

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND MEMORANDUM IN SUPPORT

Plaintiff Securities and Exchange Commission ("SEC" or "Commission") respectfully moves for an Order, pursuant to Rule 37(a)(1) of the Federal Rules of Civil Procedure, compelling Defendant Mark Cuban ("Cuban") to produce a privilege log identifying documents he has withheld based on an assertion of privilege for the period after December 31, 2006 through March 10, 2011.

The SEC served Rule 34 document requests concerning the merits of this action on Mark Cuban on April 1, 2009 and March 10, 2011 (collectively "SEC Requests"). In both requests, the SEC included a specific instruction to produce a privilege log as contemplated by the Federal Rules of Civil Procedure.¹ Cuban objected to the instruction to produce a privilege log in both requests.² After reviewing Cuban's objections, the SEC engaged in an extensive dialogue with Cuban about, among other things, his refusal to produce the required privilege logs.³ Through this exchange of letters, Cuban made clear that his objection to production of a privilege log was

¹ See Attachment A, First Set of Document Requests to Defendant Mark Cuban at 3; App'x at 7; Attachment B, Second Set of Document Requests to Defendant Mark Cuban at 3; App'x at 15. The SEC also served a document request in connection with Cuban's Motion for Attorneys' Fees that included a specific instruction to produce a privilege log. Attachment C, Documents Requests to Defendant Mark Cuban on Attorneys' Fee Issues at 3; App'x at 23. Cuban objected to production of a privilege log in response to this request. Attachment D, Mark Cuban's Objections and Responses to Plaintiff Securities and Exchange Commission's Document Requests to Defendant Mark Cuban on Attorneys' Fee Issues at 2; App'x at 29.

² Attachment E, Objections and Responses to Plaintiff Securities and Exchange Commission's First Set of Document Requests, at 2; App'x at 39; Attachment F, Objections and Responses to Plaintiff Securities and Exchange Commission's Second Set of Document Requests, at 2; App'x at 46.

³ See, e.g., Attachment G, May 14, 2009 Letter from L. Roberts to K. O'Rourke, at 2; App'x at 54; Attachment H, June 16, 2009 Letter from K. O'Rourke to H. Asbill & L. Roberts, at 1; App'x at 57; Attachment I, June 22, 2009 Letter from K. O'Rourke to H. Asbill & L. Roberts, at 1; App'x at 60; Attachment J, June 30, 2009 Letter from L. Roberts to K. O'Rourke, at 2; App'x at 64; Attachment K, January 19, 2011 Letter from K. O'Rourke to L. Roberts & S. Best, at 1-2; App'x at 67-68; Attachment L, February 9, 2011 Letter from K. O'Rourke to L. Roberts, at 1; App'x at 70; Attachment M, June 17, 2011 Letter from K. O'Rourke to L. Roberts, at 1; App'x at 73; Attachment N, June 22, 2011 Letter from K. O'Rourke to L. Roberts, at 1; App'x at 76.

based on his belief that it would be burdensome to log a large number of plainly privileged communications.⁴

As the Court knows, a motion by Cuban to compel the SEC to produce a privilege log is presently pending before the Court. Cuban's pending motion to compel seeks to require the SEC, among other things, to create a voluminous log of plainly privileged documents. At the same time, Cuban has repeatedly objected to creating precisely the same type of log that he demands from the SEC. Essentially, Cuban has objected to doing that which he asks the Court to compel the SEC to do.

Moreover, the SEC has already undertaken the burden of providing Cuban with an extensive privilege log that covers substantially the same subjects sought by his pending motion. While the previously produced privilege log was created in response to discovery promulgated under Cuban's now-dismissed motion for attorneys' fees and Cuban's current motion to compel claims to seek discovery related to the merits, the reality is that Cuban's discovery requests cover similar ground. See Plaintiff Securities and Exchange Commission's Opposition to Defendant Mark Cuban's Amended Second Motion to Compel Production of Documents, Dock. #112 at 23-24. Cuban has made no similar effort to create an adequate privilege log.

Cuban's obligation to produce a log of plainly privileged documents is no different from the obligation he projects to the SEC. If Cuban is right and the SEC is required to produce a privilege log, he must agree that he too must undertake the time-consuming and costly effort of logging thousands of plainly privileged documents. Insisting on a one-way street for discovery, Cuban has refused to satisfy this obligation, and the SEC must file this motion to compel Cuban to produce the required log.

⁴ See, e.g., Attachment G, at 2; App'x at 54; Attachment L, at 1; App'x at 70.

ARGUMENT

“‘[A] district court has broad discretion in all discovery matters....’” Beattie v. Madison County Sch. Dist., 254 F.3d 595, 606 (5th Cir. 2001) (quoting Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 855 (5th Cir. 2000)). “[Rule] 37(a)[] empowers the court to compel the production of documents and complete responses to interrogatories upon motion by the party seeking discovery.” Export Worldwide, Ltd. v. Knight, 241 F.R.D. 259, 263 (W.D. Tex. 2006). Exercise of the Court’s discretion to compel is appropriate where the discovery sought is relevant to a claim or defense or, when accompanied by good cause, relevant to the subject matter involved in the action. See, e.g., SEC v. AmeriFirst Funding, Inc., No. 3:07-CV-1188-D, 2008 WL 926587, at *2 (N.D. Tex. Apr. 7, 2008).

Cuban has failed to produce a privilege log in response to the SEC’s Requests for the period after December 31, 2006.⁵ Cuban’s failure to produce the required log is in sharp contrast to the voluminous log the SEC provided to him. Cuban objects to production of a log claiming undue burden because the majority of documents created after his December 31, 2006 cut-off date are likely to be privileged. While the SEC’s documents were similarly likely to be privileged, the SEC nonetheless expended the effort to log privileged documents. The SEC is entitled to a log so that it can evaluate Cuban’s privilege claims just as he has reviewed the SEC’s claims.

Rule 26(b)(5) of the Federal Rules of Civil Procedure states that “[w]hen a party withholds information otherwise discoverable by claiming that the information is privileged..., the party must (i) expressly make the claim; and (ii) describe the nature of the documents...not produced...– and do so in a manner that, without revealing information itself privileged or

⁵ On June 30, 2009, Cuban produced a log, substantially similar to the log he produced to the SEC staff during its investigation, identifying purportedly privileged documents for a time period through December 18, 2006. Attachment O, June 30, 2009 Letter from L. Roberts to K. O’Rourke, at 1; App’x at 79.

protected, will enable other parties to assess the claim.” The obligation to describe information withheld as privileged is typically satisfied by production of a privilege log. See, e.g., In re Santa Fe Int’l Corp., 272 F.3d 705, 710 (5th Cir. 2001). Under the Rule, production of a privilege log is mandatory. See, e.g., Estate of Manship v. United States, 232 F.R.D. 552, 561 (M.D. La. 2005).

Each of the requests on which the SEC now moves clearly and explicitly instructs Cuban to provide a privilege log for every document he claims to be privileged. In response, Cuban refused to produce a log reflecting any documents created after December 31, 2006. The SEC’s investigation began in early December 2006. Thus, Cuban’s chosen time period effectively denies the SEC access to any information about the documents he has withheld on the basis of privilege. Because Cuban has not provided any information about these documents, he has not even attempted to satisfy his obligations to the SEC – or to the Court – to allow for an assessment of his claims of privilege.

Cuban’s justification for his failure to meet his Rule 26(b)(5) obligations is that his attorneys worked with such “great intensity” that it would be burdensome to log the thousands of “plainly privileged” communications they generated. Cuban Second Motion to Compel, Dock. #111-1, at 22 n.11. Of course, the SEC has worked throughout this litigation no less intensely. Moreover, the SEC’s communications are just as “plainly privileged” as Cuban’s. Indeed, the only difference between the parties is that the SEC has already undertaken the time-consuming task of creating an extensive privilege log that substantially overlaps with the additional logs Cuban now seeks while Cuban has done nothing of the sort. Therefore, Cuban should be required to satisfy his obligations under Rule 26(b)(5) and produce the required log.

Civil discovery is a two-way street. Cuban has already obtained extensive privilege logs from the SEC, but objects entirely to producing a relevant log in exchange. In making his objection, Cuban makes an erroneous and unsupported burdensomeness objection. Such boilerplate objections are a wholly inadequate basis for a party to abandon its obligation to produce a privilege log. See, e.g., Cunningham v. Smithkline Beecham, 255 F.R.D. 474, 481 (N.D. Ind. 2009) (ordering production of a privilege log where, among other things, party objected that production would be “burdensome, expensive, time consuming, and unnecessary”). Cuban’s conclusory objections are particularly insufficient here, where he has already obtained extensive privilege logs from the SEC, but flatly refuses to produce such a responsive log of his own.

CONCLUSION

For the reasons stated above, the Commission asks this Court to enter an order compelling Cuban to provide a log identifying all responsive documents over which Cuban asserts a claim of privilege created during the period identified in the SEC’s Requests.

Dated: November 22, 2011

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that at various times, including on July 5, 2011, counsel for Plaintiff Securities and Exchange Commission conferred by telephone with counsel for Defendant Mark Cuban concerning Defendant Cuban's Responses and Objections to Plaintiff Securities and Exchange Commission's First and Second Sets of Document Requests to Defendant Mark Cuban. The parties were unable to reach a resolution with respect to the issues identified in the foregoing motion.

s/ Adam S. Aderton
Adam S. Aderton

CERTIFICATE OF SERVICE

On November 22, 2011, I electronically submitted the foregoing document 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/ Adam S. Aderton
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