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

SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 3:08-cv-02050 (SAF)**
MARK CUBAN,	)	
Defendant.	)	

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

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Defendant Mark Cuban hereby files this Opposition to the SEC's Motion to Compel Production of Documents and Memorandum in Support.

I. INTRODUCTION

In June 2009, Mr. Cuban produced an extensive privilege log to the SEC that encompassed privileged documents from 2004, 2005, and 2006. The SEC's demand that Mr. Cuban now produce a supplemental privilege log spanning more than four additional years – from 2007 through March 2011 – is improper for multiple reasons.

To begin with, all of the conduct and events underlying the SEC's claims against Mr. Cuban in this case, as alleged in the Complaint, took place and were fully concluded by mid-2004. The SEC, not surprisingly, fails to articulate a *single colorable reason* why it needs a privilege log for documents dated years after the operative allegations upon which the SEC's claims are based. Moreover, the privileged communications that the SEC seeks to compel Mr. Cuban to log consist almost entirely of privileged communications between and among Mr. Cuban and his attorneys during the time period Mr. Cuban's counsel were defending him in the SEC's investigation of Mr. Cuban and in the early stages of this action. There are many hundreds, perhaps thousands of such communications (which are not only privileged, but in many instances reflect protected attorney work product). The SEC not only cannot present any reasoned justification for demanding that Mr. Cuban log such materials, but preparing such a log would be unduly burdensome, given the extended time period at issue (2007-2011) and the sheer number of communications (and privileged attachments) at issue.

Given the facial unreasonableness of the SEC's position, one is left to wonder why the SEC brought its motion in the first place. Perhaps it was a defensive maneuver on the part of the SEC. Mr. Cuban himself recently moved to compel the SEC to produce a privilege log relating to document requests propounded by Mr. Cuban during the merits phase of this case. Maybe the SEC hopes the Court will simply deny both pending motions, or, alternatively, grant them both. That hope, however, is without foundation. There is no basis for comparing Mr. Cuban's request

for a privilege log to the SEC's demand for a privilege log from the 2007-2011 time period. The SEC's motion must be denied in full.

II. BACKGROUND[1]

a. The SEC Does Not Provide a Privilege Log With Its Productions

After the SEC filed its Complaint in this action, the parties engaged in discovery with respect to the merits of the SEC's claims and Mr. Cuban's defenses to those claims ("Merits Discovery"). The SEC made a production to Mr. Cuban of certain documents previously provided to the SEC by certain third parties. The SEC produced no privilege log to Mr. Cuban in connection with this production, even though the SEC acknowledged that it had withheld documents from that production on the basis of privilege. (*See* Attachment A, Letter from Kevin O'Rourke to Henry Asbill and Lyle Roberts (July 15, 2009); App'x at 7-9 ("the Commission's position is that it has produced its nonprivileged investigative file related to this matter").)[2]

b. The SEC Demands a Privilege Log from Mr. Cuban, Mr. Cuban Objects, and the SEC Rejects Mr. Cuban's Attempt to Reach a Compromise on the Issue

Shortly thereafter, the SEC filed its First Set of Document Requests. Those requests stated that they called "for the production of responsive documents dated, prepared, sent or received during, or pertaining to, the period commencing January 1, 2004 through and including November 16, 2008." (*See* Attachment B, Plaintiff Securities and Exchange Commission's First Set of Document Requests to Defendant Mark Cuban (April 1, 2009); App'x at 10-17.) Mr. Cuban filed timely objections and responses to the SEC's requests, which included an objection to the SEC's time period. Specifically, Mr. Cuban's counsel stated that the SEC's time period was "overbroad, unduly burdensome, not limited to the period of time relevant to the allegations in the Complaint, and not reasonably calculated to lead to the discovery of admissible evidence.

[1] The Court and all the parties are entirely familiar with the background of this action. Mr. Cuban therefore focuses only on the background specifically relevant to the SEC's Motion to Compel ("Motion" or "Motion to Compel").

[2] All attachments referred to in this memorandum are attachments to the Declaration of Lyle Roberts (App'x at 1-6) ("Roberts Decl."), filed concurrently with this Motion.

Unless otherwise specified herein, Mr. Cuban responds to these Requests only as to the period January 1, 2004 through December 31, 2006." (*See* Attachment C, Defendant Mark Cuban's Objections and Responses to Plaintiff Securities and Exchange Commission's First Set of Document Requests (May 4, 2009); App'x at 18-24.)

In the subsequent correspondence between the parties' counsel on this issue, Mr. Cuban's counsel again stated that "the time period is overbroad, not limited to the period of time relevant to the allegations in the Complaint, and not reasonably calculated to lead to the discovery of admissible evidence." (Attachment D, Letter from Lyle Roberts to Kevin P. O'Rourke (May 14, 2009); App'x at 25-28.) Mr. Cuban's counsel further explained that the SEC's proposed time period (2004-2008) "also is unduly burdensome, in part because it would require Mr. Cuban to review and prepare a privilege log for privileged and/or work product documents generated by Mr. Cuban's counsel after the administrative subpoena was issued to Mr. Cuban . . . and Mr. Cuban was therefore alerted to the prospect of the SEC filing suit against him." Mr. Cuban's counsel went on to say that "all or virtually all relevant documents created after that time are subject to the attorney-client privilege and/or work product doctrine, there exists an enormous volume of such documents, and it would be extremely burdensome and expensive to identify, review, and log each of these documents." (*Id.*; App'x at 26.)

Nevertheless, "[i]n a spirit of compromise," Mr. Cuban's counsel proposed that Mr. Cuban produce documents for the SEC's entire time period, so long as he was not required to compile the costly and burdensome privilege log associated with it. (*Id.*; App'x at 27.) The SEC rejected this proposal as "unacceptable." (Attachment E, Letter from Kevin P. O'Rourke to Henry W. Asbill and Lyle Roberts (June 16, 2009); App'x at 29-31.) The SEC did not make any counterproposal or suggestion as to how the parties could reach agreement, but simply rejected Mr. Cuban counsel's offer. (*Id.*; *see also* Attachment F, Letter from Lyle Roberts to Kevin P. O'Rourke (June 18, 2009); App'x at 32-33.)

c. The SEC Refuses to Produce a Privilege Log and Continues to Reject Mr. Cuban's Attempts to Reach Compromise

Around the same time, Mr. Cuban served the SEC with his First Requests to Plaintiff for Production of Documents on May 4, 2009. (Attachment G; App'x at 34-48.) The SEC responded with objections that included an invocation of the attorney-client privilege, work-product protection, the law-enforcement privilege, and the deliberative-process privilege for *every one* of Mr. Cuban's First Requests. (Attachment H, Plaintiff Securities and Exchange Commission's Response to Defendant Mark Cuban's First Request to Plaintiff for Production of Documents (June 8, 2009); App'x at 49-64.) The SEC did not, however, include a privilege log that listed the documents allegedly subject to these privileges, nor did it provide any kind of description that would have allowed Mr. Cuban to assess whether the privileges were properly invoked.

Again in the spirit of compromise, and in light of both parties' apparent objections to producing privilege logs, Mr. Cuban's counsel proposed that neither party be required to produce a privilege log for a period of time that post-dated the SEC's factual allegations by nearly three years. (Attachment I, Letter from Kevin P. O'Rourke to Henry W. Asbill and Lyle Roberts (June 26, 2009); App'x at 65-69.)[3] Again, the SEC pronounced this proposal "not acceptable." (*Id.*; *see also* Attachment J, Letter from Lyle Roberts to Kevin P. O'Rourke (June 30, 2009); App'x at 70-73.)

d. Mr. Cuban Produces a Privilege Log for His Merits Discovery Productions

Shortly after this exchange, Mr. Cuban produced to the SEC a privilege log from his productions during Merits Discovery. (*See* Attachment K, Letter from Lyle Roberts to Kevin P. O'Rourke (June 30, 2009); App'x at 74-76; Attachment L, Privilege Log of Mark Cuban; App'x at 77-87.) The SEC did not produce a similar privilege log for its productions. The SEC did, however, "agree[] to consider whether, and under what limitations, it would produce a privilege

[3] The SEC did make a counteroffer in this correspondence. That counteroffer, however, took the form of a proposal that the parties abide by the exact demand originally made by the SEC – that is, the SEC suggested that Mr. Cuban compromise 100% and the SEC not at all. Needless to say, Mr. Cuban did not find this offer satisfactory.

log." (Attachment J, Letter from Lyle Roberts to Kevin P. O'Rourke (June 30, 2009); App'x at 70-73.) The SEC later made clear that it would not produce a privilege log because the SEC "objected to both the appropriate substantive and temporal scope of [Mr. Cuban's] requests." According to the SEC, "[u]ntil the appropriate substantive and temporal scopes are established, it is impossible for [the SEC] to determine which documents to place on a log." (Attachment A, Letter from Kevin P. O'Rourke to Henry W. Asbill and Lyle Roberts (July 15, 2009); App'x at 7-9.) The SEC did not at this time explain why it could not produce a privilege log for withheld documents that were created during the "appropriate" temporal scope, such as the privileged portions of its investigative file.

e. The SEC Produces Privilege Logs in Response to Discovery Requests Concerning SEC Investigative Misconduct, Not the Merits of this Case

On July 17, 2009, while the parties were still engaged in Merits Discovery, this Court determined that the SEC's Complaint was deficient and it granted Mr. Cuban's earlier-filed Motion to Dismiss. Although the Court allowed the SEC leave to re-plead its claims, the SEC declined to do so and the Court dismissed the Complaint with prejudice.

Mr. Cuban then filed a Motion for Attorneys' Fees and Expenses (the "Fees Motion"), which alleged that the SEC had engaged in serious misconduct before and up to the filing of the Complaint in this matter, and that it had brought this action in bad faith. In a ruling on the Fees Motion, the Court allowed discovery on Mr. Cuban's allegations of misconduct against the SEC. The parties then commenced discovery on the issue of the SEC's misconduct ("Sanctions Discovery").

Mr. Cuban filed discovery requests during Sanctions Discovery, and the SEC made a limited production. Unlike previously, the SEC did produce privilege logs for its Sanctions Discovery productions. (Attachment M, SEC v. Cuban 03-09-2010 Production – Electronic Document Privilege Log; App'x at 88; Attachment N, SEC v. Cuban 03-09-2010 Production – Hard Copy Privilege Log; App'x at 153 (together the "Sanctions Privilege Logs").) These privilege logs were in response to Mr. Cuban's requests during Sanctions Discovery, not Merits Discovery. Mr. Cuban moved to compel the production of documents on these logs, but before

that motion was ruled upon the Fifth Circuit reversed the grant of Mr. Cuban's Motion to Dismiss and remanded the action back to this Court. The Court then denied without prejudice Mr. Cuban's Fees Motion and motion to compel.

f. The SEC Continues to Refuse to Produce Privilege Logs During Merits Discovery and the Parties are Unable to Reach Agreement

After remand, the parties re-commenced Merits Discovery. Mr. Cuban renewed his earlier requests for production and filed additional requests. (Attachment O, Defendant's Second Request to Plaintiff for Production of Documents (April 29, 2011); App'x at 162-172.) The SEC, in response, filed an opposition and made a limited production, but still produced no privilege log. (Attachment P, Plaintiff Securities and Exchange Commission's Responses and Objections to Defendant's Second Request to Plaintiff for Production of Documents (June 1, 2011); App'x at 173-179.) Mr. Cuban's counsel pointed out that the SEC could not simply refuse to provide any privilege log because it objected to "the appropriate substantive and temporal scope" of Mr. Cuban's requests. (*See* Attachment Q, Letter from Lyle Roberts to Kevin P. O'Rourke (Feb. 24, 2011); App'x at 180-182.)

Around this time, the SEC propounded a second set of document requests on Mr. Cuban. These requests – which were filed on March 10, 2011 – stated that they called for the production of documents sent or received during the period commencing January 1, 2004 through the present. (Attachment R, Plaintiff Securities and Exchange Commission's Second Set of Document Requests to Defendant Mark Cuban (March 10, 2011); App'x at 183-190.) Mr. Cuban filed timely responses and objections to these requests. He again objected to the time period as overbroad, unduly burdensome, not limited to the period of time relevant to the allegations in the Complaint, and not reasonably calculated to lead to the discovery of admissible evidence. Mr. Cuban responded to the SEC's requests only as to the period from January 1, 2004 through November 16, 2008. (Attachment S, Defendant Mark Cuban's Objections and Responses to Plaintiff Securities and Exchange Commission's Second Set of Document Requests at 2 (April 12, 2011); App'x at 191-198.) Mr. Cuban also agreed to produce non-privileged documents responsive to the SEC's first set of document requests from the period between

January 1, 2007, and November 16, 2008. (*See* Attachment T, Letter from Lyle Roberts to Kevin P. O'Rourke (April 5, 2011); App'x at 199-201.) Mr. Cuban produced these documents as promised, without waiver of any of his objections to the SEC's requests. (*See* Attachment U, Letter from Lyle Roberts to Kevin P. O'Rourke (April 15, 2011); App'x at 202-203; Attachment V, Letter from Lyle Roberts to Kevin P. O'Rourke (April 29, 2011); App'x at 204-205; Attachment W, Letter from Lyle Roberts to Kevin P. O'Rourke (May 2, 2011); App'x at 206-207.)

To date, the SEC has never produced a privilege log during the Merits Discovery portion of this lawsuit. The parties have also been unable to reach an agreement with regards to the SEC's demand for a privilege log from Mr. Cuban for the time period covering 2007-2011.

III. ARGUMENT

Mr. Cuban recently moved to compel the SEC to produce, *inter alia*, a privilege log in this matter (beyond the limited privilege logs that the SEC produced in response to Mr. Cuban's document requests in connection with the Sanctions Discovery). The SEC now makes a Motion arguing in essence that Mr. Cuban should produce *to* the SEC the kind of log that Mr. Cuban's motion to compel seeks *from* the SEC. The SEC appears to suggest that if the Court were to grant Mr. Cuban's motion to compel, there would be no less reason to compel Mr. Cuban to produce the log sought by the SEC's Motion.

The SEC's reasoning in support of its Motion is based on a specious "apples to oranges" comparison, as the log that is the subject of Mr. Cuban's motion, and the basis for Mr. Cuban's motion, are easily distinguished from the log that the SEC asks the Court to compel Mr. Cuban to produce. Mr. Cuban's motion to compel is amply supported by the arguments set forth in his briefs filed in support of that motion, and Mr. Cuban will not repeat those arguments here, as all parties have had a full and fair opportunity to brief that issue and the motion is now pending before the Court for decision.[4] In sharp contrast, the SEC's request for additional logs from Mr. Cuban is entirely unjustified.

[4] *See* Am. Mem. of Law in Supp. of Mark Cuban's Am. Second Mot. to Compel Prod. of Docs., Sept. 28, 2011, ECF No. 111-1; Pl. Securities and Exchange Commission's Opp. to Def. Mark Cuban's Am. Second Mot. to Compel

a. The SEC's Motion to Compel and Mr. Cuban's Motion to Compel are in No Way Comparable

For multiple reasons, Mr. Cuban's objection to producing an unduly burdensome privilege log for the 2007-2011 time period is in no way comparable to the SEC's unjustified failure to produce an adequate privilege log with respect to Merits Discovery.[5] There are several reasons for this.

First, Mr. Cuban has produced a privilege log during Merits Discovery, but the SEC undisputedly has not. The SEC's claims against Mr. Cuban, as set forth in the Complaint, focus principally on a particular two-day period in mid-2004. In response to the SEC's discovery requests, Mr. Cuban produced a privilege log covering the period of time beginning on January 1, 2004 and extending through December 31, 2007. He produced this log during the Merits Discovery portion of this case, when the parties were conducing discovery on the SEC's claims and Mr. Cuban's defenses against those claims. Mr. Cuban feels compelled to make this clear because the SEC, throughout its motion papers, insinuates that Mr. Cuban has not produced a privilege log in this matter. For example, the SEC makes the following statements in its four-and-a-half page brief:

- "Cuban has already obtained extensive privilege logs from the SEC, but objects entirely to producing a relevant log in exchange." Motion at 5.
- "[Mr. Cuban] has already obtained extensive privilege logs from the SEC, but flatly refuses to produce such a responsive log of his own." Motion at 5.
- "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." Motion at 2.
- "Cuban has made no similar effort to create an adequate privilege log." Motion at 2.

Prod. of Docs., Oct. 13, 2011, ECF No. 112; Reply Br. of Mark Cuban in Supp. of Am. Second Mot. to Compel Prod. of Docs., Oct. 26, 2011, ECF No. 115.

[5] Mr. Cuban has already explained why the parties are not similarly situated with respect to the production of privilege log, and he incorporates that explanation by reference. Reply Br. of Mark Cuban in Supp. of Am. Second Mot. to Compel Prod. of Docs. at 9-10, Oct. 26, 2011, ECF No. 115. He expands upon that discussion here.

- "Cuban's failure to produce the required log is in sharp contrast to the voluminous log the SEC provided to him." Motion at 3.
- "[T]he SEC has already undertaken the time-consuming task of creating of creating an extensive privilege log that substantially overlaps with the additional logs Cuban now seeks while Cuban has done nothing of the sort." Motion at 4.

To the extent that these statements suggest that Mr. Cuban has not produced a privilege log in this matter, that suggestion is false.[6] The SEC is in possession of a privilege log covering the three-year period between January 1, 2004 and December 31, 2006. Despite the SEC's expansive tone, the current dispute is narrowly and exclusively limited to the issue of whether Mr. Cuban is obligated to produce a privilege log that covers the 2007-2011 time period.

The SEC, in contrast, has never produced a privilege log in response to the discovery requests that Mr. Cuban propounded during Merits Discovery. The SEC does not contest this, nor could it. As the SEC correctly points out, it *has* produced privilege logs during the course of this litigation. It produced these logs, however, during Sanctions Discovery when the parties were conducting discovery upon Mr. Cuban's allegations of SEC misconduct. The SEC has suggested that its Sanctions Privilege Logs overlap to some extent with any privilege logs that it would produce during Merits Discovery. The SEC, however, has steadfastly refused to clarify, with any precision, to what extent the Sanctions Privilege Logs list documents that the SEC has withheld as privileged during Merits Discovery.[7]

[6] To the extent that these statements were intended to suggest that Mr. Cuban's privilege log is deficient in some respect, Mr. Cuban observes that (1) the SEC's Motion never states in what respect it finds Mr. Cuban's privilege log deficient, (2) the Motion does not seek any kind of relief with respect to that privilege log, and (3) the most concrete objection that the SEC has made to Mr. Cuban's privilege log is that it does not provide the time of day that the logged communications were made. (Attachment X, Letter from Adam Aderton to Henry W. Asbill and Lyle Roberts (July 15, 2009); App'x at 208-10.)

[7] Even the SEC's own motion papers appear inconsistent on this issue. They alternatively suggest that Mr. Cuban's motion to compel will require the SEC to produce privilege logs anew at great labor and expense, and also that the labor in creating such privilege logs has already been completed. *Compare, e.g.*, Motion at 2 ("Cuban's pending motion to compel seeks to require the SEC, among other things, *to create a voluminous log of plainly privileged documents*.") (emphasis added); with Motion at 2 ("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") (emphasis added).

Either the Sanctions Privilege Logs list all the documents that the SEC withheld as privileged from its Merits Discovery productions or they do not. If they do not, then it is not clear why the SEC continues to argue that its obligations under the Federal Rules of Civil Procedure were somehow satisfied by the Sanctions Privilege Logs or that those Logs are substitutes for logs listing documents withheld during Merits Discovery.[8] If, however, the Sanctions Privilege Logs *do* list the documents that the SEC withheld as privileged from its Merits Productions, Mr. Cuban is of course not insisting that the SEC duplicate its already-undertaken efforts. Mr. Cuban, however, has never received a straightforward answer to the question of whether the Sanctions Privilege Logs list all the documents withheld during Merits Discovery.[9]

The SEC's failure to produce any privilege logs during Merits Discovery, and its failure to disclose whether the Sanctions Privilege Logs list the documents withheld as privileged from the SEC's Merits Productions, cannot reasonably be compared to Mr. Cuban's objection to providing the extremely burdensome privilege log for the 2007-2011 period that is the subject of the SEC's instant Motion.

[8] Even if the SEC's legal obligations *were* satisfied by the production of the Sanctions Privilege Logs, those Logs were provided to Mr. Cuban nearly a year after Mr. Cuban filed his requests for production.

[9] In an effort to avoid involving the Court in this dispute over privilege logs, Mr. Cuban directly asked the SEC whether this was the case. For example, on March 31, 2011, Mr. Cuban sent the SEC a letter asking explicitly "whether ***all*** of the privileged documents contained in the 'investigative file related to this matter' . . . are already identified in the [Merits Privilege Log], and if not, why not, and whether and when the SEC intends to produce a supplemental privilege log identifying those other privileged documents." (Attachment Y, Letter from George Anhang to Kevin O'Rourke (Mar. 31, 2011); App'x at 211-213 (emphasis in original).) Mr. Cuban further asked whether the privilege logs produced by the SEC contained all the documents responsive to Mr. Cuban's first requests for production that the SEC was withholding from Mr. Cuban on the basis of privilege, and if not, whether and when the SEC would inform Mr. Cuban what it was withholding. (*Id.*; *see also* Attachment Q, Letter from Lyle Roberts to Kevin O'Rourke (Feb. 24, 2011); App'x at 180-182 (reminding the SEC of its obligation to produce a privilege log in response to Mr. Cuban's Requests).) In response, the SEC declined to answer the question. Instead, it pronounced its objection to the production of privilege logs to be "multifaceted," and it reiterated that it had already produced some privilege logs. (Attachment Z, Letter from Kevin O'Rourke to Lyle Roberts and George Anhang (Apr. 8, 2011); App'x at 214-216.) Furthermore, the SEC noted that "we have repeatedly stated that, given our outstanding objections to the substantive scope of the [First Requests], your demand for the creation of additional privilege logs is, at best, premature. We are not obligated to undertake the repeated burden of piecemeal creation of additional logs." (*Id.*; App'x at 215.) Because the SEC would not answer this direct question, Mr. Cuban was forced to move to compel this information.

Second, Mr. Cuban explained precisely why he objected to the production of a 2007-2011 privilege log, but the SEC has remained cryptic as to why it has not complied with Federal Rule of Civil Procedure 26. Again, after the SEC filed its requests, Mr. Cuban explained that the SEC's time period was overbroad, unduly burdensome, and not reasonably related to the time period alleged in the Complaint. (Attachment D, Letter from Lyle Roberts to Kevin P. O'Rourke (May 14, 2009); App'x at 25-28.) Furthermore, he made clear that the temporal scope of the SEC's requests encompassed a period that would have included hundreds or thousands of communications among Mr. Cuban and his counsel. (*Id.*) These are meritorious objections under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii).

The SEC has never given a similar legitimate explanation of precisely why it has not produced any privilege logs during Merits Discovery. The SEC has, as noted, taken the position that "[u]ntil the appropriate substantive and temporal scopes are established, it is impossible for [the SEC] to determine which documents to place on a log." (Attachment A, Letter from Kevin P. O'Rourke to Henry W. Asbill and Lyle Roberts (July 15, 2009); App'x at 7-9.) The SEC has also taken the position that it may ignore Federal Rule of Civil Procedure 26(b)(5) because it has made boilerplate objections to Mr. Cuban's document requests and the SEC accordingly is "not obligated to undertake the repeated burden of piecemeal creation of additional logs." (Attachment Z, Letter from Kevin O'Rourke to Lyle Roberts and George Anhang (Apr. 8, 2011); App'x at 214-216.) The SEC has never provided any authority for this position, and it is in fact contrary to law. *See Cunningham v. Smithkline Beecham*, 255 F.R.D. 474, 481 (N.D. Ind. 2009) (ordering production of a log and rejecting party's contention that it did not have to provide a privilege log because the requested information was "undiscoverable, and the process would be burdensome, expensive, time consuming, and unnecessary").

Third, Mr. Cuban explained to the SEC the nature of the documents that would appear on the 2007-2011 privilege log, but the SEC has not explained what documents it is withholding as privileged. Again, in his objection to the temporal scope of the SEC's document request, Mr. Cuban made clear that the time period "is unduly burdensome, in part because it would require

Mr. Cuban to review and prepare a privilege log for privileged and/or work product documents generated by Mr. Cuban's counsel after the administrative subpoena was issued to Mr. Cuban . . . and Mr. Cuban was therefore alerted to the prospect of the SEC filing suit against him." Furthermore, "all or virtually all relevant documents created after that time are subject to the attorney-client privilege and/or work product doctrine, there exists an enormous volume of such documents, and it would be extremely burdensome and expensive to identify, review, and log each of these documents." (Attachment D, Letter from Lyle Roberts to Kevin P. O'Rourke (May 14, 2009); App'x at 25-28.)

In contrast, the SEC has never indicated what documents it is withholding as privileged from its Merits Productions. It pronounces such documents "plainly privileged," Motion at 2, but it has given no indication of what the documents are, why they are privileged, or even which privilege applies to them. Although the SEC has produced the Sanctions Privilege Logs that could conceivably supply this information, the SEC has remained evasive with respect to the issue of whether the Sanctions Privilege Logs list all the documents withheld from the SEC's merits productions.

Finally, the period of time pertinent to the SEC's claims against Mr. Cuban is narrower than the period of time pertinent to Mr. Cuban's defenses against the SEC's claims and the credibility of the SEC's witnesses. As detailed in the SEC's Complaint, the period of time applicable to the issue of whether Mr. Cuban violated the securities laws ends in mid-2004, after Mr. Cuban sold his shares in Mamma.com. The period of time applicable to Mr. Cuban's defenses against the SEC's claims, however, extends beyond this period. For example, as Mr. Cuban has repeatedly made clear, the credibility of the SEC's principal witness – former Mamma.com CEO Guy Fauré – is in doubt as a result of the SEC's decision to take his witness testimony for a second time immediately after informing Mr. Fauré that the SEC would not be bringing an enforcement action against him. These events happened as late as 2007. Documents related to this issue, which implicates the SEC's conduct, will be in the SEC's possession only; they will not be in Mr. Cuban's possession. The SEC has not made a similar showing that

documents created between 2007 and March 2011 are pertinent to the SEC's claims and allegations of securities fraud in this matter.

In sum, although the SEC endeavors to create the appearance of an equivalence between its approach to discovery and Mr. Cuban's, there is no such equivalence. Mr. Cuban produced a privilege log during Merits Discovery, but the SEC refused to do the same. Mr. Cuban provided specific objections to the production of a privilege log for an overbroad period of time that would be extremely burdensome to compile. The SEC, in contrast, simply took the improper position that, because the SEC had issued its boilerplate objections to Mr. Cuban's discovery requests, Federal Rule of Civil Procedure 26(b)(5) was suspended as to the SEC (but not as to Mr. Cuban, who also objected to the SEC's requests). Mr. Cuban explained to the SEC the nature of the documents that would appear on a 2007-2011 privilege log. The SEC did not do the same with respect to the privilege logs that it refused to provide. Also, the time period applicable to Mr. Cuban's defense against the SEC's claims is broader than the time period applicable to the SEC's claims, and documents relevant to Mr. Cuban's defense will be in the SEC's possession only.

Mr. Cuban's conduct with respect to the privilege logs therefore cannot be compared to the SEC's, and the SEC cannot hope to prevail on its meritless Motion to Compel simply by declaring, without any reference to the relevant facts, that Mr. Cuban has moved to compel the very same kind of log that he himself has not provided. This argument – which of course is unrelated to the merits, *vel non*, of the SEC's Motion to Compel – is unsupported and unsupportable.

b. The SEC Has Articulated No Legitimate Need for the Privilege Log Whatsoever.

In determining whether a party should be compelled to produce materials in response to a discovery request, a court "*must* limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case . . . and *the importance of the discovery in resolving the issues*." Fed. R. Civ. P. 26(b)(2)(C)(iii) (emphases added).

Accordingly, a court will look at the importance of the discovery in considering whether the balance favors production. *See, e.g., Eli Lilly & Co. v. Valeant Pharm. Int'l*, No. 1:08-cv-1720-TWP-TAB, 2011 WL 691982, at *2 (S.D. Ind. Feb. 15, 2011) (party was justified in refusing to produce privilege log on account of the "tenuous connection between the requested documents and the core issues of the case" because "requiring [a party] to prepare a privilege log for documents that are marginally relevant to this garden-variety contract dispute would be unduly burdensome").

Here, the privilege log the SEC seeks is of no importance to its allegations at all. This is aptly demonstrated by the fact that the SEC cannot, even now, articulate a legitimate basis for seeking the log. All of the SEC's stated reasons for why it wants a privilege log somehow implicate reciprocity: that if the SEC has to undertake the burden of producing a privilege log that it was required to produce years ago, then Mr. Cuban *must* have to undertake some burden as well. Even if this were not based on a fundamental misunderstanding of the parties' positions – which it is, *see supra* § III.a – it fails to explain why the SEC would possibly *need* the privilege log it now seeks in order to prosecute its case. At no point in this litigation, including in the parties' private conferences and correspondence, has the SEC fully explained why a privilege log from 2007-2011 would possibly be essential or even helpful to its prosecution of this case. Should the SEC, in its reply brief, present some reason why a 2007-2011 privilege log might help the SEC advance its claims against Mr. Cuban, both Mr. Cuban and the Court will be hearing this reason for the first time.

c. The Time Period of the Privilege Log That the SEC Demands is Patently Overbroad in Relation to the Allegations in the SEC's Complaint.

The SEC's claims and allegations against Mr. Cuban, distilled to their essence, focus upon two events: a telephone call that Mr. Cuban had with Guy Fauré, and Mr. Cuban's sale of his Mamma.com stock. As alleged in the SEC's complaint, the telephone call between Messrs. Cuban and Fauré took place on June 28, 2004, and Mr. Cuban sold his Mamma.com stock on June 28 and 29, 2004. *See* Complaint ¶¶ 13-21, November 17, 2008, ECF No. 1. The SEC does not allege that any facts of consequence to its claims against Mr. Cuban took place later than

roughly mid-2004. Yet the SEC has demanded that Mr. Cuban provide it with a privilege log that logs all privileged communications from 2007 until March 2011.

Under Federal Rule of Civil Procedure 26, "the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case . . . and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii). As the Advisory Committee's notes to Rule 26 explain,

> the obligation to provide pertinent information concerning withheld privileged materials applies only to items "otherwise discoverable." If a broad discovery request is made – for example, for all documents of a particular type during a twenty year period – and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

Fed. R. Civ. P. 26 advisory committee's note.

Accordingly, courts adhere to the common-sense proposition that a party is not required to produce a costly and burdensome privilege log in response to an overly broad or unduly burdensome discovery request. *See, e.g.*, *Berryman v. SuperValu Holdings, Inc.*, No. 3:05cv169, 2008 WL 4934007, at *11 (S.D. Ohio Nov. 18, 2008) ("Impermissibly broad discovery requests that would place an undue burden on respondents attempting to compile a privilege log may excuse their failure to do so."); *Cendant Corp. v. Shelton*, Civil No. 3:06CV00854 (AWT), 2007 WL 2460701, at *1 (D. Conn. Aug. 24, 2007) ("requiring [party] to produce a privilege log in response to such a broad request would be unduly burdensome"); *cf. Williams v. City of Dallas*, 178 F.R.D. 103, 115 (N.D. Tex. 1998) (Fitzwater, J.) (recipients of facially overbroad subpoenas "had no obligation to undertake the task of lodging objections to a potentially vast array of protected materials that technically fell within the scope of the subpoenas").

This is exactly the circumstance here. The SEC's motion seeks a privilege log for documents created between January 1, 2007 and March 10, 2011, even though the alleged conduct underlying the SEC's claims against Mr. Cuban had ceased entirely by July 2004.[10] The conduct alleged in the complaint consists of a particular incident; the SEC does not allege a long-standing scheme or a repeated pattern of behavior as the basis for its claims. Thus, the time period of the privilege log the SEC now demands begins *two and a half years* after all the alleged conduct underlying the SEC's claims in this case concluded. This period continues until *nearly seven years* after this underlying conduct. Nothing about the SEC's claims against Mr. Cuban – which focus principally upon *two days* – warrants the production of a privilege log covering a period of time that exceeds seven years. Accordingly, Mr. Cuban is under no obligation to produce a privilege log that covers documents from a needlessly overbroad period of time.[11]

d. Producing a Privilege Log for This Time Period Would be Unduly Burdensome to Mr. Cuban

In addition, preparing the 2007-2011 privilege log that the SEC now demands would constitute an undue burden on Mr. Cuban. The Federal Rules of Civil Procedure do not require a litigant to produce a privilege log if doing so would constitute an undue burden. *See, e.g.*, *Berryman*, 2008 WL 49340007, at *11 ("Defendants' 'unduly burdensome' objections had an objectively reasonable basis, and relieved Defendants of the obligation to provide a privilege log as to any purportedly privileged materials that fell outside the scope of 'otherwise discoverable' documents, as defined by the civil rules."); *see also Cendant Corp.*, 2007 WL 2460701, at *1

[10] The SEC seeks a privilege log "identifying documents [Mr. Cuban] has withheld based on an assertion of privilege for the period after December 31, 2006 through March 10, 2011." Motion at 1. The SEC's first document requests, however, specified that it sought documents only through November 16, 2008. (*See* Attachment B, Plaintiff Securities and Exchange Commission's First Set of Document Requests to Defendant Mark Cuban (April 1, 2009); App'x at 14.) The SEC thus appears to be seeking a privilege log for the SEC's first document requests through March 10, 2011, even though the requests themselves do not specify this time period.

[11] As noted in § III.a, *supra*, the time period applicable to Mr. Cuban's defense against the SEC's claims is broader than the time period applicable to the SEC's claims against Mr. Cuban. Again, the facts underlying the SEC's claims ceased in mid-2004, yet Mr. Cuban still produced a privilege log covering a period through December 31, 2006. The facts underlying Mr. Cuban's defenses, in contrast, extend at least through September 2007, and documents related to his defense at this point will be in the SEC's possession only. Again, the SEC is comparing apples to oranges, and the SEC thus cannot contend that the privilege log Mr. Cuban seeks from the SEC is overbroad simply because Mr. Cuban has contended that the SEC seeks an overbroad privilege log from him.

(litigant not required to produce privilege log when doing so would be unduly burdensome); Fed. R. Civ. P. 26(b)(2)(C)(iii) (court must limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit").

Based on the review that Mr. Cuban conducted when he agreed, without waiving any objections, to produce documents from January 1, 2007 through November 16, 2008, Mr. Cuban's counsel believe that producing the privilege log that the SEC now demands would require substantially in excess of two hundred hours. (Roberts Decl. at ¶¶ 6-13; App'x at 2.) When Mr. Cuban produced documents from 2007 to 2008, his counsel and their staff undertook approximately two hundred hours of work. (*Id.*) Producing the privilege log the SEC demands is very likely to require much more time than this, as Mr. Cuban will have to review documents created between November 17, 2008 and March 10, 2011 – a longer period than the production of documents from 2007-2008 required – as well as to determine whether they are privileged and draft the log for those that are privileged. Mr. Cuban also will have to create a log for the documents created between January 1, 2007 and November 16, 2008, which is an extremely time-consuming process. (*Id.*) Thus, it is entirely reasonable to expect that the privilege log the SEC asks this Court to compel Mr. Cuban to produce – that is, a privilege log spanning the more than fifty-month period between January 2007 and March 2011 – will require substantially more than two hundred hours for Mr. Cuban to compile.

Compounding this burden for Mr. Cuban is the fact that all or nearly all of the documents created in the 2007-2011 time period consist of communications between Mr. Cuban and his counsel, as well as discussions among Mr. Cuban's counsel regarding his defense against this case. Mr. Cuban explained this to the SEC (*see* Attachment D, Letter from Lyle Roberts to Kevin P. O'Rourke (May 14, 2009); App'x at 26-27), and the SEC has never narrowed its request or suggested that Mr. Cuban might satisfy the SEC's demands in any way less onerous than a document-by-document privilege log. Not surprisingly, courts are reluctant to order a litigant to produce a privilege log that consists exclusively of voluminous communications between attorney and client or among counsel. *See, e.g., Del Campo v. Am. Corrective*

Counseling Servs., Inc., No. C-01-21151 JW (PVT), 2007 WL 4287335, at *4 (N.D. Cal. Dec. 5, 2007) (litigant was not required to produce a full privilege log in response to "impermissibly broad" requests, as "[i]t would be an unfair and undue burden to force [the litigant] to create a privilege log containing every letter between attorney and client"); *see also Klein v. FPL Group, Inc.*, No. 02-20170-CIV, 2003 WL 22768424, at *14 (S.D. Fla. Sept. 26, 2003) ("Wilmer Cutler is not required to produce a privilege log with respect to its internal communications, as no showing has been made that would justify the production of this work product.").

The SEC's demand for a privilege log consisting of thousands of communications among Mr. Cuban's counsel and between Mr. Cuban and his counsel would prove to be unduly burdensome to Mr. Cuban. The SEC has not made any showing that would justify subjecting Mr. Cuban and his counsel to the extremely costly and laborious process of logging all the privileged communications created during a period that commences two and a half years after the conduct alleged in the Complaint and extends until earlier this year (2011), and during which time Mr. Cuban and his counsel were vigorously defending against the SEC's investigation and subsequent lawsuit.

IV. CONCLUSION

For the foregoing reasons, the SEC's motion to compel should be denied.

Dated: December 13, 2011

By: /s/ Lyle Roberts
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CERTIFICATE OF SERVICE

I certify that on December 13, 2011, I served all counsel and/or pro se parties of record with Defendant Mark Cuban's Opposition to Plaintiff Securities and Exchange Commission's Motion to Compel, along with the accompanying Declaration of Lyle Roberts and exhibits thereto, electronically by using the electronic case filing system of the U.S. District Court, Northern District of Texas.

/s/ Lyle Roberts
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