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

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

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

FEDERAL RULES

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

INTRODUCTION

Cuban's Opposition to the Securities and Exchange Commission's Motion to Compel ("Cuban Opp.") confirms that there is a "fundamental disagreement between the parties about the scope of relevancy." SEC Mem. in Supp. of its Motion to Compel ("SEC Mem.") at 4. Cuban unequivocally states that (i) he "has already produced…every document in his possession that contains factual information about what the SEC has done," Cuban Opp. at l, (ii) he has produced all non-privileged documents responsive to the SEC's interrogatories and requests and/or any defenses the Commission might assert to those claims, Cuban Opp. at 3, and (iii) that there are "no privileged documents in his possession [that] have any relevance to the factual issues raised in Mr. Cuban's Motion and/or any defenses that [the] Commission might assert to those claims." Id. These are strong statements, and, if true, would largely resolve the SEC's motion to compel.

But Cuban's professed compliance with his discovery obligations is at odds with the very objections he raises to the SEC's discovery requests. For instance, in responding to the SEC's motion to compel communications with Mamma.com or any of its former officers, directors or employees – a request that goes to the heart of Cuban's allegation that the SEC wrongfully offered a *quid pro quo* to obtain testimony from Mamma.com's former CEO Guy Fauré – Cuban argues:

> Mr. Cuban's communications with any of these third parties simply cannot be probative of how the SEC conducted its investigation . . . . 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 [sic] 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 the SEC personnel assigned to the investigation.

Cuban Opp. at 7. Thus, on a key allegation of wrongdoing that inherently involves third parties, Cuban asserts categorically that any information he has obtained from those third parties is irrelevant to his claims or the SEC's defenses. Unless his objections are simply "theoretical" (because he has withheld no information or documents based on those objections), Cuban is using his definition of relevancy to withhold (and, in some cases, to refuse even to search for)[1] documents or information responsive to the SEC's discovery requests.[2] Cuban's definition is especially critical because, as he modifies his original claims of misconduct and attempts to interject new ones, what he deems "relevant" keeps shifting. Cuban's impermissibly narrow construction of relevance is the principal, principled basis for the SEC's motion to compel.

I. Cuban Refuses to Produce Responsive and Relevant Non-privileged Material and to Identify Responsive and Relevant Privileged Materials

In our adversarial system, each party must be relied upon to conduct discovery in good faith. See, e.g.,Rozell v. Ross-Holst et al., No. 05 Civ. 2936(JGK)JCF, 2006 WL 163143, at *2 (S.D.N.Y. Jan. 20, 2006). The scope of discovery is broad. "Parties may obtain discovery regarding any non-privileged mater that is relevant to any party's claim or defense…." Fed. R. Civ. P. 26(b)(1). "Relevancy is broadly construed, and a request

[1] See, e.g., Cuban Opp. at 2 ("evidence supporting the propriety of the SEC's actions in this case *would be unlikely to be found*" in the communications the SEC requested (emphasis added)); Cuban Opp. at 6 (objecting to burden of search).

[2] In its Motion to Compel, the SEC addressed Cuban's responses to Interrogatories 1, 2, and 3 and Requests for Production 2 and 7 as examples of Cuban's inappropriately narrow definition of relevance. As noted in its Motion, the SEC seeks to compel complete responses to all of its Interrogatories and Requests to the extent Cuban has withheld documents or information based on relevance.

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." Sheldon v. Vermonty, 204 F.R.D. 679, 689 (D. Kan. 1999) (citation omitted). When an "adversary may be wrongfully withholding relevant information," it is the court that must determine the contours of relevancy. Rozell, 2006 WL 163143, at *4. Cuban's objections to the SEC's discovery demonstrate that he has adopted a truncated, excessively narrow definition of relevance. To him, the only documents that are relevant are those that he believes support his allegations.[3] This is improper.

A. Cuban Improperly Relies on His Relevance Objection to Avoid His Obligation to Produce or Identify Responsive Materials

In seeking discovery, the SEC fashioned narrowly tailored interrogatories and document requests to discover facts underlying Cuban's claims of bad faith and the SEC's potential defenses to those claims. For instance, the Court's December 4, 2009 Order permitted discovery "to resolve whether [former Fort Worth SEC Attorney Jeffrey Norris] played a role in investigating Cuban." Order at 7. Cuban apparently now "accepts . . . that Mr. Norris played no *official* role in the investigation." Cuban Opp. at 5 (emphasis in original). While welcome, Cuban's qualified acceptance does not go far enough. The SEC has repeatedly advised Cuban – beginning in September 2007 – that Norris had no role in the investigation and was not involved in any respect. [4] Cuban

[3] Cuban agreed to produce (or log) responsive documents in the possession, custody or control of his attorneys, Cuban's Responses to SEC RFPs at 2, but he now objects to searching his attorneys' files. To the extent Cuban's counsel has responsive documents, they are required to produce them or, if privileged, provide a privilege log. See Beyer v. Medico Ins. Group, No. CIV. 08-5058, 2009 WL 736759, at *5 (D.S.D. Mar. 17, 2009) ("Because a client has the right, and the ready ability, to obtain copies of documents gathered or created by its attorneys pursuant to their representation of that client, such documents are clearly within the client's control" (quoting ASPCA v. Ringling Bros. & Barnum & Bailey Circus, 233 F.R.D. 209, 212 (D.D.C. 2006))).

[4] See, e.g., SEC Response to Cuban Int. No. 18 (Exh. A-1); Decl. of Robert B. Kaplan in Support of SEC's Opposition to Cuban's Fees Motion ¶ 3 (Exh. A-2); SEC's Response to Cuban's RFP No. 8 (Exh. A-3);

cannot allege in good faith that Norris played a role – official or otherwise – in the SEC's investigation.[5]

Nevertheless, Cuban's Opposition "does not in any way concede that Mr. Norris 'had no involvement' in the investigation or in the decision to bring charges."[6] Cuban Opp. at 5 n.2. It is his continuing refusal to accept that Norris had no role – official or otherwise – that necessitates that the SEC seek to compel complete responses to its Interrogatory No. 1, which seeks "all communications that [Cuban or his agents] have had with anyone regarding any email exchange or other interaction [Cuban] had with Jeffrey Norris." (SEC Mem., Exh. C) (emphasis supplied). Cuban objected to this interrogatory as burdensome (without providing any factual support for this assertion) and – with one exception – produced only documents reflecting communications between himself and Norris.[7] In fact, it appears that Cuban may have responsive documents related to communications with Norris that he has not produced. See Cuban Opp. at 6 (objecting to "locating, reviewing and identifying every irrelevant communication he has

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and SEC-MC0000347 (Exh. A-4). Moreover, Norris himself informed Cuban in an October 2009 letter that he "never had *any* role in the investigation or litigation of the SEC's civil enforcement action against [Cuban]." SEC-MC0302212 (Exh. A-5) (emphasis added).

[5] The SEC has produced substantial uncontradicted evidence that Norris had no role in the investigation and was not involved in the decision to bring this action in any respect. See, e.g., SEC Motion for Protective Order ("MPO") at 7-11 and exhibits cited therein.

[6] Cuban speculates that Norris's "emails *could* have influenced," Cuban Opp. at 5 n.2 (emphasis added), SEC officials with the authority to bring charges against Cuban, in particular SEC Associate Director Scott Friestad and former SEC Chairman Christopher Cox. Cuban's speculation is completely unfounded. First, as described in the SEC's MPO, Friestad's response to receiving Norris's emails was to instruct Norris immediately to cease further communications with Cuban. After confirming that Norris had copied some emails to Chairman Cox, Friestad "referred the Norris/Cuban emails to the SEC's Office of Inspector General and to Norris's supervisors in the Fort Worth Regional Office for them to consider whether to investigate Norris's conduct." SEC Response to Int. No. 20 (Exh. A-1); SEC MPO at 8. Second, Cuban – again without any evidentiary support – speculates that Chairman Cox's recusal from the Commissioners' vote adversely affected Cuban. Cuban would argue the SEC acted improperly regardless of what action it took. If Chairman Cox had participated in the discussions and the vote, Cuban certainly would have objected. Cuban now hypothesizes that Chairman Cox's recusal also somehow prejudices him. The participating Commissioners voted 4-0 to authorize the action. See SEC-MC0200985-86 (Exh. A-6). This should be the end of the inquiry.

[7] See SEC Mem., Exh. A (Cuban Response to SEC Int. No.1).

ever had with anyone about Mr. Norris"). Despite Cuban's global characterization of the requested documents as "irrelevant," responsive communications are relevant to the SEC's defenses and to Cuban's continuously morphing claims about Norris. For example, as described in the SEC's MPO, despite multiple opportunities to do so, Cuban never raised the Norris emails with the SEC staff until six months after he first received an email from Norris. See SEC MPO at 9. Responsive communications during this period may help show that Norris played no role and/or had no involvement in the investigation.[8]

Cuban's relevance objection is similarly the basis for the SEC's motion to compel complete responses to the SEC's other discovery requests. In response to Interrogatory No. 2, which seeks "all communications that [Cuban, his representatives, attorneys, etc.] had with anyone regarding [the] claims that the Commission staff engaged in misconduct…,"[9] Cuban objects to producing all responsive documents – including any documents that may rebut or undermine his allegations – because he has determined they are irrelevant. See SEC Mem., Exh. A (Cuban Resp. to Int. No. 2); Lyle Roberts to Thomas J. Karr, April 12, 2010 (Exh. B-1). With respect to SEC Interrogatory No. 3, which seeks communications between Cuban and Mamma.com or its personnel, Cuban again objected based on his restrictive construction of relevance. Cuban's position – as

[8] Cuban repeatedly states that his or his counsel's subjective beliefs are irrelevant. See, e.g.,Cuban Opp. at 3, 6. But the SEC is clearly entitled to discover the underlying facts that informed those subjective beliefs, in particular any facts Cuban possesses that suggest his allegations are not well-founded. These are the very facts that Cuban deems irrelevant.

[9] The SEC does not dispute that more than three months after the SEC's interrogatories were served, nearly three weeks after the parties' conference, and two weeks after the deadline for filing the SEC's Motion to Compel, Cuban produced a two-page letter providing additional indentifying information concerning Cuban's counsel's conversations with the "approximately five" individuals Cuban identified in his discovery responses. See Cuban's Opp. at 6 -7. However, in reliance on his relevance objection, Cuban has not identified responsive communications that may undermine his allegations or confirmed that such communications do not exist.

noted above – is that communications between him or his agents and Mamma.com concerning the SEC's investigation are irrelevant because they would not "be probative of how the SEC conducted its investigation." SEC Mem., Exh. A (Cuban Response to Int. No. 3); Cuban Opp. at 7. [10] Cuban's relevance objection to SEC Document Request No. 3 suffers from the same infirmity.

B. Cuban's Relevance Objection Does Not Justify His Failure to Produce a Privilege Log or to Identify Oral Communications

Relying again on his relevance objection, Cuban has failed to produce an adequate privilege log.[11] Cuban's position is that he has not created a log because he has objected to the relevance of responsive privileged documents to his claims or to "any defenses that Commission [sic] might assert to those claims." Cuban Opp. at 3. However, after "repeatedly" informing the SEC that he has no relevant privileged documents to log, id., Cuban now concedes that there *are* relevant documents that he has simply declined to log. See id. at 4 n.1 (stating that "comb[ing] through every privileged document *touching upon Mr. Cuban's allegations*" would "force Cuban to incur even more costs in searching for . . . wholly *irrelevant* documents") (emphasis added)). It is

[10] Cuban vociferously objects to the SEC's observation that communications between Mamma.com/its agents and Cuban "may lead to evidence showing that statements that Mamma.com personnel provided to Cuban's counsel were made under duress." Cuban Opp. at 7-8 (citing SEC Mem. at 7). The SEC has a good faith basis for believing such evidence might exist. First, Cuban provided the witnesses with releases at the same time their counsel voluntarily made their clients available to Cuban's counsel – including, in at least one instance, after counsel had refused for many months to make his witness available. See MC0001911 (Exh. B-2); SEC-MC0001857-65 (Exh. B-3). Second, counsel for some of the witnesses told the SEC that Cuban was pressuring them to give statements. See SEC Opp. at 5 n.15. Third, Cuban's counsel told the SEC that Cuban had opted out of a securities class action against Mamma.com in order "to preserve his legal right to pursue the company, its officials and outside advisers in a private action for money damages." SEC-MC0000328 (Exh. B-4). Moreover, as stated in the SEC's Motion, the SEC also seeks these communications because they are likely to show that communications between SEC investigative staff and Mamma.com were related to the *timing* of witness interviews, not, as Cuban alleges, to some *quid pro quo*. See SEC Mem. at 7.

[11] On April 9, 2010, well after the deadline for filing the SEC's Motion, Cuban produced a privilege log containing seven entries. All seven documents had been previously produced to the SEC in redacted form. Cuban's log does not include privileged documents he has withheld based on his objection that otherwise responsive documents are irrelevant unless he believes they support his allegations of bad faith.

precisely these "document[s] touching upon Mr. Cuban's allegations" that Cuban has a responsibility to search for and, if privileged, log. The Court should not permit Cuban to shirk his obligation under Rule 26(b)(5) of the Federal Rules of Civil Procedure by shielding responsive documents behind an inappropriate relevance objection.

Cuban makes the same improper relevance objection with respect to identification of oral communications. Cuban has defined all communications responsive to the SEC's focused requests – including oral communications – that he does not believe support his claims as irrelevant. This narrow definition of the scope of relevant communications necessitated the SEC's Motion.[12]

II. If the Court Allows Cuban's Newly-Raised, False Allegation That SEC Staff Attempted To "Tamp Down" A Witness, Cuban Should Be Required to Provide Complete Discovery Responses Regarding That Allegation

In his motion to compel, Cuban alleged for the first time in this action that SEC staff attempted to prevent Cuban's counsel from interviewing a witness. See Cuban Mot. at 2. Cuban's attempt to raise this issue is entirely unjustified. First, there is no evidentiary support for Cuban's "tamp down" allegation because there was no "tamp down." The very evidence Cuban offers entirely disproves his allegation. See SEC Mot. at 10-11; SEC Opp. at 4-7.[13] Second, it is not a new issue. Cuban's claims are purportedly based on a conversation with attorney Christopher Aguilar, counsel for a witness, that occurred more than two-and-a-half years ago. See MC0001955 (Exh. C-1). He first raised this issue in a letter to the SEC Enforcement staff in September 2007, see

[12] To the extent that Cuban objects to identifying oral communications based on his contention that compliance with Instruction F of the SEC's Interrogatories is unduly burdensome, Cuban Opp. at 9-10, the SEC respectfully requests that the Court order Cuban, to the best of his ability, to identify responsive communications by providing the date(s) of the communication(s), the participants, and a short description of the subject matter.

[13] Cuban's Opposition twice refers to efforts to "'tamp down' witness***es***." Cuban Opp. at 10 (emphasis added). Cuban's allegation is based on one affidavit by counsel for one witness. By suggesting that he has evidence related to multiple witnesses, Cuban is deliberately misleading the Court.

SEC-MC0000330 (Exh. B-4), and presumably also in his self-serving complaint to the SEC's Office of Inspector General in late 2008 or early 2009.[14]

Despite previously raising the issue with the SEC, Cuban affirmatively chose to omit it from his Fees Motion filed in August 2009. On December 4, 2009, the Court entered an Order permitting discovery that stated that the grounds asserted in Cuban's Fees Motion were "the presumptive limits on discovery" and cautioned that "discovery conducted should be calculated to establish the merits, if any, of the grounds asserted, not to find or develop new ones." Order at 9-10. It appears that just four days after entry of the Order, Cuban's counsel contacted Aguilar to obtain his declaration. See MC0001954-59 at 59; MCSEC0002107-10(unredacted) (Exh. C-1). It is clear that Cuban's allegation is not untimely because he was cautiously waiting until he had a signed declaration;[15] it is untimely because he did precisely what the Court warned him not to do: expand the scope of his allegations. For these reasons, the Court should not permit Cuban to pursue this allegation further.

If, however, Cuban is permitted to pursue this false and untimely allegation, the Court should required him to provide full and complete responses to the SEC's discovery requests related to this allegation. Cuban claims that he has produced "[a]ll communications with Aguilar relevant to the SEC's bad faith," Cuban Opp. at 11, but, based on his relevance objection, he may have withheld responsive documents that he

[14] See Cuban's Fees Mem. (Docket 42) at 16 (noting that "OIG reported that it had 'opened an investigation into a complaint received from counsel for a defendant in an SEC Enforcement action, alleging numerous instances of misconduct[.]'").

[15] Cuban's claim that he was "reluctant to recklessly disseminate or accuse the SEC of misconduct" that he characterizes as "witness tampering," Cuban Motion at 2 n.1, until he obtained a sworn declaration is belied by the fact that he was nonetheless willing to "reckless[ly] disseminate and accuse" on the basis of a declaration that did not even remotely support his allegation. See SEC Opp. at 4-7; SEC Mem. at 10-11.

deems irrelevant because they do not support his claims.[16] The SEC has moved to require Cuban to produce all responsive documents or to confirm, after having conducted a reasonable search, that no such documents exist.[17]

Finally, Cuban still has not produced the non-privileged notes related to an affidavit he produced that were written by his counsel of record while at Fish & Richardson P.C. ("Fish") and that apparently remain at that firm. Fish has represented Cuban since the inception of the SEC's investigation, and it continues to represent him to this day. The SEC is entitled to the notes or to confirmation that they no longer exist (and an explanation why not).

III. The SEC's Motion to Compel Does Not Support Cuban's Motion for Fees

Cuban repeatedly cites this Court's decision in Dondi Properties Corp. v. Commerce Savings & Loan Assoc., 121 F.R.D. 284 (N.D. Tex. 1988) and asserts that the SEC's Motion to Compel is "nothing short of harassment," "constitutes additional evidence of the SEC's bad faith," and is "frivolous," Cuban Opp. at 1, 12, to argue that the SEC's motion to compel is yet one more ground in support of his motion for attorneys' fees.

Cuban's argument is as meritless as it is histrionic. The SEC moved to compel to obtain information and documents relevant to its defenses in response to the apparent

[16] For example, Cuban has neither produced nor logged notes taken by his counsel in connection with his counsels' August 2007 interview of Christopher Aguilar, see MCSEC0001959 (Exh. C-1), though these notes are inherently relevant except under Cuban's definition. Similarly, Cuban has neither produced nor logged the "earlier emails" between Cuban's counsel and Aguilar referenced in Exhibit C-1.

[17] After noon on the day the SEC's Motion was due, Cuban's counsel contacted the SEC with an offer to provide an unredacted version of a memorandum they had previously shared with a third party, but produced to the SEC in redacted form. Cuban's counsel destroyed any privilege related to this document when counsel shared it with the third party in December 2009. This last-minute offer to produce suggests that Cuban was not, as he claims throughout, satisfying his discovery obligations in good faith. Neither is it evidence of the SEC's bad faith that it did not remove this item from its Motion filed hours after the offer was made. In fact, he did not actually produce the document in question until April 1, 2010, three days after the SEC's Motion was due.

withholding of responsive documents pursuant to Cuban's unduly limited construction of relevance. The necessity of the SEC's motion is obvious from the omissions in Cuban's production.

Moreover, Cuban's overwrought charge that the SEC's Motion to Compel is "harassment" and "frivolous" is ironic, given that – as demonstrated in the SEC's Opposition to Cuban's Motion to Compel and its Memorandum in Support of its Motion for Protective Order – Cuban continues to argue that the SEC has engaged in "astonishing misconduct" while failing to produce or identify evidence that supports either his original or newly-minted claims that the SEC acted "in bad faith, vexatiously, wantonly, or for oppressive reasons," Order at 5, when it authorized filing a civil insider trading action against him. Cuban's request for fees simply underscores his eagerness – contrary to Dondi – to allege "bad faith" over anything the SEC does. For all the reasons set forth in the SEC's Motion to Compel and this Reply, his request for fees should be denied.

CONCLUSION

For the foregoing reasons, the SEC respectfully requests that the Court grant its Motion to Compel and, to the extent Cuban's Opposition constitutes a Motion for Fees, deny his motion.

Dated: May 3, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

On May 3, 2010, I electronically submitted the SEC's Reply in Support of its 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/Thomas J. Karr
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