UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

STATUS REPORT REGARDING PLAINTIFF'S PROPOSAL TO PAY FOR SEARCH AND APPLICATION OF EXEMPTION 7(A) TO DOCUMENTS RELATING TO ONGOING ENFORCEMENT ACTION

Defendant, the Securities and Exchange Commission ("SEC"), is filing this document to address two issues that arose at the October 22, 2010 status hearing in this Freedom of Information Act ("FOIA") case: (1) whether Cuban can pay to the Commission the funds necessary for the Commission to hire contract attorneys or to pay its staff to work overtime to process documents he is seeking under FOIA, and (2) whether Exemption 7(A) continues to apply to documents from an investigation when the SEC has an ongoing enforcement proceeding based on the investigation. Those issues are discussed below, and this report also provides an update on the SEC's efforts to accelerate review of documents in its FIFO track.

I. The SEC Cannot Accept Funds from Cuban to Hire Contractors or Pay Overtime

The main matter before the Court at the October 22 hearing was the time the SEC needed to process 107 boxes of materials, including 2.2 GB of electronic data, potentially responsive to

Cuban's FOIA requests.[1] Most of those documents are from a closed Commission investigation entitled *In the Matter of Mamma.com* (HO–09900) ("*Mamma.com*"). (Winter Decl. ¶¶ 107, 109 (Dkt. No. 10-1).) That investigation is temporally and substantively distinct from the Commission's ongoing enforcement proceeding against Cuban. (Kaplan Decl. ¶ 6 (Dkt. No. 34-3).)[2]

During the October 22 hearing, Cuban's counsel for the first time offered that Cuban could facilitate a faster review than the SEC can provide by paying for temporary contract attorneys to conduct the review or by paying for SEC staff to work overtime to review the documents. The Court continued the hearing so that the SEC could evaluate Cuban's offer to pay for people to conduct the review. The SEC has determined that it cannot accept Cuban's offer. The Miscellaneous Receipts Statute governs such a situation, and it provides – with an exception relating to debt collection efforts that is not not applicable here – that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). This provision prevents agencies from usurping Congress's "power of the purse." Congressional appropriations establish the maximum authorized program level, and agencies cannot circumvent that limit by augmenting appropriations from sources outside the government. *See* Letter from Anthony H. Gamboa, General Counsel, U.S. General Accounting Office to Senator Charles S. Bond, Committee on Small Business

[1] At the October 22 hearing and in a filing before the hearing, the SEC provided information and documentation regarding the time it needed to process not only Cuban's request, but also approximately 845 boxes ahead of Cuban's request in the FIFO queue. (Status Report (Dkt. No. 32); Suppl. Winter Decl. (Dkt. No. 32-2).)

[2] If the documents were relevant to the enforcement action against Cuban, Cuban would be able to obtain the non-privileged documents pursuant to a discovery request in that action. His reliance on FOIA suggests that option is not available.

and Entrepreneurship, U.S. Senate (Jan. 15, 2004) (No. B-300248) (attached hereto as Ex. 1) (concluding that the Small Business Administration "improperly augmented its appropriations" when it used fees collected from banks to pay a contractor to conduct oversight reviews).

As any money Cuban paid to the Commission would have to be deposited in the Treasury, the SEC would not be able to use it to hire contractors or pay staff overtime to process the documents Cuban seeks under FOIA.

II. Status of Review of Documents in FIFO Track

When the SEC filed its October 20, 2010 Status Report, it estimated that it would be able to start reviewing the documents Cuban requested in September 2011. However, that estimate was based in part on the fact that the SEC's FOIA Office had requested funding to hire contractors to review documents in its FIFO track. (*See* Suppl. Winter Decl. ¶ 16 (Dkt. No. 32-2).) Since the time of the Winter Declaration, SEC staff have been notified that they are operating under a continuing resolution that limits spending to FY 2010 levels, and the FOIA Office's request for funding for contractors has been denied at this time. Once Congress passes a new budget for the SEC, the FOIA Office anticipates again requesting funding for contractors. The SEC will continue to try to meet the September 2011 date, but if it cannot use contractors, it will likely need additional time.

III. The SEC Properly Relied on Exemption 7(A) to Protect Investigative Documents from an Investigation that Led to a Pending Enforcement Action

This Court's September 22, 2010 Opinion found that the SEC had supported its assertion of Exemption 7(A). The Opinion, however, focused on documents from investigations conducted by the Commission's Office of Inspector General that the SEC withheld under Exemption 7(A) and said little about the separate set of documents that the SEC withheld under Exemption 7(A) because of

its pending enforcement action against Cuban, *SEC v. Cuban*, No.08-2050-D (N.D. Tex.).[3]

At the October 22 hearing, Cuban's counsel stated that Cuban was not contesting the continued application of Exemption 7(A) to the documents from the Office of Inspector General that are still being withheld under that exemption. However, Cuban's counsel questioned whether the Commission's assertion of Exemption 7(A) for documents from the investigation leading to *SEC v. Cuban* and from that litigation should be upheld. In court, Cuban's counsel argued that Exemption 7(A) is not available for the documents related to *SEC v. Cuban* because the SEC is withholding documents from an investigation that has now matured into litigation and thus is effectively closed.

To the extent Cuban's counsel was attempting to argue generally that Exemption 7(A) cannot apply once an investigation matures into litigation, his argument is plainly meritless. Courts have frequently upheld assertions of Exemption 7(A) in that circumstance. *See, e.g.*, *Kansi v. Dep't of Justice*, 11 F. Supp. 2d 42, 44 (D.D.C. 1998) (holding that Exemption 7(A) can continue to protect investigative documents "at least until plaintiff's conviction is final"). However, Cuban's counsel also said he was simply making an argument that was already raised in Cuban's summary judgment brief. That brief never argues that Exemption 7(A) is not available to protect investigative documents once litigation is pending. Instead, it argues that (1) producing correspondence from the investigation could not harm the litigation because by filing a complaint and briefing legal theories the SEC has "fully revealed" its strategy; and (2) Exemption 7(A) does not apply to internal SEC documents because Exemption 5 is the exclusive basis available for withholding those documents. (Pl.'s Mem. of Law in Opp'n to Def.'s Mot. for Partial Summ. J. and in Support of Pl.'s Cross-Mot.

[3] These documents are also separate from the investigative documents from the *Mamma.com* investigation that are in the FIFO queue. As noted above, the *Mamma.com* investigation is separate and distinct from the investigation of Cuban and the subsequent litigation against him.

for Summ. J. at 34-35 (Dkt. No. 13).)

Those arguments are meritless. Initially, the SEC has submitted a declaration that satisfies its burden of demonstrating that release of the documents could reasonably be expected to cause an articulable harm. (*See* Riewe Decl. ¶¶ 7-12 (Dkt. No. 10-6).) In moving for summary judgment, the SEC explained that it was withholding two categories of documents from its litigation against Cuban and the related investigation: (A) Commission correspondence with other government agencies and third parties; and (B) internal SEC documents, including attorney-client privilege and/or work-product materials. (*See* Def.'s Mem. of Law in Support of its Mot. for Partial Summ. J. at 24 (Dkt. No. 10).)[4] The Riewe declaration describes the specific types of documents that come within those categories and details the harm that could reasonably be expected to result from disclosure of each category. (*See* Riewe Decl. ¶¶ 7-12 (Dkt. No. 10-6).)

The SEC's reply brief in support of its motion for summary judgment specifically addresses Cuban's two claims: it points out that the Riewe Declaration explained how release of both categories could cause harm and explained that the availability of Exemption 5 in no way barred reliance on Exemption 7(A). (*See* Def.'s Reply to Pl.'s Resp. to Def.'s Mot. for Partial Summ. J. and Resp. to Pl.'s Cross Mot. for Summ. J. at 16-17 (Dkt. No. 22).)

Cuban's efforts to suggest that changed circumstances may somehow affect these arguments or that the Riewe Declaration is somehow no longer sufficient are without merit. The only difference between now and January 2010 when the SEC filed its motion for partial summary judgment and the Riewe Declaration is that the SEC has produced a few documents that had previously been

[4] Over 11,000 pages of non-privileged documents from the SEC's investigative file are not being withheld under FOIA because the SEC has already provided those documents to Cuban in discovery in *SEC v. Cuban*. (Riewe Decl. ¶ 4 (Dkt. No. 10-6).)

withheld under Exemption 7(A) in connection with discovery on an attorney fee issue in *SEC v. Cuban*, and the Fifth Circuit has vacated the district court judgment dismissing the case and remanded the case to the district court "for further proceedings including discovery, consideration of summary judgment, and trial, if reached." *SEC v. Cuban*, 620 F.3d 551, 558 (5th Cir. Sept. 21, 2010).

The fact that in that litigation the SEC produced a few documents – for which the SEC no longer asserts Exemption 7(A) – does not change the fact that revealing documents it is not required to produce would "reveal the development of the Commission's legal strategy and the staff's consideration of what legal theories to pursue or not to pursue in its investigation and the ongoing litigation." (Riewe Decl. ¶ 8.) Cuban's suggestion that in the early stages of litigation in *SEC v. Cuban* the Commission "fully revealed" all theories, leads, or strategies it ever considered is plainly without merit. In conducting its litigation, the SEC would be harmed by having Cuban know and question every step it took as it investigated Cuban's trading and developed its case against him.

Similarly, nothing changes the fact that the potential availability of Exemption 5 does not preclude reliance on Exemption 7(A). The one case that Cuban cites does not make such a general statement; it says that in that case the government had not established that disclosure would cause harm as required by Exemption 7(A) because the document at issue addressed facts that had occurred "decades ago." *See Goodrich Corp. v. Envtl. Prot. Agency*, 593 F. Supp. 2d 184, 194 (D.D.C. 2009).[5] Significantly, in several cases, courts have recognized that Exemption 7(A) can apply to

[5] To the extent *Goodrich* contends that obtaining a litigation advantage is not a relevant harm under Exemption 7(A), it cites no support for such a claim. In addition, that claim appears to be inconsistent with the general premise that the government must just show "some articulable harm," *Manna v. Dep't of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995), and with the Supreme Court's statement that "[f]oremost among the purposes of this Exemption was to prevent 'harm [to] the Government's case

documents protected – or potentially protected – by Exemption 5. *See, e.g.*, *Cal-Trim, Inc. v. Internal Revenue Serv.*, 484 F. Supp. 2d 1021,1026-28 (D. Ariz. 2007) (upholding withholding of internal correspondence under Exemptions 5 and 7(A)); *Judicial Watch, Inc. v. Dep't of Justice*, 306 F. Supp. 2d 58, 75 (D.D.C. 2004) (protecting under Exemption 7(A) documents describing "the status of the investigation, the SEC's 'main concern,' the material the SEC had thus far collected, its assessment of that information, and the information that it still required"); *Hambarian v. Comm'r of Internal Revenue*, No. 99-9000, 2000 WL 637347, at *2 (C.D. Cal. Feb. 16, 2000) (finding that documents were exempt from disclosure as work product and exempt under Exemption 7(A)); *Comer v. Internal Revenue Serv.*, No. 97-76329, 1999WL 1022210, at *3 (E.D. Mich. Sept. 30, 1999) (finding withheld documents were work product and protected by Exemption 7(A)).

* * *

in court' . . . by not allowing litigants 'earlier or greater access' to agency investigatory files than they would otherwise have.'" *Nat'l Labor Relations Bd. v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224-25, 98 S. Ct. 2311, 2318 (1978) (citations omitted).

CONCLUSION

For the reasons stated above, the SEC cannot accept Cuban's offer to pay for the processing of the documents, and this Court's finding that Exemption 7(A) protects documents from the litigation in *SEC v. Cuban* and the related investigation is still correct.

Respectfully submitted,

/s/ Melinda Hardy

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

Dated: December 1, 2010

Attorneys for Defendant