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 BRIEF IN OPPOSITION TO PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR A PROTECTIVE ORDER

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INTRODUCTION

Continuing to defy this Court's December 4, 2009 Memorandum Opinion and Order ("Order"), the SEC now refuses to produce any of the five witnesses for whom Mr. Cuban has noticed depositions. Thus, months into the discovery process this Court ordered to assist in determining whether the SEC had acted in bad faith, the SEC refuses to produce either the bulk of its responsive documents or any witnesses. With the exception of a handful of documents (which support Mr. Cuban's allegations of bad faith), Mr. Cuban stands exactly where he stood before this Court issued its Order – an Order finding Mr. Cuban *already* had raised sufficient evidence of bad faith to merit discovery. In response, the SEC's strategy has been to drag its feet, file baseless motions, and refuse to comply with valid discovery requests, in a desperate hope that these tactics will convince the Court to change its mind and relieve the SEC from the bulk of its discovery obligations. The SEC's stonewalling tactics should not be permitted.

The true purpose of the SEC's Motion for a Protective Order ("Motion") is to improperly urge the Court to reconsider its decision to grant discovery. The SEC spends the first 18 pages of the Motion re-arguing the allegations in Mr. Cuban's Motion for Attorneys' Fees and Expenses ("Fees Motion"), mischaracterizing the known facts to its advantage, and assiduously ignoring every bit of contrary evidence. The SEC's claim that "Cuban has no evidence of misconduct by the staff" fails to address the clear evidence of misconduct presented in the Fees Motion and found in the limited discovery to date.

In any event, whether the SEC must produce its witnesses is not contingent upon what the evidence to date has demonstrated concerning the agency's bad faith. Obviously, a party's self-serving description of what a subset of the responsive documents reveals cannot form the basis for denying the taking of depositions. The real issue is the *other* five pages in the SEC's Motion, which contain frivolous legal arguments.

First, the SEC argues that it is unnecessary to take any depositions concerning the evidentiary basis for its Complaint because "Cuban has all of the SEC's evidence." The fact that Mr. Cuban, and by extension the Court, has all of the SEC's evidence is exactly the problem. The

SEC has no evidence that Mr. Cuban ever "agreed" to keep any information confidential. Mr. Cuban is certainly entitled to ask the relevant SEC staff what led to the making of this false allegation in its Complaint. Moreover, the SEC's objection does not cover all of the other issues concerning the agency's investigative misconduct that are the proper subject of the noticed depositions.

Second, the SEC argues that taking the depositions of its trial team would be improper. The case law cited by the SEC, however, is inapposite. Mr. Cuban is not seeking these depositions to obtain factual information concerning the SEC's case against Mr. Cuban that could be obtained from other sources. The Court has already dismissed the SEC's case. Instead, Mr. Cuban is seeking the testimony of the same individuals who are alleged to have acted in bad faith and it is their conduct that is at issue in the Fees Motion. Under these circumstances, the depositions are clearly necessary and appropriate. Whether the SEC can or will validly assert a privilege in response to some deposition questions is not a valid reason to prohibit the deposition altogether. The SEC's objection also is once again more limited that it admits – only two (Kevin O'Rourke and Julie Riewe) of the five proposed deponents are actually identified as members of any hypothetical trial team.

Finally, the SEC argues that Mr. Cuban is seeking the testimony of "top executive officials." None of the proposed deponents, however, meets the definition established by caselaw of a "top executive official" – *i.e.*, an official who was subject to Senate confirmation. The only SEC officials who meet this definition are the Chairman and the Commissioners. Mr. Cuban is not seeking to depose anyone who holds or has held those positions.

The Court should reject the SEC's continued attempts to avoid its discovery obligations and deny the proposed protective order. The SEC should also be required, pursuant to Fed. R. Civ. P. 37, to pay the attorneys' fees Mr. Cuban has expended in responding to this motion.

ARGUMENT

I. The SEC's Self-Serving Factual Arguments Are Irrelevant and Erroneous

The SEC's arguments concerning what discovery has revealed to date are legally irrelevant to whether the extraordinary protective order sought by the SEC should be issued. It may be

instructive, however, to consider some of the key facts that the SEC conveniently omits from its 18-page, self-serving summary.

- The SEC fails to explain why it filed its Complaint alleging the existence of a confidentiality agreement, while knowing that there was *not a single witness* who said that Mr. Cuban *agreed* to keep any information confidential.
- The SEC repeats its false assertion that Mr. Cuban alleged Jeffrey Norris was "involved" in the investigation. The SEC then proceeds to spend several pages "proving" that Mr. Norris had no direct involvement. In fact, as Mr. Cuban clearly stated in his Fees Motion, Mr. Norris' emails were evidence of the SEC's bias, given that the agency made no attempt to affirmatively address the issue with Mr. Cuban, and may have had an effect on the SEC's decisionmaking in this case. The SEC confirms that both allegations are correct: (1) while SEC staff members supposedly referred the matter to the SEC's Office of Inspector General and supervisors in the Fort Worth office, they never contacted Mr. Cuban about the emails;[1] and (2) Chairman Cox was forced to recuse himself from the decision to bring an action against Mr. Cuban.[2]
- The documents produced by the SEC to date have included derisive emails accompanying an unflattering photo montage of Mr. Cuban sent by the supervisor of the Cuban investigation to two of the highest ranking members of the Enforcement Division. The SEC now asserts (without *any* supporting evidence) that these emails were part of an effort to protect Mr. Cuban's privacy.[3] The SEC's ridiculous explanation merely confirms that the emails are evidence of the SEC staff's bias and animus against Mr. Cuban.
- The SEC brazenly claims that the allegations of a "quid pro quo" related to the closing of the investigation of Mamma.com are "unfounded and supported," but fails to mention the key document produced to date. A July 2007 letter from counsel for Mamma.com, Richard

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1 Motion at 8.
2 Motion at 11.
3 Motion at 18 n.14.

Greenberg, to the SEC appears to *invite* such a quid pro quo.[4] In the letter, Mr. Greenberg encourages the SEC to close its investigation due to, among other reasons, Mamma.com's cooperation on "other important SEC matters."[5] The SEC then did as Mr. Greenberg requested, shortly before taking the testimony of Mamma.com's CEO for a second time.[6]

- An affidavit from Christopher Aguilar, the former General Counsel of Mamma.com's placement agent, establishes that Julie Riewe (one of the proposed deponents) told him that it was her preference he not make a witness available to Mr. Cuban's counsel. It is black-letter law that any attempt to limit or restrict opposing counsel's access to material fact witnesses is improper. Yet, the SEC – in a footnote and without any citation – describes the attorney's actions as "completely appropriate conduct."[7]

That the SEC feels free to argue that no evidence supports the allegations in the Fees Motion while blatantly ignoring every bit of evidence to the contrary, and then seeks to cut off further discovery under the Order based on those frivolous assertions, is nothing short of outrageous.

II. The Order Establishes the Basis for Discovery

The Order clearly contemplated that the depositions of SEC personnel would be taken.[8] Nevertheless, the SEC is essentially asking the Court to cut off further discovery concerning the allegations in the Fees Motion based on the SEC's spurious contention that Mr. Cuban has "not identified a single piece of evidence" to support these allegations.[9] In fact, as discussed above, Mr. Cuban has already amply demonstrated why discovery is warranted (which is why the Court issued the Order). Even the small amount of documents produced by the SEC in discovery thus far *support* Mr. Cuban's bad faith allegations.

More importantly, the abundance or dearth of documentary support for a party's claims or

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4 *See* July 18, 2007 letter from R. Greenberg to Y. Zelinsky. (Appendix, Tab 1, at 2-3.)

5 *Id.*

6 *See* SEC Response to Mr. Cuban's Interrogatory No. 13. (Appendix, Tab 2 at 7-8.)

7 Motion at 18 n.14.

8 *See* Order at 8-9 (providing guidance on proper circumstances for taking depositions of high government officials).

9 Motion at 1. That the SEC makes this argument – and chooses to lead with it – is evidence of the Motion's complete lack of substance.

defenses has never been a prerequisite for taking an oral deposition under Fed. R. Civ. P. 30. Mr. Cuban is under no obligation to "identify" additional evidence supporting his allegations until discovery is complete.[10] Indeed, Mr. Cuban could have chosen to depose the SEC personnel before or simultaneously with written discovery; that he chose not to do so (for reasons of efficiency and economy) does not provide a basis for the SEC to avoid those depositions.

III. Depositions of SEC Staff Regarding the Evidentiary Bases of the Complaint are Necessary and Proper

The SEC argues that it is unnecessary to take any depositions concerning the evidentiary basis for its Complaint because "Cuban has all of the SEC's evidence."[11] The fact that Mr. Cuban, and by extension the Court, has all of the SEC's evidence is exactly the problem. The SEC has no evidence that Mr. Cuban ever "agreed" to keep any information confidential. Mr. Cuban is certainly entitled to ask the relevant SEC staff what led to the making of this false allegation in its Complaint.

The SEC also insists that any questioning of its personnel concerning the evidentiary basis for the Complaint would only lead to "innumerable proper assertions of privilege."[12] But whether the SEC can or will properly assert a privilege in response to some deposition questions is not a valid reason to prohibit the deposition altogether. As courts in this district have recognized, a blanket assertion of privilege is insufficient to preclude taking the deposition of an attorney.[13] Instead, counsel must determine whether a privilege is to be asserted on a question-by-question basis.[14]

The SEC's reliance on *Nguyen v. Excel Corp*.[15] is unavailing. In that case, the district court allowed, and the Fifth Circuit affirmed, taking defense counsel's depositions, and approved the

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[10] Order at 10 ("No later than 21 days after the discovery period is completed, Cuban may file a supplemental brief and evidence appendix in support of his motion.").

[11] Motion at 19.

[12] Motion at 5, 18.

[13] *Williams v. City of Dallas*, 178 F.R.D. 103, 116 (N.D. Tex. 1998) (denying blanket claim of privilege and authorizing depositions of two attorneys).

[14] *Wright v. Life Investors Ins. Co. of America*, No. 2:08-CV-03-P, 2009 WL 4347024, at *3 (N.D. Miss. Nov 24, 2009) (allowing plaintiff to take deposition of defendant's in-house counsel).

[15] 197 F.3d 200, 210 (5th Cir. 1999).

magistrate's judge's order permitting inquiry into objective facts, "what the client said, what counsel said, and when they said it."[16] The Fifth Circuit recognized what the SEC fails to grasp here: that a "bald assertion of privilege is insufficient …. [A] claim of privilege must be directed to specific questions ... so that the trial court has enough information so as to rule on the privilege claim."[17] The SEC's reliance on *Skinner v. Quarterman*[18] and *Mattenson v. Baxter Healthcare Corp.*[19] is similarly misplaced – those cases simply concern whether notes constitute work product (a testifying expert's notes in *Skinner*; an in-house attorney's notes in *Mattenson*). *Skinner* and *Mattenson* have no application here because what constitutes work product is not at issue. The only issue is whether the SEC's witnesses can avoid being deposed based on the possibility that the SEC may assert a privilege in response to some of the questions. *Nguyen* clearly provides the answer: no. As such, the SEC staff may be deposed.

The facts of this case are more akin to those of *Energy Capital Corp. v. United States*,[20] in which the plaintiff brought a claim for attorneys' fees under the Equal Access to Justice Act,[21] which allows private parties to collect attorneys' fees from the government upon a showing that the government "has acted in bad faith, wantonly, or for oppressive reasons."[22] In that case, the former Secretary of Housing and Urban Development ("HUD") and HUD's General Counsel were allowed to be deposed on the issue of the government's bad faith because both of them had "first-hand personal knowledge that no one else has" relevant to the case.[23] The court also noted that "[t]estimony, as opposed to another means such as an affidavit, has been found to be necessary in order to assess the credibility of the witnesses."[24] Just as in *Energy Capital,* Mr. Cuban requires the

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16 *Id.* at 209-10.

17 *Id.* at 207 n.16 (*quoting* 6 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE § 26.47[1], at 26-148 (3d ed. 1999)).

18 No. 2:99-CV-0045, 2007 WL 582808, at *38 (N.D. Tex. Feb. 22, 2007).

19 438 F.3d 763, 768 (7th Cir. 2005).

20 60 Fed. Cl. 315 (2004).

21 28 U.S.C. § 2412(b).

22 *Energy Capital,* 60 Fed. Cl. at 316 (*quoting F. D. Rich Co. v. United States*, 417 U.S. 116, 129 (1974).

23 *Id.* at 318.

24 *Id.*

testimony of the SEC staff noticed for deposition because they have first-hand personal knowledge that no one else has concerning the issues raised in the Fees Motion, and no other means of discovery alone would be sufficient to obtain this necessary information.

Even if there were any merit to the SEC's objection to testimony about the evidentiary basis of the Complaint (which there is not), the objection does not address all of the other relevant issues concerning the agency's investigative misconduct. "In assessing subjective bad faith, a court may sanction parties for conducting litigation with an improper motive even if the complaint was legally adequate."[25] The Fees Motion is not based simply on the filing of a Complaint based on insufficient evidence. Mr. Cuban contends, and ample evidence already supports, that the SEC investigated and brought this action against Mr. Cuban for an improper purpose (to bring an insider trading case against a high-profile target held in disfavor by the SEC), all the while *knowing* that it had no evidence to support the key allegation in the Complaint.[26] Mr. Cuban is entitled to obtain testimony as to the agency's investigative misconduct.

IV. The Depositions of Members of the SEC's Trial Team Should Be Permitted

Two of the proposed deponents – Kevin O'Rourke and Julie Riewe – are alleged to be members of the SEC's "trial team."[27] It is undisputed, however, that Mr. O'Rourke and Ms. Riewe were also participants in the SEC's investigation of Mr. Cuban. The SEC argues that depositions of these individuals should not be permitted unless Mr. Cuban can satisfy the "*Shelton* factors" set out in the Eighth Circuit's opinion in *Shelton v. American Motors Corp.*[28] The *Shelton* factors address when depositions of opposing counsel are appropriate. The Fifth Circuit has never explicitly adopted the *Shelton* factors.[29] Moreover, the *Shelton* factors are inapplicable here because it is Mr.

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[25] Order at 7 (citing *Chambers v. NASCO, Inc.,* 501 U.S. 32, 53 (1991) ("[T]he imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation.").

[26] *See FDIC v. Maxxam*, 523 F.3d 566, 587 (5th Cir. 2008) (bringing of case for "improper purpose" is sanctionable).

[27] Motion at 1 ("Cuban still seeks to depose the SEC's trial counsel, Kevin O'Rourke and Julie Riewe . . . ").

[28] 805 F.2d 1323, 1327 (8th Cir. 1986).

[29] *See Nguyen,* 197 F.3d at 208-09 (applying the *Shelton* factors but not explicitly adopting

O'Rourke and Ms. Riewe themselves who are alleged to have engaged in the bad faith conduct that is at issue.[30]

Should the Court decide to apply the *Shelton* factors, however, Mr. Cuban would easily satisfy them. As for the first factor, it is clear that no other means exist to obtain the first-hand information that is known only to Mr. O'Rourke and Ms. Riewe. Ms. Riewe was involved in the investigation and prosecution of the case against Mr. Cuban, apparently from its inception. Mr. O'Rourke was involved in the investigation and prosecution of the case since at least July 2007, well before the investigation was completed and over a year before the SEC filed its Complaint. Because it is the actions of these individuals that are at issue here, their testimony is necessary.

The SEC's objection that Mr. Cuban has not sufficiently explored alternative avenues of obtaining the same information is meritless. First, the SEC has refused to product the vast majority of the relevant documents in its possession, severely hampering Mr. Cuban's ability to obtain information through his document requests. Second, Mr. Cuban has never stated that the depositions he has noticed to date are the only depositions he will seek. The SEC's protest that Mr. Cuban is not seeking depositions from third parties is wildly premature. Finally, it is indisputable that the most likely source of relevant information about the SEC's bad faith conduct is the key members of the SEC's staff.

As for the second *Shelton* factor, the information sought is clearly relevant, which the SEC does not dispute. The SEC only claims that all of the information sought at deposition would be privileged. This is an invalid objection, as established above.[31] Moreover, much of the information

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Shelton); *see also Murphy v. Adelphia Recovery Trust*, No. 99-10492, 2009 WL 4755368, at *2 (N.D. Tex. Nov. 23, 2009) (noting that the Fifth Circuit has not explicitly adopted *Shelton*).

[30] Interestingly, the SEC appears to suggest that if there has been any bad faith in this case, it was on the part of the SEC's Commissioners, who authorized the filing of the action against Mr. Cuban. Motion at 5. Mr. Cuban has brought his Fees Motion against the SEC as an executive agency, however, so this distinction is meaningless. Nor did the Court recognize any such distinction in its Order. Order at 4-5 ("Cuban must show that *the SEC* acted in bad faith.") (emphasis added).

[31] The SEC's repeated assertion that all of the information sought from the SEC's attorneys by Mr. Cuban is work-product overstates the case. However, to the extent some of the information sought could be characterized as work product, the extraordinary circumstances of this case, as

needed to establish Mr. Cuban's claims of bad faith and misconduct will consist of facts, not opinions, and thus the SEC staff can provide the needed information without fear of waiving some claim of privilege. The third *Shelton* factor, which is that the information sought is crucial to the case, is also inarguably satisfied. Accordingly, even under the *Shelton* factors, Mr. Cuban is entitled to take the depositions of the relevant SEC staff members in support of his Fees Motion.

All of the cases cited by the SEC for the proposition that depositions of SEC attorneys should not be permitted are inapposite. *SEC v. Buntrock, SEC v. SBM Inv. Certificates, Inc., SEC v. Rosenfeld, SEC v. Jasper,* and *In re Bilzerian* involved attempts by a defendant to depose the SEC under Fed. R. Civ. P. 30(b)(6) concerning the merits of the SEC's case against each defendant.[32] For example, in *Buntrock,* the SEC filed an enforcement action against Buntrock and other former officers of Waste Management, Inc., alleging they violated the federal securities laws by manipulating the company's stock price.[33] In response, Buntrock served the SEC with a Rule 30(b)(6) notice of deposition that required the SEC to identify and produce for deposition an individual who could testify on the SEC's behalf about the results of the SEC's investigation of Waste Management.[34] The court quashed the depositions because (1) there were other means to obtain the information sought (*i.e.*, depositions of other non-SEC witnesses), and (2) because the goal of the depositions was apparently to obtain the SEC attorneys' impressions, conclusions and legal theories about the case.[35] In other words, instead of taking depositions of witnesses and

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stated in Mr. Cuban's Motion to Compel, warrant compelling the discovery of SEC work product as well. The information Mr. Cuban seeks falls under the categories of discovery set forth in the Order. Cuban Mot. to Compel at 12; SEC Opp. at 14. The evidence Mr. Cuban discusses in his Motion to Compel and here strongly suggests that the SEC acted in "bad faith, vexatiously, wantonly, or for oppressive reasons" and cannot be dismissed as mere "hyperbole and speculation." See Cuban Mot. to Compel at 1-3; SEC Opp. at 14. This evidence of bad faith by the SEC constitutes extraordinary circumstances sufficient to overcome the work product privilege.

[32] *SEC v. Buntrock,* No. 2 C 2180, 2004 WL 1470278 (N.D. Ill. June 29, 2004); *SEC v. SBM Inv. Certificates, Inc.,* C.A. No. DKC 2006-0866, 2007 WL 609888 (D. Md. Feb. 23, 2007); *SEC v. Rosenfeld,* No. 97 Civ. 1467 (RPP), 1997 WL 576021 (S.D.N.Y. July 16, 1997); *SEC v. Jasper,* No. C07-061222 JW (HRL), 2009 WL 1457755 (N.D. Cal. May 26, 2009); *In re Bilzerian,* 258 B.R. 846 (Bankr. M.D. Fla. 2001).

[33] *Buntrock,* 2004 WL 1470278, at *1.

[34] *Id.*

[35] *Id.* at *2-3.

reviewing documents received in discovery, Buntrock intended to prepare his defense to the SEC's claims by improperly deposing the SEC attorneys about their case strategy. *SMB Inv. Certificates, Rosenfeld,* and *In re Bilzerian* all involved similar holdings.

SEC v. Cavanagh also concerned a defendant in an enforcement action seeking information to support his defense.[36] In *Cavanagh,* the defendants sought to depose two SEC attorneys concerning their interviews of some of the defendants, because one of the SEC attorneys had filed a declaration in support of the SEC's *ex parte* motion for a temporary restraining order that referred to conversations the SEC attorneys had had with several of the defendants.[37] The defendants argued that the SEC had waived any privilege concerning those interviews and the attorneys' notes of those interviews.[38] The court held, however, that the "limited reference" to defendants' interview statements in an *ex parte* motion was insufficient to find that the SEC waived its privilege as to the attorneys' interview notes, and that it would not allow the deposition of the attorneys about the interviews or their notes.[39] Significantly, however, the court noted that if the SEC made testimonial use of the notes in connection with the preliminary injunction hearing, the parties could raise the issue again and that the SEC should be prepared to produce the notes for the court's inspection.[40]

None of the SEC's cases are relevant here, where Mr. Cuban already has obtained the dismissal of the claims against him and is seeking sanctions for bad faith conduct. Mr. Cuban is taking these depositions to support his claim. In other words, the conduct of the SEC attorneys in investigating and prosecuting the case against Mr. Cuban is at issue and the only witnesses who can testify as to certain critical facts about the SEC's conduct are its attorneys. Accordingly, Mr. Cuban should be permitted to depose the attorneys in question.[41]

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[36] *SEC v. Cavanagh,* No. 98 Civ. 1818 (DLC), 1998 WL 132842, at *1 (S.D.N.Y. Mar. 23, 1998).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] The SEC argues that there is no possible reason for Mr. Cuban to depose Mr. O'Rourke, citing his lack of involvement with the Norris matter and the Wells process. Yet Mr. O'Rourke was presumably involved in the decision to file the Complaint, as well as the decision to depose

V. None of the Prospective Deponents are "Top Executive Officials" Meriting Protection from Depositions

Mr. Cuban is properly attempting to take the deposition testimony of SEC attorneys Kevin O'Rourke and Julie Riewe, Associate Director Scott Friestad, Assistant Director Robert Kaplan, and former Director of Enforcement Linda Thomsen. None of the individuals whom Mr. Cuban seeks to depose is a "top executive department official."

The SEC cites *United States v. Morgan*[42] to support its argument that Mr. Cuban should not be allowed to depose the noticed individuals. In *Morgan*, the Supreme Court concluded that a Secretary of Agriculture should not have been subjected to examination at trial. The court further explained that the process by which the Secretary reached his conclusions "resembl[ed] that of a judicial proceeding."[43] And, "[j]ust as a judge cannot be subjected to such scrutiny … so the integrity of the administrative process must be equally respected."[44]

Morgan is inapplicable to this case, however, because trial attorneys, an associate director and an assistant director are not "top executive department officials" within the meaning of the *Morgan* rule.[45] The leading case defining who is a "top executive department official" is *Cobell v. Norton*.[46] In *Cobell*, the court found that an Associate Deputy Secretary of the Interior was not a "top executive department official," but rather a "mid-level executive."[47] The court further explained that "[t]op executive officials are confirmed by the Senate and are in the Executive Schedule ... [the Associate Deputy Secretary of Interior] is not the type of executive official in need of protection from the discovery process."[48] Based on this criteria, the only SEC officials shielded from depositions are the Chairman of the SEC and its Commissioners, all of whom were confirmed by the Senate.

Mamma.com's CEO for a second time, and he is thus a key witness.

42 313 U.S. 409, 422 (1941).

43 *Id*. (citation omitted).

44 *Id*. (citation omitted).

45 *See Cobell v. Norton*, 226 F.R.D. 67 (D.D.C. 2005).

46 *Id*.

47 *Id.* at 94.

48 *Id*.

Even while serving as Director of Enforcement, Linda Thomsen was not a high level official, because her appointment to that post did not require Senate confirmation. Furthermore, she no longer works at the SEC. As the Order explains, high-ranking government officials need to be shielded from the tasking process of providing deposition testimony because "'high ranking government officials have greater duties and time constraints than other witnesses' and without appropriate limitations, such officials will spend an inordinate amount of time tending to pending litigation."[49] This reasoning obviously does not apply to a *former* government official like Ms. Thomsen. Because Ms. Thomsen is not – and was never – a top executive department official, and none of the reasons for exempting her from deposition otherwise apply, she is not entitled to the protection provided to high ranking government officials.[50]

The SEC does not and cannot establish that Mr. O'Rourke, Ms. Riewe, Mr. Friestad, Mr. Kaplan and Ms. Thomsen are "top executive officials." This Court need only examine their employment positions to make this determination. However, even if Mr. O'Rourke, Ms. Riewe, Mr. Friestad, Mr. Kaplan and Ms. Thomsen could qualify as top executive officials, their depositions should be allowed because each has personal knowledge of the facts in issue.[51] Taking the deposition testimony of the noticed deponents is the only way to obtain the relevant information that is not available from another source.

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[49] Order at 9, quoting *Bogan*, 489 F.3d at 423 (citation omitted).

[50] Moreover, another case on which the SEC relies, *In re FDIC,* 58 F.3d 1055, 1060 (5th Cir. 1995), is also inapposite. In *In re FDIC*, the Fifth Circuit held that a magistrate judge abused his discretion in declining to quash the deposition notices issues to three FDIC Directors. *Id*. at 1060. However, unlike the former SEC Director of Enforcement in this case, FDIC Directors are "top executive officials" because they are selected by the President, confirmed by the Senate, and are paid at the Level III of the Executive Schedule.

[51] *Energy Capital Corp.*, 60 Fed. Cl. at 318 (holding that depositions of high-ranking government officials allowed "if the party has personal knowledge of the facts in issue") (*citing Gibson v. Carmody*, 1991 WL 161087, 1991 U.S. Dist. LEXIS 11225 (S.D.N.Y. 1991) and *American Broadcasting Companies v. United States Information Agency*, 599 F. Supp. 765 (D.D.C. 1984)).

CONCLUSION

The SEC is understandably anxious to stop discovery in this case. The limited number of documents produced to date has provided support for Mr. Cuban's bad faith allegations. The SEC is concerned, as it should be, that additional document or testimony discovery will further establish that the agency acted improperly and subject it to sanctions. The filing of baseless protective orders, however, is an abuse of the judicial process and should not be countenanced. Last December, this Court found that Mr. Cuban had made a sufficient showing of bad faith that discovery was warranted. The Order specifically contemplated that Mr. Cuban would take depositions of SEC personnel. Accordingly, Mr. Cuban respectfully requests that the Court order the SEC to produce the five noticed deponents for depositions and pay the attorneys' fees Mr. Cuban has expended in responding to this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On May 10, 2010, I electronically submitted Defendant Mark Cuban's Brief in Opposition to Plaintiff Securities and Exchange Commission's Motion for A Protective Order 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/ Lyle Roberts

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