

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<p><b>MARK CUBAN,</b></p> <p style="text-align: center;"><b>Plaintiff,</b></p> <p style="text-align: center;">vs.</p> <p><b>SECURITIES AND EXCHANGE COMMISSION,</b></p> <p style="text-align: center;"><b>Defendant.</b></p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p><b>Case No. 1:09-cv-00996 (RWB)</b></p> <p><b>Judge Reggie B. Walton</b></p>
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**PLAINTIFF MARK CUBAN’S RESPONSE TO THE “SUPPLEMENTAL STATUS REPORT” OF DEFENDANT SECURITIES AND EXCHANGE COMMISSION**

In its third and most recent status report submitted on December 23, 2010, the Securities and Exchange Commission (“SEC”) contends that the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b), mandates rejection of Mr. Cuban’s offer to cover the costs of expediting the processing of his FOIA requests. According to the SEC, any money paid by Mr. Cuban would not actually offset the actual costs incurred, but would simply go to the United States treasury instead.

These arguments are specious. By letter dated July 22, 2009, the SEC already asked Mr. Cuban to pay to cover the (non-overtime) costs of processing his requests.<sup>1</sup> Unless it was a sham request, the SEC’s request plainly demonstrates that monies paid by Mr. Cuban *can* be used to offset search and review costs. It is perfectly consistent with that request for Mr. Cuban to simply pay additional funds to cover the extra costs of expedited search and review.

Moreover, the Comptroller General has previously determined that an agency like the SEC may permit a FOIA requester to pay a contractor directly for the processing and production of agency documents. *Matter of Retention of Fees Received by EPA Contractors Providing Information Services to the Public*, B-166506 Comp. Gen., 1975 WL 7967, at \*2-3 (Oct. 20, 1975). As long as the contractor is working as an independent entrepreneur and is not charging fees in excess of the agency’s FOIA fee schedule, and as long as the procedure is not being used to

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<sup>1</sup> Pl.’s Resp. to Def.’s Status Rep. (ECF No. 42), Ex. A.

circumvent FOIA, the money received by the private contractor will not be subject to the Miscellaneous Receipts Statute. *Id.* In fact, the Comptroller General observed that “the contractor will generally be able to provide the information more cheaply than [the agency] can.” *Id.* at \*2. The Comptroller General approved a very similar procedure several years after that. *See Matter of Federal Election Commission – Sales of Microfilm Copies of Candidate and Committee Reports*, 61 Comp. Gen. 285, 285-87, 1982 WL 26592 (1982).

The SEC, however, claims that these decisions “do[] not suggest that Cuban’s proposal would work here.”<sup>2</sup> According to the SEC, in the EPA matter contractors already had possession of the documents at issue and the agency had determined that the documents should be made available to the public. According to the SEC, Mr. Cuban’s FOIA request is different because no such determination has yet been made by the SEC with respect to the documents sought by Mr. Cuban.

This objection by the SEC is disingenuous. The SEC, by its own admission, *was already planning to use contractors*. On at least two occasions before Mr. Cuban made his good-faith offer to cover the costs of expedited review by contract attorneys, the SEC explicitly represented to the Court that it intended to hire contractors to process FOIA requests to address its backlog. On neither occasion did the SEC indicate the use of contractors was unworkable for the reasons it now raises in an effort to squelch Mr. Cuban’s proposal. In a Declaration submitted to the Court on October 20, 2010, the SEC’s FOIA and Privacy Act Officer represented that “the FOIA Office has requested funding to hire contractors to review documents in the FIFO Track and work towards eliminating the SEC’s FIFO backlog.”<sup>3</sup> And again, at the October 22, 2010, hearing before the Court, counsel for the SEC stated that the FOIA office was “in the works of beginning to contemplate and seek additional resources to hire outside contractors to come in. . . . And it’s thinking about hiring two to three contractors to work on the FIFO [queue] full time.” Tr. at 9 (statement of Woo Lee).

In fact, the SEC previously represented to the Court that its initial estimates of how much time it would take to begin reviewing documents responsive to Mr. Cuban’s requests were based

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<sup>2</sup> Def.’s Third Status Rep. (ECF No. 45) at 3.

<sup>3</sup> Def.’s First Status Report (ECF No. 32), Supp. Decl. of Celia Winter at ¶ 16.

upon the SEC's plan to hire outside contractors to process documents.<sup>4</sup> Although the SEC later claimed that it had to withdraw its estimates because funding for the contractors was denied (*id.*), the fact remains that the SEC unambiguously told the Court that it had been prepared to use contractors for FOIA review and processing. Using contractors now to expedite the processing of Mr. Cuban's requests should be no less feasible, notwithstanding the SEC's strained efforts to explain away the Comptroller General's prior decisions. Inasmuch as the only problem the SEC identified with the use of contractors was inadequate funding, Mr. Cuban's offer eliminates that problem with respect to the contractors necessary to process his requests.

Finally, the SEC also suggests that Mr. Cuban's offer is inconsistent with the D.C. Circuit's opinion in *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976), because the offer "replace[s] the D.C. Circuit's FIFO principle with one that affords requesters with the deepest pockets preferential treatment."<sup>5</sup> Mr. Cuban's offer does nothing of the sort. The *Open America* court held that, when an agency is backlogged but is showing due diligence in complying with requests, a FOIA requester with no urgent need may not jump to the front of the line simply by filing a lawsuit. *Id.* at 614-16. The court stated that the requester failed to allege that the agency's first-in, first-out policy "is anything but fair, orderly, and the most efficient procedure which can be adopted under the circumstances." *Id.* at 614.

*Open America* thus has no bearing on Mr. Cuban's proposal because he is not asking to jump the line based on his lawsuit alone. In fact, the *Open America* court noted that the "real parties at interest" in the suit might be those who had filed FOIA requests before the plaintiff in that case, as their waits would be extended by putting the plaintiff at the front of the line. *Id.* at 614. This is not the case here. As this Court has observed, Mr. Cuban's proposal would not prolong the wait of anyone in the FOIA queue before him because he is not asking for resources to be diverted from earlier-filed requests. *See* Tr. at 17 ("he's not really affecting the movement of the processing insofar as the regular employees are concerned"). Indeed, Mr. Cuban's proposal would also have the beneficial effect of reducing the wait of everyone behind him.

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<sup>4</sup> *See* Def.'s Second Status Report (ECF No. 37) at 4.

<sup>5</sup> Def.'s Third Status Rep. at 3.

Dated: February 4, 2011

Respectfully submitted,

/s/ George E. Anhang

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 4, 2011, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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