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.	)	

MEMORANDUM OF LAW IN SUPPORT OF MARK CUBAN'S SECOND MOTION TO COMPEL PRODUCTION OF DOCUMENTS

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Defendant Mark Cuban moves this Court under Rule 37(a) of the Federal Rules of Civil Procedure for an order compelling Plaintiff Securities and Exchange Commission ("SEC") to produce documents in response to his First Requests to Plaintiff for Production of Documents ("First Requests") and his Second Request to Plaintiff for Production of Documents ("Second Requests").[1]

INTRODUCTION

The SEC's discovery strategy in this case has become clear: unless the Court intervenes, the SEC will produce only non-privileged material in what it refers to as its "investigative file" and nothing else. The portion of this investigative file that the SEC has produced to date appears to consist of nothing more than documents collected from Mr. Cuban and third parties and deposition transcripts. To the extent that the SEC has in its control other relevant, discoverable material that is not part of this investigative file, it has improperly refused to produce this material. Instead, it relies on unexplained, boilerplate objections and nonspecific, blanket invocations of a variety of privileges.

The SEC is subject to the Federal Rules of Civil Procedure like any other litigant. It may not unilaterally refuse to produce materials relevant to the claims and defenses in this case. Yet this is precisely what the SEC has done. The Court should order the SEC to produce relevant, discoverable documents to Mr. Cuban immediately. Specifically, the Court should order the SEC to produce the following items.

First, Mr. Cuban is entitled to the non-privileged portions of the investigative file from the SEC's Mamma.com investigation[2] as well as documents evidencing the relationship between the Mamma.com investigation and the investigation into Mr. Cuban. These documents are

[1] Mr. Cuban styles this motion as his "Second Motion to Compel Production of Documents." Mr. Cuban's first such motion was filed on March 29, 2010, while the parties were engaged in discovery on the issue of the SEC's misconduct. *See* Memorandum of Law of Mark Cuban in Support of Motion to Compel Responses to Interrogatories and Production of Documents, ECF No. 66 ("First Mot. to Compel"). As explained in the Background Section, *infra*, the Court denied that motion without prejudice.

[2] Unless otherwise specified, references to the Mamma.com investigation are to the investigation entitled *In the Matter of Trading in the Securities of Mamma.com, Inc.* (HO-09900).

unquestionably relevant to the credibility of the Mamma.com witnesses – including the SEC's principal witness, Guy Fauré – and their possible bias in favor of the SEC. They are also relevant to Mr. Cuban's scienter with respect to his sale of Mamma.com stock. Mr. Cuban has a compelling need for these documents and cannot acquire the information elsewhere without undue burden. Moreover, the SEC's numerous, boilerplate objections to the production of these documents must be rejected, as they are issued in a blanket fashion and are not tailored to Mr. Cuban's specific requests. The SEC must also produce a privilege log listing all privileged documents in the Mamma.com investigative file.

Second, the Court should compel the SEC to produce documents discussing or relating to any involvement of Irving, Ian, or Michael Kott with Mamma.com. Again, the SEC's objections are far too cursory and facile to justify its failure to produce these documents. And, as the SEC well knows, these documents are highly relevant to Mr. Cuban's mental state regarding the sale of his Mamma.com securities, which is a central issue in this matter. Producing these documents would not constitute an undue burden for the SEC, and the Court should order the SEC to produce them without delay.

Third, Mr. Cuban is entitled to the interview notes and summaries from the SEC's interviews of witnesses taken in the course of the investigation of Mr. Cuban. Specifically, he is entitled to the factual portions of these documents that reflect statements made by witnesses during these interviews. The statements issued by witnesses earlier in the course of this matter – especially those of Mr. Fauré – are obviously relevant to the SEC's claims and Mr. Cuban's defenses in this matter. Furthermore, Mr. Fauré's statements have changed over time and, as the SEC's case relies heavily on his testimony and the credibility thereof, Mr. Cuban has a compelling need to determine precisely how Mr. Fauré's story (and potentially the story of other Mamma.com witnesses) has evolved. Mr. Cuban cannot obtain the SEC's notes and summaries elsewhere, as they exist only in the SEC's possession. Fundamental fairness dictates that the SEC should not have exclusive access to these essential documents while Mr. Cuban is left to speculate as to their contents.

Fourth, the Court should order the SEC to produce a privilege log of all documents it has withheld from production on grounds of privilege during discovery on the merits of the SEC's case. The Court should reject the SEC's position that it need not comply with its obligations under the Federal Rules of Civil Procedure *at all* until the Court evaluates all of the SEC's many objections. The SEC's failure to produce a privilege log for the documents it is withholding has considerably impaired Mr. Cuban's efforts to complete discovery in this matter, and the SEC has made it abundantly clear that it will produce no log until the Court intervenes. Mr. Cuban is entitled to a description of documents withheld as privileged from the SEC's productions to date, as well as a description of documents responsive to the requests made in this Motion that are being withheld for privilege.

In sum, the SEC has thus far declined to produce numerous categories of documents on the basis of boilerplate objections and vague claims of privilege. It also appears to have adopted the position that it is not required to produce any material other than those documents contained in its investigative file of its investigation of Mr. Cuban, even if such material is relevant and discoverable. This Court should compel the SEC to produce the listed categories of documents as well as a privilege log that will enable Mr. Cuban and the Court to evaluate the SEC's claims of privilege.

BACKGROUND

The Court is amply familiar with the general background of this litigation, and only the facts relevant to this Motion will be recounted here. The SEC filed its Complaint in this action on November 17, 2008, alleging that Mr. Cuban violated certain securities laws in connection with his sale of stock in Mamma.com. Mr. Cuban filed a Motion to Dismiss and the parties proceeded to discovery on the merits of the SEC's allegations and Mr. Cuban's defenses ("Merits Discovery").

In connection with its initial disclosures in this action, the SEC made a production (the "Merits Production") of certain documents provided to the SEC by third parties. Through this Merits Production, the SEC contends that it produced its "entire non-privileged investigative

file" for its investigation of Mr. Cuban. As the SEC itself put it, "the Commission's position is that it has produced its nonprivileged investigative file related to this matter, consisting of documents obtained from Mark Cuban, source documents and data obtained by the SEC from non-governmental third parties, and transcripts of investigative testimony (and exhibits thereto)." (Attachment A, Letter from Kevin O'Rourke to Henry Asbill and Lyle Roberts (July 15, 2009); App'x at 5.)[3] Although the SEC states that it produced only the *nonprivileged* investigative file and presumably can identify what documents were withheld for privilege, it did not produce a privilege log at that time and has not produced a privilege log for its Merits Production at any time.

Mr. Cuban served the SEC with his First Requests on May 4, 2009. (Attachment B; App'x at 8-21.) The SEC responded with objections (Attachment C, Plaintiff Securities and Exchange Commission's Response to Defendant Mark Cuban's First Request to Plaintiff for Production of Documents ("SEC First Objections"); App'x at 23-37) that included a series of general objections in addition to largely boilerplate, nonspecific objections to each of Mr. Cuban's First Requests. Although the SEC invoked 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, it did not 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.

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 replead 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

[3] All attachments referred to in this memorandum are attachments to the Declaration of Lyle Roberts (App'x at 1-3), filed concurrently with this Motion.

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 a privilege log for its Sanctions Discovery productions (Attachment D, SEC v. Cuban 03-09-2010 Production – Electronic Document Privilege Log ("Sanctions Privilege Log"); App'x at 39-101).[4] In response, Mr. Cuban filed a Motion to Compel. *See* First Mot. to Compel. Before the Court ruled on the merits of the First Motion to Compel, however, the Fifth Circuit reversed the grant of Mr. Cuban's Motion to Dismiss and remanded the action back to this Court. Shortly thereafter, the Court denied Mr. Cuban's Fees Motion in an effort to, "*inter alia*, eliminate the need to resolve difficult discovery issues that may arise due to the pendency of parallel litigation involving plaintiff's suit on the merits and defendant's attorney's fees motion." Order Denying Motion for Attorney's Fees Without Prejudice, ECF No. 76. The Court denied the First Motion to Compel without prejudice as well. *Id.*

After remand, the parties re-entered Merits Discovery. With a few exceptions, Mr. Cuban renewed the requests for documents he made in his First Requests. (*See* Attachment E, Letter from Lyle Roberts to Kevin O'Rourke (Feb. 24, 2011); App'x at 103-104; *see also* Attachment F, Letter from George Anhang to Kevin O'Rourke (Mar. 31, 2011); App'x at 106-107.) Mr. Cuban also filed his Second Requests, which sought a limited set of documents. (Attachment G; App'x at 109-118.) The SEC, in turn, produced nothing in response to the First Requests, made a limited production in response to the Second Requests, and filed objections to the Second Requests (Attachment H, Plaintiff Securities and Exchange Commissioner's Responses and Objections to Defendant's Second Request to Plaintiff for Production of

[4] During Sanctions Discovery the SEC produced a privilege log for electronic documents and another for hard-copy documents. Unless otherwise specified, "Sanctions Privilege Log" refers only to the log of electronic documents.

Documents ("SEC Second Objections"); App'x at 120-125) that are similar to the SEC's First Objections. The SEC, as before, produced no privilege log for this production in response to Mr. Cuban's Second Requests.

Because the SEC has disregarded its discovery obligations in response to Mr. Cuban's First and Second Requests, Mr. Cuban is now forced to bring this Motion to Compel ("Motion"). Mr. Cuban is not moving to compel *all* the documents that are responsive to his Requests and that the SEC has refused to produce. Rather, in an attempt to limit his demands and lessen the burden on the Court, Mr. Cuban is moving to compel only those subsets of documents that are the most crucial to his defense.[5] The SEC has refused to produce even these subsets.

STANDARD

Federal Rule of Civil Procedure 26(b)(1) states that a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." "Relevance" is an exceedingly low standard. It includes "any matter that bears on, or that reasonably could lead to other material that could bear on, any issue that is or may be in the case." *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 470 (N.D. Tex. 2005) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). The term is broadly construed and "a request for discovery should be considered relevant if there is '*any possibility*' that the information sought may be relevant to the claim or defense of any party." *Id.* (quoting *Sheldon v. Vermonty*, 204 F.R.D. 679, 689 (D. Kan. 2001)) (emphasis added). As courts in this district have noted, "[u]nless it is clear that the information sought *can have no possible bearing on the claim or defense of a party*, the request for discovery should be allowed." *Id.* (emphasis added). Relevant information sought need not be admissible at trial "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Furthermore, upon a showing of good cause, "the court may order discovery of any matter

[5] Mr. Cuban notes that although the Court has recently granted the SEC's motion to strike his affirmative defense of unclean hands, the documents requested here (as explained below) are relevant to the merits of this matter. In fact, the documents that Mr. Cuban moves to compel were all covered by his First Requests, which were propounded long before Mr. Cuban filed his answer that included the unclean hands defense.

relevant to the subject matter involved in the action." *Id.*; *see also SEC v. Amerifirst Funding, Inc.*, Civ. A. No. 3:07-CV-1188-D, 2008 WL 926587, at *2 (N.D. Tex. Apr. 7, 2008) (Fitzwater, J.).

If a party refuses to disclose discoverable material in accordance with this Rule, Rule 37(a) of the Federal Rules of Civil Procedure allows an opposing party to move to compel disclosure of discoverable materials. The moving party must demonstrate that the materials requested are relevant to a party's claim or defense or will lead to the discovery of admissible evidence. *See Amerifirst Funding*, 2008 WL 926587, at *2. The burden then shifts to the nonmoving party to demonstrate "why the discovery is irrelevant, overly broad, or unduly burdensome or oppressive, and thus should not be permitted." *Abraham v. Alpha Chi Omega*, 271 F.R.D. 556, 559 (N.D. Tex. 2010). In so doing, the nonmoving party must "[i]n a *nonconclusory fashion* . . . show *specifically* how *each document request* is overly broad, burdensome, or oppressive." *Id.* (emphases added). The nonmoving party may not satisfy its burden with "a reflexive invocation of the same baseless, often abused litany that the requested discovery is vague, ambiguous, overly broad, unduly burdensome or that it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence." *Cunningham v. Smithkline Beecham*, 255 F.R.D. 474, 478 (N.D. Ind. 2009) (quoting *Burkybile v. Mitsubishi Motors Corp.*, No. 04 C 4932, 2006 WL 2325506, at *6 (N.D. Ill. Aug. 2, 2006)).

The SEC is not exempt from these generally applicable discovery rules. "Like any ordinary litigant, the Government must abide by the Federal Rules of Civil Procedure. It is not entitled to special consideration concerning the scope of discovery, especially when it voluntarily initiates an action." *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009). Accordingly, the SEC may refuse to produce documents only if they are protected by law, not simply because the SEC has unilaterally determined that the documents are not relevant to its case.

DOCUMENTS AND INFORMATION SOUGHT

I. Documents Relating to the Mamma.com Investigation

Mr. Cuban's First Requests included a Request for "[a]ll documents concerning Mamma.com, including those related to the SEC investigation entitled 'In the Matter of Mamma.com Financing Transactions (HO-10576)'" (the "Mamma.com Request"). (Attachment B, First Requests ¶ 4; App'x at 17.) The SEC apparently did not produce any documents in response to this request. Rather, in addition to its ten general objections, the SEC concludes that the request is "duplicative, overly broad, and unduly burdensome." (Attachment C, SEC First Objections at 8; App'x at 30.) Furthermore, the Request "seeks the production of documents that are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence." *Id.* The Mamma.com Request, according to the SEC, also "seeks documents subject to the attorney-client privilege, work product protection, law enforcement privilege, and governmental deliberative process privilege, and, therefore, is improperly designed to seek a listing of documents subject to such privileges." *Id.* The SEC did not indicate which documents were subject to which of these four asserted privileges, nor did it explain how it determined that all these privileges are implicated if it could not determine the scope of the Request.

Although there are likely numerous documents responsive to the Mamma.com Request that are relevant to this lawsuit, Mr. Cuban specifically moves to compel three categories of materials: all non-privileged portions of the Mamma.com investigative file, all documents describing the relationship between the Mamma.com investigation and the investigation of Mr. Cuban, and a privilege log that lists the privileged documents in the Mamma.com investigative file and explains the basis for the SEC's assertion of privilege.

a. All Non-Privileged Portions of the Mamma.com Investigative File

Again, Mr. Cuban specifically moves to compel all non-privileged portions of the investigative file for the SEC's investigation into Mamma.com. Contrary to the SEC's boilerplate objections to the Mamma.com Request, these documents are unquestionably relevant. The documents bear directly on the credibility of all the SEC's witnesses who were affiliated

with Mamma.com and who would have had ample reason to welcome the closing of the SEC's investigation into their company. The SEC has never fully explained why the Mamma.com investigation was closed or why its closure was communicated to the investigation's targets at the particular time that it was. These questions cannot be answered without access to the full investigative file.

While these documents are relevant to the credibility of all of the Mamma.com witnesses, they are particularly relevant to the credibility of the SEC's key witness, Guy Fauré. The SEC's investigation into Mr. Cuban appears to have arisen in part out of its investigation into Mamma.com, the company whose stock Mr. Cuban is alleged to have illegally traded. Mr. Fauré, who is the SEC's principal witness against Mr. Cuban in this action, was the CEO of Mamma.com during the relevant time period. As both this Court and the Fifth Circuit have recognized, the SEC's case depends in large part on Mr. Fauré's testimony regarding his June 28, 2004, conversation with Mr. Cuban about Mamma.com's private investment in public equity ("PIPE") transaction.

Even though the SEC had already both conducted an informal interview of Mr. Fauré and taken Mr. Fauré's testimony in this matter, the SEC elected – immediately after informing him that it was closing the Mamma.com investigation and not recommending an enforcement action against Mamma.com – to take his testimony once more. Mr. Cuban contends that the timing of the SEC's closing of the Mamma.com investigation was, at the very least, suspicious, and was quite possibly a deliberate attempt to elicit favorable testimony from Mr. Fauré that the SEC had failed to secure previously. The decision to close the Mamma.com investigation was supposedly made in October 2006. The letter notifying Mamma.com that the investigation was to be closed with a recommendation of no enforcement action, however, was not sent until September 19, 2007. (*See, e.g.*, Attachment I, Plaintiff Securities and Exchange Commission's Response to Defendant Mark Cuban's Interrogatories at 13-14; App'x at 139-140.) In fact, this letter was sent not long after several calls to the SEC from Mamma.com's attorney, as evidenced by the documents already produced. Additionally, there appear to be entries on the SEC's Sanctions

Privilege Log regarding the decision to send the Mamma.com investigation closure letter that are in close proximity to entries describing documents related to the scheduling and outline of the taking of Guy Fauré's testimony for the second time. (*See, e.g.*, Attachment D, Sanctions Privilege Log Entries 177-180, 190-195, and 197-203; App'x at 55-57.) The Sanctions Privilege Log also indicates that members of the Mamma.com investigative team received the litigation hold notice related to the investigation of Mr. Cuban. (*See, e.g.*, Attachment D, Sanctions Privilege Log Entries 303-305, 314-315, 319, 326-327, and 329-330; App'x at 68-71.)

Thus, there appears to be a connection between the closing of the Mamma.com investigation and the taking of Mr. Fauré's testimony for the second time, and Mr. Cuban cannot fully assess this connection without access to the full investigative file. These documents will shed light on the SEC's reasons for closing the Mamma.com investigation, which in turn directly bears on Mr. Fauré's credibility and the credibility of all the Mamma.com witnesses. They are thus unquestionably relevant to the SEC's case and Mr. Cuban's defenses. They are also either admissible or are reasonably calculated to lead to the disclosure of relevant evidence. *See Datapoint Corp. v. Picturetel Corp.*, No. Civ. A. 3:93-CV-2381D, 1998 WL 25536, at *2 (N.D. Tex. Jan. 14, 1998) (Fitzwater, J.) ("It is well-settled at common law that evidence of witness bias or prejudice is admissible evidence.") (citing *United States v. Abel*, 469 U.S. 45, 50-51 (1984)).

Furthermore, the entirety of the Mamma.com investigative file is relevant to Mr. Cuban's motivation for selling his Mamma.com shares. In order to prove its claims, the SEC must demonstrate that Mr. Cuban sold his shares of Mamma.com with the requisite scienter. *See SEC v. Gunn*, No. 3:08-CV-1013-G, 2010 WL 3359465, at *5 (N.D. Tex. Aug. 25, 2010) ("*Scienter* is a necessary element of a substantive violation of Section 10(b) of the Exchange Act and Rule 10b-5.") (citing *Aaron v. SEC*, 446 U.S. 680, 695 (1980)). In order to prevail in this action, the SEC will have to prove that Mr. Cuban "intentionally, knowingly, or in a manner that was severely reckless" traded on material, non-public information. *Id.* Thus, Mr. Cuban's rationale for selling his Mamma.com stock is of enormous relevance to this action.

Mr. Cuban has repeatedly stated that he sold his shares in Mamma.com in part because he saw "red flags" in the company and he began to suspect that the individuals involved with Mamma.com might be "crooked." (*See* Attachment J, Transcript of Investigative Testimony of Mark Cuban in *In the Matter of Mamma.com Financing Transactions* (No. HO-10576) (Apr. 3, 2007) at 17:12-17:23; 31:18-32:1; 36:8-36:19; 40:10-41:1; 45:9-45:11; 46:3-46:13; App'x at 158, 161-165.) The SEC was investigating Mamma.com on or around this time. This investigation into Mamma.com is highly relevant to Mr. Cuban's motivation for selling his shares and could fully substantiate Mr. Cuban's concerns about whether the individuals involved with Mamma.com were "crooked." The full Mamma.com investigative file will disclose the extent to which Mr. Cuban's suspicions were accurate, and it is thus plainly relevant to this action.

As noted, the SEC does not merely contend that the Mamma.com Request is irrelevant; it brings a host of other non-specific objections, including its ten general objections. The SEC, however, makes no attempt whatsoever to explain how its numerous general objections apply to Mr. Cuban's individual document requests. The Court should therefore disregard them in their entirety. *See DL v. Dist. of Columbia*, 251 F.R.D. 38, 43 (D.D.C. 2008) (overruling party's general objections in their entirety when party made no attempt to explain how the objections applied to specific document requests). Neither Mr. Cuban nor the Court should be forced to do the SEC's job by speculating as to how the SEC's general objections apply to every one of Mr. Cuban's Requests.

Moreover, the SEC contends that the Mamma.com Request is overly broad and unduly burdensome. A party, however, may not merely incant this phrase in response to a discovery request because such a response is "almost impossible to assess on [its] merits, and fall[s] woefully short of the burden that must be borne by a party making an objection to an interrogatory or document request. 'A party asserting undue burden typically must present an affidavit or other evidentiary proof of the time or expense involved in responding to the

discovery request.'" *SEC v. Brady*, 238 F.R.D. 429, 437 (N.D. Tex. 2006) (quoting *Waddell & Reed Fin., Inc. v. Torchmark Corp.*, 222 F.R.D. 450, 454 (D. Kan. 2004)), and citing cases).

In any event, it appears clear that producing the documents Mr. Cuban requests in this Motion would *not* be an undue burden. The Mamma.com investigative file is all in one place, and the documents that discuss or relate to the closing of that investigation are very likely to be limited and manageable. The SEC cannot credibly contend that Mr. Cuban's requests are an undue burden.

The SEC also claims four privileges in response to the Mamma.com Request (as well as to every other Request in the First Requests): attorney-client privilege, work-product protection, the law-enforcement privilege, and the government deliberative-process privilege. It has not, however, explained how these privileges apply, nor has it provided a privilege log that provides a document-by-document description of the allegedly privileged documents.[6] *See infra* § IV. A party may not simply make a blanket assertion of privilege over an undifferentiated group of documents, thus giving the Court and opposing parties no basis to evaluate its claim. *See United Investors Life Ins. Co. v. Nationwide Life Ins. Co.*, 233 F.R.D. 483, 486 (N.D. Miss. 2006) ("Blanket assertions of a privilege are unacceptable, and the court and other parties must be able to test the merits of a privilege claim.") (citing *United States v. El Paso Co.*, 682 F.2d 530, 541 (5th Cir. 1982)). The Court should thus reject these bases for refusing to produce documents.

Mr. Cuban accordingly is entitled to the Mamma.com investigative file and the documents or communications discussing or relating to the closing of the Mamma.com investigation. Because they are relevant to Mr. Cuban's defenses and the SEC has offered no meritorious objection to their production, the Court should order the SEC to produce the documents immediately.

[6] Accordingly, Mr. Cuban is unable to assess any specific claims of privilege over particular documents that the SEC has withheld.

b. Documents Pertaining to the Relationship Between the Mamma.com Investigation and the Investigation into Mr. Cuban

Mr. Cuban also requests that the Court compel the production of documents that evidence the relationship between the investigation of Mr. Cuban and the Mamma.com investigation. Such documents also fall within the Mamma.com Request, but – because Mr. Cuban requested similar documents during Sanctions Discovery – the SEC listed responsive but allegedly privileged documents on the Sanctions Privilege Log.[7]

Mr. Cuban has, in his First Motion to Compel, already addressed at length why the SEC has not justified its claims of privilege for these documents. Specifically, Mr. Cuban has argued that the SEC is not entitled to rely on the attorney-client privilege because the Sanctions Privilege Log fails to make a sufficient showing to justify invocation of the privilege. First Mot. to Compel at 12-15; Reply Brief of Defendant Mark Cuban in Support of Motion to Compel Responses to Interrogatories and Production of Documents, ECF No. 73 ("Reply to Mot. to Compel") at 7. The deliberative-process privilege is unavailable because the SEC has not shown that the documents in question are sufficiently candid and personal, because the SEC seeks to apply the privilege to documents created after the relevant decision was made, because the SEC seeks to apply the privilege to ordinary, routine documents and communications to which the privilege does not apply, and because the SEC has not demonstrated that an agency head has reviewed each document and stated with particularity why the privilege is justified. First Mot. to Compel at 15-17; Reply to Mot. to Compel at 7-9. Arguments for the law-enforcement privilege also fail because the SEC has not sufficiently justified its invocation and because the investigation of Mr. Cuban is neither ongoing nor criminal. First Mot. to Compel at 17-19; Reply to Mot. to Compel at 9-10.[8]

[7] As noted in a similar discussion in Mr. Cuban's First Motion to Compel, the entries on the Sanctions Privilege Log that appear to relate to this issue include: 1-17, 58, 149, 177, 179-180, 194-195, 201, 276, 303-305, 314-315, 319, 325-330, 343-345, 382-385, 394-395, 398, 407, 409, 423-424, 513, and 519-521. (Attachment D; App'x at 39-40, 44, 52, 55-57, 65, 68-71, 73, 76-81, and 90-91.)

[8] These arguments are set forth in greater detail in Mr. Cuban's earlier briefs, which are incorporated herein by reference.

Mr. Cuban notes that, because the Court has stricken his affirmative defense of unclean hands, he does not now rely on the evidence of the SEC's investigatory misconduct to overcome the SEC's claims of privilege. Nevertheless, the SEC's reliance on the work-product doctrine is still misplaced because extraordinary circumstances are still present in this case, because Mr. Cuban has a compelling need to review materials that bear heavily on the credibility of the SEC's witnesses (especially its principal witness), and because the information Mr. Cuban seeks is simply not available elsewhere. The documents that Mr. Cuban sought in his First Motion to Compel are relevant and material to Mr. Cuban's defenses against the merits of the SEC's case, not just his contention that the SEC engaged in investigative misconduct in this matter. This is because the relationship between the investigation of Mr. Cuban and the Mamma.com investigation directly bears on the credibility of the SEC's witnesses, especially Mr. Fauré. The relevant matter here – the maintenance of the two investigations and the relationship between them – also places the conduct of various attorneys at issue, and the SEC should not be able to hide behind the work-product privilege when the conduct of its personnel undergirds the relevant issue. *See, e.g.*, *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, Civ. No. 88-9752, 1993 WL 106429, at *3-4 (E.D. Pa. Mar. 30, 1993) (work-product privilege does not protect materials "which concern[] activities of counsel that are directly at issue").

Mr. Cuban thus has a compelling need for these documents, which bear directly on the credibility of the SEC's key witness – a witness whose testimony has changed over time and upon whose testimony the entire case may depend. No substitute evidence can supply equivalent information about the circumstances surrounding the management of both the Mamma.com investigation and the investigation into Mr. Cuban, and what effect the closing of the Mamma.com investigation may have had on the testimony of the SEC's principal witness. And because the documents are not available from any source other than directly from the SEC, Mr. Cuban would have an obvious undue hardship finding them elsewhere. The Court should therefore compel the production of the documents in question.

c. Privilege Log of Privileged Documents in the Mamma.com Investigative File

In addition to the non-privileged documents in the Mamma.com investigative file and the documents on the Sanctions Privilege log that detail the distinction between the investigation into Mr. Cuban and the Mamma.com investigation, Mr. Cuban moves to compel a privilege log for all privileged documents from the Mamma.com investigative file that were not listed on the Sanctions Privilege Log. As explained below in greater detail, *infra* § IV, Mr. Cuban is entitled to a privilege log listing *all* documents responsive to the requests described in this Motion that do not appear on the Sanctions Privilege Log. A log identifying the privileged documents in the Mamma.com investigative file, however, is of critical importance, as Mr. Cuban has never had an opportunity to assess the SEC's specific claims of privilege for materials in that file. Once he receives such a log, he reserves the right to move to compel and challenge the SEC's specific assertions of privilege to individual documents.

II. All Documents Relating to Any Involvement of the Kotts with Mamma.com

Mr. Cuban's First Requests also include Requests pertaining to Irving, Ian, or Michael Kott and their activities. Specifically, one such Request (the "Kott Request") asks for the following documents:

> All documents relating to the involvement of [Ian, Michael, or Irving Kott (the "Kotts")] in Mamma.com, including all documents relating to any of the Kotts:
>
> a. trading, directly or indirectly, in the securities of Mamma.com;
> b. attending meetings with any current or former Mamma.com agent, advisor, employee, director, representative, or attorney;
> c. visiting the offices of Mamma.com; or
> d. communicating with any current or former Mamma.com agent, advisor, employee, director, officer, representative, or attorney.

(Attachment B, First Requests ¶ 11; App'x at 18.)

In response, the SEC deployed the same laundry list of objections that it used to avoid producing documents in response to Mr. Cuban's other Requests. In addition to its host of general objections, the SEC asserts that the Kott Request is "overly broad, unduly burdensome, and seeks the production of documents that are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence." (Attachment C, SEC First Objections at 13; App'x at 35.)

Furthermore, the Request "seeks the production of documents subject to the attorney-client privilege, work product protection, law enforcement privilege, and governmental deliberative process privilege, and, therefore, is improperly designed to seek a listing of documents subject to such privileges." *Id.* The SEC's objections to the Kott Request, like its objections to the Mamma.com Request, make no attempt to make an individualized explanation of why the Request is improper. Instead, the SEC reproduces its one-size-fits-all rationale for refusing to produce documents that appears verbatim in the SEC's response to nearly every other of Mr. Cuban's Requests.

As noted, although the SEC has claimed privilege for the documents that are responsive to this request, it has not provided a privilege log or otherwise "describe[d] the nature of the documents, communications, or tangible things not produced or disclosed . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim," as it is required to do by Federal Rule of Civil Procedure 26(b)(5). As a result, neither Mr. Cuban nor the Court have any way of assessing the SEC's many non-specific claims of privilege. The Court should reject the SEC's blanket, undifferentiated claims of privilege made in response to the Kott Request.

Although the SEC has claimed that this request is "unduly broad" and "overly burdensome," it has again utterly failed to explain why this might be the case. Just as with its other objections, the SEC has made no attempt to articulate why the production might be burdensome or how burdensome it may be. The Kott Request seeks documents concerning the involvement that *three* individuals had with *one* publicly traded company. As explained in the Kott Request itself, this could include documents relating to any trading by these three individuals in the securities of the one company, or any communications that the three might have had with a limited number of people involved with the company. And the three individuals in question all share the same last name, so to the extent that the SEC would be conducting electronic searches to look for responsive documents, it could do so by searching for *a single*

word. Put simply, the SEC's protest that the Kott Request is "overly broad" or that searching for documents responsive to it would be "unduly burdensome" cannot be taken seriously.

Nor can the SEC credibly suggest that these documents are not relevant to this action. Again, as the SEC well knows, the claims it pursues have a scienter requirement; Mr. Cuban's motivation for selling his Mamma.com stock is thus unquestionably relevant to this action. And as the SEC also well knows, Mr. Cuban has stated that he terminated his involvement with Mamma.com in part because he became concerned about Mamma.com's business activities, including Mamma.com's involvement with Irving Kott and Kott's possible role in the PIPE transaction. (*See* Attachment J, Transcript of Investigative Testimony of Mark Cuban in *In the Matter of Mamma.com Financing Transactions* (No. HO-10576) at 17:12-17:23; 40:10-41:1; App'x at 158, 163-164.) The evidence in this matter also demonstrates that, on the very same day that Mr. Cuban directed his broker to sell his Mamma.com securities, he received an email from an individual named Brian Shaddick confirming that Irving Kott was involved with Mamma.com. (*See* Attachment K, Email from Brian Shaddick to Mark Cuban (June 28, 2004); App'x at 177-178.) In addition – and in seeming contradiction to the above-referenced email – the evidence also suggests that Mr. Fauré had previously represented to Mr. Cuban's affiliates that "his reputation and good name were not being risked with people like Kott." (*See* Attachment L, Email from David Kelton to Mark Cuban (Mar. 15, 2004); App'x at 181.)

Documents in the SEC's possession confirming that Mr. Cuban's concerns were valid and that the Kotts were actually involved with Mamma.com (despite Mr. Fauré's claims to the contrary) are relevant to substantiating Mr. Cuban's testimony, explaining his motivation for divesting himself of his Mamma.com stock, and supporting his contention that he did not act with the scienter required to support the SEC's claims against him. These documents are also highly relevant to Mr. Fauré's credibility. The Court should therefore order the SEC to produce all documents responsive to the Kott Request immediately.

III. Notes and Interview Summaries from Interviews Relating to the Investigation of Mr. Cuban

Mr. Cuban further moves to compel the production of interview notes and interview summaries from the interviews conducted by the SEC during the investigation of Mr. Cuban, particularly from the interview of Mr. Fauré. Specifically, Mr. Cuban moves to compel the portions of those notes or summaries that reflect witness statements and not any portions that contain attorney opinions or analysis of witness statements. Mr. Cuban's First Requests contained Requests that covered these notes (*see, e.g.*, Attachment B, First Requests at 9-10 (Requests 1, 2, and 4); App'x at 16-17), but so far no notes have been produced.

The circumstances presented in this case are extraordinary, and they justify Mr. Cuban's access to these documents. Again, the SEC's entire case against Mr. Cuban relies upon an alleged agreement that was made during a telephone conversation between Mr. Cuban and Guy Fauré. Mr. Fauré, according to the SEC, claims that Mr. Cuban entered into an agreement during this conversation to keep certain information confidential and not to trade on it. Mr. Cuban denies this. The SEC's case against Mr. Cuban, therefore, hinges on the credibility of Mr. Fauré's statements as to what took place during this phone call. Mr. Fauré, however, has changed his story over time in different interviews. Mr. Cuban has not had access to the exact language of Mr. Fauré's statements in some of these interviews with the SEC. And, in fact, an individual who was present at one SEC interview of Mr. Fauré states that during the interview the SEC asked Mr. Fauré if Mr. Cuban ever agreed to hold the information regarding the PIPE in confidence or agreed not to trade. In response, *Mr. Fauré stated that Mr. Cuban had never agreed to this*. (Attachment M, Decl. of Michael Storck ¶¶ 4-8; App'x at 183-186.) In addition, this individual also was present at the SEC's interview of Irwin Kramer, a member of the board of directors of Mamma.com and another important SEC witness. According to this individual, Mr. Kramer stated during the interview that he had not thought of the information in question as confidential (although he did not consider it public), and he further stated that he had learned that Mr. Cuban threatened to sell his Mamma.com shares during his telephone call with Mr. Fauré. (*Id.* ¶ 10; App'x at 187.)

These statements, of course, are enormously relevant to this matter, as they bear on the credibility of the SEC's principal witness. The SEC's interview notes and summaries can confirm or contest the as-yet-uncontradicted statements that Mr. Fauré initially told the SEC as well as his colleagues that Mr. Cuban did *not* enter into the agreement that the SEC claims he entered into. Lack of such an agreement is of course fatal to the SEC's case.

Mr. Cuban thus is entitled to the notes and interview summaries from the SEC's interviews. While government attorney notes and summaries could conceivably fall under the deliberative-process privilege if an agency satisfies various procedural requirements, that privilege does not extend to purely factual statements, such as witness statements. *See Batton v. Evers*, 598 F.3d 169, 183 (5th Cir. 2010) (privilege does not extend to "factual material that does not reveal the deliberative process") (quoting *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007)). Further, Mr. Cuban has a particular need for these documents – insofar as they indicate whether a critical witness's statements have changed over time or are inconsistent with later testimony – that overcomes the government's interest in confidentiality. *See SEC v. Sentinel Mgmt. Group, Inc.*, No. 07 C 4684, 2010 WL 4977220, at *4 (N.D. Ill. Dec. 2, 2010) ("The deliberative process privilege is not absolute. It may be overcome where the party seeking the documents establishes that he has a particularized need for the documents and his need outweighs the government's interest in confidentiality.").

To the extent that the SEC asserts other privileges or raises additional objections, courts have recognized that SEC interview notes and summaries may be disclosed to opposing parties in appropriate circumstances. As an initial matter, Mr. Cuban is entitled to any statements in SEC interview notes or summaries that would exculpate him from the SEC's claims or that contradict the SEC's theories. *See* Order on Motion to Compel, *SEC v. Mintz*, No. H-07-1027 (S.D. Tex. Apr. 23, 2008)[9] (even if a party does not demonstrate that the work-product privilege is overcome, "[s]tatements of an exculpatory nature as well as statements that contradict the theory of the [Securities and Exchange] Commission's case are discoverable and do not find

[9] A copy of this Order, along with copies of all the unpublished cases cited herein, is included in Mr. Cuban's evidentiary appendix. (App'x at 244-245.)

cover under the attorney work-product privilege. Disclosure is required."). This material has not been disclosed to Mr. Cuban.

In addition, Mr. Cuban is entitled to the remainder of the factual portions of the interview notes and summaries as well. Courts have held that documents such as these must be disclosed in extraordinary circumstances. For example, in *SEC v. Sentinel Management Group*, the defendant in an SEC action moved to compel the SEC's answers to an interrogatory asking for detailed summaries of witness statements during interviews. The court held that, while SEC interview summaries constitute attorney work product, the defendant was still entitled to the factual information that it obtained from witnesses during interviews. Although the court determined that the documents should receive heightened protection because they contain mental processes to a greater or lesser extent, extraordinary circumstances were present. Specifically, certain witnesses who were interviewed by the SEC were not available to the defendant. Accordingly, the court held, the SEC had access to the witnesses to determine how they might testify at trial, and the defendant had not. 2010 WL 4977220 at *9.[10] The court noted that "it would not be fair for the SEC to have access to the information provided by these witnesses but not [the defendant]." *Id.* at 11. Considering the extraordinary circumstances and the seriousness of the SEC's suit, the court determined that even under a heightened standard, the defendant should have access to the interview summaries.

Extraordinary circumstances are present here, too. The SEC's interview notes and witness summaries contain information that is crucial to the merits of this lawsuit. Of critical importance is the fact that Mr. Cuban will *not* be able to acquire the information he now seeks simply by deposing Mr. Fauré. The SEC interview notes and summaries are not important

[10] The interview notes also contained sufficient indicia of accuracy and reliability, as numerous lawyers attended the interviews and took contemporaneous notes. *Id.* at *10. Furthermore, the *Sentinel Management* court also conducted an *in camera* review of the notes to ensure that they did not contain explicit mental impressions or opinions. *Id.* (interview summaries did not contain explicit mental impressions or opinions); *see also SEC v. Thrasher*, No. 92 Civ. 6987 (JFK), 1995 WL 46681, at *5-6 (S.D.N.Y. Feb. 7, 1995) (interview notes consisted mostly of "abbreviated recapitulations of what a witness has said during his or her interview" and did not "yield any significant insights into the strategy, tactics, or theories of the [SEC's] attorneys"). As Mr. Cuban is not seeking any materials that contain the mental impressions or opinions of SEC attorneys, he encourages the Court to conduct such a review as well.

simply because they capture Mr. Fauré's account of his phone call with Mr. Cuban; they are particularly important because they capture Mr. Fauré's *initial* account of the call, which apparently has *since changed*. The SEC has access to these documents in which Mr. Fauré's earlier story was recorded, but Mr. Cuban has never had access to them. And the stakes in this matter are indisputably high. Mr. Cuban therefore should be allowed access to purely factual portions of witness statements, especially those of Guy Fauré, so that he may evaluate whether they have changed over time or are inconsistent with the SEC's allegations.

IV. Privilege Log Covering the SEC's Merits Discovery Productions

Finally, Mr. Cuban is entitled to a privilege log from the SEC's Merits Production and for any documents responsive to the requests upon which he moves today. Rule 26(b)(5) of the Federal Rules of Civil Procedure makes clear that "[w]hen a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material," that party has two obligations. It "must expressly make the claim" of privilege, and it "must describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." The final obligation is typically satisfied by a privilege log that specifies individual documents and communications that are purportedly privileged, identifies their authors and recipients, and generally describes their contents. *See In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001). The language of the rule is mandatory; a party asserting privilege "must" describe the nature of the documents or communications it seeks to withhold. *See Estate of Manship v. United States*, 232 F.R.D. 552, 561 (M.D. La. 2005) (noting that previous incarnation of rule "employs the mandatory term, 'shall,' requiring that the responding party prepare a privilege log where a privilege is asserted").

The instructions to Mr. Cuban's First and Second Requests clearly instruct the SEC to provide a privilege log for every document which it claims to be privileged. (*See* Attachment B, First Requests at 7-8; App'x at 14-15; Attachment G, Second Requests at 6-7; App'x at 114-115.) Although the SEC produced a privilege log in connection with its production during

Sanctions Discovery, it has *not* produced one for its productions and responses during Merits Discovery. The SEC has refused to supply a privilege log even though it has asserted broad privileges and protections as a basis for refusing to produce documents. It has thus not even attempted to describe the nature of the documents in a manner that would enable other parties – including this Court – to assess its claims of privilege.[11] As a result of the SEC's failure to produce a privilege log, Mr. Cuban's efforts to obtain the materials to which he is entitled under the Federal Rules of Civil Procedure – including the filing of this Motion – has been made considerably more difficult.

The SEC's refusal to provide a privilege log, by its own admission, was based on the notion that the scope of *all* of Mr. Cuban's Requests had not been determined. Put differently, the SEC made it clear to Mr. Cuban that it would produce no privilege log until Mr. Cuban sought the Court's interference. The SEC, incidentally, did not even produce a *partial* privilege log that contained entries for the allegedly privileged documents that are undisputedly responsive to Mr. Cuban's requests, even if the full scope of Mr. Cuban's requests would have to be determined through a motion to compel. Instead, it produced *no* privilege log whatsoever, and it elected to burden the Court with the efforts of forcing the SEC to comply with its discovery obligations.

To illustrate, the SEC stated in correspondence to Mr. Cuban that it was under no obligation to produce a privilege log because the SEC "objected to both the appropriate substantive and temporal scopes of [the First Requests]. Until the appropriate substantive and temporal scopes are established, it is impossible for us to determine which documents to place on

[11] The SEC will no doubt observe that Mr. Cuban has declined to produce a privilege log for certain documents as well. Mr. Cuban has produced a privilege log for the period prior to 2007, but he has declined to produce a privilege log that reflects communications with and among his attorneys *after* Mr. Cuban became aware that the SEC was investigating him. With respect to the production of a privilege log for this period, Mr. Cuban's position is very different from the SEC's. The SEC has made no showing whatsoever that communication between Mr. Cuban and his attorneys, or communications among Mr. Cuban's attorneys years after his trades in Mamma.com stock, are at all relevant. In contrast, the actions of the SEC and its attorneys during its investigation have significant relevance for important witness testimony. In addition, because Mr. Cuban's attorneys began working in this case with great intensity after becoming aware of the investigation, these thousands of communications – which are plainly privileged – would be enormously burdensome to compile into a log.

a log." (Attachment A, Letter from Kevin O'Rourke to Henry Asbill and Lyle Roberts (July 15, 2009); App'x at 6.)

Again, after the Court dismissed the SEC's Complaint, the SEC produced the Sanctions Privilege Log during Sanctions Discovery. Once the lawsuit was reinstated and the parties re-entered Merits Discovery, Mr. Cuban attempted to ascertain whether the Sanctions Privilege Log covered the documents withheld as privileged from the SEC's production of its investigative file. 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 [privilege logs already produced], and if not, why not, and whether and when the SEC intends to produce a supplemental privilege log identifying those other privileged documents." (Attachment F, Letter from George Anhang to Kevin O'Rourke (Mar. 31, 2011); App'x at 106-107 (emphasis in original).) Mr. Cuban further asked whether the privilege logs produced by the SEC contained all the documents responsive to the First Requests 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 E, Letter from Lyle Roberts to Kevin O'Rourke (Feb. 24, 2011); App'x at 103-104 (reminding the SEC of its obligation to produce a privilege log in response to Mr. Cuban's Requests.)

In response, the SEC did not answer the questions that Mr. Cuban presented. Instead, it described its objection to the production of privilege logs as "multifaceted" and it reiterated that it had already produced some privilege logs. (Attachment N, Letter from Kevin O'Rourke to Lyle Roberts and George Anhang (Apr. 8, 2011); App'x at 196-197.) 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 196.)

Thus, the SEC has entirely declined to comply with Rule 26(b)(5) because it has outstanding objections to Mr. Cuban's Requests – objections that are, as noted, largely blanket

privilege requests or nonspecific and unexplained pronouncements of burden, irrelevance, and overbreadth. A party may not simply abandon its obligation to produce a privilege log on the basis of such boilerplate. *See Cunningham*, 255 F.R.D. at 481 (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").

In sum, the Court should reject the SEC's argument that its obligations under Rule 26 were suspended once it incanted its boilerplate objections to Mr. Cuban's requests. The Court should order the SEC to produce a privilege log that describes, in accordance with Rule 26, all documents withheld as privileged from all of the SEC's Merits Productions as well as all allegedly privileged documents responsive to the documents requested in this Motion.[12]

CONCLUSION

The SEC has refused to produce numerous categories of relevant documents in this matter on the pretext of vague, boilerplate objections and the blanket invocation of numerous privileges. This conduct reflects the SEC's strategy of producing *nothing* other than what it deems part of its "investigative file" until the Court is forced to intervene. It has also declined to provide a privilege log in accordance with its obligations under the Federal Rules of Civil Procedure.

As a result of the SEC's strategy, Mr. Cuban has no choice but to ask the Court to compel the SEC to produce the documents described in this Motion. The documents requested in this Motion are a carefully selected subset of the documents that Mr. Cuban has requested, but which the SEC has refused to provide. These subsets are of critical importance to the merits of this case, including to the credibility of the SEC's key witness and to Mr. Cuban's mental state. Mr. Cuban thus respectfully asks the Court to compel the SEC to produce the documents listed in this

[12] Because the SEC has never disclosed what it has and has not withheld as privileged from its Merits Discovery productions, Mr. Cuban is largely unable to contend in this motion that the SEC's claims of privilege are inadequate. He thus reserves the right to do so at a later time after the SEC has complied with its Rule 26 obligations and provided Mr. Cuban and the Court with the basis for assessing the SEC's many claims of privilege.

Motion and also to provide a privilege log for its Merits Production and for any documents requested in this Motion that the SEC is withholding as privileged.

Dated: August 29, 2011

By: /s/ Lyle Roberts
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