IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK CUBAN,	)	
	)	
Plaintiff,	)	
	)	**Case No. 1:09-cv-00996 (RWB)**
vs.	)	**Judge Reggie B. Walton**
	)	
SECURITIES AND EXCHANGE COMMISSION,	)	
	)	
	)	
Defendant.	)	

PLAINTIFF MARK CUBAN'S OPPOSITION TO
DEFENDANT'S MOTION FOR RECONSIDERATION

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INTRODUCTION

On September 22, 2010, the Court denied in part the summary judgment motion of the Securities and Exchange Commission ("SEC") and granted in part Mr. Cuban's summary judgment motion because of, among other reasons, the "minimally supported" and "extremely limited, vague, and conclusory" Declarations submitted by the SEC in connection with those motions. Memorandum Opinion ("Op.") at 2, 47 n. 12. The Court found a number of other significant deficiencies in the SEC's arguments and submissions, including that the SEC had made wholesale FOIA exemption claims without "distinguishing the content of specific records, which is necessary to establish that redactions are unwarranted or impossible." *Id*.

In its motion for reconsideration, the SEC now reargues its previous positions and attempts to remedy the inadequacies of its previous filings with several new Declarations. Relying on these Declarations, the SEC contends that it did conduct an adequate search and that it has properly withheld documents under FOIA Exemptions 6 and 7(C), as well as the civil-discovery privileges recognized under Exemption 5. In addition, the SEC for the very first time in this case claims the protection of FOIA Exemption 3(A).

Despite the heft of the SEC's motion papers and new Declarations, they still largely contain "uninformative information that precludes the Court from independently evaluating the merits of [its] positions." Op. at 47 n. 12. The SEC still invokes exemptions categorically and without reference to individual documents. And the *Vaughn* Index has become lengthier, but scarcely more descriptive, and the new Declarations are still conclusory and nonspecific. The SEC still has not even established that the contested documents warrant *in camera* review by the Court, much less that summary judgment in the SEC's favor is warranted. Mr. Cuban respectfully requests that the SEC's reconsideration motion be denied.[1]

[1] The SEC's brief refers to and incorporates large amounts of material from its new Declarations and revised *Vaughn* Index. Space constraints do not permit Mr. Cuban to fully respond to the SEC's submissions. Thus, for example, with respect to Exemption 7(C), Mr. Cuban will rely on the arguments in this Opposition regarding Exemption 6 – which also apply with some force to the SEC's Exemption 7(C) claim – and on Mr. Cuban's previous briefs. Pl.'s Cross-Mot. Summ. J. 26-28 (R. Doc. 13) (showing that the SEC has failed to demonstrate that the records were compiled for law-enforcement purposes); Pl.'s Reply 18-19 (R. Doc. 24). Mr. Cuban would also note that whereas the Court found the SEC's previously-submitted Declarations to be inadequate, the SEC's new Declarations add only *one* (inadequate) sentence of substance. *See* Def.'s Mot. for Recons., Ex. 18, 2d Supp. Maloney Dec. at ¶ 16 ("Maloney Dec").

ARGUMENT

I. The Declarations of Shira Minton and David Cunningham Still Do Not Warrant Summary Judgment for the SEC with Respect to Documents Responsive to Category 7

The SEC submits new Declarations conceding that, while it has located hard-copy documents that might be responsive to Category 7 of Mr. Cuban's December 19, 2008, letter ("Request Letter I"),[2] it has not bothered to review them.[3] These declarations describe the systems that contain potentially responsive documents in some detail.[4] The SEC suggests, however, that some of the potentially responsive documents are reviewable electronically and some are *not*, and it has no intention of reviewing the documents that must be reviewed *manually* in hard-copy form.

These Declarations demonstrate that the SEC's search and review was inadequate. The Court held that the SEC must make "a good faith effort to conduct a search for" documents potentially responsive to" Mr. Cuban's requests "using methods which can reasonably be expected to produce the information requested." Op. at 9.[5] A manual search of the hard-copy documents in question is plainly a method that "can reasonably be expected to produce the information requested." The SEC's contentions that a manual search for documents is "not feasible" cannot be taken seriously.[6]

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[2] Category 7 of Request Letter I focused upon trading by SEC employees in Copernic securities. The text of Request Letter I is found at Def.'s Mot. for Recons., Ex.7, Declaration of Noelle Frangipane at Ex. B ("Request Letter I").

[3] The SEC also contends that it searched some of these documents electronically. Previously the SEC argued that the records of its employees' securities trading could *not* be searched electronically. Puzzlingly, and without explanation, the SEC now presents the Cunningham Declaration, which for the first time explains that the SEC can conduct sophisticated electronic searches – including searches for specific securities – through approximately 145,000 forms that record securities trading by SEC employees. Def.'s Mot. for Recons., Ex. 17, Cunningham Dec. at ¶¶ 8-11 ("Cunningham Dec."); *but see* Def's Reply, Ex. 14, Declaration of William Lenox at ¶ 5 (as of March 16, 2010, "it [was] not possible to perform an electronic search of these records for specific securities"); *see also Citizens for Responsibility and Ethics in Wash. v. Nat'l Indian Gaming Comm'n*, 467 F. Supp 2d 40, 56 (D.D.C. 2006) (presumption of good faith inapplicable when there is "a material conflict in agency affidavits"); *Shreibman v. Dep't of Commerce*, 785 F. Supp. 164, 165 (D.D.C. 1991) (summary judgment appropriate when there is "no contradictory evidence on the record, nor evidence of bad faith on the part of the agency").

[4] Def.'s Mot. for Recons., Ex. 16, Minton Dec. at ¶¶ 9-11, 15-16 ("Minton Dec."); Cunningham Dec. at ¶¶ 14-17.

[5] The Court also held that an agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested" and that "an agency must demonstrate the adequacy of its search by . . . 'averring that all files likely to contain responsive materials . . . were searched.'" Op. at 9 (internal punctuation altered); *see also Servicemembers Legal Defense Network v. Dep't of Defense*, 471 F. Supp. 2d 78, 84 (D.D.C. 2007) (agencies required to "conduct a good faith, reasonable search of those systems of records likely to possess the requested information").

[6] One record system that the SEC has refused to search consists of *two drawers* of documents. Minton Dec. at ¶ 17. Another consists of ten drawers. *Id.* at ¶ 11; *see also People for the American Way Found. v. Dep't of Justice*, 451 F. Supp. 2d 6, 15 (D.D.C. 2006) (120 hours of searching not an unreasonable burden). The third record system seems

II. The Noelle Maloney Declaration Belies the SEC's Claim That it Has Demonstrated that it Conducted an Adequate Search for Documents Responsive to Categories 11, 12, and 13 of Request Letter I

The Maloney Declaration describes the SEC's search for documents responsive to Categories 11-13[7] as primarily involving discussions with SEC personnel. Maloney Dec. at ¶¶ 6, 14. The Maloney Declaration still fails to provide the Court with a sufficient basis to determine whether additional electronic searches can or need to be conducted. As the Court pointed out in its Opinion, an agency must demonstrate the adequacy through a declaration "*setting forth the search terms and type of search performed . . . .*" Op. at 9 (emphasis added). The Declaration fails to do this. With respect to electronic searches, the declarant contends that she only "reviewed indexes of investigations conducted by the OIG" and "for each investigation in the case tracking database, reviewed the fields in the database that identify the nature of the allegations or would cause us to believe that the investigative file would contain potentially responsive documents." Maloney Dec. at ¶¶ 6, 14. There is no indication of how the case indexes and database were searched, what search terms were used, or what level of information was displayed in the fields in the case-tracking database.[8] The Maloney Declaration fails to convey the level of detail or thoroughness with which the search for Categories 11-13 was conducted. The SEC has therefore not described the extent of its search, and summary judgment is inappropriate.[9]

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large only in comparison to the two vastly smaller systems that the SEC has not searched. The SEC has not indicated how many documents it contains or how much time would be required to conduct a manual search through them. And the SEC's description of the records system – "approximately 260 linear feet of cabinet space" that is all in one place, a "substantial subset" of which has already been searched – shows that a search would be eminently manageable, *see Public Citizen, Inc. v. Dep't of Education* 292 F. Supp. 2d 1, 6 (D.D.C. 2003) (individual review of 25,000 paper files, which could include sending employees across the country to review them, did not constitute an unreasonable burden), and the volume of materials is not commensurate with other FOIA burdens found to be unreasonable. *See Nation Magazine v. Customs Service*, 71 F.3d 885, 892 (D.C. Cir. 1995) (twenty-three years of unindexed files); *Goland v. C.I.A.*, 607 F.2d 339, 353 (D.C. Cir. 1978) (page-by-page review of 84,000 cubic feet of documents).

[7] Categories 11-13 of Request Letter I focused upon various allegations of misconduct by SEC employees in the course of investigations. The text of these Categories may be found in Request Letter I at 3.

[8] *Compare* Maloney Dec. at ¶ 12 (portion of Declaration unrelated to Categories 11-13 describing search terms at length).

[9] *See People for the American Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 294 (D.D.C. 2007) (denying summary judgment for agency because it "has neither identified what search terms were used, nor has it identified why the scope of [its] search was limited to the files or personnel listed").

III. The SEC is Not Entitled to Withhold Almost Every Contested Document in Its Entirety By Universally Asserting Exemption 6 or Baldly Denying the Public Interest in the Documents' Disclosure

The Court has already disposed of the SEC's Exemption 6 claim, finding that "[j]ust as it did with Exemption 5, the defendant relies on Exemption 6 to withhold almost all of the 80 records included in the *Vaughn* index. Specifically, the defendant states that Exemption 6 justifies its withholding of records 1-22, 25-57, and 59-80. . . . The defendant thus far only speculates that '[d]isclosure of such information [as is contained in records 1-77] *could* amount to an invasion of privacy of the individuals identified' . . . but the defendant, who carries the burden, must do more than that . . . ." Op. at 32, 36-37. The SEC, already having had a full opportunity to brief this issue, should not be allowed to simply re-litigate the matter now.

But even if the Court chooses to entertain the SEC's arguments, the agency has not carried its burden. The SEC argues that there is no public interest in the documents because the former SEC employee who used his office email account to harass Mr. Cuban did not participate in the investigation of Mr. Cuban, and that there is no public interest in the information contained in many documents in the *Vaughn* Index because they do not discuss this former employee.

The flaws in this argument are manifest. First, there certainly is a clear public interest in the details of the disciplining of a public servant who sent vitriolic emails to a private citizen from a government email address during work hours, regardless of whether he also participated in the investigation of the citizen. Op. at 35, 41, 43. Second, the SEC's argument confuses public and private interests. Essentially, it argues that because Mr. Cuban does not have a *private* interest in some of the files, there is no *public* interest. But this argument is simply a *non sequitur*. This Court held that "[t]here is a compelling public interest" in knowing how the SEC addresses employee transgression, and Mr. Cuban's request "would assuredly 'shed light on an agency's performance of its statutory duties and its compliance with the law.'" *Id.* at 35. The SEC does not dispute that the files would shed light on the SEC's performance of its duties.

In addition, the SEC attempts to demonstrate that privacy concerns are substantial because Mr. Cuban "has already speculated that . . . he can identify the SEC employee. Def.'s Mot. for

Recons. at 9. The SEC's position that it must serve as a careful steward of individual privacy is belied by its motion, which contains an exhibit that refers *by name* to the employee discussed in documents 1-6 and 47 in a publicly available filing. *See, e.g.*, Def.'s Mot. for Recons. at 8 & Ex. 12, Kaplan Dec. at ¶ 3 (referring, by name, to former SEC employee subject to discipline).

Finally, Exemption 6 in no way permits the SEC to withhold documents *in their entirety*. *See* Op. at 36. The SEC argues that nearly all of the documents cannot be disclosed even in redacted form. Even if it were plausible that sixty-seven of the eighty documents in question cannot possibly be redacted, this argument is purely conclusory and provides the Court no basis to assess the SEC's position. The newest *Vaughn* Index simply repeats the same phrase – "[r]edacting identifying information alone is not sufficient because information already available to plaintiff and/or the public would allow plaintiff and others to identify the employee subject to discipline" – for the documents that are purportedly impossible to redact. Def.'s Mot. for Recons., Ex. 15, *passim*. The SEC simply proclaims that any disclosure would constitute a clearly unwarranted invasion of personal privacy, which is insufficient to meet the SEC's burden and fails to provide the Court with the opportunity for meaningful review. The Court need not accept bare declarations that the standard is met.[10] Moreover, the Court has already held that the SEC's tactic of "universally asserting" the same rationale for all documents instead of "distinguishing the content of specific records" is impermissible. Op. at 47 n.12. Yet this is precisely what the new Declarations do.[11]

IV. The SEC's Withholding of Numerous Records Under the Deliberative Process Privilege is Still Unsupported by the SEC's New Declarations

The Court previously held that the SEC's Declarations regarding the deliberative process privilege "completely lack[ed] any detail regarding any particular record and [did] nothing more than generally state that Exemption 5 is satisfied," and accordingly the SEC "*must redact and*

[10] *See United Am. Fin., Inc. v. Potter,* 531 F. Supp. 2d 29, 47 (D.D.C. 2008) ("If the government's bare assertion that a protected privacy interest is involved is sufficient, then the FOIA privacy exemptions could effectively swallow the general rule favoring disclosure.") (internal punctuation omitted).

[11] In addition, Exemption 6 applies when the likelihood of identifying an individual is "more palpable than [a] mere possibilit[y]." *Dep't of Air Force v. Rose*, 425 U.S. 352, 381 n.19, 96 S. Ct. 1592, 1608 n.19 (1976). Here, the SEC has pointed to nothing more than the mere possibility that redacted documents, in connection with unspecified "information already available to plaintiff and/or the public" that might be assembled with some similarly unspecified level of effort and resourcefulness, "would *allow*" an individual to identify the employee in question.

disclose these records in the manner indicated above." Op. at 22, 24 (emphasis added). The SEC has neither produced the documents nor shown why the Court's ruling was erroneous.

The deliberative process privilege applies to documents that express opinions on legal or policy matters and not documents that explain existing policy. Op. at 20. The SEC must demonstrate "*with respect to each its records*, that it was candid or personal in nature . . . ." *Id.* at 23 (emphasis added). The SEC's newly submitted materials are scarcely more informative than those already held insufficient by the Court. The Tyler Declaration provides no information as to particular documents; it simply recounts the SEC's general process of determining discipline and announces, without elaboration, that "[t]he documents withheld under the deliberative process privilege contain or reflect candid communications on those and other issues." Def.'s Mot. for Recons., Ex. 19, Tyler Dec. at ¶ 5 ("Tyler Dec."). This does not allow the Court to determine whether the privilege is properly applied to all the documents in question.[12]

In addition, while the SEC's newly revised *Vaughn* Index is longer than the previous one, it is not more informative and still asserts in conclusory fashion that the documents contain predecisional deliberations. For example, the first two documents on the previous Index are described as internal email chains among staff "RE: deliberations and reasons for employee discipline." Def.'s Reply, Ex. 9, SEC's Revised *Vaughn* Index at 2. Under the most recent *Vaughn* Index, these documents are marked deliberative because they "include[] discussion of deliberations that led to the discipline." Def.'s Mot. for Recons., Ex. 15 at 1. The Court should reject the SEC's transparent tactic of adding scant detail then tacking on a nonspecific assurance that the document contains predecisional deliberations.[13]

V. The SEC's Withholding of Numerous Documents Related to the Disciplining of an SEC Employee is Not Justified by the Work-Product Privilege

The SEC has submitted the Declaration of David Pinansky to support the argument that the disciplinary matter "could result in either administrative or court litigation" because the discipline

[12] In addition, Mr. Cuban incorporates by reference his earlier argument that routine disciplinary matters are not covered by the deliberative process privilege. *See* Pl.'s Reply 17-18 (R. Doc. 24).

[13] Even if the Court does determine that the privilege applies to portions of documents, it should reaffirm its previous holding that the SEC must disclose those documents in redacted form.

was both significant and contested. Def.'s Mot. for Recons., Ex. 20, Pinansky Dec. at ¶ 4 ("Pinansky Dec."). In providing legal advice to the SEC's human resource staff, he "specifically considered" unidentified issues that were "relevant to possible future litigation."[14]

But the record as a whole suggests that the contested documents were simply compiled in the ordinary course of business of disciplining an employee. The attorney-work-product privilege applies when documents "have been prepared or obtained *because of the prospect of litigation*," and the privilege "has no applicability to documents prepared by lawyers in the ordinary course of business or for other nonlitigation purposes." *In re Sealed Case*, 146 F.3d 881, 884, 887 (D.C. Cir. 1998). The Declaration of Nancy Ellen Tyler submitted by the SEC declares that "before discipline is imposed, SEC management, [human resources] staff, *and SEC attorneys* consider a variety of issues including whether the conduct at issue warrants discipline, what discipline is appropriate, *how memoranda describing misconduct and resulting discipline should be written*, how to make sure required procedures are followed, and *how to implement the decisions*." Tyler Dec. at ¶ 5 (emphases added). Thus, attorneys are consulted and memoranda drafted even when litigation is not anticipated. And the documents described in the *Vaughn* Index refer to general documents that, according to Ms. Tyler, are of the type prepared in the ordinary course of disciplining employees.[15]

The SEC's supporting materials thus suggest nothing more than that the documents in question were produced in the course of ordinary employee discipline, regardless of whether litigation might result. It has not demonstrated that those documents were "prepared or obtained

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[14] According to the SEC, the matter did end up in litigation. Pinansky Dec. at ¶ 4. The Declaration states that the human-resources staff sought legal advice in this matter "because they recognized that the personnel matter could result in discipline that could be appealed to the Merit Systems Protection Board." *Id.* The possibility of an appeal to the Board is unremarkable because a wide variety of ordinary employment actions can result in an appeal to the Board, including different types of demotions, terminations, reductions in pay, and suspensions. *See* 5 C.F.R. § 1201.3(a). Thus, a large category of quotidian employee discipline presents the possibility of such an appeal.

[15] The *Vaughn* Index documents largely indicate that the supposed attorney work product is either a memorandum proposing or describing discipline or advice about handling or implementing discipline. By making this observation, Mr. Cuban is not acknowledging that these documents are properly categorized as attorney work product at all. Many plainly are not. *See, e.g.*, Def. Mot. for Recons., Ex. 15, *Vaughn* Documents 50, 51, 65 (non-attorney forwarding emails possibly constituting misconduct to human resources department); 61 (email discussing need to seek legal advice). In addition, the SEC claims that certain documents contain discussions about ongoing enforcement actions and also must be withheld under the privilege. The one sentence provided to establish the application of the privilege, *see* Def.'s Mot. for Recons., Ex. 21, Wharton Dec. at ¶ 4 ("Wharton Dec."), is patently too conclusory to establish this point.

because of the prospect of litigation." *Sealed Case*, 146 F.3d at 884 (emphasis added); *see also Onwuka v. Fed. Express Corp.*, 178 F.R.D. 508, 514-15 (D. Minn. 1997) (rejecting as unspecific employer's claim of work-product protection for all documents prepared in disciplinary investigation that resulted in litigation). Accordingly, the Court lacks sufficient information to determine that the withheld documents were produced in specific anticipation of litigation as opposed to employee discipline in the ordinary course of business.

VI. The SEC's Two New Declarations from Nancy Ellen Tyler and David Pinansky Are Conclusory and Inadequate to Demonstrate That the Attorney-Client Privilege Applies

The attorney-client privilege requires a showing "that the information provided to [] lawyers was intended to be confidential and was not disclosed to a third party." *Id.* at 25. Previously, the SEC "offer[ed] nothing more than conclusory assertions and blanket affirmations" that the privilege applied. Op. at 27. The new Declarations are no different, consisting of more blanket affirmations and providing nonspecific statements assuring that, in general, people at the SEC do not disclose confidential materials.[16] In addition, the Declaration of Nancy Ellen Tyler simply announces that "[a]ll the substantive communications reflected in or related to Document Nos. 1-77 were confidential." Tyler Dec. at ¶ 4. No detail is given on particular documents, nor is an attempt made to show that all communications "reflected in or related to" the documents were confidential.

These Declarations do not demonstrate that "confidentiality was expected in the handling of these communications" or that the SEC was "reasonably careful" to control the disclosure of the information. Op. at 27. Not only does the SEC attempt to establish confidentiality through a blanket statement, but there is no indication that an effort was made to consult the large group of people who were party to the communications – attorneys, human-resources staff, and managers – to determine if the information was kept confidential. The SEC instead relies on generalized statements that its declarants were not affirmatively told that information had been disclosed beyond this group, and that confidentially is usually expected from SEC employees. The new Declarations thus fail to remedy the Court's concern with "conclusory assertions and blanket affirmations."

[16] Tyler Dec. at ¶ 4; Pinansky Dec. at ¶ 5.

VII. The SEC Improperly Attempts to Claim Exemption 3(A) for the First Time in Its Motion for Reconsideration

The SEC contends that Exemption 3(A) applies to two documents because they contain "Suspicious Activity Reports" and are exempt from disclosure under the Bank Secrecy Act. 31 U.S.C. § 5319. This is the first time in nearly two years that the SEC has claimed Exemption 3 as a basis for withholding documents. It did not, for example, raise the issue in the previous summary-judgment briefs, and it has pointed to no intervening change in law or facts to excuse its failure to timely raise the issue.[17] This is not a matter appropriate for a motion for reconsideration.[18] The SEC should not be permitted, after the Court has issued a ruling unfavorable to it, to present brand new exemptions and ask the Court to "reconsider" its ruling on arguments that were never made.[19]

Even if the Court entertains the SEC's entirely new argument, declarations supporting Exemption 3 withholding must provide a sufficient description of the documents with reasonably specific detail. The declarations cannot be "merely conclusory."[20] Here, the SEC's new Declaration merely announces that the documents in question contain a record of a Suspicious Activity Report. Wharton Dec. at ¶ 4. There is no further description or elaboration regarding the

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[17] The SEC provides no reason why the issue was not raised before, presumably because it has no explanation for its failure. It notes only that it has not waived this argument, but the cases it cites are inapposite. Under *Maydak v. Dep't of Justice*, 218 F.3d 760 (D.C. Cir. 2000), a party must raise a FOIA exemption in the district court if it wishes to argue that exemption in the court of appeals. *Assassination Archives & Research Ctr. v. C.I.A.*, 334 F.3d 55 (D.C. Cir. 2003), notes that, for an agency to have waived its ability to claim an exemption based on a previous disclosure, that disclosure must have been "official" and not unofficial. *See Fitzgibbon v. C.I.A.*, 911 F.2d 755, 765-66 (D.C. Cir. 1990). Neither case addresses a situation where a reconsideration motion advances a new theory that could have been brought before with no reason for the delay.

[18] *See Casanova v. Marathon Corp.*, 246 F.R.D. 376, 379 (D.D.C. 2007) ("A court should not, under the guise of 'reconsidering' a decision, permit a party to offer information that was readily available to that party when the court first ruled."); *see also* General Order and Guidelines for Civil Cases (ECF), Judge Walton at 8, *available at* http://www.dcd.uscourts.gov/dcd/sites/dcd/files/rbw-general-civil-order.pdf ("the court will not entertain . . .arguments that should have been previously raised, but are being raised for the first time in the 'Motion for Reconsideration'").

[19] *See Tax Analysts v. I.R.S.*, 152 F. Supp. 2d 1, 25-26 (D.D.C. 2001) (that agencies should not bring new exemption claims after a court has ruled against them, and observing that "the interests of judicial economy and finality militate against a court's tolerating a piecemeal approach by a party"), *aff'd in part and rev'd in part on other grounds*, 294 F.3d 71 (D.C. Cir. 2002); *see also Ryan v. Dep't of Justice*, 617 F.2d 781, 792 (D.C. Cir. 1980) (noting "[t]he danger of permitting the Government to raise its FOIA exemptions one at a time, at different stages of a district court proceeding"), *overruled on other grounds as recognized in Nat'l Inst. of Military Just. v. Dep't of Defense*, No. 06-5242, 2008 WL 1990366, at *1 (D.C. Cir. April 30, 2008); *Judicial Watch, Inc. v. Dep't of Energy*, 319 F. Supp. 2d 32, 34-35 (D.D.C. 2004).

[20] *See Thompson v. Exec. Office for U.S. Attorneys*, 587 F. Supp. 2d 202, 207-08 (D.D.C. 2008); *Students Against Genocide v. Dep't of State*, 50 F. Supp. 2d 20, 26 (D.D.C. 1999).

Report or the document. This Declaration is thus "merely conclusory," it provides no opportunity for meaningful review, and summary judgment in the SEC's favor on this issue is unwarranted.

* * *

For all of the reasons set forth above, none of the rulings as to which the SEC has sought reconsideration should be modified and the SEC's motion for reconsideration should be denied. The SEC has not even established that *in camera* review of any of the documents at issue is necessary, much less that summary judgment should now be awarded in its favor as to any of the documents. If, however, the Court is inclined to reconsider any of its prior rulings, Mr. Cuban respectfully submits that at a minimum, *in camera* review of the contested documents is warranted, in view of the arguments set forth above and in his briefs previously submitted in connection with the parties' respective summary judgment motions.[21] *See* 5 U.S.C. § 552(a)(4)(B).

Dated: November 19, 2010

Respectfully submitted

/s/ George Anhang

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[21] Of note, the SEC has previously withheld documents that should never have been withheld, and *in camera* review may well reveal the SEC is continuing to improperly withhold certain documents. For example, in its January 15, 2010 *Vaughn* index, the SEC indicated that it was withholding Document 66 of the *Vaughn* Index because it was subject to Exemption 6 and was being "[w]ithheld *in its entirety* to protect *personal privacy interests* in personnel matters." Def's Mot. Summ. J., Ex. 2, Original *Vaughn* Index at 10 (emphasis added). Yet almost eleven months later, on the same day that the SEC filed its reconsideration motion, the SEC suddenly produced Document 66, which turned out to be a document relating in large part to email etiquette, and stating, among other things, "[s]ome people view upper case as the equivalent of SHOUTING. Be aware of the potential to unintentionally cause offense." This document contains no personal information whatsoever. It contains no names of SEC employees and is obviously not covered by Exemption 6. The SEC likewise previously withheld documents 23, 24, and 58 as attorney work product. Attorney-work-product documents, according to the SEC, were prepared by or at the direction of SEC attorneys anticipating litigation and "include[d] legal analysis and strategy." Revised *Vaughn* Index at 4, 8; Def. Reply at 8; *see also* Def.'s Reply, Ex. 10, Supp. Pinansky Dec. at ¶ 5. But these documents, which the SEC produced in redacted form at the eleventh hour just prior to the hearing on October 22, 2010, turned out to be electronically-generated notices regarding participation in a teleconference. By no stretch of the imagination do they reflect legal analysis, strategy, or other work product. Yet until the last minute, the SEC withheld them.