. at 444 (denying motion to compel interview notes and memoranda where requesting party failed to produce evidence of unavailability of witnesses).

Moreover, it is clear that Cuban seeks documents protected by the work product doctrine solely to impeach the Mamma.com CEO's testimony. See Mem. at 18 (documents "bear on the

credibility of the SEC's principal witness"). Courts are "extremely reluctant to allow discovery of attorney work product simply as impeachment evidence." Sandra T.E., 600 F.3d at 622. This is for good reason. Cuban is free to depose the CEO and to identify and question him about any allegedly inconsistent statements. He should not be allowed to overcome the work product protection for documents containing witness statements based on "mere surmise or suspicion that he might find impeaching material in the statements." Hauger v. Chi., Rock Island & Pac. R.R. Co., 216 F.2d 501, 508 (7th Cir. 1954).

Applying these standards, Cuban has not demonstrated any "substantial need" for the notes and memoranda of counsel.[21] First, Cuban already has notes of the SEC's interviews of Mamma personnel; he obtained these notes from Mamma's former counsel. Second, the SEC has already produced to Cuban transcripts of the sworn, investigative testimony of these witnesses. In addition, Cuban's counsel has already taken its own unsworn, transcribed statements from several of these witnesses, including the Mamma CEO. Lastly, Cuban is free to depose these witnesses in this litigation. In fact, the depositions of some former Mamma employees are already scheduled. Unlike cases where courts have required the production of protected notes and memorandum, the witnesses here are alive. Cf. In re Grand Jury Investigation, 599 F.2d 1224, 1231-32 (3rd Cir. 1979) (ordering production of protected work product where witness had died). There is no question that Cuban has access to -- indeed, already has in his possession -- the "underlying facts through other avenues of the discovery process." Brady, 238 F.R.D. at 444. The SEC should not be compelled to produce its interview notes and memoranda that are protected as opinion work product.

[21] Cuban's claim that the he "cannot obtain the SEC's notes and summaries elsewhere, as they exist only in the SEC's possession," Mem. at 2, is contrary to over a half century of jurisprudence and an obvious sleight of hand. While Cuban does not have the SEC's privileged documents, he physically possesses -- by virtue of his September 2011 financing of the purchase of Mamma's business, see discussion infra -- the notes and summaries of the Mamma lawyer who participated in those interviews.

Nor has Cuban shown the requisite hardship to obtain access to the SEC's opinion work product. Instead, he merely repetitively asserts that "extraordinary circumstances" in this case justify the compelled production of protected documents. Mem. at 14, 18, 20. Even if "extraordinary circumstances" were the standard, Cuban's sole factual allegation in support of those circumstances -- an allegation that Mamma's CEO's testimony has changed -- lacks any reliable factual support.

Cuban's source in support of his allegation that a key witness' testimony has changed over time is the revised Second Declaration of Michael Storck, formerly counsel to Mamma ("Revised Second Storck Declaration"). See Mem. at 18. The story of how the Revised Second Storck Declaration came to be underscores its unreliability and absolute lack of credibility. On July 20, 2011, Mr. Storck executed a declaration under penalty of perjury. Exhibit 15 ("First Storck Declaration"). In the First Storck Declaration, Mr. Storck claimed he was present for an interview of Guy Fauré, Mamma's Chief Executive Officer in June 2004, that was conducted by members of the SEC's Enforcement Division on September 10 or 11, 2007 in Montreal, Canada. See id. ¶7. Mr. Storck further claimed that he explicitly recalled at this interview that Mr. Fauré -- contrary to Mr. Fauré's testimony to the staff in January and September 2007 and contrary to Mr. Fauré's transcribed interview with Cuban's counsel in September 2007 -- said that Cuban did not agree to keep information concerning the PIPE confidential. See id. Although dated July 20, Cuban's counsel provided the First Storck Declaration to the SEC shortly (three business days) before filing it with the Court in support of Cuban's original second motion to compel on August 29. The SEC immediately recognized that Mr. Storck's assertion of statements at an SEC interview of Mr. Fauré in Montreal was false; the SEC knew -- and had previously provided Cuban's counsel in discovery with the itinerary for the Montreal interviews, see Exhibit 16

(Email from J. Riewe to M. Storck (SEC-MC-E0000140)) -- that the interview Mr. Storck claimed to have attended with Mr. Fauré never happened.[22] Indeed, two days after Cuban's counsel filed the First Storck Declaration with the Court, the SEC served Mr. Storck with a subpoena (with a service copy to Cuban's counsel) with detailed specifications seeking documents concerning the claimed SEC interview of Mr. Fauré and noticing Mr. Storck's deposition. See Exhibit 17 (Subpoena of Michael E. Storck).

During his recent deposition, Mr. Storck admitted that Paragraph 7 of the First Storck Declaration was false. See Exhibit 18 (M. Storck 09/28/11 Dep. Tr. at 114-18).[23]

On September 9, 2011, Mr. Storck, again under penalty of perjury, executed a second declaration ("Original Second Storck Declaration"). In this Original Second Storck Declaration, Mr. Storck again stated that the SEC had conducted an in-person interview of Mr. Fauré on September 10 or September 11, 2007. Because the claimed interview never happened, this assertion was also false.[24]

Previously, on September 1, 2011, Cuban's counsel informed the SEC that a Purchaser, financed by Cuban, was purchasing Mamma's business. See Exhibit 19 (Letter from S. Best to K. O'Rourke & D. Thompson). This Cuban-financed purchaser waived Mamma's attorney-client privilege: On September 9, and after Cuban's counsel had completed their review of previously privileged Mamma documents that Mr. Storck had, Cuban's counsel informed the

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[22] In addition to the Montreal itinerary produced by the SEC in its Initial Disclosures, Cuban's counsel, who drafted Mr. Storck's Declarations, also knew that Mr. Storck had no notes to attach from the purported Montreal interview of Mr. Fauré and that he could not identify the specific date of the purported interview or the names of the SEC interviewers. Compare ¶7 of Exhibit 15 (First Storck Declaration), with ¶¶9 and 10.

[23] The progression to the final false version of Paragraph 7 of the First Storck Declaration is no longer transparent. Cuban's counsel has advised that the drafts they reviewed with Mr. Storck, other than the initial draft that did not mention the phantom Montreal interview, were shredded by Cuban's counsel.

[24] In Paragraph 29 of the Original Second Storck Declaration, Mr. Storck falsely attested that "On or about September 10 and 11, 2007, the SEC conducted in-person interviews with Guy Faure, David Goldman, Daniel Bertrand, Irwin Kramer and Claude Forget." Not only was this statement false as to Mr. Fauré, it was also false as to Claude Forget, who was inserted in this version of the declaration.

SEC for the first time that the privilege had been waived. See Exhibit 20 (Email from S. Best to K. O'Rourke et al.). On September 15, former counsel for Mamma notified the SEC that, in providing documents to Cuban's counsel, the company may have turned over documents that were privileged pursuant to a joint defense agreement. See Exhibit 21 (Letter from K. Cross to S. Best & K. O'Rourke). In this same communication, former counsel for Mamma sought to claw back the Original Second Storck Declaration. Mr. Storck's reiteration of his false assertion that there was an in-person interview of Mr. Fauré by SEC staff on September 10 or 11, 2007 could in no way be covered by any claimed joint defense agreement, and the SEC did not agree to surrender this additional false sworn statement. Throughout, the SEC continued to seek documents related to Mr. Storck's false claim that the SEC interviewed Mr. Fauré in Montreal on September 10 or 11, 2007. See, e.g., Exhibit 22 (Sept. 22, 2011 Email from K. O'Rourke to K. Cross ("Third…[w]e informed you that we have identified no documents produced by Mr. Storck or you that concern the interview identified in Paragraph 7 of the July 20 Declaration.")). As a result of the SEC's continued probing about the phantom Montreal interview,[25] as well as Mr. Storck's firm's disclosure of potentially privileged documents, Mr. Storck executed a third declaration, see Exhibit 23 ("Second" Declaration of Michael Storck, styled as a replacement to the Original Second Storck Declaration; hereinafter, "Revised Second Storck Declaration"). Finally, in this third sworn declaration, Mr. Storck admitted for the first time that he could not confirm his attendance at an SEC interview of Mr. Fauré in Montreal, see id. ¶18 -- an unsurprising admission since the interview never happened.

[25] It was only after SEC counsel continued to insist on September 22, in a phone call and in a confirming email, on the production pursuant to the subpoena of any documents related to the phantom interview, see Exhibit 22, that Mr. Storck's partner called on September 23 and stated that the declaration was not accurate with respect to the interview. See Cuban Appendix at 217-18 (Sept. 26, 2011 Email from K. O'Rourke to K. Cross).

Nonetheless, despite being "unable to pinpoint an exact date or location," id., despite having, at least, a false memory of an event that never happened, and despite the absence of any corroborating evidence, Mr. Storck now states in his Revised Second Declaration that he is "confident" he heard Mr. Fauré say -- somehow, sometime, somewhere -- that Cuban did not agree to keep PIPE information confidential. Nonsense.

Mr. Storck's Revised Second Declaration -- the only evidence cited in support of Cuban's assertion that Mr. Fauré's account of his conversation with Cuban has changed -- is utterly unreliable. Mr. Storck claimed to be present at an SEC interview that never occurred. Mr. Storck knew he had no corroboration of the claimed interview: no notes, no emails. He had nothing that supported his assertion. Moreover, Mr. Storck knew, and included as exhibits to his declarations, notes of SEC interviews of Mamma personnel in Montreal on the dates specified, but knew he had no notes of the claimed interview of Mr. Fauré. These deficiencies are not cured by the Revised Second Storck Declaration that Cuban's counsel has now filed with the Court. Mr. Storck admits in this declaration that he cannot identify the date, time, or place in which Mr. Fauré allegedly made the statement. Mr. Storck makes no effort to identify the participants in the alleged conversation and, indeed, offers no clue at all as to the context in which the alleged statement was made. The inescapable conclusion is that the SEC interview described in the First Storck Declaration and the Original Second Storck Declaration was a fabrication.

In light of Mr. Storck's changing stories and the complete absence of verifiable details regarding the alleged statement, the Revised Second Storck Declaration is completely unreliable on the question of whether Mr. Fauré made the alleged statement -- and likely on any other issue

as well.[26] As noted above, Mr. Storck's declaration is the only evidence Cuban has offered the Court to support his allegation that Mr. Fauré's account of his call with Mr. Cuban has changed over time. Because Mr. Storck, having twice made false sworn statements, is an unreliable witness, Cuban has provided no credible evidence that Mr. Fauré has changed his account.[27]

IV. The SEC Has Produced Extensive Privilege Logs Substantially Identifying Responsive Documents While Cuban Has Provided Meager And Severely Time-Limited Logs.

The SEC produced an extensive privilege log in response to discovery requests Cuban served pursuant to his motion for attorneys' fees. See Appendix of Exhibits to Opposition to Motion to Compel, Dock. #70, at 3-96. This log identified privileged documents, described their salient characteristics, and disclosed the basis for the assertion of privilege. See id. The log the SEC produced required innumerable hours of work and was in response to Cuban's fees discovery requests that substantially overlapped with the specific requests and categories as to which Cuban has now moved. For example, Request No. 13 in the Cuban fees Document Requests and Cuban fees Interrogatory Nos. 7-10, 13, and 14 all relate to any relationship between the SEC's unrelated investigation of trading in the securities of Mamma and the investigation that led to the filing of this action. See Exhibit 8 (Interrogatory Nos. 7-10, 13, and 14, at 8-9); Exhibit 9. Cuban's current motion seeks compelled production of seemingly identical documents pertaining to the relationship between the Mamma investigation and the investigation into Cuban. Setting aside that this is not an appropriate subject for discovery as a

[26] Many of the statements in the Storck declarations on their face strain credulity, even without regard to the falsity of the claimed Montreal interview of Faure. See, e.g., Exhibit 23 ¶15 (Mr. Storck claims to have anticipated by five years this Court's opinion requiring an agreement of both confidentiality and not to trade). Among other things, Mr. Stork's repeated claims about statements that he would recall if they had been made are completely discredited, if they were deserving of any credit to begin with.

[27] Mr. Storck and his firm have been and continue to be paid by Cuban for their time and expenses incurred in working on SEC v. Cuban. See, e.g., Exhibit 24 (example of a Storck invoice to Cuban for payment (MCSEC0006302-11)); see also Exhibit 25 (Sept. 5, 2007 Email from M. Storck to S. Best (MCSEC0005921)).

result of the Court's Order striking with prejudice Cuban's affirmative defense, Cuban has already received responsive documents and privilege logs on this subject.

Similarly, Cuban's fees requests called for documents supporting the allegations in the SEC's Complaint. See Exhibit 8 at 7; Exhibit 9 at 8. As indicated in the SEC's responses, the SEC produced the documents and information in its possession, custody, or control responsive to these requests. What the SEC has not done is precisely what Cuban has not done -- logged "thousands of communications…which are plainly privileged." Mem. at 22 n.11. In essence, Cuban argues that, while it is too burdensome for him to log "plainly privileged" communications created after December 31, 2006, the SEC should nonetheless be compelled to do so, even when the SEC has already created a substantial log covering the actual relevant time period and categories. Cuban, in turn, has produced virtually nothing and has dictated a date of December 31, 2006, after which he objects to discovery and to producing a privilege log.

Cuban chose to pursue broad merits discovery during attorneys' fees discovery, requiring the creation of a detailed privilege log. Having made his decision, Cuban is not entitled to now re-impose a search and log burden on the SEC, while he interposes an artificial limitation on his own discovery and privilege log obligations.

Cuban offers no argument why the SEC should be required to produce an additional privilege log when he refuses to produce documents or a log for the same time period. Instead, he argues that the SEC was wrong in asserting that it could not create a log until its objections to the scope of Cuban's requests were resolved. The SEC has objected because it believes that virtually all the documents Cuban is seeking that have not already been produced are irrelevant to the claims or defenses in this action, or are covered by the same categories of documents already logged, with the exception being the same type of plainly privileged documents that

Cuban has refused to log. Cuban argues that the SEC's position concerning these plainly privileged documents necessitated his motion to compel, but he has taken the same position, without having provided the equivalent log to that already provided by the SEC.

For more than two years, both sides have objected to the undue burden of logging plainly privileged documents. See, e.g., Exhibits 5-7. Neither party has changed positions. Cuban's motion has now brought the issue before the Court. The SEC will now also file a motion to compel Cuban to produce documents and a privilege log because he "has entirely declined to comply with Rule 26(b)(5) because [he] has [objected based on]…largely nonspecific and unexplained pronouncements of burden." Mem. at 23-24. The SEC tried to resolve this impasse, see, e.g., Exhibit 5, but cannot concede to one-sided discovery where Cuban supposedly is entitled to an additional log of plainly privileged documents and the SEC is not. There is no basis for such an outcome, and it would not comport with fundamental notions of fairness.

CONCLUSION

For the reasons stated above, the Court should entirely deny Cuban's motion to compel.

Dated: October 13, 2011

Respectfully submitted,

s/Kevin P. O'Rourke

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CERTIFICATE OF SERVICE

On October 13, 2011, I electronically submitted the SEC's Memorandum in Opposition to Defendant Mark Cuban's Amended Second Motion to Compel Production of Documents with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

s/Rebecca R. Fairchild
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