UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK CUBAN,	)	
Plaintiff,	)	
	)	
v.	)	**Case: 1:09-cv-00996**
	)	**Assigned: Walton, Reggie B.**
SECURITIES AND EXCHANGE COMMISSION,	)	**Description: FOIA/Privacy Act**
Defendant.	)	

DEFENDANT'S MOTION FOR RECONSIDERATION

The Defendant, the Securities and Exchange Commission ("Commission" or "SEC"), respectfully asks the Court to reconsider portions of its September 22, 2010 ruling regarding the parties' cross-motions for summary judgment. The SEC addresses the issues the Court raised in its Memorandum Opinion, and in light of the additional information, asks the Court to grant its initial motion for partial summary judgment.

BACKGROUND[1]

The Plaintiff, Mark Cuban ("Cuban"), brought this action seeking the release of certain information from Defendant pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C §552 and the Privacy Act, 5 U.S.C §552a. On the parties' cross-motions for summary judgment, the Court held that the SEC did not sufficiently substantiate (1) the adequacy of its search for records responsive to categories 7, 11, 12, and 13 of Request I;[2] and (2) its withholding of certain documents under FOIA

[1] The SEC incorporates by reference the facts provided in its prior filings in this case.

[2] "Request I" refers to the Dec. 19, 2008 Letter from David M. Ross to SEC, cited in Defendant's original moving papers as "FOIA Request Letter."

Exemptions 2, 5, 6, 7(C), and 7(A).[3]

The SEC has since produced to Plaintiff, documents 4, 10, 20, 21, 23, 24, 29, 58, 61, 66 and 78-80 with personal identifying information redacted. (Def.'s Status Report 6, Oct. 20, 2010, Dkt. No. 32.) Because the SEC invoked Exemption 2 only for documents 78-80, which it has now produced, the Exemption 2 issue is moot. The basis for withholding the remainder of the documents on the Second Revised *Vaughn* Index is addressed below. Additional documents were withheld under Exemption 7(A) and the SEC will address those documents further in its status report due December 1, 2010.

ARGUMENT

I. Legal Standard for Motion for Reconsideration of an Interlocutory Order

A district court may revise it own interlocutory decisions "at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities." FED. R. CIV. P. 54(b); *see also Bolden v. Ashcroft*, 515 F. Supp. 2d 127, 135 (D.D.C. 2007); *Moore v. Hartman*, 332 F. Supp. 2d 252, 256 (D.D.C. 2004). The D.C. Circuit has long held that the standard district courts apply when amending interlocutory orders is when it is "consonant with equity to do so." *Langevine v. Dist. of Columbia*, 106 F.3d 1018, 1022-23 (D.C. Cir. 1997) (quoting *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 90-91 (1922)).

II. The SEC's Searches of Categories 7, 11, 12, & 13 of Request I Are Adequate

The Court held that the SEC must provide more detailed declarations for the Court to reassess the adequacy of the SEC's search efforts. (Mem. Op. at 14.) As to category 7, which seeks information of SEC personnel who traded in Copernic securities,

[3] All documents referred to herein are identified in the Second Revised *Vaughn* Index, attached hereto as Exhibit 15. For ease of reference, the documents are referenced by the number assigned in the Second Revised *Vaughn* Index. The document numbers are the same as in the original *Vaughn* Index.

the SEC submits the declarations of Shira Minton and David Cunningham (attached hereto as Exhibits 16 and 17, respectively). Those declarations describe the forms the SEC collected during the relevant time period about securities owned by SEC personnel, the efforts the SEC staff made to search those forms, and why a further search is not feasible. (Minton Decl. ¶¶ 4-18; Cunningham Decl. ¶¶ 3-18.) As to categories 11, 12, and 13, which request investigatory records from the Office of Inspector General ("OIG"), the declarant, Deputy Inspector General, Noelle Maloney (formerly Frangipane), describes the OIG's search for responsive documents. (2d Suppl. Maloney Decl., attached hereto as Ex. 18, ¶¶4-15.)

III. The SEC Properly Withheld Documents Pursuant to Exemption 5

As the Court recognized, Exemption 5 permits the SEC to withhold documents protected by the deliberative process privilege, the work-product doctrine, and the attorney-client privilege. (Mem. Op. at 20.) The Second Revised *Vaughn* Index and supplemental declarations the SEC submits herewith substantiate its invocation of these privileges. All documents the SEC withheld under Exemption 5 also contain personal privacy information under Exemption 6, which is discussed further below.

A. The SEC Properly Withheld Documents Protected by the Deliberative Process Privilege

The SEC withheld documents 1-3 (in part), 11, 13, 14, 22, 25-28, 29 (in part), 32, 33-35, 37-46, 48, 49, 52-57, 59-60, 61 (in part), 62-64, 69, 71, and 73-76 (collectively, "DP documents") under the deliberative process privilege. The Court agreed with the SEC that "its officers must be allowed to make discretionary judgments and consider policy choices in an environment protected from public scrutiny and unnecessary disclosures or it 'would tend to discourage candid discussion within an agency.'" (Mem.

Op. at 22 (citation omitted).) The Court stated "the categories of records that might qualify as predecisional and deliberative is great." (*Id.* at 23 (citation omitted).) All the documents withheld are "so candid or personal in nature that public disclosure is likely in the future to stifle honest communication within the agency." (*See id.* (quoting *Soc. v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 1, 15 (D.D.C. 2004)).)

The DP documents relate to several disciplinary proceedings and contain or reflect the internal deliberations of SEC management, Human Resources ("HR") staff, and SEC attorneys on potential disciplinary actions based on particular misconduct. (2d Suppl. Tyler Decl., attached hereto as Ex. 19, ¶¶ 5-6.) The Second Revised *Vaughn* Index explains the deliberative nature of each DP document. In addition, the SEC is submitting a declaration from Ellen Tyler describing the circumstances of the deliberations. (*Id.*; *see also* 2d Suppl. Pinansky Decl., attached hereto as Ex. 20, ¶ 4.)

B. The SEC Properly Withheld Documents Protected by the Work-Product Doctrine

The SEC withheld documents 11, 13, 25-28, 29 (in part), 31-37, 39, 41-44, 49-51, 53-55, 57, 59-60, 61 (in part), 62, 63, and 65 (collectively, "WP documents") pursuant to the work-product doctrine. The Court acknowledged that the work-product doctrine "should be interpreted broadly and held largely inviolate, and often there is no necessity to segregate information within work-product records . . . ." (Mem. Op. at 30 (citation and internal quotation marks omitted).) The Court held that the SEC must better establish "that all of the communications were created with litigation in mind." (*Id.*)

The SEC is submitting a declaration from David Pinansky addressing all of the WP documents other than documents 49-51, 65, and 72 that establishes that those documents were created by or at the direction of an attorney in anticipation of litigation

regarding discipline of an SEC employee.[4] (2d Suppl. Pinanksy Decl. ¶ 4.) In addition, the Second Revised *Vaughn* Index explains the role of an attorney in the creation of each document withheld as work-product. Although in prior filings, the SEC focused on the potential litigation over a disciplinary action as a basis for its work-product claims, five documents (documents 49-51, 65, and 72) gathered in connection with the discipline issue contain work-product from the SEC enforcement proceedings. The text of those documents shows that they contain the discussions of attorneys about the handling of ongoing litigation in the SEC securities actions. (Wharton Decl., attached hereto as Ex. 21, ¶ 3.) Further, as discussed below, the SEC has recognized that two of these documents contain information that is also protected under Exemption 3(A).

C. The SEC Properly Withheld Documents Protected by the Attorney-Client Privilege

The SEC withheld documents 11, 13, 25, 26, 35, 37, 39, 41-44, 53, 55, 57, 59, and 63 (collectively, "AC documents") pursuant to the attorney-client privilege. As the Court stated, "to invoke the [attorney-client] privilege, an agency must demonstrate that the document it seeks to withhold (1) involves confidential communications between an attorney and his [or her] client and (2) relates to a legal matter for which the client has sought professional advice." (Mem. Op. at 24 (citations and internal quotation marks omitted) (alteration in original).) The Court concluded that, to shoulder its burden, the SEC must "demonstrate that confidentiality was expected in handling these communications, and that it was reasonably careful to keep this confidential information protected from disclosure, not just within the agency, but also among any other individuals outside the agency who needed access to the information." (*Id.* at 27

[4] Indeed, there is now an on-going legal proceeding concerning the disciplinary action that is at issue in some of the WP documents. (2d Suppl. Pinanksy Decl. ¶ 4.)

(citations and internal quotation marks omitted).)

All participants in these communications were expected to protect confidential information. (2d Suppl. Pinansky Decl. ¶ 5; 2d Suppl. Tyler Decl. ¶ 4.) The declarants stated they preserved the confidentiality of the documents. (2d Suppl. Pinansky Decl. ¶ 5; 2d Suppl. Tyler Decl. ¶ 4.) Further, the participants in these communications have a practice of keeping confidential all communications involving potential employee discipline. (2d Suppl. Pinansky Decl. ¶ 5; 2d Suppl. Tyler Decl. ¶ 4.) Thus, the SEC was reasonably careful to keep this information confidential and protected for disclosure, and the AC documents are protected by the attorney-client privilege.

IV. The SEC Properly Withheld Documents Pursuant to Exemption 3(A)

Exemption 3(A) permits the SEC to withhold documents that are prohibited from disclosure by other federal statutes.[5] Pursuant to 31 U.S.C. §5319, a provision of the Bank Secrecy Act, reports on monetary instruments transactions (including suspicious activity reports ("SARs")) and records of those reports are exempt from disclosure under FOIA.[6] *Sciba v. Bd. of Governors of the Fed. Reserve Sys.*, No. 04-1011, 2005 WL 3201206, 103 at *6 (D.D.C. Nov. 4, 2005) (Walton, J.) (holding Exemption 3(A) justifies nondisclosure of SARs). Documents 50 and 51 contain a record of a SAR (Wharton Decl. ¶ 4) so to that extent they are also exempt from disclosure under 31 U.S.C. §5319.

[5] Although the SEC did not raise this issue previously, the D.C. Circuit has held that waiver of FOIA exemptions applies when a party fails to raise the exemption in the district court proceedings such that the district court has no opportunity to decide the issue before it is raised in the circuit court. *Maydak v. Dep't of Justice*, 218 F.3d 760, 767-79 (D.C. Cir. 2000). Furthermore, this Circuit has held that "an agency waives an Exemption 3 claim only if it has made an official disclosure of the information." *Assassination Archives & Research Center v. CIA*, 334 F.3d, 55, 60 n.4 (D.C. Cir. 2003).

[6] *N.Y. Times Co. v. DOD*, 499 F. Supp. 2d 501, 512-13 (S.D.N.Y. 2007) (treating 31 U.S.C. § 5319 as providing "absolute" protection).

V. The SEC Properly Withheld Documents Pursuant to Exemption 6

The SEC is withholding all eighty documents on the Second Revised *Vaughn* Index, in whole or in part, under Exemption 6.[7] As to documents 78-80, the SEC has already disclosed, as ordered by the Court, all information other than personal identifying information. Thus, it appears that there is no further issue as to those documents.

With respect to documents 1 through 77, as the Court has recognized, they "are personnel-related and their content – the investigation of alleged wrongdoing by an SEC employee – implicates 'substantial privacy concerns' of the subject of the investigation." (Mem. Op. at 34 (quoting *Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982)).) The Court also determined that the public has some interest in knowing whether the SEC takes action if one of its employees uses his position to "further private interests or harass private citizens." (*Id.* at 35.) And "[t]here is a compelling public interest in knowing whether the defendant *conducts investigations free of misconduct by its employees* and how alleged transgressions by its employees are addressed[.]" (*Id.* (emphasis added).) The Court's "only question" goes to the balancing of the privacy interest versus the public interest and "whether the release of the information would constitute a clearly unwarranted invasion of that person's privacy." (*Id.* at 34 (citation omitted).) The SEC is submitting declarations and a Second Revised *Vaughn* Index that provide relevant information for that balancing.[8]

---

[7] On October 20, 2010, the SEC produced redacted versions of documents 4, 10, 20-21, 23-24, 58, and 78-80. The SEC also produced exhibits from documents 29 and 61 and document 66 in its entirety. Consequently, the Exemption 6 records currently disputed in their entirety are documents 1-3, 5-9, 11-19, 22, 25-28, 30-57, 59-60, 62-65, and 67-77.

[8] At the October 22, 2010 status hearing, opposing counsel argued that the Court's Order directed the SEC to produce documents 1-77 and did not leave the SEC the option of providing additional information to assist the court in balancing public and private interests. But the Court unequivocally stated that it could not properly conduct the balancing required until the SEC provided more detail about these records. (Mem.

Two points relevant to the balancing bear emphasis. First, the Court's finding of a public interest relies on an interest in knowing the SEC conducts investigations free from misconduct. However, disclosure of the documents at issue would not satisfy that public interest. Evidence the SEC previously submitted shows that the employee about whom Cuban is seeking information had no connection to the investigation of or litigation against Cuban. A declaration from the Assistant Director in the SEC's Division of Enforcement who supervised the investigation against Cuban from its beginning and filed in the SEC's enforcement action against Cuban explains that the employee in question "did not participate in the Commission's investigation and had no role in the review, recommendation, or litigation of this case. . . . [He] had no supervisory role or relationship with anyone working on the investigation." (Kaplan Decl., attached hereto as Ex. 12, ¶ 3.) In addition, his e-mails with Cuban "were not a factor in, and had no effect on, the initiation or continuation of the investigation or the staff's recommendation that the Commission file insider trading charges against Cuban." (*Id.*) The second point is that most of the documents withheld under Exemption 6 do not pertain to a decision whether to take disciplinary action as a result of the Cuban e-mails. (2d Suppl. Tyler Decl. ¶ 6.) Only documents 1-6 and 47 pertain to the decision regarding discipline for the Cuban e-mails. (*Id.*) Thus, even if there is a public interest in those seven documents, the remaining documents should be found exempt.

In light of these facts, the only documents in which the public interests identified by the Court may outweigh private interests are documents 1-6 and 47. However, when

---

Op. at 36 ("greater detail concerning the content of each record is needed to determine whether that information is exempted from disclosure").) The Court's Order requiring disclosure applies only to documents 78-80, which are not documents about employee discipline. (*Id.* at 35.)

there is such a public interest, the public interest is not in the name of the employee. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 380-81 (1976). In *Rose*, where redaction did not sufficiently protect the identity of the person subject to discipline, the Court held that summaries of discipline should not be disclosed. *Id.* at 381. In this case, all of the documents being withheld in their entirety cannot be redacted in a way that would sufficiently protect persons subject to discipline from an unwarranted invasion of their privacy interests. The Plaintiff has already speculated that based on the original *Vaughn* Index and the SEC's previously filed declarations he can identify the SEC employee. (Pl.'s Opp'n to Def.'s Partial Mot. for Summ. J., Dkt. No. 13, 25.) The public interest identified here is not sufficient to require such a disclosure. Knowing how the SEC handled one incident of misconduct that did not occur in the context of an investigation or any other official SEC action and did not result in any injury is not sufficiently strong to justify requiring the disclosure of information that can be tied directly to a specific person. Accordingly, the SEC properly withheld these documents in whole or in part, as necessary, pursuant to Exemption 6.

VI. The SEC Properly Withheld Documents Pursuant to Exemption 7(C)

Exemption 7(C) raises issues similar to those discussed above in connection with Exemption 6. However, "the reach of the privacy interest protected under Exemption 7(C) is much broader that [sic] the reach of Exemption 6." (Mem. Op. at 40 n.10 (citation omitted).) Also, Exemption 7(C) applies only to documents compiled for law enforcement purposes. The only documents the SEC is withholding in their entirety under Exemption 7(C) are documents 9 and 16-18. The SEC is also withholding personal identifying information in documents 78-80 pursuant to Exemption 7(C). It appears that

there is no issue as to the propriety of withholding that personal identifying information.

As to documents 9 and 16-18, Exemption 7(C) protects them because they were gathered for a law enforcement matter conducted by the SEC's Office of Inspector General ("OIG") where an employee was a subject of the investigation. (Frangipane Decl., Jan. 15, 2010, attached hereto as Ex. 7, ¶ 11.) It is clear from the face of the documents that they are from an OIG investigation and disclosing them would invade the employee's privacy by indicating what the OIG was investigating. (2d Suppl. Maloney Decl. ¶ 16.) As explained under Exemption 6 above, for these documents, the privacy interest outweighs the public interest because they are not among the documents concerning discipline for the Cuban e-mails. Also, disclosing them with personal identifying information redacted will not protect any privacy interest. Cuban has not identified a relevant public interest that would warrant disregarding all privacy interests. Thus, the SEC rightfully withheld these documents in whole pursuant to Exemption 7(C).

CONCLUSION

Accordingly, the SEC respectfully asks the Court the grant its Motion For Reconsideration. A proposed order is attached pursuant to Local Rule 7(h).

Respectfully submitted,

/s/ *Juanita C. Hernandez*

Juanita C. Hernández (D.C. Bar No.449797)
Melinda Hardy (D.C. Bar No. 431906)
Woo Lee (D.C. Bar No.486004)
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9612
Hernandezj@sec.gov
202-551-5152 (telephone) (Hernández)
202-772-9263 (facsimile)
Attorneys for Defendant

Dated: November 5, 2010

Cuban v. SEC, Civ. Action No. 1:09-cv-00996 (RWB)

Defendant's Second Supplemental Exhibit List in Support of its Motion for Reconsideration*

Exhibit 1 = Declaration of Margaret Celia Winter

Exhibit 2 = *Vaughn* Index

Exhibit 3 = Declaration of Kenneth H. Hall

Exhibit 4 = Declaration of David M. Pinansky

Exhibit 5 = Declaration of Nancy Ellen Tyler

Exhibit 6 = Declaration of Julie M. Riewe

Exhibit 7 = Declaration of Noelle L. Frangipane

Exhibit 8 = Supplemental Declaration of Margaret Celia Winter

Exhibit 9= Revised *Vaughn* Index

Exhibit 10= Supplemental Declaration of David M. Pinansky

Exhibit 11= Supplemental Declaration of Nancy Ellen Tyler

Exhibit 12= *Pl. SEC's Mem. of Law in Opp'n to Def. Mark Cuban's Mot. for Attorneys' Fees and Expenses*, Civ. Action No. 3-08-cv-2050-D (SAF), United States District Court, Northern District of Dallas, filed Sept. 30, 2009. Attached thereto at Document 47-2 (page 33 of the attached adobe acrobat file) is the Declaration of Robert B. Kaplan.

Exhibit 13= Supplemental Declaration of Noelle Frangipane

Exhibit 14= Declaration of William Lenox

Exhibit 15= Second Revised *Vaughn* Index

Exhibit 16= Declaration of Shira Minton

Exhibit 17= Declaration of David Cunningham

Exhibit 18= Second Supplemental Declaration of Noelle Maloney (formerly Frangipane)

Exhibit 19= Second Supplemental Declaration of Nancy Ellen Tyler

Exhibit 20= Second Supplemental Declaration of David Pinanksy

Exhibit 21= Declaration of Leslie Wharton

---

*. Exhibits 1–7 were filed on January 15, 2010, with Docket Doc. No. 10. (Def.'s Mot. for Partial Summ. J.)

**. Exhibits 8–14 were filed on March 16, 2010, with Docket Doc. No. 22 (Def.'s Reply to Pl.'s Opp'n to Def.'s Partial Mot. for Summ. J.)

***. Exhibits 15–21 are being filed on November 5, 2010, in connection with Def.'s Mot. for Reconsideration.