UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

Plaintiff Mark Cuban ("Cuban") makes two principal arguments in his Response to Defendant's Status Report. First, Cuban uses this court filing to argue that the Securities and Exchange Commission ("SEC") must accept his offer to pay overtime or pay for contractors so that he does not have to wait for his turn in the SEC's queue for large FOIA requests even though he does not – and cannot – contend that this is a legal issue for the Court to decide. Second, he reiterates some of the same arguments regarding Exemption 7(A) that he made in his summary judgment brief but does not contend that any circumstances have changed that warrant revisiting those arguments.

I. The SEC cannot accept Cuban's proposal to pay SEC employees or contractors to process his FOIA requests.

The Commission filed its Status Report on December 1, 2010, in order to apprise the Court that the SEC could not accept Cuban's proposal to pay SEC contractors or employees to process his FOIA requests. In light of this rejection, the only issue currently pending before the

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Court for purposes of the February 1, 2011 status conference is the original issue calendared for hearing on September 22, 2010—namely, to "determine how much additional time, if any, the defendant is entitled to receive to complete the processing of plaintiff's FOIA requests." Memorandum Opinion at 49. As explained in the SEC's Status Reports filed on October 20, 2010, and December 1, 2010, the SEC will continue to process FOIA requests on a "first in, first out" basis, and will try to the best of its ability to commence reviewing the 107 boxes of materials, including 2.2 GB of electronic data, requested by Cuban in September 2011. That issue is governed by the principles set forth in *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976). The parties have already briefed those issues, and nothing in Cuban's response to the SEC's Status Report addresses that issue. The Status Report discusses only whether it is reasonable for the SEC to decline Cuban's offer to pay for an expedited review of the documents he seeks.

While it is not necessary to address whether the SEC's decision is reasonable, we will do so briefly to provide assurance that the SEC is not rejecting a settlement offer without good reason for doing so. In its Status Report, the SEC explained that it was not accepting Cuban's offer to pay contractors or employees working overtime to process Cuban's FOIA request because under the Miscellaneous Receipts Statute ("MRS"), 31 U.S.C. 3302(b), any money Cuban provides to the SEC to cover these costs must be deposited in the Treasury. Thus, the SEC would have expended funds to pay employees or contractors to work overtime on Cuban's FOIA requests but would not be able to use any of the funds Cuban paid.

Cuban's somewhat puzzling response is that because he will have to pay fees provided for in the FOIA and the SEC's FOIA regulations, he should be able to pay additional money to have his FOIA requests processed before requesters who made their FOIA requests earlier in

time. That, however, does not address the SEC's concern that it will not be able to keep any of the money that Cuban pays. The MRS requires that any funds that Cuban provides to the SEC that are intended to pay for "overtime" or contractor expenses that the Commission would incur by accepting his proposal must be deposited in the Treasury. The SEC would consequently not be able to use Cuban's funds to pay employees' overtime or to pay contractors.

Cuban also cites to a letter from the Comptroller General to argue that the MRS does not prevent him from paying contractors to process his FOIA request. *See Matter of Retention of Fees Received by EPA Contractors Providing Information Services to the Public*, B-166506 Comp. Gen., 1975 WL 7967 (Oct. 20, 1975)("*EPA Fees Case*"). The situation in the *EPA Fees Case*, however, does not suggest that Cuban's proposal would work here. In contrast with the instant case, where Cuban has requested under FOIA that the SEC produce its non-public documents, the materials at issue in the *EPA Fees Case* were already (i) in the possession of outside contractors, and (ii) information that the EPA had previously determined should be "available to the public." In the present case, the relevant materials are in the SEC's possession. Furthermore, whether and to what extent these materials can be released publicly still needs to be determined, and making that determination is what will take time. Indeed, as noted in the Declaration of Margaret Celia Winter, nine separate requests for confidential treatment have been filed by third parties with the SEC in connection with these materials. Winter Decl. ¶152.

Finally, we note that Cuban's proposal is inconsistent with the key principle outlined by the D.C. Circuit in *Open America* and its progeny, that the most fair way for agencies to process FOIA requests is to address them on a "first in, first out" ("FIFO") basis. *Open America*, 547 F.2d 605, 614 (D.C. Cir. 1976) (noting that processing requests on a FIFO basis was "fair, orderly and the most efficient procedure which can be adopted under the circumstances");

Freeman v. United States, 822 F.Supp. 1064, 1067 (S.D.N.Y. 1993) ("FIFO appears to be the fairest method of processing requests"). Cuban's novel proposal, if accepted, would essentially replace the D.C. Circuit's FIFO principle with one that affords requesters with the deepest pockets preferential treatment.

II. The SEC relied properly on FOIA Exemption 7(A).

Cuban mischaracterizes the SEC's arguments with respect to its assertion of Exemptions 7(A) and 5, claiming incorrectly that the Commission is contending that certain investigative materials are subject to Exemption 7(A) solely "***because*** [they are] exempt under Exemption 5." Cuban Response at 9 (emphasis in original). This is not accurate. The SEC has never made this argument, and Cuban's attempt to mischaracterize the SEC's legal arguments lacks merit. Indeed, Cuban's Response neither identifies nor contends that any circumstance has changed that impacts in any way the arguments he already made, and which this Court implicitly rejected in its Memorandum Opinion, regarding the SEC's invocation of FOIA Exemption 7(A). The arguments contained in Cuban's Response merely rehash arguments he already made—unsuccessfully—to this Court in his earlier submissions.

To be clear, it is the SEC's position, as stated explicitly in the Commission's earlier submission, that ***both*** Exemption 7(A) ***and*** Exemption 5 apply to certain investigative documents.[1] Contrary to Cuban's arguments, the SEC has never claimed that a causal nexus exists between these statutory exemptions. Rather, Exemption 7(A) and Exemption 5 constitute distinct bases for withholding from Cuban certain confidential and privileged materials. SEC Status Report at 5-6.

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[1] As previously noted in the SEC's earlier filed Status Report, the Riewe Declaration filed in support of Defendant's Motion for Partial Summary Judgment explains in detail how the release of these materials could cause harm to the SEC's ongoing enforcement proceedings, including revealing the development of the Commission's legal strategy and the staff's consideration of what legal theories to pursue. (Riewe Decl. ¶¶ 8, 10, 12.)

Cuban's contention that the SEC must "describe individual documents" to show that these exemptions both apply is incorrect. It is well-accepted that Exemption 7(A) may apply to documents also potentially protected by Exemption 5. *See, e.g., Cal-Trim v. IRS*, 484 F. Supp. 2d 1021, 1026-28 (D. Az. 2007). Plaintiff does not, and cannot, cite any case or statutory provision to the contrary. The fact that the SEC invokes both Exemption 7(A) and 5 does not impact the well-established rule that "the government [when it invokes Exemption 7(A)] need not justify its withholdings document-by-document; it may instead do so category-of-document by category-of-document." *Crooker v. ATF*, 789 F.2d 64, 67 (D.C. Cir. 1986).

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/Woo S. Lee_______________________________

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