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 MOTION FOR A PROTECTIVE ORDER

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INTRODUCTION

Cuban is right that the SEC is "understandably anxious" to end discovery, Cuban Motion for Protective Order ("MPO") Opp. at 13, but not for the reasons he supposes. The SEC has asked the Court to preclude depositions of the SEC's lawyers because (1) document discovery has shown that no reasonable fact finder could conclude that Cuban's disparate and ever-morphing allegations of misconduct have merit and (2) Cuban's purpose in noticing the depositions is "not . . . to obtain factual information," Cuban MPO Opp. at 2, but improperly to discover opposing counsels' thoughts and opinions – i.e., the core of counsels' privileged opinion work product. Lacking evidence supporting his claims, Cuban's demand to depose the SEC's lawyers – depositions that inherently implicate issues of privilege – is entirely unwarranted and improper.[1] Accordingly, the SEC's Motion for Protective Order should be granted.

ARGUMENT

I. Cuban Cannot in Good Faith Continue to Allege Investigative Misconduct.

Setting "the grounds on which Cuban relied in his [fees] motion" as the "presumptive limits on the scope of discovery," December 4, 2009 Order ("Order") at 9-10, and without suggesting "that any specific ground on which Cuban relie[d] will probably support relief," id. at 9 n.5, the Court granted Cuban "some discovery" to resolve

[1] Cuban again employs hyberbolic rhetoric in mischaracterizing the SEC's responses to his discovery requests. See, e.g., Cuban MPO Opp. at 1 (SEC "def[ies]" the Court's discovery Order" and "refuses to produce…witnesses"). The SEC moved for a protective order only after document discovery and interrogatory responses demonstrated that there was no basis for Cuban's allegations, and, therefore, no basis for him to continue to seek depositions of the SEC's lawyers. Moving for a protective order in these circumstances, i.e., to halt improper discovery, is consistent with Federal Rule of Civil Procedure 26(c). Because the SEC's motion has an appropriate basis contemplated by the Rules, Cuban's compounded request for fees, see Cuban MPO Opp. at 2, should be denied.

(1) "the extent of the evidentiary support for the SEC's allegation that Cuban agreed to keep [Mamma.com's PIPE] information confidential;" (2) "whether [a former Fort Worth SEC] attorney played a role in investigating Cuban;" and (3) that there "was no overlap of staff working on the [investigation related to Mamma.com and the investigation of Cuban's trading in Mamma.com] and/or no *quid pro quo*." Id. at 6-8.[2] Document and interrogatory discovery has resolved the issues for which the Court granted discovery by showing that, under any reasonable evaluation, Cuban's allegations are meritless and deposition testimony is therefore unnecessary.

First, the SEC has extensively demonstrated the evidentiary basis for the allegations in the Complaint.[3] More than a year ago, the SEC produced to Cuban its approximately 11,000-page non-privileged investigative file, which contains all of the facts that support – indeed, that the SEC believes compel – the conclusion that Cuban agreed to keep the PIPE information confidential, and, in response to Cuban's discovery requests served pursuant to the Order, the SEC has produced approximately 1,400 additional pages that assist in evaluating – indeed, disprove – Cuban's claim.[4] At this point, Cuban has the entirety of the SEC's evidentiary basis for its claims against Cuban; there is nothing factual that depositions can add.

Second, as the SEC has repeatedly demonstrated and as Cuban now admits, the former Fort Worth SEC attorney did not "play[] a role in investigating Cuban." See, e.g., Cuban MPO Opp. at 3 (Cuban does not allege that the Fort Worth attorney "was 'involved'

[2] Cuban is clearly wrong in asserting that the Court has found that "Cuban already ha[s] raised sufficient evidence of bad faith to merit discovery." Cuban MPO Opp. at 1. The Order made no such finding of bad faith and stated only that "there are fact issues that remain to be resolved…and these issues require (or would benefit from) some discovery…." Order at 6.

[3] See SEC MPO at 18-20; SEC Opp. to Fees Mot. at 3-15; SEC Resp. to Int. No. 1 (SEC MPO, Exh. 2).

[4] Cuban's repeated assertion that the SEC has withheld "the bulk of responsive documents," e.g., Cuban MPO Opp. at 1, is highly misleading and inaccurate. As Cuban knows, the only responsive documents the SEC has not produced are those for which it is asserting privilege.

in the investigation").[5] Discovery and Cuban's admission have entirely answered the second issue on which the Court permitted discovery, and depositions of the SEC's lawyers on this topic are thus unnecessary.

Third, the SEC established that there is no overlap between the teams on HO-09900 (the investigation relating to Mamma.com) and HO-10576 (the investigation relating to Cuban's trading in Mamma.com) and no evidence that the SEC offered or accepted a *quid pro quo*. See SEC MPO at 11-15. The only fact Cuban offers to support his charge is an unsolicited letter from Mamma.com's attorney for the HO-09900 matter to a member of the HO-09900 team that Cuban claims "appears to *invite*…a quid pro quo." Cuban MPO Opp. at 4 (emphasis in original). Cuban offers nothing more than this speculation, which is overwhelmed by the evidence that (1) the HO-09900 team intended to close its investigation in October 2006, well before a member of what became the HO-10576 team independently found the instant message regarding Cuban's trading that sparked the unrelated HO-10576 investigation, and (2) the minimal communications between members of the respective teams were insubstantial and had nothing to do with any alleged *quid pro quo*. See SEC MPO at 13-14. There is no evidence of a *quid pro quo*, and no reason to depose counsel on this issue, for a simple reason – there was no *quid pro quo*.

Nor is there evidence to support Cuban's newly raised allegations of misconduct.[6] Cuban continues to make the incendiary (but absurd) argument that an SEC staffer engaged in "witness tampering," even though Cuban's own declarant (Christopher Aguilar,

[5] Cuban's position on the involvement of the Fort Worth attorney has devolved into incoherence. Compare Cuban Opp. to SEC Mot. to Compel at 5 n.2 ("Cuban does not in any way concede that [the former Fort Worth SEC attorney] 'had no involvement' in the investigation or in the decision to bring charges.") with Cuban MPO Opp. at 3 (it is false that "Cuban alleged that [the former Fort Worth SEC attorney] was 'involved' in the investigation."). Whatever Cuban's position, the evidence is clear that the former Fort Worth SEC attorney did not "play a role in investigating Cuban." Order at 7.

[6] Despite the Court's warning, Order at 10, Cuban improperly raises an allegation concerning facts that he knowingly did not include in his original motion for fees.

the witness's attorney) expressly declared – despite Cuban's counsel's efforts to get him to declare otherwise – that the SEC staffer told him "[he] could do what [he] wanted" regarding making the witness available to Cuban's counsel. See SEC Opp. to Cuban Mot. to Compel ("SEC MTC Opp.") at 5 (emphasis added).[7] Testimonial discovery related to this facially false allegation is neither proper nor necessary.

Lastly, Cuban inexplicably rejects the SEC's explanation of emails relating to the staff's efforts to inform senior Enforcement Division personnel of Cuban's public persona so that discussion of the investigation of his trading could be conducted in limited access Executive Session and Cuban's privacy could be protected. See SEC MTC Opp. at 3-4. Moreover, even assuming *arguendo* that the emails were not sent for this innocuous purpose, Cuban's continued focus on two trivial and isolated emails as the primary support for his allegation of imagined "bias" betrays the dearth of any real support for that allegation. No reasonable finder of fact could conclude, based on these two emails, that the SEC brought this action out of bias against Cuban. Given the absence of evidence, depositions of the SEC's lawyers concerning this allegation are unwarranted and unnecessary.

II. Depositions of the SEC's Lawyers Are Improper.

Cuban seeks free-ranging depositions where he can question five SEC lawyers about everything from his spurious and scattershot allegations of investigative misconduct,

[7] Moreover, even if Cuban's charge of attempting to "tamp down" a witness was not squarely disproven by his own declarant (and leaving aside that the SEC vigorously disputes Aguilar's account of the conversation), it still fails as a matter of law. There is no misconduct if defense counsel has access to the witness. See, e.g., SEC MTC Opp. at 6 & n.17. Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966), the only case Cuban cites in support of his contention of the "black-letter law," see Cuban Reply in Supp. of Mot. to Compel at 3 n.6, does not support his charge of misconduct. As Cuban notes, the Gregory court reversed a criminal conviction where the prosecutor "effectively denied defense counsel access to the witnesses…." See id. It is undisputed that Cuban had unfettered access to the relevant witness; Cuban even obtained his sworn statement before the SEC did.

see Cuban MPO Opp. at 7, to the SEC's lawyers' impressions, conclusions, and legal theories concerning Cuban's confidentiality agreement. See id. at 5 (claiming Cuban is "entitled to ask" why the SEC's lawyers viewed the evidence as supporting his confidentiality agreement). Cuban's proposed depositions of the SEC's lawyers, opposing counsel in this case, are both improper and unnecessary.

A. Depositions of SEC Counsel on the "Evidentiary Bases" of the SEC's Complaint Are Unnecessary and Would Encroach on the SEC's Privileges.

Cuban has noticed depositions of SEC trial and investigative counsel, claiming he wants to depose opposing counsel on the "evidentiary bases of the Complaint." Cuban MPO Opp. at 5. While the Court permitted discovery on "the evidentiary support for the SEC's allegation that Cuban agreed to keep [Mamma.com's PIPE] information confidential," Order at 6, the Commission has produced all its evidence and explained in detail the legal basis for its claims. See supra at 2 & n.3. There is no need for depositions on this issue.

Moreover, Cuban's assertion that he should be able to depose SEC counsel to discover "what led to the making of th[e] false allegation in this Complaint," Cuban MPO Opp. at 6,[8] admits that his objective is not to examine SEC counsel on the evidence but on how they interpreted that evidence. Given that Cuban intends to probe the SEC's lawyers thoughts, evaluations, opinions, strategy, internal communications, deliberations, and legal analysis – i.e., the core of the SEC's work product, attorney-client and deliberative process

[8] The SEC rejects Cuban's repeated premise that the SEC did not believe Cuban had entered into a confidentiality agreement when it filed the Complaint and continues to believe – based on the evidence that it has extensively detailed – that a reasonable fact finder would conclude that the evidence shows Cuban agreed to keep Mamma.com's PIPE information confidential.

privileges – Cuban's assertion that "here…what constitutes work product is not at issue," Cuban MPO Opp. at 6, is disingenuous.

B. Depositions of Opposing Counsel Are Strongly Disfavored and Unjustified.

The law strongly disfavors Cuban's claimed "entitle[ment]" to depose opposing counsel. Depositions of opposing counsel necessarily implicate the work product privilege.[9] They also "inherently constitute an invitation to harass the [opposing] attorney[s] and parties[.]"[10] Further, the "deposition of a party's attorney is usually both burdensome and disruptive" to the adjudicative process.[11] In light of these concerns, "the mere request to depose a party's attorney constitutes good cause for obtaining a Rule 26(c) [] protective order unless the party seeking the deposition can show both the propriety and the need for the deposition."[12] Under Shelton, 805 F.2d at 1327, which the Fifth Circuit has followed, see, e.g., Theriot v. Parish of Jefferson, 185 F.3d 477, 491 (5th Cir. 1999), opposing counsel cannot be deposed unless a party shows that (1) no other means exist to obtain the information, (2) information sought is relevant and nonprivileged, and (3) the information is crucial to preparation of the case. Cuban cannot meet any of these requirements.

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[9] See SEC v. Morelli, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (prohibiting deposition of SEC's lawyer where litigant sought to discover "the inferences that [the SEC] believes properly can be drawn from the evidence"); N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 85 (M.D.N.C. 1987) (citing Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986) for the proposition that deposition of opposing counsel "merely embroils the parties and the court in controversies over the attorney-client privilege and more importantly, involves forays into the area most protected by the work product doctrine – that involving an attorney's mental impressions or opinions").

[10] See, e.g., West Peninsular Title Co. v. Palm Beach Cty., 132 F.R.D. 301, 301 (S.D. Fla. 1990); N.F.A. Corp., 117 F.R.D. at 85 (deposing opposing counsel invites harassment and disqualification of attorney).

[11] N.F.A. Corp., 117 F.R.D. at 85; see also West Peninsular Title Co., 132 F.R.D. at 301 (depositions of attorneys constitute invitation to disrupt the case).

[12] N.F.A. Corp., 117 F.R.D. at 85; see Nguyen v. Excel Corp., 197 F.3d 200, 209 & n.26 (5th Cir. 1999) ("request to depose opposing counsel generally would provide a district court with good cause to issue a protective order").

First, Cuban has failed to show that "no other means exists to obtain the information." Shelton, 805 F.2d at 1327. He has clearly failed to pursue other readily available means of obtaining the information he claims to seek. For example, Cuban has not noticed the former Fort Worth SEC attorney nor has he noticed anyone at Mamma.com about the alleged *quid pro quo*. Instead, Cuban falsely asserts that the SEC's lawyers are the "only witnesses" who can testify about his misconduct claims, Cuban MPO Opp. at 10.[13] Cuban's secondary claim that it is "wildly premature" to object to his failure to pursue any other means of discovery, Cuban MPO Opp. at 8, is unpersuasive. Since the December 2009 Order, the only depositions Cuban has noticed are of the SEC's trial team[14] and supervisory attorneys involved in the decision to recommend the action against him.

Second, Cuban fails to satisfy the Shelton requirement that the information sought is both relevant *and nonprivileged*. See Shelton, 805 F.2d at 1327. By his own admission, he seeks highly privileged information. See, e.g., Cuban MPO Opp. at 5 (Cuban claims he is "entitled to ask" how the SEC's lawyers interpreted the evidence). Cuban further states that he intends to depose the SEC's lead trial counsel about his role in the decision to file the Complaint and the decision to take additional testimony from Fauré, see id. at 10-11 n.41, and urges the Court to pierce the SEC's work product privilege.[15] Id. at 8-9 n.31. Cuban's description of the testimony he seeks, coupled with his failure to pursue other sources, amply demonstrate that his aim is to discover privileged information from the

[13] It is possible, of course, that Cuban has contacted third-party witnesses but found no support for his allegations of SEC misconduct.

[14] Cuban's efforts to obtain privileged information from the SEC's chosen trial counsel suggest he is improperly attempting to disqualify that counsel.

[15] Cuban's argument that he does not need to pursue other, non-privileged avenues of discovery because the case has been dismissed, see Cuban MPO Opp. at 10, ignores the possibility this case could be remanded. Cuban presumably seeks access to the SEC's privileged materials so that he can use those materials if this matter is remanded from the Court of Appeals.

SEC's attorneys. As even Cuban concedes, such discovery is improper. See id. at 9 (citing five cases for the proposition that courts "quash the depositions [of SEC attorneys where]… the goal of the depositions [is] apparently to obtain the SEC attorneys' impressions, conclusions and legal theories about the case"). Because Cuban is clearly seeking discovery of privileged information, he also fails to establish the second Shelton factor.

Third, Cuban makes no attempt to satisfy the third Shelton factor – that the information sought is "crucial to…the case." Shelton, 805 F.2d at 1327. He simply asserts that the factor is "inarguably satisfied." Cuban MPO Opp. at 9. Concerning the evidentiary basis for Cuban's confidentiality agreement, Cuban already has all of the SEC's evidence and its legal arguments about why this evidence is sufficient to state its claim. Further discovery on this issue is unnecessary, not "crucial." Moreover, the SEC has shown that Cuban's other assorted allegations of investigative misconduct are utterly meritless. See supra at 1-4; see also SEC MPO at 6-18; SEC MTC Opp. at 2-7.

Finally, Cuban's insistence that the proposed deponents – two members of the SEC's trial team and three supervisory attorneys – be required to assert the same privilege objection on a "question-by-question basis," Cuban MPO Opp. at 5, is both improper and unworkable. In arguing for a question-by-question objection, Cuban ignores the long line of case law prohibiting depositions of opposing counsel. See supra at 5-8. Crucially, in the cases Cuban cites for allowing attorney depositions, the relevant attorney was not opposing counsel. See Wright v. Life Investors Ins. Co. of Am., Civil Action No. 2:08-CV-03-P-A, 2009 WL 4347024, at *3 (N.D. Miss. Nov. 24, 2009) (proposed attorney-deponent "does not fit the definition of opposing counsel as discussed in Shelton");

Williams v. City of Dallas, 178 F.R.D. 103, 112 n.8, 116 (N.D. Tex. 1998) (referencing order denying request to depose opposing counsel; permitting depositions where attorney-deponents were not opposing counsel).[16] The depositions Cuban seeks are more like those in the analogous Rule 30(b)(6) context, where litigants have sought to probe SEC's lawyers' impressions, conclusions, and legal theories concerning the investigation and the merits of the SEC's action. See, e.g., SEC MPO at 21-24. Under these circumstances, it would be highly intrusive, infeasible, and contrary to precedent to permit Cuban's contemplated depositions to go forward and to require the SEC's trial team and the other attorneys to object on a question-by-question basis.

C. Cuban Fails To Establish "Extraordinary Circumstances" Necessary to Depose Senior SEC Officials.

In the absence of "extraordinary circumstances," former Director of Enforcement Linda Thomsen and Associate Director Scott Friestad, as high ranking enforcement officials, are exempt from deposition. Cuban cites to United States v. Morgan, 313 U.S. 409 (1941) to argue that Thomsen and Friestad are not sufficiently high ranking to be exempt from deposition, but "there is no hard and fast rule when it comes to applying Morgan to a particular government official." United States v. Sensient Colors, Inc., 649 F. Supp. 2d 309, 321 (D.N.J. 2009). In fact, the principles underlying the Morgan doctrine strongly counsel against allowing Cuban's contemplated depositions of senior SEC

[16] Cuban's citation to Energy Capital Corp. v. United States, 60 Fed. Cl. 315 (2004), see Cuban MPO Opp. at 6, is equally unavailing. In that case, the court permitted depositions of an agency's former general counsel concerning non-privileged information only where the agency had admitted liability, the court had entered a final, non-appealable judgment, and the court had concluded that alleged threats made by the agency's lawyers, if proven, were sufficient as a matter of law to establish bad faith. Energy Capital, 60 Fed. Cl. at 316-17. Here, the SEC continues to believe that the evidence supports the Complaint's allegations and has appealed the dismissal of the Complaint, Cuban seeks privileged information, and the Court has expressly not concluded to whether "any specific ground on which Cuban relies will probably support relief." Order at 9 n.5.

officials.[17] The doctrine protects the mental processes of government officials, including their thought processes, methods, and matters they considered,[18] to protect the integrity and independence of the administrative decision-making process.[19] Where, as here, a party has failed to demonstrate extraordinary circumstances,[20] courts will not question agency decision-makers, former or current,[21] or subject them to testify about those matters.[22]

CONCLUSION

Depositions of opposing counsel are strongly disfavored. They inherently implicate applicable privileges, disrupt the adjudicative process, and invite harassment of opposing counsel and parties. There is no basis for overcoming the presumption against depositions of opposing counsel here. First, the documentary and interrogatory evidence establishes that Cuban cannot maintain his claims of investigative misconduct in good faith. Second, the SEC has already described the evidentiary basis for the Complaint, and the depositions Cuban seeks about that basis exclusively concern privileged information. For these reasons, the SEC respectfully requests that the Court grant its Motion for Protective Order.

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[17] The doctrine has repeatedly been applied to preclude depositions of senior government officials, below the executive officer level. See Sunsient Colors, 649 F. Supp. at 319-21 (listing examples); In re World Trade Center Disaster Site Litig., Nos. 21 MC100(AKH), 05 Civ. 9141(AKH), 06 Civ. 8890(AKH), 06 Civ. 11710(AKH), 2009 WL 4722250, *4 (S.D.N.Y. Dec. 9, 2009) (same).

[18] See, e.g., Malone Mortgage Co. Am., Ltd. v. Martinez, No. 3:02-CV-1870-P, 2003 WL 23272381, at *3 (N.D. Tex. Jan. 6, 2003) (protecting deliberative process of government officials).

[19] See Morgan, 313 U.S. at 422 (citing Chicago, B. & Q. Ry. Co. v. Babcock, 204 U.S. 585, 593 (1907)).

[20] See, e.g., Bank of Commerce v. City Nat'l Bank of Laredo, 484 F.2d 284, 288 (5th Cir. 1973) (requiring "a strong showing of bad faith or improper behavior" and citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971)).

[21] See Sensient Colors, 649 F. Supp. 2d at 316-17; United States v. Wal-Mart Stores, No. Civ.A. PJM-01-CV-152, 2002 WL 562301, at *2-3 (D. Md. Mar. 29, 2002).

[22] See, e.g., In re FDIC v. 11,950 Acres of Land, 58 F. 3d 1055, 1061 (5th Cir. 1995) (ruling that allegations of misconduct by agencies and officials were insufficient to justify deposing high-level officials).

Dated: May 24, 2010

Respectfully submitted,

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