

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

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

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION’S
MOTION TO COMPEL DEFENDANT MARK CUBAN TO APPEAR
FOR DEPOSITION AND MEMORANDUM IN SUPPORT**

The Securities and Exchange Commission (“SEC” or “Commission”) asks the Court to enter an order under Rule 37 of the Federal Rules of Civil Procedure compelling Defendant Mark Cuban (“Cuban”) to appear for a deposition in this case on a date in December 2011 or January 2012. The SEC has made repeated efforts to accommodate Mr. Cuban’s schedule and to work with his counsel to find an agreeable date for his deposition. In November, the SEC asked counsel to provide dates in December or January when Mr. Cuban could be available, and recently the SEC offered to take Mr. Cuban’s deposition on a Saturday if necessary to accommodate his schedule. Despite these efforts, his counsel indicates Mr. Cuban will not appear for deposition on any date other than on the day before the close of discovery.

Discovery is set to close in this case on February 17, 2012. The SEC is entitled to take the deposition of Mr. Cuban – the central witness in this enforcement action – sufficiently in

advance of the close of discovery to allow for any follow up discovery that may be required based on his testimony. This is a reasonable request, and consistent with the approach the Commission would take in any enforcement action.

The SEC regrets having to bring this matter before the Court, but efforts to resolve this issue between counsel have failed. An order compelling Mr. Cuban to appear for deposition should be entered.

FACTUAL BACKGROUND

In October, the parties agreed to conduct Mr. Cuban's deposition on November 18, 2011.¹ Prior to that date and as part of an agreement to seek an extension of discovery, the parties agreed to move Mr. Cuban's deposition to December 16, 2011.² Consistent with that agreement, the SEC noticed Mr. Cuban's deposition for that date.³ That Notice of Deposition is still in effect.⁴

After having agreed to a deposition on December 16, Mr. Cuban's counsel subsequently objected to this date and stated Mr. Cuban would not appear.⁵ Counsel stated he would consult with Cuban to propose dates in February.⁶ The SEC did not withdraw the deposition notice, but stated it was willing to consider alternate dates for Mr. Cuban's deposition provided they were

¹ Attachment 1, October 4, 2011 Email string between Kevin P. O'Rourke and Stephen A. Best, et al., re: Mark Cuban's Deposition; App'x at APP000004-5.

² Attachment 2, October 27, 2011 Email string between Duane K. Thompson and Lyle Roberts, re: SEC v. Cuban case schedule; App'x at APP000008-9.

³ Attachment 3, November 15, 2011 Email from Kevin P. O'Rourke to Stephen A. Best, re: Notice of Deposition of defendant Mark Cuban and attachment thereto; App'x at APP000013-16.

⁴ As a procedural matter, Mr. Cuban – who indicates he will not appear for his deposition on December 16 despite a valid notice – should be seeking a protective order from the Court rather than necessitating the SEC filing a motion to compel.

⁵ Attachment 4, November 15, 2011 Email string between Kevin P. O'Rourke and Stephen A. Best, re: Notice of Deposition of defendant Mark Cuban; App'x at APP000018.

⁶ Id.

more than 30 days from the close of discovery. The SEC pointed out that it would prejudice the Commission to move Mr. Cuban's deposition to the final two weeks of discovery by providing inadequate time to pursue any motion practice or follow-up discovery arising from the testimony.⁷

On December 8, 2011, Mr. Cuban's counsel informed the SEC that Cuban would only be available on Thursday, February 16, 2012,⁸ one day before the close of the discovery period. The SEC informed Mr. Cuban's counsel that this date was not acceptable and again requested alternate dates and expressed a willingness to conduct Mr. Cuban's deposition on the same day as other scheduled depositions in the case, if necessary, or on a Saturday in order to accommodate Mr. Cuban's schedule.⁹ When the parties met and conferred on this subject on December 12, Mr. Cuban's counsel reiterated that they would not agree to any deposition date for Mr. Cuban other than February 16, 2012 and counsel stated that they would not even consult with Cuban on his availability for earlier dates.¹⁰

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(d)(1)(A) of the Federal Rules of Civil Procedure provides that the Court may order sanctions “if...a party...fails, after being served with proper notice, to appear for that person's deposition.”

⁷ Attachment 5, November 18, 2011 Email string between Kevin P. O'Rourke and Stephen A. Best, re: Notice of Deposition of defendant Mark Cuban; App'x at APP000022.

⁸ Attachment 6, December 9, 2011 Email string between Stephen A. Best, Lyle Roberts, and Kevin P. O'Rourke, re: Cuban Deposition; App'x at APP000027-28.

⁹ Id.

¹⁰ December 13, 2011 Declaration of Kevin P. O'Rourke at ¶ 10.

In this case, the SEC has agreed to accommodate Mr. Cuban's schedule by moving, at his request, his previously scheduled deposition from November 18, 2011 to December 16, 2011. When Cuban asserted that he was no longer available on December 16, the SEC attempted, without withdrawing the deposition notice, to reach a compromise solution by seeking dates that would both accommodate Mr. Cuban's schedule and provide the SEC with sufficient time following the deposition to conduct any further discovery or motions practice. The SEC even offered to accommodate Mr. Cuban's schedule by conducting his deposition on a Saturday or to deploy additional resources to take Cuban's testimony on the same day as other depositions in the case.

In response to these gestures, Mr. Cuban has asserted that he will only be available for deposition on the day before the close of discovery. It appears this is just a matter of preference on his part, as it is unreasonable to believe that, when this issue first arose in November, Mr. Cuban could not have been available on any single day in December or January to provide seven hours of testimony.

The SEC is charged with administering and enforcing the federal securities laws which are designed to protect investors and the integrity of the capital markets. The Commission takes that responsibility seriously. This enforcement action concerns serious issues, and the Commission would not bring such a matter as a scheduling dispute to the Court's attention if not necessary. Mr. Cuban needs to submit to a deposition in this case, within the timeframe of the current scheduling order and on a date that allows the Plaintiff a fair opportunity to develop its case for trial. An order to compel should be entered.

CONCLUSION

For the reasons stated above, the Commission asks this Court to enter an order compelling Cuban to appear for a deposition on a date in December 2011 or January 2012.

Dated: December 15, 2011

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that on December 12, 2011, counsel for Plaintiff Securities and Exchange Commission conferred by telephone with counsel for Defendant Mark Cuban concerning Defendant Mr. Cuban's appearance at his noticed deposition. The parties were unable to reach a resolution.

s/ Adam S. Aderton
Adam S. Aderton

CERTIFICATE OF SERVICE

On December 15, 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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