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 TO COMPEL RESPONSES TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

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INTRODUCTION

By its Motion to Compel ("Motion"), the SEC seeks this Court's permission to go on a fishing expedition through Mr. Cuban's documents, and those of his counsel, under the pretense that there might be a document somewhere in those voluminous files that exculpates the agency of its misconduct. Mr. Cuban has already produced, however, every document in his possession that contains factual information about what the SEC has done, including any documents concerning how that information was obtained. Indeed, to the extent that the parties' meet-and-confer on discovery issues raised any legitimate issues about Mr. Cuban's production, Mr. Cuban has agreed to address those issues. Nevertheless, and despite that fact that Mr. Cuban provided the SEC with additional documents *prior to the filing of the SEC's motion to compel* and agreed to provide others shortly thereafter, the agency still seeks those documents in its motion – conduct that is in direct contravention of this Court's *Dondi* decision. *See Dondi Properties Corp. v. Commerce Savings & Loan Assoc.*, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc). Under these circumstances, the SEC's motion is nothing short of harassment and constitutes additional evidence of the SEC's bad faith. The Motion should thus be denied in its entirety, and Mr. Cuban should be awarded the fees and expenses he incurred in responding to the Motion in addition to the award sought by his Motion for Attorney's Fees and Expenses.

BACKGROUND

The Court granted *Mr. Cuban's* request for discovery (in connection with *Mr. Cuban's* Motion for Attorneys Fees and Expenses ("Mr. Cuban's Motion")) "because there are fact issues that remain to be resolved and because these issues require (or would benefit from) some discovery[.]" December 4, 2009 Memorandum Opinion and Order ("Order") at 6. In an adjacent footnote, the Court noted that it "assumes that only Cuban seeks discovery. If the SEC desires to conduct some discovery as well, it may do so in accordance with" the Order. Order at 6, n.3. The Order limits discovery to those issues raised in Mr. Cuban's motion, using as guidance various matters, discussed below, that concern evidence that can only be in the hands of the SEC

or those with whom the SEC dealt. None of the evidence needed for the Court to properly consider the allegations in Mr. Cuban's Motion for Attorney's Fees and Expenses remains in Mr. Cuban's hands. The SEC readily accepted the Court's invitation to conduct discovery, but is in no way conducting its discovery in "in accordance with" the Order – *i.e.*, conducting discovery relevant to the grounds on which Cuban relies in his Motion. Order at 9-10. In accordance with the Order, discovery should be limited to requests for documents and information relevant to the allegations in Mr. Cuban's motion that the SEC acted in bad faith. Instead, the SEC has embarked upon precisely the "fishing expedition" the Order cautioned against. Order at 9.

To establish whether the SEC committed misconduct or acted in bad faith in its investigation and prosecution of this case, the Order, as well as simple common sense, requires examination of (1) the relevant statements and actions of SEC personnel (the majority of which are currently being shielded from discovery by the SEC on privilege grounds), and (2) the evidence in the SEC's possession that it contends supports the allegations in the Complaint. From that information, the Court should then be able to determine whether the SEC's evidence supports or contradicts the allegations made in the Complaint, and whether the SEC committed misconduct or acted in bad faith. Logic dictates that this information and evidence must be almost exclusively in the possession of the SEC, not Mr. Cuban. With limited exceptions relating to information volunteered to Mr. Cuban by third parties (and produced to the SEC), evidence supporting the propriety of the SEC's actions in this case would be unlikely to be found in Mr. Cuban's communications with third parties, with his attorneys, or among his attorneys themselves. Nothing said or written by Mr. Cuban and/or his attorneys could be considered relevant to prove or disprove the SEC's bad faith, and nothing could be more probative on this issue than the actual statements and actions of SEC personnel themselves.

ARGUMENT

I. Neither the Court's Order nor the Federal Rules of Civil Procedure Require Mr. Cuban to Either Produce or Log His Communications with His Attorneys or Communications Among His Attorneys

The SEC repeatedly argues that under Federal Rule of Civil Procedure 26(b)(1), Mr. Cuban must produce "any [non-privileged] documents responsive to the Commission's interrogatories or requests that have any relevance to the factual issues raised in Mr. Cuban's Motion and/or any defenses the Commission might assert to those claims." Mr. Cuban has done so and has informed the SEC of this fact. *See* Motion at 4.

Mr. Cuban also has repeatedly informed the SEC that no privileged documents in his possession have any relevance to the factual issues raised in Mr. Cuban's Motion and/or any defenses that Commission might assert to those claims. *See, e.g.*, Motion at 4. To the extent that any privileged information is relevant, it has been produced in redacted form and a privilege log with these redactions has been provided to the SEC. *See* Exhibit 1, Declaration of Stephen M. Ryan ("Ryan Dec.") at Tab 1 (App. 6-7). Yet the SEC has repeatedly demanded that Mr. Cuban produce a log of all his communications with his attorneys and other privileged documents, even though other than the aforementioned redactions, Mr. Cuban has not withheld any documents on the basis of privilege and has repeatedly told this to the SEC. *See, e.g.*, Motion at 4.

The SEC claims to need a "privilege log" not to determine whether any privilege applies, but to determine from the *descriptions* of Mr. Cuban's privileged communications whether Mr. Cuban or his attorneys truly believe that the SEC acted in bad faith or committed misconduct. *See, e.g.*, Motion at 5 ("documents or other communications that, even by their mere existence, reflect Cuban's or his counsel's beliefs . . . . would clearly be relevant to the Commission's defense.") The SEC is not entitled to a privilege log of privileged and irrelevant documents, but only to documents that are both privileged *and* relevant. *See* FED.R.CIV.P. 26(b)(5). Mr. Cuban's or his counsel's subjective beliefs are utterly irrelevant to determining whether the SEC actually committed misconduct or filed and prosecuted this action in bad faith. That is, there is "'no possibility' that the information sought may be relevant to the claim or defense of any

party." Motion at 7 (citing *Sheldon v. Vermonty*, 204 F.R.D. 679, 689 (D. Kan. 2001) (internal citation omitted). Indeed, it is "clear that the information sought" – documents containing the subjective beliefs of Mr. Cuban and/or his counsel as to whether the SEC acted in bad faith – "can have no bearing on the claim or defense of [the SEC] [and] the request for discovery – and for a privilege log – should be denied." Motion at 7.[1]

Further, the only reason to provide a privilege log is to allow a party or the Court to determine whether a privilege has been validly asserted. *In re Papst Licensing, GmbH Patent Litig.,* No. CIV. A. MDL 1298, 2001 WL 1135268, at *2 (E.D.La. Sept.19, 2001). Here, Mr. Cuban has not withheld any relevant, responsive documents on the basis of privilege, and thus no privilege log is required or needed. FED.R.CIV.P. 26(b)(5) (proving that a privilege log is required when a party withholds otherwise discoverable information under a claim of privilege). Therefore, the SEC's claim of entitlement to a privilege log for all of Mr. Cuban's privileged communications with his attorneys in this matter is simply a transparent attempt to cause Mr. Cuban to incur further unnecessary burden and expense in this matter. Such tactics should not be tolerated by this Court and the SEC's demand for an unnecessary privilege log should be denied.

II. The SEC's Claims for the Production of Specific Information and/or Documents Should be Denied

a. Interrogatory No. 1

Interrogatory No. 1 asks Mr. Cuban to "[i]dentify all communications that you have had with anyone regarding any email exchange or other interaction that you had with Jeffrey Norris." The SEC has represented that Jeffrey Norris "had no involvement" and/or "was in no way involved in investigation HO-10576." *See* Ryan Dec., Tab 2 (App. 9-10). The SEC also has represented that Mr. Norris had no role in the investigation, recommendation, or litigation of this action against Mr. Cuban. *See* Ryan Dec., Tab 3. The SEC has produced documents that

[1] In point of fact, neither Mr. Cuban nor his attorneys have anything to hide and are confident that if the SEC were to comb through every privileged document touching upon Mr. Cuban's allegations that the SEC acted in bad faith, the facts would remain exactly as they are. Indeed, such an exercise would do nothing but force Mr. Cuban to incur even more costs in searching for and producing wholly irrelevant documents.

indicate that Mr. Norris had no *official* role in the investigation and/or decision-making process related to the investigation and bringing of an action against Mr. Cuban. Mr. Cuban accepts the SEC's representation that Mr. Norris played no *official* role in the investigation[2] because the documents produced by the SEC appear to corroborate that claim. Accordingly, Mr. Cuban's counsel indicated to the SEC – before the SEC filed its Motion – that he would not seek further documents regarding disciplinary action against Mr. Norris (and also so noted this in his Motion to Compel), which appear from the privilege log to be the only remaining documents related to Mr. Norris. *See* Ryan Dec., Tab 4 (App. 17, penultimate paragraph). Because Mr. Cuban is not seeking discovery of these materials, he need not address the SEC's baseless allegations, other than to note that the SEC's remaining arguments as to why it needs Mr. Cuban's communications with his attorneys or third parties are absurd. The SEC's speculation that Mr. Cuban was somehow attempting to "goad Norris into sharing his email communications with Chairman Cox for strategic reasons" reveals the paucity of the SEC's justification for seeking discovery at all. In other words, if *that* implausible scenario is the best justification the SEC can muster for its request that Cuban provide a privilege log, it has proven that it has no reason to request a privilege log.

To the extent that the SEC nevertheless wishes to press its Motion to Compel Mr. Cuban to further respond to the SEC's Interrogatory No. 1 regarding Mr. Norris, the SEC's Motion should be denied. As illustrated by, among others, Interrogatory No. 1, the SEC's discovery requests to Mr. Cuban are neither "narrowly tailored," as it claims in its Motion, nor are they "in accordance with" the Order. The Order allowed discovery concerning Mr. Norris only so that the Court could resolve whether Norris "played a role in investigating Cuban." Order at 7. The

[2] Mr. Cuban does not in any way concede that Mr. Norris "had no involvement" in the investigation or in the decision to bring charges. Indeed, Mr. Cuban contends that provision of these inflammatory emails could have influenced those who *did* have the official capacity to investigate and bring charges against Mr. Cuban. For example, Mr. Norris' emails to Mr. Cuban were forwarded to, among others, Scott Friestad (the SEC Enforcement Division Associate Director heading the Cuban investigation) prior to the May 23, 2007 Wells call. Additionally, it is uncontested that because Mr. Norris forwarded the emails to Chairman Cox, Chairman Cox recused himself from the vote and, very likely, limited the ability of the Chairman to provide his experience and input into the decision-making process. As such, to the extent that any documents remaining on the privilege log relate to Mr. Norris with regard to anything other than disciplinary action, Mr. Cuban continues to seek production of such documents.

only communications in Mr. Cuban's possession that could possibly be probative of whether Mr. Norris played a role in investigating Mr. Cuban are those communications between Mr. Norris and Mr. Cuban, and Mr. Cuban has produced those documents to the SEC.

By asking Mr. Cuban to identify "all communications" he has had "with anyone regarding any email exchange or interaction" with Mr. Norris, the SEC attempts to unnecessarily and unduly burden Mr. Cuban with locating, reviewing, and identifying every irrelevant communication he has ever had with anyone about Mr. Norris. The SEC makes the absurd argument that these emails "would be probative of Mr. Cuban's understanding that…Mr. Norris's emails were unrelated to the Commission's investigation." Motion at 5. Mr. Cuban's "understanding" (*i.e.*, personal belief) as to whether Mr. Norris played a role in the SEC's investigation of him does not and could not make it more or less probable that Mr. Norris actually played a role. Therefore, the evidence the SEC seeks, which is simply intended to probe Mr. Cuban's subjective beliefs, is not relevant and not calculated to lead to the discovery of admissible evidence. Mr. Cuban therefore properly objected that Interrogatory No. 1 was overbroad, unduly burdensome, and seeks irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence. Mr. Cuban's objections to Interrogatory No. 1 should be sustained and the SEC's Motion to Compel should be denied.

b. Interrogatory No. 2

SEC Interrogatory No. 2 asks Mr. Cuban to "[i]dentify all communications that you have had with anyone regarding your claims that the Commission staff engaged in misconduct in conducting the investigation that led to the filing of this action." Mr. Cuban responded to this Interrogatory on the March 9, 2010 due date by identifying approximately five individuals with whom his counsel had communicated "regarding [Mr. Cuban's] claims that the Commission staff engaged in misconduct in conducting the investigation that led to the filing of this action." *See* Ryan Dec., Tab 5 (App. 20-21). On the parties' March 24, 2010 meet-and-confer call – prior to the filing of this Motion – counsel for Mr. Cuban agreed in good faith to provide more information regarding the dates on which counsel for Mr. Cuban communicated with these

individuals; the SEC accepted counsel's representation. Ryan Dec., Tab 6 (App. 24, ¶ 6). Mr. Cuban provided this information to the SEC on April 12, 2010. Ryan Dec., Tab 7 (App. 30-31).

c. Interrogatory No. 3

SEC Interrogatory No. 3 asks Mr. Cuban to:

> Identify all communications that you (or anyone acting on your behalf) have had with Mamma.com, or with any former Mamma.com officer, director, or employee, since you became aware of the Commission investigation that led to the filing of this action. This includes any final draft or final agreement with, or release provided to, any current or former Mamma.com officer, director, or employee.

Mr. Cuban's communications with any of these third parties simply cannot be probative of how the SEC conducted its investigation of Mr. Cuban or on what basis it brought the action against him. Nothing that Mr. Cuban or these third parties said to each other about how the SEC conducted its investigation has any relevance to how the *SEC* acted its investigation of Mr. Cuban, and evidence of Mr. Cuban's communications with his attorneys or these third parties would not assist or enable the Court to evaluate how the SEC actually conducted its investigation. The only evidence that would be probative of how the SEC conducted its investigation is evidence of the SEC's own conduct, namely the actual statements and actions of SEC personnel assigned to the investigation. Such evidence is only in the possession of the SEC and the parties the SEC dealt with during the course of its investigation.

The SEC is unable to articulate how or why Mr. Cuban's communications with these third parties might somehow show the SEC did not act in bad faith or engage in prosecutorial misconduct. The SEC lamely speculates that "it is quite possible" Mr. Cuban or his attorneys had "communications with Mamma.com personnel or others that would tend to show that the [SEC's] investigation was not conducted in bad faith," but does not explain how a communication between Mr. Cuban and a third party could possibly "tend to show" the SEC's purported lack of bad faith.

Even worse, the SEC makes the outrageous assertion that Mr. Cuban's communications with Mamma.com personnel "may lead to evidence showing that statements that Mamma.com

personnel provided to Cuban's counsel were made under duress." Motion at 7. It is a complete outrage that the SEC includes this allegation in its Motion because the SEC *knows* this allegation is false. The SEC is referring to a single release entered into among Copernic, Inc., Guy Faure, David Goldman, Daniel Bertrand and Mark Cuban. When taking testimony from Mr. Faure in September 2007, the SEC questioned Mr. Faure about the release the SEC seeks – but which it has had for *almost three years*, after receiving it from Mamma.com. The SEC asked Mr. Faure if he had ever been threatened with litigation by Mr. Cuban and Mr. Faure stated unequivocally that he had not. *See* Ryan Dec., Tab 8 (Sep. 27, 2007 testimony of Guy Faure at 30: 9-11 (App. 34)). That the SEC would accuse Mr. Cuban's lawyers of coercing statements from third parties, with the necessary implication that such statements are false or unreliable – especially when it knows there is no good-faith basis for such an accusation – is simply unconscionable and should not be tolerated by this Court. The SEC's baseless accusation does not comply with the standards promulgated for the conduct of counsel in the *Dondi* opinion, which were established to signal this Court's "strong disapproval of practices that have no place in our system of justice and to emphasize that a lawyer's conduct, both with respect to the court and to other lawyers, should at all times be characterized by honesty and fair play." *Dondi,* 121 F.R.D. at 288-89.

Mr. Cuban therefore properly objected that Interrogatory No. 3 is overbroad, unduly burdensome, and seeks irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence. Mr. Cuban's objections to Interrogatory No. 3 should therefore be sustained and the SEC's Motion to Compel should be denied.

d. Document Request No. 3

SEC Document Request No. 3 asks Mr. Cuban to produce "[a]ll witness statements that relate to or concern your allegations that the Commission brought this action in bad faith." Mr. Cuban has produced all such statements. *See* Ryan Dec., Tabs 14-16 (App. 54-83).

e. SEC Interrogatory Instruction F, As Applied to SEC Interrogatory Nos. 1-3.

With its Instruction F, the SEC seeks to impose an overly broad instruction to Interrogatory Nos. 1-3. An examination of the SEC's Interrogatory Instruction F reveals its expansive scope. According to that Instruction F, Mr. Cuban is supposed to state, for every oral communication requested: (1) the date and place of every oral communication; (2) whether the communication was made in person or by telephone; (3) the name, last known business address, telephone number, business affiliation and capacity of each person who participated or was in any way present at any part of the communication; (4) the substance of the communication; (5) the identity of all individuals to whom Mr. Cuban communicated the substance of the communication; (6) whether Mr. Cuban intends to call any individuals referred to in his response as a witness at the trial of this matter; and (7) any writing, memoranda, or recording that recorded, summarized, or confirmed the oral communication. *See* Ryan Dec., Tab 9 (App. 37-38).

As applied to the SEC's broad interrogatories, Instruction F asks Mr. Cuban to "[i]dentify all communications that you have had with anyone" regarding "any email exchange or other interaction with Jeffrey Norris" (Interrogatory No. 1) or "your claims that the Commission staff engaged in misconduct conducting the investigation that led to the filing of this action." (Interrogatory No. 2). *Id.* Interrogatory No. 3 demands that Mr. Cuban "[i]dentify all communications that you (or anyone acting on your behalf) have had with Mamma.com, or with any former Mamma.com officer, director, or employee, since you became aware of the Commission investigation that led to the filing of this action." *Id.*

As discussed above, nothing Mr. Cuban discussed with any person could be relevant to determining whether Mr. Norris actually played a role in the investigation of Mr. Cuban or the prosecution of this action, or whether the SEC staff engaged in investigative misconduct. Yet the SEC demands that Mr. Cuban provide it with the endless details of every irrelevant communication he has ever had with anyone about Mr. Norris or the SEC's misconduct. The SEC seems to believe that its unreasonable demand is justified solely on the basis that Mr. Cuban gave a similar instruction to the SEC, although the SEC overlooks the fact that Mr. Cuban did

not couple that instruction with overbroad interrogatories or seek to compel the SEC to provide reams of irrelevant information. Moreover, the SEC's response to Mr. Cuban's request to provide similar information did not meet the exacting standards the SEC demands, but simply identified 10-15 approximate dates on which SEC enforcement staff spoke with various individuals. *See* Ryan Dec., Tab 10 (App. 45-46). The SEC's Interrogatory Instruction F, especially when coupled with its overbroad interrogatories, does not comport with the discovery requirements of the Federal Rules of Civil Procedure, and is only intended to impose an undue burden on Mr. Cuban. The Court should deny the SEC's frivolous attempt to impose even more unnecessary litigation burden and expense on Mr. Cuban than it already has. *See, e.g., Dondi,* 121 F.R.D. at 293 ("Requests for production should not be excessive or designed solely to place a burden on the opposing party, for such conduct in discovery only increases the cost, duration, and unpleasantness of any case.").

III. Mr. Cuban's "New" Factual Allegations Are Relevant to the Issues Raised in His Motion for Attorneys Fees and Expenses

The SEC argues that because Mr. Cuban knew of the SEC's efforts to "tamp down" witnesses (*i.e.*, discourage them from cooperating with his defense team's investigation) more than two years ago, he should not now be allowed to bring evidence of those improper tamp down efforts before the Court. This argument overlooks the fact that the SEC's efforts to tamp down witnesses should be considered investigative or prosecutorial conduct *per se*, and it is thus relevant to the issues raised in Mr. Cuban's Motion for Attorney's Fees and Expenses. Moreover, the reason Mr. Cuban refrained from raising this allegation prior to this time is that Mr. Cuban and his counsel were appropriately cautious of making such a serious allegation without having sworn testimony to substantiate it (although the SEC apparently has no such qualms about making baseless allegations against Mr. Cuban and his counsel). Once Mr. Cuban's counsel was provided with an affidavit demonstrating the SEC's misconduct, it was promptly produced.

As for the SEC's demands that Cuban produce additional documents regarding this allegation, counsel for Mr. Cuban has already produced:

- All communications with Mr. Aguilar relevant to the SEC's bad faith were produced to the SEC on February 25, 2010 – well before the discovery deadline, the meet-and-confer, and the filing of the SEC's motion to compel. *See* Ryan Dec., Tab 11 (App. 48-49). Further, on the parties' meet-and-confer call, counsel for Mr. Cuban agreed to unredact additional portions of an August 15, 2007 memorandum reflecting a call with Mr. Aguilar and provide this to the SEC. *See* Ryan Dec., Tab 6 (App. 24, ¶ 8). Going beyond this agreement, on Monday, March 29, 2010 (the due date for Motions to Compel) at 12:59 p.m., counsel for Mr. Cuban emailed the SEC and offered to provide a completely unredacted version of this memo if the SEC agreed that it would not claim provision constituted a waiver of privilege. *See* Ryan Dec., Tab 12 (App. 51). Counsel for Cuban received no response to that email and six hours later, the SEC filed its Motion to Compel seeking "unredacted versions of the memorandum." (Motion at 11.) This could not be more directly in contravention of the principles espoused in *Dondi*. Having received no response, counsel for Mr. Cuban sent a follow-up email to the SEC on March 30, 2010. *See* Ryan Dec., Tab 13 (App. 53). Counsel for Mr. Cuban ultimately received a response and produced the unredacted memorandum on April 1, 2010. *See* Ryan Dec., Tab 14 (App. 55).

As for the SEC's claim that Mr. Cuban must produce all documents shared with third parties, Mr. Cuban has already done so and the SEC is well aware of this. Specifically:

- "all notes or memoranda prepared by or for counsel with respect to the May 23 Wells call" and the "June 19, 2007 meeting between Cuban's counsel and the SEC."[3] *See* Ryan Dec., Tab 15 (App. 57-80).

[3] One exception to this is the fact that Dewey & LeBoeuf (D&L) has, to date, been unable to locate the handwritten notes taken by the Kip Mendrygal at the June 19, 2007 meeting between the SEC staff and Fish & Richardson (F&R). At that time, Mr. Mendrygal was employed by (F&R), then-counsel to Mr. Cuban. Mr. Mendrygal left F&R approximately one week after D&L received the SEC's discovery requests and was not permitted to take the files relevant to the case with him. F&R has now substituted new attorneys as counsel for Mr. Mendrygal and Paul Coggins (who represented Mr. Cuban, but has also left F&R). D&L and Mr. Mendrygal are working with F&R to locate these notes in Mr. Mendrygal's F&R files.

- "all documents provided to Professor Stephen Saltzburg and information regarding the dates on which counsel for Mr. Cuban spoke to Professor Saltzburg." Indeed, almost all documents provided to Professor Saltzburg (as well as Professor Saltzburg's invoice) were provided to the SEC as part of Mr. Cuban's second production on March 9, 2010. *See* Ryan Dec., Tab 16 (App. 82-83). In response to a letter from the SEC prior to the meet-and-confer call, Mr. Cuban also provided Professor Saltzburg's invoice on March 23, 2010. *See* Ryan Dec., Tab 15. Finally, on the meet-and-confer call, counsel for Mr. Cuban agreed to provide information regarding the dates on which counsel for Mr. Cuban spoke to Professor Saltzburg and did provide this information on April 12, 2010. *See* Ryan Dec., Tab 7 (App. 30-31).

CONCLUSION

In addition to continuing to press Mr. Cuban for documents that are not relevant to any of the issue this Court has deemed appropriate for discovery in its Order, the SEC has improperly moved to compel the production of documents already in its possession as well as the production of documents that Mr. Cuban has, in good faith, agreed to produce. *Dondi*, 121 F.R.D. at 294 (citing the Dallas Lawyer's Creed: "I will not abuse the System or the Profession by pursuing or opposing discovery through arbitrariness or for the purpose of harassment or undue delay" and "I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party."). The SEC's effort to deflect attention away from its failure to comply in good faith with Mr. Cuban's discovery requests through a frivolous motion to compel ignores the basic requirements of civility set out in *Dondi* and should be denied in its entirety. *Dondi,* 121 F.R.D. at 288 ("A lawyer should not use any form of discovery . . . as a means of harassing opposing counsel or counsel's client."). Mr. Cuban should also be awarded the fees and expenses he incurred in responding to the Motion in addition to the award sought by his Motion for Attorney's Fees and Expenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 19, 2010, I electronically submitted Defendant Mark Cuban's Brief in Opposition to Plaintiff Securities and Exchange Commission's Motion to Compel Responses to Interrogatories and Production of Documents 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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