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## **REPORT OF INVESTIGATION**

**UNITED STATES SECURITIES AND EXCHANGE COMMISSION  
OFFICE OF INSPECTOR GENERAL**

**Case No. OIG-511**

**Allegations of Enforcement Staff Misconduct in  
Insider Trading Investigation**

**August 22, 2011**

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## REPORT OF INVESTIGATION

Case No. OIG-511

### Allegations of Enforcement Staff Misconduct in Insider Trading Investigation

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# REPORT OF INVESTIGATION

## UNITED STATES SECURITIES AND EXCHANGE COMMISSION OFFICE OF INSPECTOR GENERAL

Case No. OIG-511

### Allegations of Enforcement Staff Misconduct in Insider Trading Investigation

#### Introduction & Summary of Allegations

On January 30, 2009, complainant Mark Cuban, through his counsel at the law firm Dewey & LeBoeuf, filed a complaint with the Securities and Exchange Commission ("SEC" or "Commission") Office of Inspector General ("OIG"), outlining various allegations of misconduct by the SEC Division of Enforcement ("Enforcement") staff. Exhibit 1. Mr. Cuban, a well-known entrepreneur and owner of the Dallas Mavericks basketball team, alleged Enforcement staff engaged in misconduct in the course of its investigation of Mr. Cuban for insider trading in connection with the sale of all of his Mamma.com stock before the company publicly announced a private investment in public equity ("PIPE") transaction in June 2004. *Id.* at 1. Generally, Mr. Cuban alleged that: (1) the Enforcement staff violated SEC policy when they notified Mr. Cuban that they intended to recommend insider trading charges against him before the investigation was substantially complete; (2) Enforcement staff showed a bias and predetermined agenda against Mr. Cuban and the investigation appeared to have been motivated by political bias because an SEC Fort Worth Regional Office ("FWRO") Enforcement attorney sent Mr. Cuban a series of politically charged e-mails, which he later copied to former Chairman Cox, just before Mr. Cuban received his Wells notice; (3) Enforcement staff "used the closure of [an earlier] investigation to attempt to induce Mamma.com's executives to cooperate with the staff and perhaps even to depart from the testimony they previously had provided" to Mr. Cuban's counsel during their own investigation of the matter; and (4) a senior Enforcement official failed to properly report the misconduct of the FWRO Enforcement attorney who was e-mailing Mr. Cuban from his SEC e-mail account during the ongoing investigation into Mr. Cuban's trading.<sup>1</sup> *Id.*

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<sup>1</sup> The January 2009 letter of complaint summarized the allegations:

... the staff seemed to have rushed to judgment and reached its decision to recommend charges against Mr. Cuban based on an incomplete record; the staff initiated the Wells process long before the staff's investigation was completed; the staff took the interviews of key witnesses after the staff's mind was already made up about Mr. Cuban, thereby apparently shaping the interview process; the staff was resistant to Mr. Cuban exercising his right to conduct his own investigation of the matter and to prepare a defense to the staff's ill-founded allegations; the lead SEC trial lawyer in the litigation against Mr. Cuban made a

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At the time of the investigation into Mr. Cuban's sale of all of his Mamma.com shares of stock, Attorney 1 ("Attorney 1") was the lead staff attorney in the investigation. Attorney 1 reported to then Branch Chief Attorney 3 ("Attorney 3") who reported to then Assistant Director Assistant Director 1 and ("Assistant Director 1"). The Associate Director over Assistant Director 1 Attorney 3 and Attorney 1 was Scott Friestad ("Friestad"). Attorney 2 ("Attorney 2") was, and continues to be, the trial attorney for the ongoing litigation from the complaint filed against Mr. Cuban arising from this investigation. At the time of the investigation, Christopher Cox was Chairman of the SEC.

On October 27, 2009, Mr. Cuban's counsel submitted another letter, and expert report, following the OIG taking Mr. Cuban's and Mr. Cuban's attorneys' testimony. Exhibit 2. That letter and the expert report focused on the allegation that, in the investigation of Mr. Cuban, Attorney 1 told Mr. Cuban's counsel that the Enforcement staff had "contemporaneous supporting documentation" of the relevant telephone call between Mr. Cuban and Guy Faure ("Faure"), then President and Chief Executive Officer ("CEO") of Mamma.com. *Id.* at 1. The expert report discussed the admissibility of that evidence, which were e-mails sent from Mamma.com's Chairman, Witness 2 ("Witness 2") to Mamma.com board members about a telephone call between Faure and Mr. Cuban the same day and the next day, which the SEC alleged showed Mr. Cuban agreed to keep the information he learned from Faure about the upcoming Mamma.com PIPE transaction confidential. *Id.* The expert report concluded that the Enforcement staff's representation of that evidence as contemporaneous "painted an extremely false picture of the evidence that the SEC had" which could have affected how Mr. Cuban's counsel responded to the SEC. *Id.* at 1&2.

In addition, Mr. Cuban alleged that Attorney 1 characterization of Mr. Cuban's call with Witness 1 ("Witness 1") the placement agent for the PIPE transaction for Mamma.com, was misleading because she "attempted to create the impression that Mr. Cuban's call with him involved a *continuing* acceptance by Mr. Cuban of confidential information that *compounded* the alleged impropriety of his subsequent trades." *Id.* at 2 (emphasis in original). Mr. Cuban further alleged that he learned from Witness 1 that he "never once told Mr. Cuban that the information he gave him about the PIPE transaction was confidential" and that the SEC must have learned the same from Witness 1 in their interview of him in December 2006. *Id.* at 2 & 3. He claimed that this information clearly tended to exonerate Mr. Cuban and that Attorney 1 "*intentionally omitted to mention*

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disparaging and unfounded remark about Mr. Cuban in a meeting with Mr. Cuban's counsel; a different member of the enforcement staff delivered a vicious personal attack upon Mr. Cuban by e-mail; a staff member, upon being informed of staff attorney misconduct, apparently took no immediate steps to refer the matter to the appropriate body for a full investigation and any necessary disciplinary action against the staff attorney in question; and, finally, key allegations in the SEC's complaint against Mr. Cuban are in direct conflict with the prior testimony of key witnesses.

Exhibit 1 at 9&10.

*any of this critical exculpatory information we would only learn from Mr. [Witness 1] many months later.” Id. at 3 (emphasis in original).*

The SEC OIG began its investigation of the above-outlined allegations of staff misconduct after receiving the January 30, 2009 letter of complaint from Mr. Cuban's counsel at Dewey & LeBoeuf, who began representing Mr. Cuban in this matter in early August 2007, along with attorneys from the law firm Fish & Richardson who had represented Mr. Cuban from January 2007. As discussed below, however, the investigation was suspended for more than a year because Mr. Cuban had pending before the federal district court a motion for attorney's fees and expenses in which Mr. Cuban made many of the same allegations of SEC staff misconduct. After the district court denied without prejudice Mr. Cuban's motion for attorney's fees on September 21, 2010, the OIG resumed its investigation into Mr. Cuban's allegations of SEC staff misconduct.

On June 2, 2011, Mr. Cuban's counsel filed another letter of complaint against [Attorney 1] concerning an allegation described as [Attorney 1] "tamp down" of a witness. Exhibit 3. That allegation had been previously alluded to by Mr. Cuban in the January 30, 2009 letter of complaint, wherein he alleged that Mr. Cuban's counsel's investigation was complicated by the fact that many of the witnesses expressed concern that cooperating with Mr. Cuban's counsel would cause them problems with the SEC. Exhibit 1 at 4. During the course of the ongoing litigation of this matter, discussed below, Mr. Cuban alleged that "at least one entity indicated that it had received a call from a member of the SEC's enforcement team expressly discouraging it from making a witness available -- in the words of one person, 'tamped down' by the SEC staff." Exhibit 3 at 2 & 3. In the June 2011 letter, Mr. Cuban claimed that [Attorney 1] violated State bar rules when "she purportedly requested that a witness not be made freely available to defense counsel." Exhibit 3 at 1. The OIG investigated all of these claims, as well as other related claims of staff misconduct made in the ongoing civil litigation.<sup>2</sup>

### The Civil Litigation

The SEC's investigation into Mr. Cuban's sale of all of his Mamma.com shares in June 2004 led to the November 17, 2008 filing of a civil complaint against Mr. Cuban in the United States District Court for the Northern District of Texas.<sup>3</sup> Exhibit 4. In that complaint, the SEC alleged that Mr. Cuban committed securities fraud by engaging in

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<sup>2</sup> Those additional claims include that a senior Enforcement official sending photographs of Mr. Cuban to other senior Enforcement officials evidenced a bias against Mr. Cuban and the "tamp down" allegation which was outlined more explicitly in the court pleadings at the time we took the testimonies in this investigation.

<sup>3</sup> On May 28, 2009, Mr. Cuban filed a complaint in the United States District Court for the District of Columbia against the SEC under the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, seeking the immediate production of the records denied to him and maintaining that the SEC's search efforts were inadequate and its reliance on exemptions to withhold documents was improper. *Mark Cuban v. Securities and Exchange Commission*, Civil Action No. 09-0996. On September 22, 2010, the district court granted Mr. Cuban summary judgment, in part, and found that the SEC's search for responsive documents was inadequate in certain respects. *Id.* On July 1, 2011, the district court granted in part and denied in part the SEC's motion for reconsideration of the September 2010 order. *Id.*

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insider trading when he sold his entire stake of 600,000 shares of stock in Mamma.com prior to the public announcement of a PIPE offering in June 2004, despite agreeing to keep material, non-public information about that impending stock offering confidential. *Id.* at 1. The Commission further alleged that by selling his stake, Mr. Cuban avoided losses in excess of \$750,000. *Id.* The Commission alleged Mr. Cuban violated sections 17(a) of the Securities Act of 1933 and 10(b) of the Securities Exchange Act of 1934. *Id.*

On August 13, 2009, the district court granted Mr. Cuban's motion to dismiss the SEC's complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6). The district court held that Mr. Cuban did not have a duty to refrain from trading on information about the impending PIPE offering and, therefore, could not be held liable under the misappropriation theory of insider trading.

On August 28, 2009, Mr. Cuban filed a motion for attorney's fees and expenses. 2009 U.S. Dist. LEXIS 113191. In the memorandum in support of the motion for attorney's fees, Mr. Cuban argued that the SEC should be sanctioned because it acted in bad faith in bringing suit against Mr. Cuban, for many of the same reasons outlined in the above-referenced letters to the SEC OIG. *Id.* Those reasons included: initiating the Wells process without having evidence of a confidentiality agreement between Mr. Cuban and Mamma.com; improperly attempting to prevent the Commission from receiving their second Wells submission; closing an earlier investigation into Mamma.com days before seeking new testimony from key witnesses; and taking the testimony of Mamma.com's CEO for the second time in an attempt to get him to change his earlier testimony. *Id.*

On October 7, 2009, the SEC appealed the district court's decision to grant Mr. Cuban's motion to dismiss. 2010 U.S. 5<sup>th</sup> Cir. Briefs LEXIS 72. On September 21, 2010, the U.S. Court of Appeals for the Fifth Circuit vacated the district court's decision to grant Mr. Cuban's motion to dismiss and remanded for further proceedings including discovery, consideration of summary judgment and, if necessary, trial. 2010 U.S. App. LEXIS 19563. On that same day, the district court denied, without prejudice, Mr. Cuban's motion for attorney's fees and expenses writing, in part, "This will . . . eliminate the need to resolve difficult discovery issues that may arise due to the pendency of parallel litigation involving plaintiff's suit on the merits and defendant's attorney's fees motion." Exhibit 5. As a result, the district court did not rule on any of the allegations of misconduct reviewed in this report. On July 18, 2011, the district court issued a decision finding that Mr. Cuban failed to adequately plead prejudice related to his claims of misconduct, and that therefore it need not address whether he adequately pleaded that the Enforcement staff had engaged in egregious misconduct.<sup>4</sup> 2011 WL 2858299 (N.D. Tex.). The litigation in this matter is ongoing.

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<sup>4</sup> In that July 18, 2011 Memorandum Opinion and Order the Court concluded, "The court holds that Cuban has failed to allege facts that give the SEC fair notice that the misconduct on which he relies resulted in prejudice to his defense of the enforcement action that rises to a constitutional level and is established through a direct nexus between the misconduct and the constitutional injury. This is fatal to his unclean hands defense." 2011 WL 2858299 (N.D. Tex.) at 23.

### Executive Summary of Investigative Findings

The SEC OIG conducted a thorough and comprehensive investigation into Mr. Cuban's claims. The OIG investigation was protracted, however, because it was suspended for more than a year when Mr. Cuban had pending in the district court a motion for attorney's fees and expenses involving many of the same allegations of SEC staff misconduct, as discussed above. After the district court denied without prejudice Mr. Cuban's motion for attorney's fees, the OIG resumed its investigation into Mr. Cuban's allegations of SEC Enforcement staff misconduct.

In all, the OIG concluded that there was insufficient evidence to substantiate Mr. Cuban's claims that the SEC Enforcement staff engaged in misconduct in conducting their investigation into Mr. Cuban's sale of his Mamma.com stock shares. Specifically, the OIG investigation found that there was insufficient evidence to substantiate the claim that Enforcement improperly provided Mr. Cuban's counsel with a "Wells notice" before the investigation was substantially complete. The OIG found that Enforcement had conducted significant investigative work before the Wells notice was provided on May 23, 2007. SEC Enforcement staff had 1) conducted interviews of <sup>Witness 1</sup> [REDACTED] <sup>Witness 2</sup> [REDACTED] Mark Cuban, Guy Faure, and <sup>Witness 2</sup> [REDACTED] <sup>Witness 2</sup> [REDACTED] 2) obtained proffers from the other Mamma.com board members, as well as 3) taken investigative testimony of Guy Faure and Mark Cuban, the two participants to the relevant telephone call. SEC Enforcement staff had also obtained important documents including Mr. Cuban's trading and telephone records, the timing of the announcement of the PIPE deal with Mr. Cuban's trades, and the so-called "contemporaneous" e-mails from <sup>Witness 2</sup> [REDACTED] about the Faure/Cuban telephone call that same day and the following day. While the OIG did find that some additional investigative work was conducted by Enforcement staff after the Wells notice and submissions, the OIG found that conducting additional investigative work, and even testimony, after the Wells notice is provided, is not *per se* prohibited by the Enforcement Manual or internal guidance and sometimes occurs in Enforcement cases.

The OIG investigation also did not find sufficient evidence to substantiate Mr. Cuban's claim that an earlier Enforcement investigation into Mamma.com was closed as a *quid pro quo* for the investigation relating to Mr. Cuban. Mr. Cuban alleged that a mere four days after his counsel sent a September 21, 2007 letter to Associate Director Friestad and "just around the time the staff was seeking testimony from the very same Mamma.com executives in its investigation of Mr. Cuban, the Commission abruptly closed its investigation of Mamma.com, which at that time had been ongoing for over three years." Mr. Cuban further alleged "that the staff would suddenly choose to close a long-standing investigation of Mamma.com only a few days after receiving a Wells submission, and just when the staff was seeking testimony from the company's senior executives, gives rise to the reasonable suspicion that the staff, bent on obtaining testimony unfavorable to Mr. Cuban, used the closure of the investigation to attempt to induce Mamma.com's executives to cooperate with the staff and perhaps even to depart from the testimony they previously had provided to us." However, the OIG found evidence that the Enforcement staff intended to close the earlier investigation by

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September 30, 2006, several weeks before the matter under inquiry (MUI) was opened into Mark Cuban's trading. While a letter was not sent to Mamma.com until a year later, and at the same time that SEC Enforcement staff was conducting additional investigative work in the matter related to Mr. Cuban, the OIG did not find any evidence that closing the earlier investigation had any effect on the investigation into Mr. Cuban's trading or in any way induced the Mamma.com executives to give different testimony. The only Mamma.com executive the Enforcement staff got additional information from was Faure in his second investigative testimony. Moreover, the OIG found that the two investigations were separate and there was very little interaction between the investigative teams, except to request certain transcripts of testimony taken years earlier.

The OIG investigation further established that a former FWRO trial attorney, Jeffrey Norris ("Norris"), was e-mailing Mr. Cuban from his SEC computer in March 2007. The e-mails pertained to Mr. Cuban's apparent backing of a movie which the trial attorney alleged posited that President Bush planned the September 11, 2001 attacks "as a pretext for going to war against Iraq." In these e-mails, Norris expressed his personal views accusing Mr. Cuban of promoting a radical and irresponsible viewpoint by backing this movie. Norris also e-mailed Mr. Cuban that he had been an avid Mavericks basketball team fan, but was no longer going to be rooting for the team because Mr. Cuban, who owns the team, backed this movie. The investigation found that Norris continued the e-mails to Mr. Cuban again in May 2007, and copied former Chairman Christopher Cox on those e-mails.

The OIG investigation revealed that Norris was not involved in any way in the investigation into Mr. Cuban's sale of Mamma.com shares, and there is no evidence that Norris had any knowledge of the ongoing investigation into Mr. Cuban's sale of his shares when he was e-mailing Mr. Cuban. The OIG found that former Chairman Cox did receive the Norris/Cuban e-mail exchanges and forwarded them to the then director of the SEC's Equal Employment Opportunity ("EEO") office. However, the investigation revealed that the former Chairman did not know who Mr. Cuban was and was unaware that there was an ongoing Enforcement investigation into Mr. Cuban's trading. Nevertheless, the OIG investigation found that former Chairman Cox did recuse himself from the meeting and the vote to authorize suit against Mr. Cuban. In all, the OIG investigation did not reveal that Norris's e-mail exchange with Mr. Cuban had any substantive impact on the SEC investigation of Mr. Cuban.

In addition, the OIG determined that Associate Director Friestad, who supervised the investigation into Mr. Cuban's trading, was also copied on the May 2007 e-mail exchanges between Norris and Mr. Cuban. The OIG investigation established that immediately after receiving copies of the e-mail exchanges between Norris and Mr. Cuban, Friestad informed Norris of the ongoing investigation related to Mr. Cuban and instructed him to stop communicating with Mr. Cuban. There is no evidence that Norris communicated any further with Mr. Cuban while an SEC employee. However, the OIG found that Friestad failed to promptly report this misconduct to his superiors, the FWRO, the Office of Human Resources ("OHR") or the OIG. Nevertheless, former Chief of Staff and former counsel to former Chairman Cox did take action several weeks after the

former Chairman was copied on the Norris/Cuban e-mail exchanges, and Norris was then promptly suspended for 14 days of work without pay. In 2009, Norris was removed from federal service for continuing to engage in similar misconduct.

The OIG investigation also did not find sufficient evidence to establish that the investigation into Mr. Cuban's sale of Mamma.com shares was motivated by politics or other improper motives or that Mr. Cuban was targeted by the Enforcement staff because he was a high-profile or recognized individual. The OIG investigation revealed that **Attorney 1** opened this investigation as a result of finding instant messages while searching for the term "jail" in the course of conducting another investigation. While **Attorney 1** was aware of who Mr. Cuban was, **Attorney 3** and **Assistant Director 1** were not aware of who Mr. Cuban was at the time the investigation was opened. The OIG investigation did not establish that anyone on the Enforcement staff was motivated to bring a case against Mr. Cuban because he was well-known or a high-profile individual. The OIG investigation further revealed that the Enforcement staff only learned about the existence of the Norris/Cuban e-mail exchanges the day before the Wells meeting, and it had no bearing on their investigation. In addition, the OIG found that no one on the Enforcement staff discussed Mr. Cuban's political views, even after reading the Norris/Cuban e-mail exchanges.

Moreover, the OIG investigation also did not find sufficient evidence to substantiate the allegation that the Enforcement staff had a preconceived notion or bias of Mr. Cuban's guilt. The investigation did establish that during the July 19, 2007 Wells meeting **Attorney 2** the newly appointed trial attorney, made the comment, "Mr. Cuban takes irrational and silly risks every day," or words to that effect. This comment was confirmed by counsel for Mr. Cuban, memorialized in a memorandum prepared the next day from notes taken during the meeting, and **Attorney 2** acknowledged a comment like that was made. The OIG further found that although the comment was made as part of a back-and-forth conversation in a Wells meeting about the strengths and weaknesses of the case against Mr. Cuban, and Mr. Cuban's propensity to take risks was not altogether irrelevant to the merits of the SEC's case (particularly when his counsel raised the argument that Mr. Cuban would not risk everything he had and his reputation for the amount of dollars at stake), **Attorney 2** could have been more temperate in his language. The OIG also found that former Enforcement Director Linda Thomsen ("Thomsen"), who attended the Wells meeting in this matter, made the comment, "That's just noise," or words to that effect, in response to Mr. Cuban's counsel's arguments about Faure's credibility. While perhaps Thomsen could have chosen a different word to describe her view that certain arguments were irrelevant or extraneous to the merits of the case against Mr. Cuban, the OIG did not find use of the word "noise" in this context to be improper. Overall, the OIG investigation concluded that these comments, standing alone, do not establish a preconceived bias against Mr. Cuban, particularly since they were made in the moment of responding to Mr. Cuban's counsel's arguments. We also note that **Attorney 2** was appointed to the case only just before the Wells meeting and well after the Wells notice was provided; and, Thomsen's comment was not inappropriate in and of itself.

The OIG also found that Friestad sent photographs of Mr. Cuban (one or two of which could be considered unflattering) which he obtained from the Internet to Thomsen



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and another senior Enforcement official without commentary. The OIG found that Friestad sent these photographs of Mr. Cuban because Thomsen and the other senior official were unaware of who Mr. Cuban was, and to explain why the request for a formal order should be presented in executive session. We did not find evidence to establish that sending these photographs without commentary demonstrated evidence of a bias against Mr. Cuban that could have tainted the investigation.

Furthermore, the OIG investigation did not find sufficient evidence to establish that **Attorney 1** or anyone on the Enforcement staff had engaged in a “tamp down” of a witness, specifically **Witness 1** or engaged in an effort to keep witnesses from Mr. Cuban’s counsel. First, **Witness 1** did provide Mr. Cuban’s counsel with a declaration during their own investigation and before the SEC took **Witness 1** testimony. Second, according to **Attorney 1** and substantiated by **Assistant Director 1** **Attorney 1** merely stated that **Witness 1** counsel, Christopher Aguilar (“Aguilar”) did not have to make **Witness 1** available for an interview with Mr. Cuban’s counsel and **Attorney 1** noted that the “only preference I expressed was wanting the SEC to go first with the testimony.” Third, even according to Aguilar’s declaration obtained by Mr. Cuban’s counsel, **Attorney 1** merely “stated that she would prefer that I did not produce **Witness 1** to Mr. Cuban’s counsel for an interview but that I could do what I wanted.” Moreover, we do not find that **Attorney 1** articulating her preference as to the timing of presenting employees to defense counsel would violate standards of conduct or State bar rules.

The OIG also did not find sufficient evidence to show that SEC Enforcement staff engaged in misconduct when questioning **Witness 1** in testimony in October 2007. Upon careful review of the transcript of **Witness 1** October 17, 2007 testimony, the OIG did not find evidence that **Attorney 1** avoided asking **Witness 1** about certain critical facts or that she attempted to manufacture extraneous or potentially misleading testimony from **Witness 1**.

In addition, the OIG found that there was insufficient evidence to support the allegation that members of the Enforcement staff investigating Mr. Cuban had engaged in misconduct in other cases. The OIG carefully analyzed these other cases and did not find instances in which SEC Enforcement attorneys who worked on Mr. Cuban’s matter engaged in any improper actions in other matters that would taint their work in Mr. Cuban’s case.

While the OIG did not find sufficient evidence to substantiate the allegations of misconduct, we are referring this matter to management, for counseling for Friestad for his failing to promptly report Norris’s misconduct and for **Attorney 2** for his comment about Mr. Cuban taking irrational and silly risks every day in the July 19, 2007 Wells meeting.

### Scope of the OIG's Investigation

In conducting this investigation into Mr. Cuban's allegations, the OIG took the following sworn, on-the-record testimony of:

- (1) Paul Coggins, Esq., Principal at Fish & Richardson PC, taken on October 19, 2009. Transcript of Testimony of Paul Coggins (hereinafter "Coggins Tr."), attached hereto as Exhibit 6.
- (2) Kiprian Mendrygal, Esq., Associate at Fish & Richardson PC, taken on October 19, 2009. Transcript of Testimony of Kiprian Mendrygal (hereinafter "Mendrygal Tr."), attached hereto as Exhibit 7.
- (3) Mark Cuban, entrepreneur and owner of the Dallas Mavericks, taken on October 19, 2009. Transcript of Testimony of Mark Cuban (hereinafter "Cuban Tr."), attached hereto as Exhibit 8.

In addition, the OIG conducted the following sworn, on-the-record testimony of current SEC employees:

- (4) Scott Friestad, Associate Director, SEC Division of Enforcement, taken on March 24, 2011. Transcript of Testimony of Scott Friestad (hereinafter "Friestad Tr."), attached hereto as Exhibit 9.
- (5) [Attorney 1] former staff attorney, SEC Division of Enforcement, taken on April 7, 2011. Transcript of Testimony of [Attorney 1] (hereinafter "[Attorney 1] Tr."), attached hereto as Exhibit 10.
- (6) [Assistant Director 1] former Assistant Director, SEC Division of Enforcement, taken on April 7, 2011. Transcript of Testimony of [Assistant Director 1] (hereinafter "[Assistant Director 1] Tr."), attached hereto as Exhibit 11.
- (7) [Attorney 2] Trial Attorney, SEC Division of Enforcement, taken on April 12, 2011. Transcript of Testimony of [Attorney 2] (hereinafter "[Attorney 2] Tr."), attached hereto as Exhibit 12.
- (8) [Attorney 4] staff attorney, SEC Division of Enforcement, taken on April 15, 2011. Transcript of Testimony of [Attorney 4] (hereinafter "[Attorney 4] Tr."), attached hereto as Exhibit 13.
- (9) Peter Uhlmann, former Chief of Staff to former SEC Chairman Christopher Cox, taken on May 5, 2011. Transcript of Testimony of Peter Uhlmann (hereinafter "Uhlmann Tr."), attached hereto as Exhibit 14.

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The following former SEC employees voluntarily provided the OIG with sworn, on-the-record testimony:

- (10) [Counsel] [Counsel] former Counsel to former SEC Chairman Christopher Cox, conducted by telephone on April 28, 2011. Transcript of Testimony of [Counsel] [Counsel] (hereinafter "[Counsel] Tr."), attached hereto as Exhibit 15.
- (11) Louis Mejia, former Chief Litigation Counsel, SEC Division of Enforcement, taken on May 17, 2011. Transcript of Testimony of Louis Mejia (hereinafter "Mejia Tr."), attached hereto as Exhibit 16.

The following former SEC employee voluntarily provided the OIG with an in-person interview:

- (12) [Attorney 3] [Attorney 3] former Branch Chief, SEC Division of Enforcement, in-person interview conducted on May 13, 2011. Memorandum of Interview of [Attorney 3] [Attorney 3] cited and attached hereto as Exhibit 17.

The OIG also unsuccessfully attempted to interview, or obtain written answers to questions from, Aguilar, former in-house counsel to [Witness 1] the private placement agent for the Mamma.com PIPE offering. In early June 2011, the OIG sent Aguilar's counsel written questions for Aguilar about an allegation that Enforcement staff engaged in a "tamp-down" of [Witness 1] which was outlined in a sworn declaration of his which Mr. Cuban's counsel filed in the ongoing district court litigation. Despite several follow-up attempts with Aguilar's counsel, the OIG never received any responses from Aguilar to its questions and Aguilar did not agree to an interview.

The OIG obtained e-mails for the following SEC employees for the period October 2006 through June 2009: (1) Scott Friestad; (2) [Assistant Director 1 and Director 1]; (3) [Attorney 2] [Attorney 2] (4) [Attorney 3] [Attorney 3] (5) [Attorney 1] [Attorney 1] (6) [Attorney 5] [Attorney 5] and (7) [Attorney 6] [Attorney 6]. The OIG also obtained e-mails for [Attorney 4] [Attorney 4] for the periods April through September 2005; January 2004 through December 2006; and January through December 2007. In all, the OIG received and reviewed more than 400,000 e-mails. The OIG also reviewed copies of pleadings filed to date in the ongoing *SEC v. Mark Cuban* litigation. In addition, several of the SEC employees who provided sworn testimony also provided additional documents and e-mails.

### Applicable Policy and Regulations

#### The Wells Notice:

The so-called Wells submission process represents a critical phase in SEC investigations, and originated from recommendations made by an advisory committee chaired by John Wells. The objective of the Wells process was outlined in the Securities Act of 1933, Release No. 5310, Procedures Relating to the Commencement of

Enforcement Proceedings and Termination of Staff Investigations (September 27, 1972) ("Wells Release"). The Wells Release stated that when Enforcement staff decide to seek authority from the Commission to bring a public administrative proceeding or civil injunctive action against an individual or entity, Enforcement staff may advise prospective defendants of the proposed charges against them and provide them the opportunity to file a written statement "setting forth their interests and position" in accordance with Rule 5(c) of the Commission's Rules on Informal and Other Procedures. 17 C.F.R. § 202.5(c).<sup>5</sup> This advisement by Enforcement staff of proposed charges against prospective defendants, made by a telephone call and/or letter, is called the "Wells notice." Prospective defendants use these responding statements -- known by the SEC and the securities bar as "Wells submissions" -- as an opportunity to set forth the reasons why the staff should not pursue such action before the Commission brings formal charges.

According to the SEC Division of Enforcement, Enforcement Manual (October 8, 2008) ("Enforcement Manual"),<sup>6</sup> the objective of the Wells notice is, as the Commission stated in the Wells Release, "... not only to be informed of the findings made by its staff but also, where practicable and appropriate, to have before it the position of persons under investigation at the time it is asked to consider enforcement action." Enforcement Manual at Section 2.4; *see also* Wells Release. The Wells notice should tell a person involved in an investigation: 1) that the Division is considering recommending or intends to recommend that the Commission file an action or proceeding against them; 2) the potential violations at the heart of the recommendation; and 3) that the person may submit arguments or evidence to the Division and the Commission regarding the recommendation and evidence. Enforcement Manual at Section 2.4.

According to the Enforcement Manual, to determine whether or when to provide a Wells notice the staff should consider whether: (1) the investigation is substantially complete as to the recipient of the Wells notice; and (2) immediate enforcement action is necessary for the protection of investors. The Manual does not provide further guidance on the meaning of "substantially complete." *Id.* The Manual states that a Wells notice should be in writing when possible, and that a Wells notice given orally should be followed promptly by a written confirmation. *Id.* The substance of a Wells call should provide the same information outlined above, but the staff also may refer to specific

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<sup>5</sup> According to Mr. Cuban's complaint, 17 C.F.R. § 202.5 provides that "an individual subject to an SEC investigation may submit *at any time* a written statement to the Commission setting forth [his] interests and position in regard to the subject matter of the investigation." (emphasis added). The OIG, however, could not locate this language in 17 C.F.R. § 202.5. Moreover, as outlined below, the Enforcement Manual provides for instances of staff discretion to reject a Wells submission as untimely.

<sup>6</sup> The Enforcement Manual states that it is designed to be a reference for the Enforcement staff in the investigation of potential violations of the federal securities laws. Enforcement Manual at Section 1.1. The Manual contains various general policies and procedures and is intended to provide guidance only to the staff of the Division. *Id.* However, the Manual is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. *Id.*

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evidence regarding the facts and circumstances which form the basis for the staff's recommendations. *Id.*

#### The Post-Notice Wells Process:

According to the Enforcement Manual, recipients of Wells notices occasionally request to review portions of the staff's investigative file. *Id.* On a case-by-case basis, the Manual states, it is within the staff's discretion to allow the recipient of the notice to review portions of the investigative file that are not privileged. *Id.* In considering a request for access to portions of the staff's investigative file, the staff should keep in mind, among other things, whether access to portions of the file would be a productive way for both the staff and the recipient of the Wells notice to assess the strength of the evidence that forms the basis for the staff's recommendations; and the stage of the investigation with regard to other persons or witnesses, including whether certain witnesses have yet to provide testimony. *Id.*

There are circumstances in which the staff may reject a Wells submission, according to the Enforcement Manual. *Id.* For example, if the Wells submission exceeds the limitations on length specified in the Wells notice, the staff may reject the submission. *Id.* In addition, the staff may determine not to grant a recipient's request for an extension of time. *Id.*

Moreover, the Enforcement Manual states that recipients of Wells notices may request meetings with the staff to discuss the substance of the staff's proposed recommendation to the Commission. *Id.* The Manual further states that a Wells recipient generally will not be accorded more than one post-Wells notice meeting. *Id.* According to the Wells Release, "In the event that a recommendation for enforcement action is presented to the Commission by the staff, any submissions by interested persons will be forwarded to the Commission in conjunction with the staff memorandum."

#### Commission's Conduct Regulation & Cannon of Ethics

The Commission's Regulation Concerning Conduct of Members and Employees and Former Members and Employees of the Commission (hereinafter "Conduct Regulation"), at 17 C.F.R. § 200.735-1 *et seq.*, sets forth the standards of ethical conduct required of Commission members and current and former employees (hereinafter referred to collectively as employees). The Conduct Regulation states in part:

The Securities and Exchange Commission has been entrusted by Congress with the protection of the public interest in a highly significant area of our national economy. In view of the effect which Commission action frequently has on the public, it is important that . . . employees . . . maintain unusually high standards of honesty, integrity, impartiality and conduct.



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17 C.F.R. § 200.735-2. It also requires SEC staff members to “avoid any action which would result in or might create the appearance of . . . losing complete independence or impartiality” or “affecting adversely the confidence of the public in the integrity” of the SEC. 17 C.F.R. §§ 200.735-3(a)(2)(iii) & (v), (2002).

The Canon of Ethics, set forth at 17 C.F.R. § 200.50 *et seq.*, for members of the SEC requires Commission employees to “conduct themselves in their official and personal relationships in a manner which commands the respect and confidence of their fellow citizens.” 17 C.F.R. § 200.53(b). The Canon of Ethics further provides,

The power to investigate carries with it the power to defame and destroy. In determining to exercise their investigatory power, members should concern themselves only with the facts known to them and the reasonable inferences from those facts. A member should never suggest, vote for, or participate in an investigation aimed at a particular individual for reason of animus, prejudice or vindictiveness. The requirements of the particular case alone should induce the exercise of the investigatory power, and no public pronouncement of the pendency of such an investigation should be made in the absence of reasonable evidence that the law has been violated and that the public welfare demand it.

17 C.F.R. § 200.66.

In addition, the Cannon of Ethics requires that,

Members should be temperate, attentive, patient and impartial when hearing the arguments of parties or their counsel. Members should not condone unprofessional conduct by attorneys in their representation of parties. The Commission should continuously assure that its staff follows the same principles in their relationships with parties and counsel.

17 C.F.R. § 200.69.

### Reporting Misconduct

SEC employees have long had a duty to report misconduct. In a 1996 Policy Statement on Employee Cooperation in Internal Investigations issued by then SEC Chairman Arthur Levitt, he reminded employees of “. . . their duty to disclose waste, fraud, abuse and corruption to appropriate authorities, such as to supervisors or the Office of Inspector General.” Exhibit 18. In an April 2008 message from then Chairman Christopher Cox about whistleblower protections for employees who make protected

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disclosures of wrongdoing and how to report possible misconduct, he wrote in part, "You should also be mindful of your duty to disclose waste, fraud, abuse, and corruption to the appropriate authorities. Communicating with the OIG may be an alternate, confidential channel of communication that you may use to report wrongdoing or misconduct if you fear communicating through the chain of command." [http://insider.sec.gov/whats\\_happening/at\\_the\\_sec/april\\_2008/whistleblower\\_protections.html](http://insider.sec.gov/whats_happening/at_the_sec/april_2008/whistleblower_protections.html).

The OIG website states, in part, "The OIG welcomes information provided by current and former employees, as well as the public, concerning fraud, waste, abuse, or mismanagement at the Commission, and misconduct by Commission staff and contractors." <http://www.sec-oig.gov/OOI/Hotline.html>.

The original October 2008 version of the Enforcement Manual at Section 5.5.5 entitled, "Informal Referrals to Professional Licensing Boards" stated, among other things, "From time to time, staff investigations may reveal conduct that warrants referral to professional licensing boards or similar organizations, such as a state bar association, accountancy board, professional association or self regulatory authority that performs a similar function." Exhibit 108. This section typically involved staff identifying potential attorney or accountant misconduct during the course of one of its investigations.

#### Relevant State Bar Rule

The District of Columbia ("DC") Bar Rules of Professional Conduct, Rule 3.4 "Fairness to Opposing Party and Counsel" states, in part,

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding.

...

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

(2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information . . .

**Comment [in part]**

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed.

## Results of the Investigation

### I. BACKGROUND FINDINGS

#### A. Initiation of the Investigation Into Mr. Cuban's Sale of his Mamma.com Stock Shares

On or about December 6, 2006, while conducting an investigation of another PIPE transaction, then SEC Enforcement staff attorney, and current Assistant Director, [Attorney 1] [Attorney 1] came across the following instant message exchange dated July 2, 2004:

Billionaire Mark Cuban Sells His Stake in Mamma.com  
VERY SUSPICIOUS TIMING OF HIS SALE . . . I AM  
SURE THE SEC WILL LOOK AT THIIIS  
Reply: very suspicious.  
Reply: CAN U SAY JAIL TIME?  
Reply: after the SEC is through with him, he'll need a  
benefactor.

Exhibit 19; [Attorney 1] Tr. at 12. [Attorney 1] testified that after finding this instant message exchange she conducted research into Mr. Cuban's sale of his Mamma.com stock and the timing of the press release related to that sale. [Attorney 1] Tr. at 13. On December 6, 2006, [Attorney 1] sent her then immediate supervisor, Branch Chief [Attorney 3] [Attorney 3] an e-mail entitled, "new case?" and wrote, in part:

Best I can tell, Cuban bought 600,000 shares of MAMA (Mamma.com) in March 2004 and sold those 600,000 shares (which was about 6% of the company) on 6/29/04. After the close on that date, MAMA announced a PIPE offering.



## Exhibit 20.

A few minutes later that same day, Attorney 1 sent a follow-up e-mail to Attorney 3 saying that she checked on Enforcement's internal case tracking database called "NRSI," which stands for Name Relationship Search Index, to determine whether anyone else at the Commission had already opened a matter related to Mr. Cuban's trading in Mamma.com. *Id.* Attorney 1 told Attorney 3 she found that another Associate Director group had an active investigation open into Mamma.com for fraud and market manipulation, but she could not determine from NRSI whether it covered the same 2004 PIPE offering.<sup>7</sup> *Id.* & Attorney 1 Tr. at 15. On February 21, 2007, Attorney 1 forwarded that same e-mail chain to Friestad and copied then Assistant Director (current Co-Chief of the Asset Management Unit) Assistant Director 1 Exhibit 20. That same day, Assistant Director 1 told Friestad, "And, of course, we did follow up with what ultimately turned out to be [Assistant Director] Assistant Director 2 [Assistant Director 2] group, and they were not looking at trading in connection with the 2004 PIPE offering." *Id.*

Attorney 1 testified that she recalled checking on NRSI, but had no specific recollection of reaching out to anyone on the other investigative team. Attorney 1 Tr. at 14-16. Similarly, neither Attorney 3 nor Assistant Director 1 remembered who contacted the other investigative team to determine if that Enforcement staff was already investigating Mr. Cuban's sale of his Mamma.com stock. Exhibit 17 at 2 & Assistant Director 1 Tr. at 15-16. But Assistant Director 1 did recall that at the time they inquired about the "... investigation involving the securities in Mamma.com ... that the investigation was not going anywhere, it was a dead investigation." Assistant Director 1 Tr. at 15. Assistant Director 1 further explained that the other team's investigation was "technically open" but inactive. *Id.* at 15-16.

As discussed in Section I.C., Enforcement opened a matter under inquiry, also known as a "MUI," into Mr. Cuban's sale of his Mamma.com shares on December 7, 2006. Exhibit 21.

### **B. The HO-09900 Investigation into Mamma.com**

In March 2004, a different Associate group in Enforcement opened an investigation into Mamma.com because of a large increase in its stock price over a two-day period. The OIG found that SEC staff intended to close this investigation into Mamma.com, identified as HO-09900, as early as September 2006, several weeks before the investigation of Mr. Cuban, identified as HO-10576, was opened. According to NRSI, the HO-09900 investigation entitled, "Mamma.com" was opened on May 4, 2004,

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<sup>7</sup> Associate Director Scott Friestad ("Friestad") testified that it is standard procedure in Enforcement to look to see if anyone else already has open the same conduct so that there is no duplication of efforts. Friestad Tr. at 21-22.

after a MUI was opened initially in this matter on March 4, 2004. Exhibits 22-24. The Hub Case Report<sup>8</sup> stated as follows:

We opened this investigation in March 2004 into the Internet search engine Mamma.com after the company's stock price increased by over 200% over a two-day period with trading volume of twenty times available float. Contemporaneously, we were contacted by an anonymous source who claimed that [Subject] [Subject] was a major shareholder in Mamma.com and was manipulating the price of the stock. We are investigating whether there was any manipulation of the stock price by [Subject] [Subject] or others. We are also investigating whether the company's financial results for fiscal year 2005 were reported in accordance with GAAP.

Exhibit 24 at 2. A Formal Order of investigation was issued by the Commission on March 2, 2005, which outlined the various allegations being investigated. Exhibit 25. According to the Hub, the staffing on that case was: Staff Attorney [Attorney 4] [Attorney 4] ("Attorney 4" then Branch Chief (current Assistant Director) [Assistant Director 2] Assistant Director [Assistant Director 2] ("Assistant Director 2" and Associate Director Antonia Chion ("Chion").<sup>9</sup> Exhibit 24 at 1. The Formal Order listed all the designated officers of the Commission who were authorized to conduct that investigation. Exhibit 25. Those listed in the Hub were included on the Formal Order, along with several others. *Id.* None of those individuals listed on the HO-09900 Formal Order included anyone who worked on the HO-10576 matter investigating Mr. Cuban. *Id.*

According to [Attorney 4] the case was opened as a result of a "stock pop" in Mamma.com. [Attorney 4] Tr. at 11. [Attorney 4] testified that a press release was issued by Mamma.com, but Enforcement staff "weren't quite sure if the press release was of the nature to indicate that type of activity in the stock" and wanted to look at "whether or not the stock was being manipulated actively." *Id.* [Attorney 4] further testified that they were also reviewing an accounting issue, specifically the calculation of revenues included in the press release. *Id.* at 12.

In HO-09900, testimony was taken of several individuals in late 2004 and 2005, including Mamma.com officers and board members Guy Faure, [Witness 2] [Witness 2] [Witness 5] [Witness 5] and [Attorney 3] [Witness 3] according to the Hub report. Exhibit 24 at 3. In addition, the Hub report stated that, among the other investigative work performed were "telephone

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<sup>8</sup> The Hub is an automated internal SEC computer system which tracks the work conducted in Enforcement's investigations.

<sup>9</sup> This was confirmed in all of the uniformly consistent testimony we obtained on who staffed the HO-09900 investigation. *See, e.g.,* Friestad Tr. at 27; [Assistant Director 4] Tr. at 17-18; [Attorney 4] Tr. at 14-15.

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interviews with related parties concerning MAMA, including the anonymous source, investors, former employees and other individuals and entities.” *Id.*

While not indicated in the Hub report, the OIG learned during the course of its investigation that one of those telephone interviews conducted in investigation HO-09900 was of Mark Cuban. Mr. Cuban's counsel attached a timeline of certain highlighted events to a September 21, 2007 letter from counsel to Mr. Cuban to Friestad, discussed more fully in Section I.J.2. Exhibit 26 at 1. The timeline started with June 30, 2004, stating that [Attorney 4] interviewed Mr. Cuban by telephone that day “regarding his investment in Mamma.com, and his interactions with Mamma.com's officers and directors.” *Id.* [Attorney 4] testified that he wanted to speak to Mr. Cuban because he was a “high profile investor” in Mamma.com and he “wanted to see exactly what he knew about the company and whether or not he knew of any issues with the company . . . .” [Attorney 4] Tr. at 25 & 26. [Attorney 4] also testified that he originally reached out to Mr. Cuban's counsel to arrange a telephone interview, but Mr. Cuban personally called [Attorney 4] back while Mr. Cuban was at a barbershop. *Id.* [Attorney 4] testified that, during the telephone interview of Mr. Cuban on June 30, when [Attorney 4] asked whether Mr. Cuban knew of [Subject] (“[Subject] and his involvement in Mamma.com, Mr. Cuban responded that “he had heard that Mr. [Subject] was involved in this company.” [Attorney 4] Tr. at 27. [Attorney 4] testified to the OIG, “I think Mr. Cuban had concerns about Mr. [Subject] involvement in the company.” *Id.* at 33.

The timeline further stated, “Mr. Cuban also forwards Mr. [Attorney 4] several dozen e-mails detailing his correspondence with Mamma.com personnel, as well as brokerage statements and trading records.”<sup>10</sup> Exhibit 26 at 1. [Attorney 4] testified that he did request documents from Mr. Cuban, but did not specifically recall whether he requested trading records. [Attorney 4] Tr. at 29. The OIG obtained a copy of a July 1, 2004 letter [Attorney 4] sent to Mr. Cuban regarding the HO-09900 investigation. Exhibit 27. In that letter, [Attorney 4] requested certain documents and information, which he testified he believed Mr. Cuban had agreed to voluntarily provide in their conversation the day before. *Id.* at 1. Mr. Cuban testified that he spoke to [Attorney 4] about an investigation [Attorney 4] was conducting of [Subject] and that he provided [Attorney 4] with e-mails he had related to that. Cuban Tr. at 10-11.

According to [Attorney 4] he did not recall whether the fact that Mr. Cuban completed the sale of his entire holding of Mamma.com on the previous day, June 29, 2004, was discussed during the telephone call with Mr. Cuban on June 30, 2004, but admitted that this would have been relevant to his case. [Attorney 4] Tr. at 31-37 & 39.

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<sup>10</sup> Mr. Cuban testified that it was a “red flag” that [Attorney 4] asked him for his trading records, “particularly since it was July 1<sup>st</sup> and the trade only had been June 29<sup>th</sup>, how would he even know?” Cuban Tr. at 50. He further testified that those trading records appeared to have been given to the other team. *Id.* We found no evidence that the team investigating Mr. Cuban obtained any of this information from [Attorney 4].

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The next entry in the timeline of events prepared by Mr. Cuban's counsel was December 7, 2006, "Attorney 3 Attorney 3 . . . calls to speak with Mr. Cuban; Robert Hart<sup>11</sup> returned the call." Exhibit 26 at 1.

The Hub Case Report executive summary for this matter stated:

This investigation concerned Mamma.com, Inc. ("MAMA") . . . a Canadian internet search engine company based in Montreal, Quebec. . . . The staff investigated whether MAMA issued misleading financial information in March 2004 and whether there had been manipulative trading of the company's stock around the time of the earnings release. After a thorough investigation that was hampered in part by the inability to obtain testimony or other information from foreign witnesses, the staff concluded that there was insufficient evidence that violations had occurred. A termination letter was provided to MAMA in 2007. A closing memorandum is being prepared.

Exhibit 24 at 2.

As discussed more fully in Section II.B.1., the OIG obtained evidence that SEC staff intended to close the HO-09900 investigation into Mamma.com as early as September 2006, several weeks before the HO-10576 investigation of Mr. Cuban was opened.

### C. Early Investigative Work into Mr. Cuban's Sale of Mamma.com Stock

Enforcement opened a MUI into Mr. Cuban's sale of his Mamma.com shares on Thursday, December 7, 2006. Exhibit 21. In a December 7, 2006 e-mail from Attorney 1 to Attorney 3 she wrote that she had spoken to Aguilar, counsel for Merriman Curhan Ford & Co ("Merriman"), and that Aguilar had told her he did not "want to put words into the "private placement guy's mouth." Exhibit 28. Attorney 1 added that she and Attorney 3 were scheduled to "talk to the [private placement] guy on Monday at 4pm." *Id.* On Monday, December 11, 2006, Attorney 1 and Attorney 3 conducted a telephone interview of Witness 1 head of private placements at Merriman. Exhibit 29 at 1. In that interview, Witness 1 told Attorney 1 and Attorney 3 that he had served as the placement agent for Mamma.com's June 2004 PIPE offering. *Id.* at 2. Witness 1 described to Attorney 1 and Attorney 3 that the night before the Mamma.com PIPE press release was issued, Witness 2 Chairman of Mamma.com, gave him Mark Cuban's telephone number and asked him to contact Mr. Cuban because Mr. Cuban was upset about the PIPE. *Id.* Witness 1 further informed Attorney 1 and Attorney 3 that when he reached Mr. Cuban by telephone that evening, Mr. Cuban

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<sup>11</sup> Robert Hart ("Hart") was Mr. Cuban's initial counsel in the investigation into Mr. Cuban's sale of his Mamma.com stock.

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sounded angry and [Witness 1] had the impression from Mr. Cuban that Mr. Cuban already knew about the PIPE. *Id.*

On December 18, 2006, SEC Enforcement staff conducted a telephone interview of Faure, then President and Chief Executive Officer of Mamma.com.<sup>12</sup> [Attorney 1] Tr. at 26. In that interview, as he testified to in his January 11, 2007 testimony with the Enforcement staff, he told staff that during the telephone call with Mr. Cuban he told Mr. Cuban that he had confidential information to convey to him and then asked if Mr. Cuban was interested in participating in the impending PIPE offering. Exhibit 30 at 19. In addition, Faure told the Enforcement staff that Mr. Cuban said at the end of that call, "Well, now I'm screwed. I can't sell." *Id.*

Later that same day, Faure's counsel forwarded two e-mails Faure had sent to Mark Cuban on June 28, 2004. Exhibit 31. In the first e-mail, Faure wrote at 12:56 p.m., "Hi Mark, I would like to speak to you ASAP. Can you please call me" and then gave his telephone numbers. *Id.* In the second e-mail, Faure wrote Mark Cuban at 3:51 p.m., "Hi Mark, if you want more details about the private placement please contact (I guess you or your financial advisors) [Witness 1] [Witness 1] . . . with Merriman Curhan Ford & Co." *Id.*

Later that same day, December 18, 2006, [Attorney 1] [Attorney 3] and [Assistant Director 1] conducted a telephone interview of Mark Cuban. Exhibit 32. Mr. Cuban was not represented by counsel in that interview. *Id.* at 1. Mr. Cuban told the Enforcement staff that he was initially told about the PIPE by Merriman, likely [Witness 1] *Id.* at 2. Mr. Cuban said he did not recall [Witness 1] telling him that the information about the PIPE was confidential. *Id.* In addition, Mr. Cuban further stated, among other things, that no one contacted him about the PIPE prior to [Witness 1] and that no one from Mamma.com called him about the PIPE. *Id.* Mr. Cuban added that he never spoke to Faure about the PIPE. *Id.* at 3.

[Attorney 1] testified that they had spoken to [Counsel 1] [Witness 6] ("[Witness 6] Mamma.com's in-house counsel, probably just after December 11, 2006 "because this was when we realized that Cuban had likely found out about the PIPE from the company." [Attorney 1] Tr. at 22-23. [Attorney 1] testified that [Witness 6] provided them with proffers. *Id.* at 22. Documentary evidence shows that [Witness 6] made proffers for four of the Mamma.com board members. Exhibit 33. [Attorney 1] testified that she believed that after conducting these interviews in December the Enforcement staff had sufficient evidence to open a formal investigation: "Because we had evidence that Guy Faure had talked to Mark Cuban. We had these e-mails. We had trading. The stock price movement was, at least in my initial cut edit, you know, statistically significant movement." [Attorney 1] Tr. at 28.

Documentary evidence shows that the MUI was converted to a formal investigation on January 3, 2007, in order for Enforcement staff to travel to New York the following week to take testimony. Exhibit 34. SEC Enforcement staff took sworn investigative testimony of Guy Faure in New York City on January 11, 2007. Exhibit 30. On January 12, 2007, the Enforcement staff sent Mr. Cuban's then counsel, Robert Hart, a letter requesting Mr. Cuban's voluntary testimony. Exhibit 35. On January 31, 2007,

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<sup>12</sup> Staff did not prepare a written memorandum of interview of Guy Faure. [Attorney 1] Tr. at 24.

Attorney 3 received an e-mail from Paul Coggins ("Coggins"), a partner at the law firm of Fish & Richardson, saying that he now represented Mr. Cuban in the staff's investigation of him involving Mamma.com and indicated that Mr. Cuban was eager to cooperate with the request for an interview. Exhibit 36.

On February 12, 2007, Attorney 1 e-mailed Assistant Director 1 and Attorney 3 stating, "Coggins called back to say that, after thinking about it over the weekend, he will not make MC [Mark Cuban] available without a subpoena . . . ." Exhibit 37. Attorney 1 ended her e-mail, "I'll start the FO [formal order] memo." *Id.* That same day, Assistant Director 1 asked Friestad if the Formal Order they were preparing on the Cuban matter should be presented in executive session, to which Friestad replied, "Let's talk to Linda [Thomsen] and/or Joan [McKown] first." *Id.* On February 22, 2007, Friestad e-mailed Attorney 1 and copied Assistant Director 1 saying, ". . . I would leave it [the Formal Order memorandum] as Executive Session and limited distribution for now." Exhibit 38.

According to Kiprian Mendrygal ("Mendrygal"), an attorney at the law firm Fish & Richardson, they met briefly with Attorney 1 and Attorney 3 in about February 2007 to introduce themselves and "just try to get a flavor for what the case was about." Mendrygal Tr. at 13-15. Mendrygal testified that the SEC had very minimal responses, but they believed the SEC was listening to the concerns and arguments they were making on behalf of Mr. Cuban. *Id.* at 15. According to Attorney 1 Coggins "was never willing to acknowledge the call" between Faure and Mr. Cuban; she testified that Coggins came to the SEC in February 2007 before the formal order was issued for a meeting with herself, Assistant Director 1 and Attorney 3 Attorney 1 Tr. at 78-79. Attorney 1 testified that Coggins tried to dissuade the Enforcement staff from going to the Commission to get the formal order, and brought a picture of Mark Cuban with Michael Jordan on a golf course to show that this telephone call could not have possibly happened. *Id.* Attorney 1 added, "And that wasn't true. He just hadn't apparently gotten the phone records from his side." *Id.* at 79.

On February 27, 2007, the action memorandum requesting a formal order from the Commission was unanimously granted by the Commission in executive session. Exhibit 39. Friestad testified that he and the Enforcement staff had decided that the Formal Order memorandum should be held in Executive Session. Friestad Tr. 95-96. Friestad explained, "Executive Session is a closed Commission meeting that is only open to the staff who have worked on a case or otherwise have a need to know and participate in the consideration of a particular recommendation." Friestad Tr. at 96. The Formal Order was issued on March 12, 2007. Exhibit 40.

On March 2, 2007, SEC Enforcement staff interviewed Mamma.com Chairman Witness 2 Exhibit 41. In that interview, Witness 2 told Attorney 1 and Attorney 3 that he remembered the Mamma.com board considering whether to contact Mr. Cuban about the PIPE in late June 2004 and that "the board made clear that the person contacting Mr. Cuban would have to get Mr. Cuban to agree to keep the information confidential because Mr. Cuban would become a Mamma.com insider upon hearing that information." *Id.* Witness 2 told Attorney 1 and Attorney 3 that Faure was tasked with contacting Mr. Cuban and that after speaking with Mr. Cuban, that Faure reported back to Witness 2 what Mr.

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Cuban had said, including that Mr. Cuban said he would not participate and planned to sell his Mamma.com stock after the public announcement of the PIPE. *Id.* [Witness 2] further told [Attorney 1] and [Attorney 3] that he had summarized his conversation with Faure about the call with Mr. Cuban in an e-mail he sent to the board members. *Id.*

On March 9, 2007, [Attorney 1] received from Mamma.com's counsel [Witness 6] June 28 and 29, 2004 e-mails from [Witness 2] to the Mamma.com board of directors. Exhibit 42. [Attorney 1] forwarded those e-mails to [Assistant Director 1] and [Attorney 3] stating,

Finally. Confirms Faure-Cuban conversation and that press release occurred, as we thought, after COB on 6/29.

Doesn't really add much to the substance of the Faure-Cuban call, but it's nice to have a contemporaneous summary. In relevant part, the one email says 'Today, after much discussion Guy spoke to Mark Cuban about this equity raise and whether or not he would be interested in participating. As anticipated he initially 'flew off the handle' and said he would sell his shares (recognizing that he was not able to do anything until we announce the equity) but then asked to see the terms and conditions which we have arranged for him to receive from one of the participating investor groups with which he has dealt in the past.' A second email summary says '[Mark Cuban's] answers were: he would not invest, he does not want the company to make acquisitions, he will sell his shares which he can not do until after we announce. The last possibility had been pointed out by Guy [Faure] at the board meeting.'

LE/WP

*Id.* The first e-mail dated June 28, 2004, referenced in [Attorney 1] e-mail, ended with "Guy [Faure] and Dave [Witness 2] *Id.* at 6. The second e-mail referenced in [Attorney 1] e-mail was dated June 29, 2004. *Id.* at 7-8.

On April 3, 2007, [Attorney 3] and [Attorney 1] took investigative testimony of Mark Cuban. Exhibit 43. During that testimony, Mr. Cuban testified that he did not remember how he first learned about the PIPE. *Id.* at 35. Mr. Cuban recalled, during that testimony, that he had spoken to someone from Merriman who told Mr. Cuban that Mamma.com was conducting an offering. *Id.* at 36. Mr. Cuban further testified that he was at a golf tournament near Dallas, Texas when he spoke to the sales representative from Merriman. *Id.* at 37. Mr. Cuban testified that the Merriman representative asked him to participate in the PIPE on that telephone call. *Id.* at 40. Mr. Cuban testified that the sales representative did not ask him to keep the information confidential. *Id.* at 42.

Mr. Cuban further testified that he called his broker and told him to “get me out of this stock” and sell what you can tonight and the remainder the following day. *Id.* at 45. Mr. Cuban testified he did not remember ever speaking to anyone at Mamma.com about the PIPE offering. *Id.* at 47.

**D. A Fort Worth Regional Office Trial Attorney Began an Inappropriate E-Mail Exchange with Mr. Cuban from his SEC Computer in March 2007**

**1. The March 2007 E-Mails**

On March 28, 2007, Jeffrey Norris, then trial attorney in the FWRO, began e-mailing Mr. Cuban from his SEC e-mail account during the workday. Those e-mails, entitled “Loose Change,” began with Norris writing Mr. Cuban:

It's a very sad day for me. I have been in Texas for about 15 years and I have watched the transformation of the Mavericks over that time. I had become a passionate Mavericks fan, following every game and letting the team's success or failure in the playoffs practically control my entire emotional state. Your association with “Loose Change” has altered that . . . .

You are promoting a point of view that is radical and irresponsible. . . . I try to mold my children's values and opinions in the proper direction, even when it comes to sports. . . . Next time one of [my children] asks me ‘Daddy, do we like the Mavericks?’, I will say: ‘No, honey we don't [sic] We hate the Mavericks because the man who owns the team helps very bad people who hate America and hate President Bush . . . .

Exhibit 44 at 10 & 11. That e-mail ended with a signature block with Norris's name and SEC title, address and telephone numbers. *Id.* at 11. Mr. Cuban responded to Norris's e-mail, “Explain to me how this movie, its [sic] not a doc, will Help people who hate this country? And to question my patriotism, well, you have no clue.” *Id.* at 10. Norris replied with a lengthy e-mail which stated, among other things, “I can, however, conclude that your judgement [sic] is terrible; you have chosen to help promote lies. . . . I certainly conclude without hesitation that your decision to promote this ‘documentary’ is an unpatriotic act.” *Id.* at 8. The e-mail exchange between Norris and Mr. Cuban continued into the following day. *Id.* at 1 & 2.



**2. The FWRO Attorney Sent More E-Mails to Mr. Cuban in May 2007, Copied to Former Chairman Cox, and then Forwarded Them to Associate Director Friestad**

On May 5, 2007, Mr. Norris continued the March e-mail exchanges with Mr. Cuban. Exhibit 45 at 3. In response, Mr. Cuban wrote, "And you work for the sec [sic] That's scary. Should I forward all your e-mails to chris cox?" *Id.* Norris replied with an e-mail beginning, "I AM SHARING THIS WITH CHAIRMAN COX. NEITHER HE NOR THE COMMISSION ENDORSE MY OPINIONS, BUT IN LIGHT OF YOUR THREAT, I THOUGHT I SHOULD SEND THIS TO HIM." *Id.* at 2. Norris ended the e-mail,

Since Chairman Cox may not know the background, I will explain it. Mark Cuban is the owner of the Dallas Mavericks and has participated in distributing the vicious and absurd documentary, "Loose Change," which posits that President Bush planned the demolition of the World Trade Center as a pretext for going to war against Iraq. We have had some past exchanges about my opinion that Mr. Cuban's support for this project is irresponsible and immoral. Below, I parodied his justification that every opinion, no matter how absurd and vicious, deserves to be broadly disseminated.<sup>13</sup>

*Id.* at 3. Norris copied former Chairman Christopher Cox on that e-mail. Exhibit 46. Mr. Cuban replied saying, among other things, "Yeah, sending and [sic] unsolicited e-mail to me, basically accusing me of being a traitor and lacking in patriotism, from your sec e-mail account and during working hours is exactly how taxpayer dollars should be spent." Exhibit 49 at 2.

On May 9, 2007, Norris forwarded that e-mail exchange from May 5, 2007 to several individuals, including Friestad and others who work at the SEC, and entitled it, "My Impending Termination over Mavericks Basketball." *Id.* at 2. Norris wrote, "I have been exchanging some e-mails with Mark Cuban, the billionaire owner of the Dallas Mavericks, gigging him for his support for a vicious anti-Bush documentary called, 'Loose Change.' . . . Cuban threatened to send my past and present e-mails to Chairman Cox. I preempted him by copying Cox on my reply. See below." *Id.* A minute later, Friestad responded to Norris, "You need to call me ASAP. You should not be having communications like this with Mr. Cuban." *Id.* at 1. Norris replied,

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<sup>13</sup> On November 17, 2008, the same day the SEC charged Mark Cuban with insider trading for selling all 600,000 shares of his stock in Mamma.com, this May 2007 e-mail from Norris to Mr. Cuban was publicized. Exhibit 46. According to one newspaper account, "a person close to Mr. Cuban told DealBook that an S.E.C. employee had sent Mr. Cuban e-mails several times over the last year or so, accusing him of being unpatriotic. The bone of contention was Mr. Cuban's involvement with "Loose Change," a documentary that accuses the Bush administration of engineering the Sept. 11 terrorist attacks as a pretext for the Iraq war." *Id.*

I don't plan any further communication. I have made sure that he knows my position is only my own. I am not going to initiate any other exchanges. I understand that he is also the majority owner of HD.net, probably a publicly traded company, so I am backing off entirely in order to avoid any problem.

*Id.* Friestad answered, "It's worse than that. Please call me." *Id.*

Friestad testified that before receiving the e-mail exchange between Norris and Cuban on May 9 from Norris, he did not know that Norris had been e-mailing Mr. Cuban, nor had Norris ever discussed Mr. Cuban with him. Friestad Tr. at 44 & 48-49. Moreover, Friestad testified he had no idea why Norris e-mailed him saying, "I do know him. It was an uninvited e-mail that he sent to me and some other people on the staff." *Id.* at 44. Friestad testified that "it was fortuitous that this thing came to my attention, because it was accidentally colliding with me and what I knew about Mr. Cuban" and the Enforcement investigation into Mr. Cuban's sale of his Mamma.com shares of stock. *Id.* at 44-45.

Friestad explained that he got to know Norris through his friends and would see Norris when he came back to Washington, D.C. several times a year. *Id.* at 45. Norris began his career at the SEC at headquarters in 1992 as a senior counsel in Enforcement, and moved to the then Fort Worth District Office in 1995. Transcript of Testimony of Jeffrey Norris, conducted by telephone in OIG-549 on December 20, 2010 (excerpted portion of transcript attached as Exhibit 47 at 6). Friestad testified that there were "periodic e-mails back and forth" from Norris which he was sometimes included on. *Id.* According to Friestad, Norris would sometimes send him e-mails about his family, about songs he had written, or his commentary on political events. *Id.* at 46-47. Friestad testified that he knew Norris was "very conservative." *Id.* at 49. Friestad also testified that he "had no idea" about what Mr. Cuban's political views were nor did he know anything about Mr. Cuban's alleged backing of a movie called, "Loose Change." *Id.* at 49.

Friestad testified that he was shocked, among other things, when he read the e-mail exchange Norris had had with Mr. Cuban. Friestad Tr. at 47. Friestad claimed he was not sure whether Norris had actually sent the e-mails testifying,

To be honest with you, it's hard for me to imagine anyone having that poor of judgment to have engaged in an e-mail exchange like this and to copy the Chairman of the Commission on it . . . . It just boggles my mind that someone would do that . . . . And so there was a part of me that wasn't sure that really had happened, and as I looked at the attachment, it didn't look like a real e-mail. . . . even his title to this e-mail that he had sent to us which seemed to suggest a recognition that he had done something wrong

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... and that's why I responded as I did [and] as quickly as I did.

Friestad Tr. at 47-48.

### **3. Actions Taken After the Chairman was Copied on, and Associate Director Friestad was Forwarded, the May 2007 E-Mails**

Associate Director Friestad explained that when he responded right away to Norris's May 5, 2007 e-mails to Mr. Cuban saying, "It's worse than that. Please call me,"

I'm referring to the fact that we have [an] investigation pending relating to Mr. Cuban. He's suggesting that just theoretically that Mr. Cuban might be an officer or director of a public company, and it's not a good idea for him to be having that type of discourse with someone who's an officer or director of a public company. And I'm saying it's not a theoretical concern. It's a real concern, because this is involving here, you're having discourse with someone who's [sic] conduct is being reviewed in an ongoing investigation.

*Id.* at 51. Friestad testified that he believed Norris called him within a couple of minutes after he sent his second e-mail to Norris. *Id.* at 52. He explained that the conversation was very short, and that he told Norris they had an open investigation related to Mr. Cuban. *Id.* According to Friestad, he did not tell Norris any details about the investigation, or even that the investigation was of Mr. Cuban, but told him enough to let him know why he felt the communications Norris had been having with Mr. Cuban were inappropriate.<sup>14</sup> *Id.*

Friestad testified that he realized Norris's actions raised "potential personnel issues" beyond having an impact on the investigation of Mr. Cuban and explained the additional actions he took after learning about Norris e-mailing Mr. Cuban. *Id.* at 54. According to Friestad, he wanted to learn more about the exact sequence of events and,

shortly after this interchange, and by shortly I mean two or three weeks or a month, I had had communications with someone I know in the Chairman's office who confirmed to me that Mr. Norris had in fact sent these e-mails to the Chairman. And not only what I was aware of, but substantially more than I was aware of.

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<sup>14</sup> Friestad testified he did not recall instructing Norris not to tell others about the investigation related to Mr. Cuban because no one at the agency is allowed to share that kind of non-public information. *Id.* at 53-54.

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*Id.* at 54-55. He further testified that it may have been when he had the “follow-up communications” with the Chairman’s office that he learned of the additional March 28-29, 2007 e-mail exchanges Norris had with Mr. Cuban. *Id.* at 55. Friestad testified that he talked to [Counsel] then Counsel to former Chairman Cox, and that it probably occurred in mid-June 2007. *Id.*

According to a January 30, 2008 memorandum from Thomsen to former Chairman Cox which set forth the chronology of events related to the Norris e-mail exchanges with Mr. Cuban and the investigation of Mr. Cuban, on May 9, 2007,

Mr. Norris sent an excerpt from the e-mail exchange with Mr. Cuban to several acquaintances, including three members of the Home Office staff (Scott Friestad, Greg Faragasso and Tom Sporkin). Mr. Friestad responded immediately by e-mail, telling Mr. Norris that such e-mails are inappropriate. Mr. Friestad followed up with a telephone call, reiterating that message and informing Mr. Norris of the Home Office investigation. Mr. Norris responded that he was unaware of the investigation and promised to stop communicating with Mr. Cuban.

Exhibit 48 at 2 & 3. The next entry in that same memorandum related to the Norris e-mails stated:

June 22, 2007 (approx.): [Counsel] [Counsel] contacted Mr. Friestad to advise that the Norris/Cuban e-mails had been sent to Chairman Cox. Mr. [Counsel] and Mr. Friestad brought the matter to my attention and, shortly thereafter, Mr. Friestad and I contacted the Office of Inspector General (Brian Bressman) to report the conduct.

*Id.* at 3.

[Counsel] testified under oath before the OIG by telephone. [Counsel] is currently a Senior Counsel at the law firm of Fulbright & Jaworski, which he joined around September 2009. [Counsel] Tr. at 6-7. Before that, [Counsel] worked at the Commodity Futures Trading Commission as chief of staff to the Chairman and counsel to Commissioner Walter Lukken. *Id.* at 7. Prior to that, [Counsel] worked at the SEC from approximately September 2000 to September 2007. *Id.* [Counsel] testified he began as a staff attorney in Enforcement, held that position for several years, and then served as counsel in the Office of the Chairman for about a year before leaving the SEC. *Id.* at 8. At that time, Christopher Cox was the Chairman of the SEC. *Id.* According to [Counsel] as counsel to the Chairman he served as lead counsel for matters dealing with the Enforcement Division. *Id.*

██████████ Counsel after reviewing the Norris/Cuban e-mail exchanges during his testimony before the OIG, did not recall seeing them before. *Id.* at 11. He did, however, recollect that former Chairman Cox's then Chief of Staff Peter Uhlmann asked ██████████ Counsel to come to his office and, at that point, Uhlmann described the e-mails to him. *Id.* at 12. He testified that Uhlmann told him generally that the Chairman had received or been copied on an e-mail exchange between an SEC employee and Mark Cuban, and he generally described the back and forth in the e-mails. *Id.* at 12-13. ██████████ Counsel remembered informing Uhlmann that he was aware that there was an ongoing Enforcement investigation related to Mr. Cuban, and that ██████████ Counsel recommended that Enforcement be informed about the e-mail exchange and that the OIG be contacted. *Id.* at 14.

██████████ Counsel also testified he recalled after meeting with Uhlmann, he had a conversation with Friestad to inform him of the e-mail exchange since Friestad was the Associate Director for the Enforcement staff handling the Cuban investigation. *Id.* at 17. He recalled going to Friestad's office and informing him about the Norris/Cuban e-mail exchange and that "at some point during the conversation, [Friestad] indicated some familiarity with the e-mail." *Id.* at 18. According to ██████████ Counsel he also went to Thomsen's office by himself to inform her about the Norris/Cuban e-mail exchange and while he was in her office, Thomsen telephoned Rose Romero ("Romero"), then head of the SEC's Fort Worth Office,<sup>15</sup> and the Inspector General. *Id.* at 18-20. ██████████ Counsel testified that he had the impression that Thomsen was not aware of the Norris/Cuban e-mail exchanges until he informed her of them. *Id.* at 19. He described Thomsen's reaction to learning about the e-mails as "surprised, disappointed, and seemed to take it seriously." *Id.* at 20.

Uhlmann testified that he recalled seeing the May 5, 2007 Norris/Cuban e-mail exchanges but he could not recall how he first saw them. Uhlmann Tr. at 9. According to Uhlmann, he would sometimes review the Chairman's e-mail accounts, but he could not recall if he saw these e-mail exchanges that way or if the Chairman had shared it with him. *Id.* He did remember having a conversation with the Chairman once he learned of the e-mail exchanges to let the Chairman know he would be taking action on it because he had the impression that an SEC employee was sending these e-mails on SEC time and from his SEC e-mail account. *Id.* at 10. Uhlmann did testify, however, that he did not see these e-mail exchanges for several weeks or a month or more after they had been originally sent. *Id.* at 17.

Uhlmann further testified that once he learned of the e-mail exchanges he moved "fairly . . . expeditiously to pass those along." *Id.* Uhlmann testified he spoke to ██████████ Counsel and asked him to follow-up with the appropriate person in Enforcement. *Id.* at 12 & 14. According to Uhlmann, both he and the Chairman were unaware of who Jeffrey Norris was and the Chairman did not know who Mark Cuban was. *Id.* at 11. Uhlmann also testified that when he learned of these e-mail exchanges he did not know there was an open Enforcement investigation related to Mr. Cuban. *Id.* at 12. Uhlmann further told the OIG that his best recollection is that former Chairman Cox and he did not learn about the Cuban investigation until after ██████████ Counsel spoke to Friestad. *Id.* at 23.

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<sup>15</sup> At the time of the Norris/Cuban e-mail exchanges, the SEC's Fort Worth office was identified as the Fort Worth District Office and Romero was the District Administrator.

The OIG obtained a May 18, 2007 e-mail exchange between former Chairman Cox and then EEO Director Deborah Balducchi, in which former Chairman Cox attached the May 5, 2007 Norris/Cuban e-mail exchanges and wrote,

Deborah -- This is probably spam, but on a quick reading the suggestion of misuse of agency resources indicates there could be a personnel issue. So I am forwarding to you out of an abundance of caution. If it's nothing, just delete it. Thanks, Chris.

Exhibit 49 at 1. Balducchi responded,

I think it was prudent of you to forward the e-mail. While it does not appear to be EEO-related, it very well may be misuse of government resources. According to the SEC phone directory, Jeffrey Norris works in the Ft. Worth Regional Office. It appears he used his SEC e-mail for this banter and told the other party he would continue the (e-mail dialogue) along as that person did not copy you.

This looks like an issue that HR would look into and take appropriate action, if needed. Thus, I will forward the string of e-mails to Jeffrey Risinger for appropriate action.

Thanks.

*Id.* We conducted a follow-up interview of Uhlmann to ask about this e-mail exchange, and Uhlmann told us he first saw this within the last year when someone from the Office of General Counsel ("OGC") had found this in the ongoing litigation. Exhibit 50. He told the OIG that former Chairman Cox "almost certainly" forwarded this e-mail himself because it ended with, "Thanks, Chris." *Id.* Uhlmann explained that if he responded on behalf of former Chairman Cox, his practice was to note that it was from himself or to forward the e-mail from former Chairman Cox to his own SEC e-mail account and respond from there. *Id.* Uhlmann said that seeing this e-mail exchange did not refresh his recollection about the timing of events. *Id.* He noted, however, that he was quite certain it would have been the conversation he had with [Counsel] that prompted [Counsel] to take action and go to Enforcement. *Id.*

Upon learning about the e-mail exchanges, Uhlmann referred it to then Inspector General Walter Stachnik on July 13, 2007, and attached a copy of the e-mail exchange. Uhlmann Tr. at 12 & Exhibit 50. That same day, and shortly after Uhlmann's e-mail, Friestad forwarded the e-mail exchanges to the OIG. Exhibit 45. As mentioned above, Uhlmann testified he asked [Counsel] to follow-up with the appropriate person in Enforcement. Uhlmann Tr. at 14. Uhlmann recalled that [Counsel] reported back to him

that he had spoken to Friestad and learned that there was an active ongoing investigation of Mr. Cuban and that Friestad was already aware of the e-mails. *Id.* at 15 & 18.

Uhlmann was not aware, however, that Friestad had been copied on those e-mails. *Id.* at 16. When shown a February 4, 2008 memorandum from Thomsen to Daniel Gallagher, then counsel to the Chairman, with the same chronology in the January 30, 2008 memorandum discussed above in section I.D.3., Uhlmann did not recall seeing it and did not know if the Chairman ever received it, but testified that "this chronology seems to fit with my recollection." *Id.* at 18 & Exhibit 51. He also believed that Counsel informed him that Norris was not involved in that particular investigation. *Id.* at 15.

#### **4. Former Chairman Cox Recused Himself from the Commission Meeting to Decide Whether to Authorize Suit Against Mr. Cuban**

As noted in the memorandum prepared by the Office of the Secretary, "The Commission voted (4-0) to approve the staff's recommendation. (Chairman Cox was recused from this matter.)" Exhibit 52. The Action Memorandum dated December 31, 2007, similarly was stamped: "Recommendation Approved by Commission. November 13, 2008." Exhibit 53. Handwritten on the document is: "4-0 CK, Wa. Au. P/Cx Recused." *Id.* The OIG found a November 11, 2008 e-mail entitled "Mamma.com" from Friestad to Thomsen and others stating, "FYI, we learned tonight that the Chairman is not going to participate in the Executive Session matter on Thursday." Exhibit 54.

Documentary evidence shows that the matter was calendared a couple of times early in 2008, but then pulled from the calendar. Exhibits 55 & 56. Friestad testified that he prepared parts of the chronology of the case and Norris/Cuban e-mails, discussed above in section I.D.3., sent by Thomsen to the Chairman's office. Friestad Tr. at 65 & 66. A few days before the matter was scheduled to be considered by the Commission, the Chairman's office pulled it from the calendar "for what I believe are reasons related to the Norris e-mails." *Id.* at 66. According to an April 2010 Kaplan declaration, prepared for and filed in the ongoing litigation in this matter, former Chairman Cox recused himself from the Commission deliberations of whether to authorize suit against Mr. Cuban after a late January, early February 2008 chronology was prepared by the Enforcement staff for the Chairman. Exhibit 57 at 5.

Friestad testified that his assumption all along was that there was a correlation between the Chairman recusing himself and the Chairman being copied on the Norris/Cuban e-mail exchange. Friestad Tr. at 81. He explained that no one told the Enforcement staff why the recusal decision was made. *Id.* Attorney 3 told the OIG that he recalled that the Chairman was recused, and knew that he did not attend the November 13, 2008 Commission meeting, and assumed the recusal was because of "that e-mail nonsense" but added, "they don't tell you why" they are recused. Exhibit 17 at 8. Attorney 3 told the OIG that he remembered there was a delay between the submission of the Action Memorandum and the approval of the case, but did not know why there was that delay. *Id.*

Uhlmann testified that he did recall a discussion about whether the Chairman should recuse himself, but did not recall that the Chairman recused himself. Uhlmann Tr. at 22 & 23. Specifically, Uhlmann testified he could not recall whether it was a conversation he had directly with the Chairman or if it was a conversation between the General Counsel and the Chairman and he was apprised of it later, "But I just generally recall there was a -- it was identified as an issue to explore that in light of the fact that he was copied on these emails, you know, would recusal be required or just prudential recusal just for appearance of fairness." *Id.* at 23. Uhlmann testified that he recalled that the advice the Chairman was given about this matter was that <sup>AC</sup> [REDACTED] <sup>AC</sup> [REDACTED] *Id.* at 29.

Uhlmann testified that in the spring of 2008, several Commissioners were in the process of leaving the agency. Uhlmann Tr. at 26. In addition, he recalled that the agency was sensitive to the fact that there could be a perception that the investigation might have been motivated by the Norris e-mails, which contained "a partisan flavor," and that it would, therefore, be preferable to wait for a full Commission, which included its Democrat members. *Id.* at 26-27.

##### **5. The FWRO Trial Attorney Was Disciplined for Sending Inappropriate E-Mails to Mr. Cuban from his SEC Computer**

The OIG obtained documentary evidence that OHR was asked in July 2007 to assist Norris's supervisor, Steve Korotash ("Korotash"), with developing a proposed disciplinary action against Norris for sending inappropriate e-mails to Mr. Cuban through the SEC e-mail system.<sup>16</sup> Exhibit 58 at 1. In an e-mail an OHR official sent to another OHR official about Norris's proposed suspension, he described the Norris/Cuban e-mail exchanges as containing "a number of politically charged e-mail exchanges between Mr. Norris and Mr. Cuban between March 28, 2007 and May 5, 2007, that Mr. [Norris] eventually forwarded to Chairman Cox." *Id.* at 2. According to OHR, some of the Norris e-mails were found to be "inappropriate and derogatory." *Id.* OHR also noted, "There was no indication Mr. Norris knew of or was involved in any investigation of Mark Cuban." *Id.*

On August 7, 2007, Norris was issued a notice of a proposal from his supervisor, Korotash, to suspend him without pay for 14 days for his misuse of government e-mail for sending several inappropriate, derogatory e-mails to Mr. Cuban in March and May 2007. Exhibit 59. The proposal noted that Norris had been previously suspended for one day for sending inappropriate e-mails. *Id.* at 1 & 2. The proposal stated that Norris's conduct of sending e-mails to Mr. Cuban reflected poorly on him and the SEC and "has an adverse impact on morale, productivity and the maintenance of proper discipline, and it therefore cannot be tolerated." *Id.* at 2. On August 28, 2007, Romero, then director of the Fort Worth Office, determined that the reason and specifications outlined in the

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<sup>16</sup> It therefore appears no action was initiated against Norris until July, although Friestad and presumably OHR received the e-mail exchanges in May.



proposed suspension were fully supported, and ordered that Norris be suspended from work and pay for 14 days. Exhibit 60. Norris completed his suspension in November 2007. Exhibit 61.

On May 22, 2009, Norris's removal from federal service was recommended based on the e-mail exchanges with Mr. Cuban and similar, additional misconduct he engaged in afterward. Exhibit 62. In that proposal, Korotash recommended Norris be terminated because he had sent several unauthorized and inappropriate e-mails, including: (1) to a defense counsel in September 2006, (2) to Mr. Cuban in 2007, (3) to a colleague in August 2007 after he was put on notice of his proposed suspension for the inappropriate e-mails to Mr. Cuban, (4) in September 2008 when he sent *The Washington Post* an e-mail from his SEC account making partisan political statements, and (5) to another colleague in October 2008. *Id.* at 1-4. In addition, the proposal noted that Norris had shared highly confidential information in October 2008 with a Receiver and his counsel.<sup>17</sup> *Id.* At that time, Norris was placed on administrative leave until his removal from federal service became effective August 28, 2009. Exhibit 63.

#### E. The Wells Call and Process

The OIG found that Enforcement had conducted significant investigative work before the Wells notice was provided on May 23, 2007. Specifically, the Enforcement staff had 1) conducted interviews of Witness 1 Witness 1 Mark Cuban, Guy Faure, and Witness 2 Witness 2 2) obtained proffers from the other Mamma.com board members; as well as 3) taken investigative testimony of Guy Faure and Mark Cuban, the two participants to the relevant telephone call. Moreover, as discussed in Section I.C., the Enforcement staff had obtained important documents including Mr. Cuban's trading and telephone records, the timing of the announcement of the PIPE deal with Mr. Cuban's trades, and the so-called "contemporaneous" e-mails from Witness 2 about the Faure/Cuban telephone call that same day and the following day.

On May 15, 2007, Friestad informed then Deputy Director of Enforcement Peter Bresnan the Enforcement staff planned ". . . to make a Wells call to Mark Cuban, the owner of the Dallas Mavericks, for engaging in insider trading." Exhibit 64.

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<sup>17</sup> The memorandum noted that before initiating the proposed removal action, Korotash had considered many factors, including Norris's 17 years of federal service, but found:

You repeatedly have been warned and disciplined about your improper use of your government computer by sending unauthorized and inappropriate e-mails. Despite all of the warnings and prior discipline, you continue to exercise poor judgment in your use of the SEC's e-mail system. I have lost confidence in your judgment and your ability to protect the integrity of the SEC computer network. Your repeated actions adversely affect the public's confidence in the Commission's integrity and your colleagues' confidence in you. Moreover, your actions affect the ability of the Commission to accomplish its mission.

*Id.* at 5.

## 1. The Wells Notice to Mr. Cuban's Counsel

On May 23, 2007, the Enforcement staff made the Wells notice by telephone, and then by letter, to Mr. Cuban's counsel, Paul Coggins and Kiprian Mendrygal of Fish & Richardson. Exhibits 65 & 66. Friestad, Assistant Director 1, Attorney 3 and Attorney 1 all participated in that telephone call. Exhibit 65. According to an outline prepared by the Enforcement staff before the Wells call, Enforcement intended to tell Mr. Cuban's counsel that they planned to recommend to the Commission an enforcement action against Mr. Cuban, charging him with violating Sections 17(a) of the Securities Act of 1933 and 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. *Id.*

On the same day of the Wells call, Coggins and Mendrygal prepared a memorandum to Hart ("Hart memorandum"), Mr. Cuban's initial counsel in this matter, outlining what had happened in that call. Exhibit 67. In the Hart memorandum, Coggins and Mendrygal stated that Enforcement staff told them they intended to recommend to the Commission that civil litigation be instituted against Mr. Cuban based on the above-outlined violations of the federal securities laws. *Id.* at 1. According to the Hart memorandum, Attorney 1 described the facts that formed the basis for the SEC's proposed complaint, including that on June 28, 2004, Guy Faure, the CEO of Mamma.com, notified Mark Cuban about an impending PIPE transaction, and that the PIPE was confidential, non-public information. *Id.* In addition, according to the Hart memorandum, Attorney 1 stated that Faure created "contemporaneous supporting documentation" memorializing the telephone conversation with Mr. Cuban. *Id.* Attorney 1 also told Coggins and Mendrygal, according to the memorandum, that ". . . the SEC had determined that Mark Cuban had a duty to keep the PIPE information confidential, and breached this duty by selling his Mamma.com stock before the company issued the press release." *Id.* at 2.

Coggins testified he remembered that Attorney 1 did most of the talking during the Wells call and that she seemed to be reading from a "script of some kind." Coggins Tr. at 9. He also recalled that Attorney 1 mentioned "a contemporaneous document." *Id.* Mendrygal also testified that Attorney 1 the most junior person on the call, was communicating on behalf of the SEC and "sounded like something that was being read off of either notes or some sort of script." Mendrygal Tr. at 11. Coggins further testified about the purpose of the call, "They had reached a conclusion that they were going to institute a lawsuit and that they had the evidence they thought that would warrant a lawsuit. It was really not to receive any feedback from us, just to notify us of the Wells Notice and to tell us that if we were going to file a response we needed to tell them by a certain date." Coggins Tr. at 10 & 11. Mendrygal testified similarly, "I do remember the gist of the call was the SEC's communication to us that they were giving us a Wells warning, giving us the opportunity to file a brief in the Wells process. They had decided to file charges against Mark Cuban." Mendrygal Tr. at 10.

Friestad testified that Wells calls tend to be very short because they are a summary way of letting defense counsel know that the staff intends to recommend charges against their client. Friestad Tr. at 114. Friestad did not have a specific

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recollection of questions asked during that call, but thought that there had been some asked. *Id.* Attorney 1 testified that she prepared the Wells outline for the call and that she walked through the charges listed on the first page. Attorney 1 Tr. at 71-72 & Exhibit 65. Attorney 1 also testified that the Wells call with Fish & Richardson was “pretty short.” Attorney 1 Tr. at 73. She also recalled that Coggins wanted details about the telephone call between Faure and Mr. Cuban. *Id.* at 72 & 73. According to Attorney 1 she recalled the Enforcement staff talking about having contemporaneous evidence. *Id.* at 74. Attorney 1 testified that the evidence would have been the Witness 2 e-mails which described the telephone call between Faure and Mr. Cuban, but that she and the Enforcement staff did not describe the details of that evidence during the call. *Id.* at 74 & 75. Rather, Coggins followed up on this point in an e-mail the next week, which is discussed in the section below. *Id.* at 75.

According to Enforcement's Wells outline, they planned to inform Cuban's counsel of facts supporting the recommendation, including the telephone call with Faure on June 28, 2004. Exhibit 65. In addition, the outline had a section entitled, E/WP

E/WP

E/WP

*Id.* According to the Hart memorandum, Attorney 1 told them they could make a Wells submission in response to this recommendation, that the proposed deadline for it was June 14, 2007 although it is common to grant extensions of time, and that the submission could not exceed 40 pages. Exhibit 67.

## 2. Mr. Cuban's Counsel's Request for Evidence

On June 1, 2007, Attorney 1 e-mailed Friestad, Assistant Director 1 and Attorney 3 saying that Coggins intended to make a Wells submission and that she had extended the deadline two weeks, to June 29, 2007. Exhibit 68. In addition, Attorney 1 told them that Coggins wanted to see: (1) the corroborating documents mentioned on the Wells call and (2) the telephone records of the Faure/Cuban call. *Id.* Attorney 1 added, “He wants the corroborating documents, he says, because this is going to come down to he said, he said and since there is no NDA [non-disclosure agreement] or confirming e-mail from Guy to

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Cuban, he wants to see what it says, . . . . I told him that my instinct was that we were unlikely to show these to him since it would be previewing litigation if this goes that route . . . ." *Id.*

Friestad e-mailed in response:

I would vote no. The purpose of the Wells process is to provide notice of the proposed charges (including a general description of the facts that support them) and to give the other side the opportunity to make a submission setting forth the reasons why they think the enforcement action should not be brought. Cuban was a key participant in the key conversation and made the trades at issue. If there is an innocent explanation for what happened, Coggins can get that information from Cuban and put it in writing. We are not required to demonstrate the strength of our case at this point by turning over all of our evidence, nor are we under any obligation to try to convince the other side we are right.

*Id.* Assistant Director 1 agreed and e-mailed, in part, "I don't think we should provide the documents. As I mentioned to Attorney 1 earlier, he isn't trying to 'sell' the settlement to his client, he's just trying to assess litigation risk. That generally isn't a sufficient basis for me to open up the investigative record to a potential defendant. I might feel differently after the Well [sic] but for now I'd politely decline the request." Exhibit 69. Later that morning, Coggins e-mailed Attorney 1

I want to reiterate my request for two items to assist us in making the fullest and most factually accurate presentation possible. First, I would like a copy of the so-called corroborating document related to the alleged call between Mr. Faure and Mr. Cuban. Second, I need information on that call, including the numbers the call was made from and to, the time of the call and its duration.

While you are not required to provide me with the above information at this stage, I hope that you will do so here . . .

Exhibit 70. In response to the above-quoted e-mail from Coggins, Assistant Director 1 wrote:

LEWP  
[Redacted]

First, the fact that he calls it a 'so-called corroborating document' and 'alleged call' suggests a level of distrust of the staff that makes me think it wouldn't be a productive

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exercise to open the books -- heck, his own client's e-mail confirms that there was a call. And as for the Commission making 'the right call,' well we don't need to give him the documents to reach that result -- the Commission will get an accurate assessment of the documents from the staff (it's what we're here for).

*Id.* Assistant Director 1 testified about his e-mail saying, ". . . I feel like most counsel that we deal with are certainly experienced SEC counsel, there's a level of professional trust, that they don't as an assumption, believe that we are making misrepresentations to them about the evidence and I felt this request ran contrary to that." Assistant Director 1 Tr. at 92-93.

Assistant Director 1 further testified that the Wells process is beneficial to the agency in a number of ways, including that the Wells submission is an admissible statement of a party opponent in litigation and "very often comprises the first fully articulated statement of the defendant's position that the Commission has." Assistant Director 1 Tr. at 89. He explained that they can be "extremely effective because you get a defendant's unvarnished view of what happened at a moment where they don't have all of the evidence before them and they're only relying on their best recollection." *Id.* And, according to Assistant Director 1 there was a chance here that Mr. Cuban may craft his statements around the evidence provided to him. *Id.* at 90.

In response to a question about whether providing Mr. Cuban's counsel with evidence that the call between Mr. Cuban and Faure happened would put them in a better position to defend Mr. Cuban during the Wells process, Assistant Director 1 testified,

I don't think so. . . . they could come up with a number of reasons why they think the call wasn't what it was, but Cuban didn't even remember the call, he didn't even know that it happened. You would run the risk, and some say in a case like this it would be an actual risk, that you could affirmatively harm your record if people make improper use of the information that as a courtesy you share with them.

Assistant Director 1 Tr. at 88.

The Enforcement staff decided not to give Coggins the requested documents.<sup>18</sup> Assistant Director 1 Tr. at 91; Attorney 1 Tr. at 82; Friestad Tr. at 120-122. Friestad explained why the staff decided not to provide the documents to Mr. Cuban's counsel:

. . . you have to understand the context of where we were at the time. . . ., Mr. Cuban had lied to the staff during his initial interview. He told the staff that he had never had

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<sup>18</sup> Although later, as discussed in Section I.H.1., during the Wells meeting held on July 19, 2007, the team showed Coggins the telephone record of Mr. Cuban calling Faure on June 28, 2004. Exhibit 71. at 2.

any communications with anybody from Mamma.com about the PIPE offering. That means his statement to the staff was he never spoke to Guy Faure about the PIPE offering. . . . Our view was having lied to the staff, that put him in a very bad spot. That's why we followed up fairly quickly to take his testimony on the record, to lock in that story. During testimony, he changed his story. At that point his testimony was he didn't recall whether he spoke to anybody from Mamma.com.

Friestad Tr. at 120-121. Friestad further explained that because of Mr. Cuban's initial interview being inconsistent with the factual record, "this presented a situation where we tried to be careful in terms of what information we share with defense counsel, because of concern about them tailoring their testimony to what they think we know." *Id.* at 121-122.

Attorney 1 explained that the Enforcement staff did not provide the requested documents to Mr. Cuban's counsel, "Because there was no reason to do it. . . he had equal access to the information on his client's end. And for the board e-mails, we didn't see any reason to do that." Attorney 1 Tr. at 82. Attorney 3 told the OIG he did not recall a discussion about whether to provide the documents requested by Coggins, but added that in Enforcement you "don't always or even ordinarily" disclose all documents and that it is not the normal practice to put every piece of evidence on the table. Exhibit 17 at 6.

### 3. The First Wells Submission

On June 29, 2007, Coggins filed a Wells submission on behalf of Mr. Cuban. Exhibit 72. That day, Coggins e-mailed Attorney 1 to let her know the Wells brief for Mr. Cuban would be submitted that afternoon, and in an accompanying letter requested a meeting with Enforcement Director Thomsen prior to the submission of the Wells brief that afternoon. Exhibit 73. The letter stated,

As you are aware from our prior discussions, we strongly believe the Staff should not recommend an enforcement action against Mr. Cuban. Should the SEC still be inclined to do so after reviewing our submission, we respectfully request a conference with Ms. Linda Thomsen, Director of Enforcement, to discuss the legal and factual hurdles faced by the SEC in this case, prior to the presentation of the matter to the Commissioners.

Exhibit 72 at 1. In addition, Coggins also submitted another letter to Thomsen stating,

In short, this case boils down to a "he said/he said" action between Mr. Cuban (a reputable and law-abiding citizen) and Mamma's former CEO Guy Faure (an interested and

non-credible party who has been investigated by the SEC and sued for securities fraud by his shareholders). Under these facts, it is highly unlikely that a fact finder will find Mr. Faure's testimony credible.

*Id.* As discussed in Section I.H., Thomsen and the Enforcement staff did not honor this request for a same-day meeting, but did meet with Coggins and Mendrygal approximately three weeks later on July 19, 2007.

The Wells submission filed on June 29, 2007 argued that Faure's recollection of the telephone conversation with Mr. Cuban was contradicted by Mr. Cuban. Exhibit 72. Specifically, they argued that "Mr. Cuban does not recall any conversation with Mr. Faure" and that, "As Mr. Cuban has already stated under oath, if there was a conversation, Mr. Faure did not state that the PIPE information was confidential and did not ask Mr. Cuban to keep the information confidential (nor did Mr. Cuban agree to do so)." *Id.* at 10, 22 & 23. Coggins also claimed that Mr. Cuban was attending a charity golf tournament on June 28, 2004. *Id.* at 9.

#### F. Trial Counsel Gets Appointed to Case

Friestad explained that a trial attorney is often not appointed to a matter until after the initial Wells call, and in this case, that was sometime in June or July of 2007. Friestad Tr. at 106. On July 11, 2007, Attorney 1 e-mailed Lou Mejia ("Mejia"), then Chief Litigation Counsel and head of the trial unit in Enforcement, a copy of the Cuban Wells submission. Exhibit 74. The following day, Mejia forwarded that e-mail to Attorney 2 an Assistant Chief Litigation Counsel.<sup>19</sup> *Id.*

Attorney 2 recalled Mejia asking him to work on the Cuban matter about a week or two prior to the Wells meeting. Attorney 2 Tr. at 10-11. He recalled Mejia approaching him in the hallway and telling him he had a case for him and saying something to the effect of the matter needing "someone like [him] to look at." *Id.* at 11. Mejia remembered assigning Attorney 2 to the Cuban matter, but did not recall who in Enforcement requested a trial attorney or when that occurred. Mejia Tr. at 11. Mejia testified that he decided to assign Attorney 2 to the Cuban matter because, "He was one of the best trial attorneys, and he had the time." *Id.* Mejia had worked at the SEC in the trial unit for approximately ten years, from November 1999 until December 2009. *Id.* at 7. Mejia testified he conducted performance evaluations of Attorney 2 and found him to be an outstanding attorney, and rated his abilities "at the top" of the other 35 Assistant Chief Litigation Counsels. *Id.* at 9-10.

On July 16, 2007, Attorney 1 e-mailed Attorney 3 "MC -- Attorney 2 Attorney 2 is trial attorney." Exhibit 75. That same day, Attorney 2 e-mailed Assistant Director 1 copying Mejia, stating:

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<sup>19</sup> Attorney 2 testified that he began working at the Commission 24 years ago in the same position in Enforcement's trial unit. Attorney 2 Tr. at 7-8.

I am looking at the Cuban Wells. Can you forward me the long Cuban Wells outline?

LE/WP

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Faure testified that at the end of June 2004 the board decided to contact Cuban and told Faure to preface the conversation by informing Cuban that MAMA had confidential info to convey to him -- --

LE/WP

Exhibit 76. Attorney 2 testified that fairly early on he had answers to the first couple of questions LE/WP Attorney 2 Tr. at 24-25.

Assistant Director 1 testified that some additional steps were taken after the Wells call was made in the Cuban matter saying, "in part some of the steps were taken because trial counsel had wanted certain additional steps taken." Assistant Director 1 Tr. at 68. According to Friestad, "If they [trial counsel] think there are additional facts we should have or additional evidence we should have, we'll work with them to obtain it." Friestad Tr. at 106.

### G. The Pre-Wells Meeting

On July 18, 2007, Friestad, Assistant Director 1, Attorney 3, Attorney 1 and Attorney 2 all met with Director Thomsen in her office to prepare for the Wells meeting to be held the following day. Friestad Tr. at 73; Exhibits 48 & Exhibit 77. Attorney 1 testified she did not recall anything about that meeting, although she did recall preparing a chart of the Wells arguments made by Coggins and the Enforcement staff's responses to those arguments, "to prepare [her] bosses for this meeting with [Coggins]." Attorney 1 Tr. at 89 & Exhibit 78. As outlined in that chart, Coggins and Mendrygal's principal argument in the Wells submission was that Guy Faure was not a credible witness. Exhibit 78. Attorney 2 recalled getting a copy of the chart Attorney 1 prepared, as well as meeting with Thomsen to prepare for the Wells meeting the following day with Coggins. Attorney 2 Tr. at 31-32.

Attorney 2

recalled that during this pre-Wells meeting, Attorney 3

LE/WP

LE/WP



LE/WP

The OIG found that during this meeting Thomsen and Friestad informed the Enforcement staff about the Norris/Cuban e-mail exchange for the first time. Friestad Tr. at 73; Exhibit 48 at 2. Attorney 1 testified, "I believe we -- the team met with Linda Thomsen to prep her for the Wells meeting, and I think she said something to the effect, 'Just FYI, you may hear about something tomorrow related to somebody sending e-mails to Cuban.'" Attorney 1 Tr. at 36-37. Attorney 1 elaborated, "It was a very generic comment that there's -- somebody has been e-mailing -- I don't even know if she said e-mailing. Maybe she said, 'Contact.' It was a very generic comment . . ." *Id.* at 39. Attorney 2 testified, "I remember talking generally about the case. The one thing I particularly remember is for the first time I heard something about Jeff Norris." Attorney 2 Tr. at 32. He then clarified his testimony, "I can't say for sure she mentioned the name." *Id.*

According to Attorney 1 she understood Thomsen was telling them about the Norris/Cuban e-mail exchanges because if somebody at the Commission was e-mailing Mr. Cuban, it might cause a problem for the case, but "I remember leaving [the meeting], thinking the person had probably been doing something that was inappropriate but . . . I left sort of thinking, 'What was that about?'" Attorney 1 Tr. at 37. Similarly, Attorney 2 testified since the Enforcement staff did not receive much in the way of particulars about the communications with Mr. Cuban, his reaction to learning this was "more puzzlement." Attorney 2 Tr. at 34. Attorney 1 testified she did not see the Norris/Cuban e-mails until they were submitted with Mr. Cuban's second Wells submission in September 2007. Attorney 1 Tr. at 38-39. Similarly, Attorney 2 testified ". . . I don't think I knew anything else about it until a point in time later." Attorney 2 Tr. at 33. Attorney 1 told the OIG Friestad never spoke to her about the Norris/Cuban e-mails. *Id.* at 38.

Attorney 3 told the OIG he remembered being told about the e-mail exchanges between a trial attorney in the FWRO and Mr. Cuban. Exhibit 17 at 7. Attorney 3 did not

20 During our interview of LE/WP

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LE/WP *Id.* Regulation FD provides that when an issuer discloses material non-public information to certain individuals or entities the issuer must make public disclosure of that information. <http://www.sec.gov/answers/regfd.htm>.

know who Norris was at the time. *Id.* He explained that even when he was told about the e-mails, he was still unaware of the true substance of them. *Id.* In fact, he said he initially thought the e-mails involved "crazy [basketball] fan type of stuff." *Id.* Attorney 3 also said that he later learned that former Chairman Cox was copied on these e-mails, but did not remember when he learned that. *Id.*

## H. The Wells Meeting

On July 19, 2007, Thomsen, Friestad, Assistant Director 1, Attorney 3, Attorney 1, and Attorney 2 met with Coggins, Mendrygal, and a summer associate from Fish & Richardson. Exhibit 71. Mr. Cuban alleged that at that meeting, Enforcement staff "gave the appearance that the staff's early initiation of the Wells process might have been motivated by a preconceived notion of Mr. Cuban's supposed culpability." Exhibit 1 at 2. He further alleged that at the Wells meeting the Enforcement staff repeated its intention to recommend charges against Mr. Cuban, expressed confidence in its conclusion that Mr. Cuban should be charged, and "dismissed as 'noise' and 'irrelevant' the various defenses and evidence tending to exonerate Mr. Cuban that Fish & Richardson pointed out." *Id.* at 2 & 3. He added that the Enforcement staff refused to explain why it disagreed with the defenses and evidence presented by Fish & Richardson. *Id.* at 3.

Coggins testified that this was requested by Fish & Richardson because,

This is kind of a he said/he said situation and there is just a tremendous amount of material that challenges the credibility of Guy Faure and we want to present that. . . . and we wanted to have this meeting, in part, I wanted to test them and find out if they really did have the supporting documentation they claimed they had. . . . We were trying to talk them out of going further in the Wells process.

Coggins Tr. at 16.

Friestad confirmed that he attended the Wells meeting, which was held at SEC headquarters. Friestad Tr. at 145. Friestad recalled that the meeting was held because Coggins had requested it, and that as a result the Enforcement staff usually "give them the floor" to make their presentation. *Id.* at 146 & 148. Friestad added, "I didn't think the Wells submission was particularly persuasive."<sup>21</sup> *Id.* at 147. Friestad remembered that the general focus of the presentation made by Coggins and Mendrygal at the meeting was that Faure was not a credible witness. *Id.* According to Friestad, Coggins and Thomsen did most of the talking during the meeting, but he also testified he was "pretty

<sup>21</sup> Friestad testified that the purpose of the Wells meeting is generally for defense counsel to "advance arguments to present their case" and has found that in the sixteen years he's been attending Wells meetings, they "tend not to be particularly productive." Friestad Tr. at 148-149. Although, Friestad told the OIG "there are plenty that I've listened and considered arguments and defenses that people have raised, and either modified the recommendation to drop certain charges or certain sanctions and remedies . . . or in some cases, to drop the case altogether." *Id.* at 149.

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sure" that others on the Enforcement staff also "responded to different points." *Id.* at 148. Coggins also testified that he and Thomsen did most of the talking. Coggins Tr. at 17.

Friestad, Attorney 2, Assistant Director 1, Attorney 3, and Attorney 1, all told the OIG that the Wells meeting was professional and cordial. Friestad testified that the tone of the Wells meeting was "very normal" and that he did not recall any yelling or screaming or raised voices. Friestad Tr. at 149. Attorney 3 told the OIG he attended the July 19, 2007 Wells meeting, but could recall few details of the meeting, other than the meeting was professional and not overly adversarial. Exhibit 17 at 7. He added that Mr. Cuban's counsel were zealous advocates and that there was back and forth between both sides at the meeting. *Id.* Attorney 1 testified that the Wells meeting with Coggins was "... a very collegial meeting, except for the bizarre response to the phone record," discussed in Section I.H.1. below. Attorney 1 Tr. at 97 & 100. Assistant Director 1 testified he thought the meeting was "pretty civil." Assistant Director 1 Tr. at 102. Attorney 2 characterized the meeting as a "businesslike exchange of ideas and positions." Attorney 2 Tr. at 76.

Mendrygal testified that he thought the meeting was "tense." Mendrygal Tr. at 26. He stated that the fact that there were six SEC staff and officials and three attorneys on their side, along with the fact that it was a high-profile client, added to the atmosphere being tense. *Id.* Mendrygal recalled that this particular meeting was "one of the more serious meetings I've been a part of with the SEC." *Id.* at 18. He explained that he thought it was more serious for two reasons: (1) the seniority of the people who attended, and (2) the fact that there was "not a lot of exchange of, you know, concessions or, you know, accepting each other's [view] points." *Id.* at 19. Coggins testified that "the only time voices were raised was Linda Thomsen raised her voice a couple of times." Coggins Tr. at 19. Mendrygal testified that he took handwritten notes at the Wells meeting, and then prepared a memorandum to the file the following day. Mendrygal Tr. at 17.

### 1. The Enforcement Staff Showed Mr. Cuban's Counsel the Relevant Telephone Records

Attorney 2, Assistant Director 1, and Attorney 1 testified that one particular thing about the Wells meeting stood out to them -- Coggins' reaction when the Enforcement staff gave him a copy of the Cuban/Faure telephone record. All of them testified that Coggins had a strong reaction to seeing the telephone record, and left the room for several minutes afterward.<sup>22</sup>

Assistant Director 1 testified that Coggins, upon receiving a copy of the telephone record, turned to his associate and exclaimed, "We know what this is," and then "sprinted out" of the room. Assistant Director 1 Tr. at 85. Attorney 1 testified that the only thing she specifically recalled

<sup>22</sup> In the July 20, 2007 memorandum documenting the Wells meeting by Fish & Richardson, it stated the following about the telephone record: "The SEC then showed us phone records demonstrating that MC [Mark Cuban] placed two calls to Mr. Faure on June 28, 2004, including one eight minute conversation. The SEC said this was a long, substantive conversation that involved an explicit confidentiality agreement." Exhibit 71.

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about the Wells meeting was Coggins' response after the Enforcement staff handed him the record of the telephone call between Mr. Cuban and Faure, which Coggins was "still insisting that he didn't believe . . . had occurred." Attorney 1 Tr. at 97. Attorney 1 explained:

He [Coggins] popped out of his chair like someone had shot him and immediately adjourned the meeting, ran out into the hall with his associates and then came back in after 10 minutes . . . and said essentially about the phone record, 'I know what this is, and we'll deal with this at trial,' or something like that. I thought that was bizarre, so that's what I remember from that meeting.

Attorney 1 Tr. at 97-98. She further testified that she took this reaction to mean that he was shocked to see the telephone record from the basketball arena where Mr. Cuban made the call to Faure, instead of from the charity golf tournament they had been alleging. *Id.* at 98. Similarly, Assistant Director 1 testified that this appeared to be the first time Mr. Cuban's counsel received an "iron-clad confirmation . . . that the conversation even happened," but that the Enforcement staff never did hear any explanation for the telephone record which Coggins had implied they had. Assistant Director 1 Tr. at 85-86.

Attorney 2 remembered the Enforcement staff showing Coggins the telephone record of the call between Mr. Cuban and Faure during the Wells meeting, and described Coggins' reaction to seeing it:

. . . he [Coggins] went apoplectic . . . . They went crazy. . . . my take on it is . . . He had been told that there was not a phone call, and so he had been arguing that he saw a record. And I think it must have been then that he started saying, oh, that he was at a golf tournament. And it was pointed out to him that no, this was a phone call from the American Airlines Center, so he wasn't at a golf tournament. . . . he took a break. They went out in the hall, he and his associate.

And he came back in, and then at some point said, . . . 'I think it was Linda [Thomsen] said, 'We would . . . . like to know if there's additional information we ought to take into account here.

Attorney 2 Tr. at 72-73. According to Attorney 2 Coggins responded that they had additional information, but were going to wait to use it later. *Id.* at 73.

Mendrygal explained the reaction as follows:

Our understanding of the facts was that the SEC was alleging that Mark Cuban had a phone call at a certain time

on a certain date with Guy Faure where this alleged confidential information was communicated. It was our understanding, based upon trying to piece together Mark's schedule on the date that the phone call supposedly occurred, is that he would have been out of the office at a golf tournament that day. And so we scoured certain phone numbers that would be likely candidates for this phone call to take place from, so we could get an idea of when it took place, how long it took, and those sorts of things. It turns out they showed us a phone number that they believed that the phone call came from that wasn't the phone number we were expecting.

Mendrygal Tr. at 22 & 23.

2. Attorney 2 **Comment About Mr. Cuban Taking Irrational and Silly Risks**

Mr. Cuban alleged that there was "an apparent violation of the SEC's standard of conduct toward parties and their counsel" when Attorney 2 stated during the Wells meeting, "Mr. Cuban takes irrational and silly risks every day" and that Mr. Cuban's alleged actions of selling his Mamma.com shares after learning about the PIPE offering were consistent with that. Exhibit 1 at 3. Mr. Cuban's counsel described making the argument, during the Wells meeting, that it would be illogical for Mr. Cuban to have risked his reputation on the relatively small amount of money that the Enforcement staff claimed Mr. Cuban had saved by engaging in his alleged insider trades, and that Attorney 2 made this comment in response. *Id.* Specifically, Mr. Cuban alleged that Attorney 2 comment was not "temperate" or "impartial," as required by 17 C.F.R. § 200.69, and that it showed a "preconceived notion of Mr. Cuban" and a "propensity to prejudge him without regard for the facts." *Id.*

Mendrygal testified that he quoted Attorney 2 in his notes, and later memorandum, because "it struck me as something to write down in as accurate a detail as I could." Mendrygal Tr. at 23. He testified,

It's certainly not the meanest thing anyone's ever said to me. And so on the grand scale of things that you hear as a lawyer, it's not that big of a deal. But I mean it wasn't something that I thought was particularly appropriate.

*Id.* at 25. Coggins testified that he recalled a male at the meeting making a comment to the effect of, "your client takes crazy risks all the time," in response to an argument about how Mr. Cuban would not risk his credibility and reputation for such a small amount of money. Coggins Tr. at 20. Coggins could not recall whether it was Attorney 2 who made the comment, and only remembered that it was a male. *Id.* at 21. He further testified, "I just thought it was almost kind of a ridiculous statement to say." *Id.*

Mr. Cuban testified as to his impression about the alleged comment by Attorney 2 that he takes irrational and silly risks every day, "That's crazy. I mean I didn't understand it. I mean what does he base that on?" Cuban Tr. at 35. Mr. Cuban also testified,

. . . it's very scary that the person that was casting personal aspersions on me was going out there and conducting the interviews, because, I mean, you asked just based on business experiences. If you've already come to a conclusion, you're only going to be looking for information that supports your conclusion; and I don't think there's any question that that happened by Attorney 2 Attorney 2 Linda Thompsen [sic], and all those who were involved.

Cuban Tr. at 37. According to Mr. Cuban, Attorney 2 should recuse himself from the case. *Id.* at 39-40.

Attorney 2 recalled Coggins making the argument about why would Mr. Cuban risk so much for so little, and admitted that he responded with whatever word Coggins used, as was his usual practice, and generally recalled that the word was irrational. Attorney 2 Tr. at 81-82. He explained:

There was a comment made. The whole discussion took probably no more than 60 seconds, maybe closer to 30 seconds . . . . What Coggins, a litigator said, discussing litigation risk, as he was raising what I call the 'John Connolly' defense: Edward Bennett Williams, how he defended John Connolly in a criminal trial . . .

Why would he risk everything he had and his reputation for whatever the number of dollars were then? I heard him say it. I don't recall it was in the Wells . . . . And I immediately thought, well, you know. Wait a second. I mean John Connolly. . . . I knew of Cuban, generally, from his self-created, celebrity persona.

I've seen him on TV, you know. I've read about him, and it was not a button-down reputation. And . . . Coggins said -- I used his word as I recall. It would have been irrational for him to do this. I used his word and said that he does irrational. I don't remember 'silly,' but I understand there are notes to that affect. . . .

Attorney 2 Tr. at 81-82. According to Attorney 2 this was a back and forth between litigators. *Id.* at 83. He added that Mr. Cuban's self-created persona is of someone who

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does things of an unusual variety, and that is what he was referring to. *Id.* In addition, Attorney 2 testified, "and being an advocate, a lawyer that's used to dealing with other litigators back and forth, I made my comment." *Id.* at 86.

Attorney 2 also noted that no complaint was ever made about him making that comment until after the litigation was filed and "somebody's out to go comb the notes, find anything they can, and comes up with that. . . ." *Id.* at 83 & 88. He pointed out that Linda Thomsen was there and that she made no complaint about it. *Id.* at 83. He surmised that the reason no complaint was ever made was because "it was done professionally as part of an exchange between lawyers and litigators in particular."<sup>23</sup> *Id.*

None of the other attendees of the Wells meeting recalled Attorney 2 making this comment, although they did not specifically deny that it was said either. For example, Attorney 1 testified that while she had seen the allegation made about Attorney 2 she did not remember the exchange, but had no reason to think it did not happen. Attorney 1 at 45. Assistant Director 1 testified that he was familiar with the allegation against Attorney 2 but stated, "I actually have no recollection of that happening." Assistant Director 1 Tr. at 102. Attorney 3 told the OIG he had no specific recollection of Attorney 2 being at the Wells meeting, and did not remember him making a statement that Mr. Cuban takes "irrational and silly risks every day." Exhibit 17 at 7. Friestad testified, "I don't recall that. I've seen it raised in different court papers by Mr. Cuban's lawyers." Friestad Tr. at 156.

Similarly, no one on the Enforcement staff indicated that they believed that, if Attorney 2 did make this comment, it would have been inappropriate. When asked if Attorney 2 did make that comment whether it would be inappropriate, Attorney 1 testified, "No. . . . Because it's sort of a back and forth with counsel in the discussion about the merits or weaknesses of the case." Attorney 1 Tr. at 45. Likewise, Assistant Director 1 testified in response to that question, ". . . I feel like it's kind of the back and forth that people have at these meetings." Assistant Director 1 Tr. at 103. He added,

I read the allegation, I was sort of so-whaty about it. I don't know if Attorney 2 said it or not said it, I don't think it evidences bias against Mr. Cuban or that we're in the business of suing people because they took a specific risk and it was a violation of the securities laws.

*Id.* at 104. According to Attorney 3 if a statement like that were made he would look at it as "litigation banter . . . . tough guy back-and-forth talk." Exhibit 17 at 7. Attorney 3 noted that Mr. Coggins, a Texas lawyer, had been a trial attorney like Attorney 2. *Id.* Friestad testified, "That's probably not what I would have said, but I didn't view it as inappropriate if it happened." Friestad Tr. at 156.

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<sup>23</sup> Attorney 2 also testified that, just a month or so after he was alleged to have made this comment, Mr. Cuban's own counsel admitted, in their testimony of Witness 2, Witness 3 that Mr. Cuban can be mercurial. Attorney 2 Tr. at 84-85. In fact, Witness 2 testified to Mr. Cuban's counsel Stephen Best ("Best"), that Mr. Cuban is "fairly mercurial and unpredictable," and Best responded, "That's fair to say." Exhibit 79.

Attorney 3 added that in every single case with a famous person, the defense counsel makes the same argument of why would their client risk everything for such a small amount. Exhibit 17 at 7-8. Assistant Director 1 testified similarly,

. . . this argument that it didn't make economic or rational sense for somebody to engage in "x," insider trading, anything, you hear in every case. And, you know, our view -- I mean I've had insider trading cases against a lawyer who made like \$16,000, he was a partner at a major law firm and I've had cases against a billionaire who made a couple hundred thousand dollars or maybe it was more than that but it was not quantitatively material to his or her net worth and everybody says the same thing, 'Why would I possibly do that?' So I can't say that argument that it's not rational was that compelling and if someone stood here and said, 'You said that at the meeting,' I would be like, 'All right, maybe I did,' not the silly and irrational but the idea of, you know, that's not normally the basis in which white collar crime is committed. Sometimes, but not regularly.

Assistant Director 1 at 103.

### 3. Thomsen's Alleged Dismissive Response to Mr. Cuban's Counsel's Argument

Mr. Cuban also alleged that in the Wells meeting, Thomsen gave the appearance that the Enforcement staff's early initiation of the Wells process might have been motivated by a preconceived notion of Mr. Cuban's supposed culpability. Exhibit 1 at 2. Specifically, in the file memorandum prepared by Fish & Richardson on the day following the Wells meeting, it stated that in response to Coggins arguing that there were credibility issues surrounding Faure, "Ms. Thomsen explained that 'This is a one-on-one case -- if there was a confidentiality agreement, we win. If not, we lose.' Ms. Thomsen then said that everything else Paul [Coggins] discussed is 'noise.'" Exhibit 71 at 2. Coggins, according to the file memorandum, argued that it was not just "noise" because the SEC admitted this was a credibility contest between Mr. Cuban and Faure. *Id.* The SEC responded, according to the file memorandum, that this information by Coggins was irrelevant. *Id.*

Mendrygal testified that at the Wells meeting,

. . . Ms. Thomsen sort of let us get through our presentation and said, well, you know, a lot of the stuff you guys are raising is noise. The presentation -- or the response by the SEC was seemingly focused on the fact that they weren't concerned about our arguments about the lack of credibility



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of their witness, because they had this contemporaneous supporting documentation that was sort of extra chips in their stack.

Mendrygal Tr. at 21. Coggins testified that he recalled during the meeting that Thomsen responded to his argument that he had a lot of evidence challenging Faure's credibility saying, "well this is just noise, you know. We don't need to hear any of this." Coggins Tr. at 17.

Neither Attorney 1 nor Attorney 3 remembered Thomsen saying, "That's just noise," in response to Coggins questioning the credibility of Faure. Exhibit 17 at 7; Attorney 1 Tr. at 100. Attorney 3 added that it would depend on the context in which the statement was made to determine whether such a statement would be inappropriate. Exhibit 17 at 7. Attorney 2 also testified that he did not recall Thomsen making that statement. Attorney 2 Tr. at 78. In addition, Attorney 2 told the OIG he did not remember "any dismissiveness whatsoever" on the part of Thomsen. *Id.* at 80.

Friestad and Assistant Director 1 however, did recall Thomsen making a comment like, "That's just noise." Assistant Director 1 testified that there was nothing eventful about it and added,

. . . the principal facts of this case at the time and to this day depend on the conversation between Mr. Cuban and Mr. Faur[e]. Mr. Cuban had no recollection; Mr. Faur[e] had a reasonably good recollection. There were contemporaneous corroborating documents that talked about some of the salient details of that conversation. And that I think it's true almost anything else to this case is noise, so I remembered that discussion.

Assistant Director 1 Tr. at 100-101. When asked what he understood the phrase "just noise" to mean, Assistant Director 1 testified that means something is an ancillary issue to a case, "not what the case is about." *Id.* at 101. Assistant Director 1 did not, however, recall to what comment Thomsen was responding. *Id.* Friestad testified about what he remembered concerning Thomsen making that comment:

As I recall, Mr. Coggins went on at some length about some issues that we had viewed . . . that were at the heart of this investigation. And it might have been incorporated into his Wells submission as well. I think it goes back to what I said earlier about the credibility of Mr. Faure.

My recollection is that he went on at some length about an individual named Subject or Subject Subject or something like that. And apparently, Mr. Cuban had some view, and others may as well, that Mr. Subject who I think they told us was some well-known stock swindler . . . had some hidden

connection to Mamma.com. . . . And I think that if there was something said by Linda about "That's noise" was whether that was true or not doesn't have any bearing on whether Mr. Faure is telling the truth about his dealings in the conversation with Mr. Cuban.

. . . he wasn't a party to that conversation, you know, nothing relevant to this investigation. He's not being called as a witness in the case. I don't see any reason why he would be, because he doesn't have any relevant information about whether there was a duty of confidentiality, whether Mr. Cuban traded what was said, what wasn't said, that sort of stuff, so that it sort of doesn't really move the ball to understand the issues about whether there was insider trading by Mr. Cuban.

Friestad Tr. at 151-152. Friestad testified that his reaction to Thomsen making that comment was that it was truthful. *Id.* at 154. He added that she could have used a different word, like irrelevant, which was the import of what she was saying. *Id.*

## I. Additional Investigative Work Conducted after the July 2007 Wells Meeting

### 1. Enforcement Staff Conducted Interviews of Mamma.com Board Members

Attorney 1 testified that the Enforcement staff interviewed the following Mamma.com board members in person after the July 2007 Wells meeting: Guy Faure; Witness 2, Witness 2, Witness 3, Witness 3, Witness 4, Witness 4 and Witness 5, Witness 5, Attorney 1 Tr. at 33-34.

According to Attorney 1 she traveled to Montreal to interview Witness 2, Witness 3 and Witness 4 in early September 2007. *Id.* at 34. The Enforcement staff interviewed Witness 5 in New York City. *Id.* During the course of the investigation, Attorney 1 prepared a two-page chart of individuals the Enforcement staff had taken testimony of or interviewed. Exhibit 33. The chart listed Mamma.com board members and Witness 1, Witness 1 and indicated that proffers were made by Witness 6 counsel to Mamma.com. *Id.* According to Attorney 1 all of the proffers supported their case against Mr. Cuban. Attorney 1 Tr. at 65. Attorney 1 testified that the chart must have been prepared before she and Attorney 2 conducted the interviews of Witness 2, Witness 3 and Witness 4 in Montreal, because it indicated no interviews had been conducted. *Id.* at 63-64. Attorney 1 told the OIG that she did not prepare interview memoranda from those interviews in Montreal. *Id.* at 64.

In a July 20-23, 2007 e-mail chain initiated by Attorney 2 asking whether the Enforcement staff had plans to take Witness 1 testimony or interview the UBS broker, Attorney 1 wrote, "Attorney 2 and I are going to Montreal to interview Witness 2, Witness 5 and

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hopefully at least one BOD [board of director] member next Friday, 8/3.”<sup>24</sup> Exhibit 80. In an August 2, 2007 e-mail entitled, “MAMA,” Attorney 1 wrote Assistant Director 1

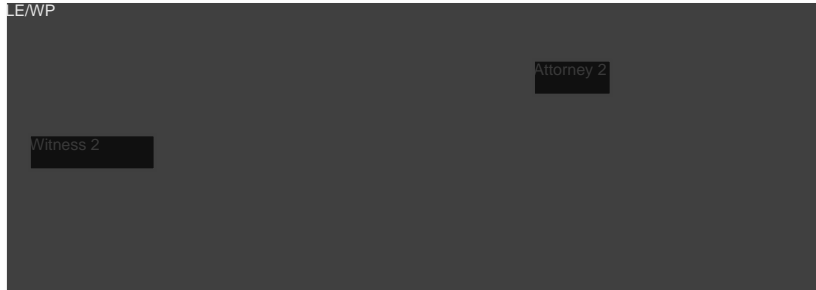


Exhibit 82.

Attorney 2 recalled that he traveled with Attorney 1 to Montreal in September 2007 to interview Witness 2 and two others. Attorney 2 Tr. at 60-61. Attorney 2 testified that he wanted to interview Witness 2 again to “flesh out the chronology” and the “history of the events.” *Id.* at 61 & 62. Consistent with Attorney 1 Attorney 2 testified that the information they got from those interviews “was generally consistent with our understanding.” *Id.*

## 2. Enforcement's Second Investigative Testimony of Guy Faure

On September 27, 2007, Attorney 1 and Attorney 3 took Faure's testimony for the second time, after initially taking his investigative testimony on January 11, 2007. Exhibits 30 & 83. Dewey & LeBoeuf had taken Faure's testimony on September 7, 2007. Exhibit 84. On August 24, 2007, Attorney 1 sent Assistant Director 1 and Attorney 2 draft testimony questions for Faure saying, “In case Faure's lawyer wants us to put him back on the record right after Labor Day, attached is a draft testimony outline. Comments/additions welcome.” Exhibit 85.

On September 14, 2007, Attorney 2 sent Attorney 1 and Assistant Director 1 an e-mail entitled, “Additional Questioning,” which outlined testimony he would find helpful from both Faure and Witness 1 Exhibit 86. Attorney 2 began that e-mail:

After Cuban acknowledged to Guy that he could not dispose of his mamma stock until after the PIPE deal was done and knowing that mamma would rely on his statement, mamma made Witness 1 Witness 1 available to him to provide more detailed information about the PIPE transaction. Under the cloak of his stated acceptance that he could not sell, Cuban called Witness 1 for even more material non-public information about the PIPE. After

<sup>24</sup> According to another e-mail dated August 24, 2007, entitled “Faure testimony in Montreal?,” Attorney e-mailed Assistant Director 1 and Attorney 2 saying in part that she had not offered Faure's attorney “one of our days in Montreal as a possible testimony date.” Exhibit 81. Therefore, it appears the Montreal trip was taken after this date.

obtaining the additional information, and within a minute of hanging up the telephone, Cuban placed his order to dispose of his mamma stock. Sounds like old-fashioned fraud and deception.

*Id.* According to [Attorney 2] when he wrote this about the case, it was one part of what he had already determined based on the evidence, but also it was a concept in development with his applying his "usual skepticism" to the case. [Attorney 2] Tr. at 44-47. In response to [Attorney 2] e-mail, [Assistant Director 1] asked [Attorney 1] [LE/WP]

[LE/WP]

[LE/WP] Exhibit 86 at 1. [Attorney 1] recalled the e-mail from [Attorney 2] and testified she thought he was "just weighing in on things it would be helpful to know" in anticipation of the upcoming Faure testimony. [Attorney 1] Tr. at 115.

[Attorney 2] wrote, among other things, in that e-mail that [LE/WP]

[LE/WP] Other questions [Attorney 2] wanted answered from Faure were: [LE/WP]

[LE/WP]

[Attorney 2] testified that the additional questions he wanted asked of Faure were [LE/WP] [Attorney 2] Tr. at 49. But, [Attorney 2] testified that he believed there was already circumstantial and inferential evidence to answer those questions. *Id.* [Attorney 2] further testified that he believed Faure's second testimony was helpful and corroborated their case. [Attorney 2] Tr. at 58-59. [Attorney 2] did not believe that the additional testimony of Faure was critical to the case. *Id.* at 58.

### 3. Enforcement's Investigative Testimony of [Witness 1] [Witness 1]

On October 17, 2007, [Attorney 1] and [Assistant Director 1] took the investigative testimony of [Witness 1] [Witness 1] Exhibit 87. In an e-mail dated August 27, 2007 from [Attorney 1] to [Assistant Director 1] and [Attorney 2] entitled, "[Witness 1] [Witness 1] at Merriman," she wrote:

Per Merriman in house counsel, Ralph [Ferrara at Dewey & LeBoeuf] is putting the heat on [Witness 1] to sit for a statement.

If we want to go first with him re: testimony, we're going to need to do it Wednesday, 9/5 or Thursday, 9/6 in San Francisco.

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I have a call scheduled at 2:00 p.m. to confirm our plans so we need to chat about this before then. He then has a call with Ralph at 4:00 p.m.

Exhibit 88. In the above-referenced September 14, 2007 e-mail from Attorney 2 regarding additional questioning of Faure and Witness 1 he wrote:

LE/WP



Exhibit 86 at 2.

On the evening of September 20, 2007, Aguilar sent Attorney 1 an e-mail entitled, "Witness 1 Declaration," which attached a declaration of Witness 1 that had been obtained by Mr. Cuban's counsel. Exhibit 89. The following morning, Attorney 1 forwarded that e-mail and attachment to Friestad, Assistant Director 1, Attorney 3 and Attorney 2 saying, in part, LE/WP

LE/WP



LE/WP *Id.* Shortly thereafter, Attorney 1 forwarded that e-mail and wrote,

LE/WP



*Id.* Attorney 2 testified that LE/WP

LE/WP



Attorney 1 testified that she believed the Enforcement staff had originally subpoenaed Witness 1 at the end of July, before Dewey & LeBoeuf took Witness 1 testimony. Attorney 1 Tr. at 116-117. Friestad testified that his recollection was that the Enforcement staff had scheduled Faure and Witness 1 testimony to "make sure that we were right," not in

response to the second Wells submission, discussed below at section II.J.2. Friestad Tr. at 109. Similarly, Assistant Director 1 testified that the Enforcement staff's efforts to obtain additional testimony from Faure and testimony from Witness 1 "had been either contemplated or the scheduling had been underway" before receiving the second Wells submission. Assistant Director 1 Tr. at 81.

Attorney 1 and Assistant Director 1 took Witness 1 testimony in New York, where he was represented by Aguilar. Exhibit 87. In that testimony, Witness 1 was asked about his role at Merriman, where he was no longer employed, the policies and procedures he followed when he solicited investors to participate in PIPE offerings, his communication with Witness 2 at Mamma.com about contacting Mr. Cuban, his telephone call with Mr. Cuban, and the circumstances of his above-referenced declaration, among other things. *Id.*

## **J. Dewey & LeBoeuf Engaged to Represent Mr. Cuban**

According to the Enforcement staff, Ralph Ferrara ("Ferrara"), a former General Counsel of the SEC and partner at the then-named law firm LeBoeuf, Lamb, Greene & MacRae, and other attorneys at the law firm which became Dewey & LeBoeuf began representing Mr. Cuban in this matter in early August 2007. Friestad Tr. at 110-111; Assistant Director 1 Tr. at 77; Attorney 1 Tr. at 107 & 108. In addition, Enforcement staff testified that Fish & Richardson continued their representation of Mr. Cuban as co-counsel with Dewey & LeBoeuf, but in the background. Friestad Tr. at 111-112; Attorney 1 Tr. at 108; Assistant Director 1 Tr. at 80. According to Friestad, there was nothing hostile or antagonistic between the Enforcement staff and the attorneys at Fish & Richardson. *Id.* at 125.

### **1. Dewey & LeBoeuf's Request for Additional Time to Submit Second Wells Submission & Settlement Discussions**

Friestad testified that Ferrara initially reached out to Linda Thomsen by e-mail on or around August 7, 2007, and that Thomsen forwarded the e-mail to him. Friestad Tr. at 161; Exhibit 90. The August 8, 2007 e-mail to Thomsen from Ferrara stated that they were now joining Fish & Richardson in their representation of Mr. Cuban and that they had advised Mr. Cuban a supplemental response should be made on his behalf. Exhibit 90. Ferrara also told Thomsen in his e-mail that they were having difficulty getting information in August and accordingly asked for an extension of time to file that supplemental submission in the first week of September. *Id.* Friestad recalled that he and the Enforcement staff, probably Assistant Director 1 and Attorney 1 called Ferrara the day he received the forwarded e-mail from Thomsen. Friestad Tr. at 162. Friestad recalled that they discussed two topics during that call: (1) the fact that Ferrara wanted to submit an additional Wells response, and (2) settlement. *Id.* Friestad recalled that the Enforcement staff "resolved the issue of the supplemental submission and set a response date as September 7<sup>th</sup> . . ." *Id.* at 163. Assistant Director 1 similarly recalled that Ferrara told the Enforcement staff he had been retained by Mr. Cuban and that he wanted to put in a supplemental Wells submission, and that around that same time there was some discussion of a settlement. Assistant Director 1 Tr. at 77.

According to Friestad, Ferrara told them that Mr. Cuban LE/WP

LE/WP

LE/WP

Assistant  
Director 1

LE/WP

LE/WP But the Enforcement staff did agree to give Ferrara and the other lawyers at Dewey & LeBoeuf representing Mr. Cuban until September 7, 2007, nearly a month, to submit a second Wells submission on behalf of Mr. Cuban. *Id.* at 163-164.

## 2. Dewey & LeBoeuf Conducted their Own Investigation

Dewey & LeBoeuf conducted their own investigation and took testimony from some witnesses. As noted in their September 21, 2007 letter to Friestad, submitted with their Wells submission, “. . . we immediately began to compile a full factual record of this matter, which necessitated setting up interviews with key Mamma.com and Merriman personnel, to determine whether there was any basis for concluding that Mr. Cuban had engaged in insider trading.” Exhibit 91 at 3. In that letter, Ferrara claimed they were hampered in meeting the September 7 deadline because, among other reasons, many of the witnesses expressed concern that cooperating with their investigation would cause them problems with the SEC, and that at least one entity told them that a member of the Enforcement staff discouraged it from making a witness available, calling it a “tamp down,” which is discussed fully in Section II.E. *Id.* at 4. Also in that letter to Friestad, Ferrara wrote, “I certainly sense from the tone of your e-mails to me that you are annoyed that we, on behalf of Mr. Cuban, conducted our own factual review.” *Id.*

Attorney 1 testified that requests are sometimes made by defense counsel to talk to an SEC witness. Attorney 1 Tr. at 122. Friestad testified that other counsels have conducted their own investigations in other matters, and “I don’t have any problem or issue with that.” Friestad Tr. at 166. Friestad stated he first learned that Ferrara was conducting his own investigation when the Enforcement staff told him that Ferrara was trying to get sworn statements from witnesses by threatening them with legal action.<sup>25</sup> *Id.* at 165-168. Similarly, Assistant  
Director 1 testified that they have had other counsel conduct their own inquiries,

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<sup>25</sup> Friestad testified that he realized Ferrara had lied to him, however, about why he needed a month to prepare a supplemental Wells submission – Ferrara did not have vacation plans, as Friestad testified Ferrara had told him, but Dewey & LeBoeuf was conducting their own investigation. Friestad Tr. at 165. According to Friestad, “I was annoyed that I was lied to.” *Id.* at 166.

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but that what was improper about this particular inquiry by Dewey & LeBoeuf was “to demand that witnesses appear on the record and threaten consequences if they refused to do so voluntarily.” Assistant Director 1 Tr. at 108-109.

In an August 28, 2007 e-mail entitled, “More Ralph,” Attorney 1 relayed to Assistant Director 1 and Attorney 2 that she had spoken to Witness 6 who told Attorney 1 that Ferrara was “trying to get the MAMA people to give sworn statements by dangling releases, and that when they told him they would talk to him but not under oath, he suggested he could get the information through subpoena power if Cuban sued them.” Exhibit 92. Assistant Director 1 forwarded the e-mail to Friestad stating, “Scott, this strikes me as outrageous.” *Id.* Attorney 1 testified that she had been getting calls from various counsel about the threats that Dewey & LeBoeuf was making about potentially suing their clients. Attorney 1 Tr. at 122-123. Attorney 1 testified that Aguilar, counsel to Witness 1 told her that Dewey & LeBoeuf was “pressuring him or turning up the heat,” and that she had been getting questions from all of the counsel about what to do about it; Attorney 1 testified she told them to “do what you need to do.” *Id.* at 123.

Friestad testified that when the Enforcement staff presented the facts to him about the inquiry Ferrara was conducting, LE/WP Friestad Tr. at 166. Assistant Director 1 testified that Dewey & LeBoeuf conducting their own investigation in the way that they allegedly were was “extremely unusual”:

... in my experience it is very unusual and the practice of ... threatening witnesses with civil action if they didn't sit for such testimony and offering them a release from liability at that testimony, I haven't had that experience previously in the 19 years I've been practicing.

Assistant Director 1 Tr. at 94. According to Assistant Director 1 and Friestad, AC

AC

### 3. Dewey & LeBoeuf Filed Second Wells Submission on Behalf of Mr. Cuban

On September 21, 2007, Dewey & LeBoeuf submitted a second Wells submission on behalf of Mr. Cuban. Exhibit 91. According to the Enforcement staff's description of the second Wells submission, Dewey & LeBoeuf made only one argument - that Mr. Cuban never agreed to keep the PIPE information confidential. Exhibit 53 at 9. The Enforcement staff indicated in the Action Memorandum, discussed in the section below, that Mr. Cuban's counsel cited to a portion of Mr. Cuban's testimony of Faure to establish that Mr. Cuban did not agree to keep the information confidential. *Id.* at 10.



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According to Enforcement staff, Dewey & LeBoeuf abandoned Fish & Richardson's earlier Wells submission arguments that the telephone call between Faure and Mr. Cuban never occurred and that Rule 10b5-2 does not apply to business relationships. *Id.* at 9.

Along with the second Wells submission, Ferrara submitted a letter, discussed in Section J.2., above, to Friestad. Exhibits 53 & 91. In that letter, Ferrara requested the Commission be given the second submission. *Id.* On September 19, 2007, Ferrara requested a meeting on Friday, September 21, 2007 to present their revised Wells submission "and the additional evidence we have gathered with respect to his sale of Mamma.com shares." Exhibit 93. Friestad e-mailed Ferrara on September 20, 2007:

Dear Ralph,

For a number of reasons, we are disinclined to acquiesce to your request.

As you know, Mr. Cuban's supplemental Wells submission was due on September 7, 2007. You did not request an extension, and none was granted. As a result, going forward, you should no longer assume that any further submission on behalf of Mr. Cuban will be considered by the Commission. Mr. Cuban's June 29, 2007 Wells submission will, of course, be forwarded to the Commission.

We will be in touch with you after the Commission considers our recommendation.

*Id.* Assistant Director 1 testified that informing counsel whose submission is late that Enforcement cannot then give assurances that the Commission will consider it was typical Enforcement practice. Assistant Director 1 Tr. at 110.

Later in the day on September 20, 2007, Friestad e-mailed Thomsen informing her that they declined Ferrara's request to meet the following day. Exhibit 94. He wrote, in part: "We do not think that such a meeting would be productive, and we continue to have concerns about protecting the integrity of the investigation." *Id.*

In court pleadings, Dewey & LeBoeuf argued that they were uncertain the Commission was ever given the second Wells submission. But the evidence shows, as discussed in the next section, that the Commission did receive both the first and second Wells submissions.

#### **K. December 31, 2007 Action Memorandum Submitted to the Commission**

The Enforcement staff all testified that the first and second Wells submissions, along with the September 21, 2007 letter from Ferrara to Friestad, were submitted to the

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Commission. Friestad Tr. at 189-191;<sup>26</sup> Assistant Director 1 Tr. at 109; Attorney 2 Tr. at 112; Attorney 1 Tr. at 143. Moreover, the Action Memorandum drafted by Enforcement clearly discussed the two Wells submissions. Exhibit 53 at 9 & 10. Assistant Director 1 noted that the Commission's policy is that if Enforcement receives a Wells submission before the Commission decision is made, it gets forwarded to the Commission for consideration. Assistant Director 1 Tr. at 109. According to an April 19, 2010 Declaration by Robert Kaplan, prepared for and filed in the ongoing litigation, Enforcement began drafting an Action Memorandum in the early summer of 2007 recommending that the Commission authorize the filing of an insider trading case against Mark Cuban. Exhibit 57 at 3 & 4. On December 31, 2007, Enforcement sent the 11-page Action Memorandum to the Commission for consideration. Exhibit 53. Attached to that Action Memorandum were the first and second Wells submissions submitted by Mr. Cuban's different counsels as well as the September 21, 2007 letter, and its attachments, from Ferrara to Friestad and the September 24, 2007 response from Friestad. *Id.*

#### **L. The Commission Authorized Suit Against Mr. Cuban on November 13, 2008**

On November 13, 2008, the Commission entered into executive session to hear the Enforcement staff's recommendation to authorize suit against Mr. Cuban. Exhibit 52. As Kaplan noted in his April 2010 declaration:

In order to prevent any inadvertent pre-decisional disclosure of the HO-10576 investigation and protect Mark Cuban from unwanted adverse publicity, the Commission considered both the First and Second Action Memoranda in Executive Session instead of the typical Closed Commission meeting which all SEC staff may attend. An Executive Session is generally restricted to only those Commission personnel with a legitimate need to know about the matters being deliberated and decided by the Commission.

Exhibit 57 at 7.

As memorialized in the memorandum prepared by the Office of the Secretary after the Executive Session, "The Commission considered a memorandum, dated December 31, 2007, from the Division of Enforcement, concerning Mamma.com Financing Transactions (HO-10576)." Exhibit 52. The memorandum identified the SEC staff present and also briefly memorialized the discussion beginning.

E/DP

E/DP

*Id.* at 1. It also noted that the meeting began at 2:34 p.m. and ended

<sup>26</sup> Friestad testified that he felt it was important and necessary to provide the Commission with the two Wells submissions and the September 21, 2007 letter "to be completely candid and open with the Commission about facts and issues that affect our recommendations." *Id.* at 190-191.

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at 2:46 p.m. and that, "The Commission voted (4-0) to approve the staff's recommendation. (Chairman Cox was recused from this matter.)" *Id.*

The OIG listened to the tape recording of that Executive Session, and confirmed that it was consistent with the above-referenced memorandum prepared by the Office of the Secretary. <sup>LE/DP</sup>

## II. INVESTIGATIVE FINDINGS

### A. **The OIG Did Not Find Sufficient Evidence to Substantiate the Claim that the SEC Enforcement Investigation of Mr. Cuban Was Not Substantially Completed Before the Wells Notice**

Mr. Cuban alleged that the investigation was not substantially completed until at least five months after the Wells notice was provided. Exhibit 1 at 2. Mr. Cuban believed that the Enforcement staff had not taken any sworn testimony, except of Mr. Cuban, including of Faure, and had not interviewed any Mamma.com senior executive until October 2007. *Id.* at 2. Mr. Cuban's counsel wrote,

In our firm's collective knowledge of Enforcement actions, we are not aware of any other instances where the staff has taken the approach it did here and reached a decision to recommend the institution of a fraud case so substantially in advance of the staff's completion of its investigation. We have also spoken about the matter with many former SEC enforcement staff now in private practice, and none of them have ever heard of a Wells notice being issued before investigative testimony had been concluded or was close to conclusion.

*Id.* at 3.

However, the OIG found that Enforcement had conducted significant investigative work before the Wells notice was provided on May 23, 2007. As described in Section I.C., the Enforcement staff had: 1) conducted interviews of <sup>Witness 1</sup> <sup>Witness 1</sup> Mark Cuban, Guy Faure, and <sup>Witness 2</sup> <sup>Witness 2</sup> 2) obtained proffers from the other Mamma.com board members; and 3) taken investigative testimony of Guy Faure and Mark Cuban, the two participants to the relevant telephone call. Moreover, the Enforcement staff had obtained important documents, including Mr. Cuban's trading and telephone records, documents concerning the timing of the announcement of the PIPE deal with Mr. Cuban's trades, and the contemporaneous e-mails from <sup>Witness 2</sup> about the Faure/Cuban telephone call on that same day as well as the following day. Furthermore,

as discussed in section II.A.2., the OIG found that conducting additional investigative work, and even testimony, after the Wells notice is provided, is not *per se* prohibited by the Enforcement Manual or internal guidance and Enforcement does on occasion do so.

## 1. Critical Testimonies Were Taken and Evidence Obtained

As outlined in section I.C., at the time of the Wells call to Mr. Cuban's counsel, the Enforcement staff had taken Mr. Cuban's and Faure's testimony - the key participants to the telephone call which in which Mr. Cuban is alleged to have gained confidential insider information. In the initial Enforcement staff interview and testimony of Faure, he recalled that the Mamma.com board asked him to contact Mr. Cuban, tell him that he had confidential information to convey to him, and invite him to participate in the private placement. Exhibit 30 at 14. Faure testified that he recalled telling Mr. Cuban this information, and that Mr. Cuban responded at the end of their telephone call by saying, "Well, now I'm screwed. I can't sell." *Id.* at 19.

In addition, the Enforcement staff had obtained several important documents. For example, the Enforcement staff had obtained e-mails Faure sent to Mr. Cuban on June 28, 2004, first asking Mr. Cuban to call him and an e-mail subsequent to their telephone conversation informing Mr. Cuban that he could obtain additional information about the PIPE offering from Witness 1 Witness 1 at Merriman. Exhibit 31 at 2 & 3. In addition, the Enforcement staff had the telephone record which showed that Mr. Cuban called Faure four minutes after Faure sent him the initial e-mail, and that the call lasted more than eight minutes. *See, e.g.,* Attorney 1 Tr. at 48-49.

The Enforcement staff also obtained Witness 2 e-mails which were sent to the Mamma.com board members after Faure reported to Witness 2 about his conversation with Mr. Cuban. Exhibit 42. Those e-mails purported to corroborate Faure's testimony that Mr. Cuban knew he could not sell until after the PIPE was publicly announced. *Id.* In addition, the Enforcement staff had interviewed Witness 1 and obtained the telephone records of Mr. Cuban's call to Witness 1 Exhibit 29. Moreover, the Enforcement staff had obtained Mr. Cuban's trading records showing that he sold all of his shares of Mamma.com before the PIPE offering was publicly announced. Exhibit 4. Enforcement had analyzed the stock prices on the relevant days which showed that Mr. Cuban avoided losses in excess of \$750,000 by selling his shares before the PIPE offering was announced. *Id.* All of this information, obtained prior to the Wells call, was used as a basis for the November 2008 complaint filed against Mr. Cuban. *Id.*

Everyone on the Enforcement staff testified that they believed the investigation was substantially complete when the Wells call was made. Friestad testified, "And so in this case, I believe that the investigation was substantially complete in the sense that I think we had a good sense of what the facts and the evidence about the issues were at the time we made the Wells call." Friestad Tr. at 105. He conceded, however, that if the Enforcement staff had not spoken to Mr. Cuban and Faure, "the two parties that in our judgment were most likely to have the most relevant information that would have a bearing on a decision about whether Mr. Cuban engaged in insider trading," he would be

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hard pressed to think they were in a position to make a Wells call. *Id.* at 105. He added, "There are other individuals who had information that was interesting to know, but not particularly relevant to the issues that were at the heart of this case." *Id.*

Attorney 1 testified that she believed the investigation was substantially complete,

Because we had spoken to the two participants to the conversation. We had supporting documents. We had phone records. We had document production from Cuban that was relevant, and we had interviewed the other couple of people who might have had relevant information. And we had had proffers from company counsel about the other board members.

Attorney 1 Tr. at 48-49.

According to Assistant Director 1 the general purpose of the Wells is to "... make sure that when the staff notifies a party that they're going to recommend action that they actually have a present intention to do so and a good faith basis to do so." Assistant Director 1 Tr. at 65.

Assistant Director 1 testified that in this case by mid-May or the end of May he felt they "absolutely" had a good faith basis to say Enforcement intended to proceed with an Enforcement action. *Id.*

Assistant Director 1 testified that there are instances when Enforcement had a good faith basis to proceed with making a Wells call, but then the Enforcement staff find additional information; in those instances, Enforcement would go back to defense counsel so they have an opportunity through the Wells process to provide their opinions on the additional information. Assistant Director 1 Tr. at 67 & 68. Assistant Director 1 stated, however, that this did not happen in this case. *Id.* at 68 & 69. He explained "our investigative steps are confidential," and the way the Enforcement staff viewed the additional investigative steps taken after the Wells notice was "really just crossing the 't's and dotting the 'i's' . . . but the principle investigative steps, the testimony of the key participants, the key documents, were all done and we felt had been presented significant evidence prior to the time the Wells had been made." *Id.* at 69 & 71.

## **2. Enforcement May, and Does on Occasion, Conduct Additional Investigative Testimony and Work after the Wells Notice**

The OIG investigation revealed that Enforcement may and does on certain occasions, conduct additional investigative testimony and work after the Wells notice is provided. The OIG learned that, as the evidence shows happened in this case, trial counsel get appointed and often want to solidify and/or clarify the record. In addition, as shown below, the Enforcement staff sometimes find that the Wells submission raises a lack of clarity in the record and additional work may therefore be needed.

As noted in the Applicable Policy and Regulations Section above, the Enforcement Manual provides only guidance to Enforcement staff and states that generally staff should consider whether investigations are “substantially complete” before issuing a Wells notice. Enforcement Manual at Section 2.4. But there is no guidance as to what “substantially complete” means, and there is no *per se* requirement that an investigation be substantially complete before issuing a Wells notice. *Id.* Nor is there a prohibition against conducting additional investigative work after the Wells notice. As the Enforcement staff testified, it is determined on a case-by-case basis whether and when to provide a Wells notice. In fact, <sup>Attorney 3</sup> told the OIG that generally defense counsel are eager to know the charges against their client, and usually welcome the Wells notice as early as possible. Exhibit 17 at 6.

Friestad testified that “It is quite routine that testimony be taken and subpoenas are sent, and other information is gathered after a Wells call is made.” Friestad Tr. at 106. During his investigative testimony, we requested that Friestad provide the OIG with a list of random cases in which investigative work and testimony had been taken after the Wells notice. *Id.* at 116.

The day following his OIG testimony, Friestad forwarded to the OIG responses he obtained from his group of Assistant Directors of “any examples where we have (1) taken additional testimony (new witnesses or follow-up questions to a previous witness) or (2) sent subpoenas for additional documents, after having made a Wells call, but prior to going to the Commission with our recommendation.” Exhibit 95. In each of the responses Friestad received and forwarded, the Assistant Director noted instances in which this has happened in their cases. *Id.* One Assistant Director noted,

We have done this on numerous occasions. Most notably in Citi - we took testimony of several witnesses after Wells notices were issued . . . . I found the availability of obtaining additional testimony and documents a useful tool when Wells arguments revealed a lack of clarity in our record. Wells submissions often crystallize arguments and issues for both defense counsel and for us. It was in everyone's interest to clarify the record.

*Id.* Another Assistant Director responded, saying:

Yes. In the Amex investigation, 5 individuals received Wells calls and made Wells submissions around the end of 2004/Early 2005. Some issues were raised in the Wells submissions which caused us to want to talk to additional witnesses and to re-interview other witnesses. We ended up conducting quite an extensive supplemental investigation. We talked to 15 additional witnesses and re-interviewed 2 witnesses who had previously testified. We also received additional documents as part of the

investigation - much of it relating to the Amex's decision with its new counsel to waive privilege.

*Id.*

In all, the OIG found that Enforcement had conducted critical testimonies and gathered significant evidence prior to the Wells call in the investigation of Mr. Cuban. We also found that there is no prohibition on Enforcement staff conducting additional investigative work after a Wells notice and/or submission are made, as was done in this instance, and there have been occasions in the past where this has occurred.

**B. The OIG Did Not Find Sufficient Evidence to Substantiate the Claim that the Earlier Enforcement Investigation was Closed as a *Quid Pro Quo* in the Investigation Related to Mr. Cuban**

Mr. Cuban alleged that a mere four days after he sent the September 21, 2007 letter to Friestad was "just around the time the staff was seeking testimony from the very same Mamma.com executives in its investigation of Mr. Cuban, the Commission abruptly closed its investigation of Mamma.com, which at that time had been ongoing for over three years." Exhibit 1 at 5. He further alleged:

That the staff would suddenly choose to close a long-standing investigation of Mamma.com only a few days after receiving a Wells submission, and just when the staff was seeking testimony from the company's senior executives, gives rise to the reasonable suspicion that the staff, bent on obtaining testimony unfavorable to Mr. Cuban, used the closure of the investigation to attempt to induce Mamma.com's executives to cooperate with the staff and perhaps even to depart from the testimony they previously had provided to us.

*Id.* Mr. Cuban testified about this allegation, explaining that Enforcement staff attorney Attorney 4 told him the investigation he was conducting was about Subject role in Mamma.com. Cuban Tr. at 9 & 10. Mr. Cuban testified that after Attorney 4 interviewed him, he provided Attorney 4 with e-mails he had from various people about Subject *Id.* at 11. According to Mr. Cuban, after it became public that he had purchased stock in Mamma.com in March 2004, he was contacted by an FBI agent who told him to be careful with Subject *Id.* at 12. Mr. Cuban further testified:

. . . that after three and a half years, basically, of all this going on -- that two days before they started going after me they closed the investigation into Mamma.com, that I had talked to somebody in 2004, and then there was this long break. And then they closed the investigation and then --

boom! Here they are talking to me and pursuing me, and so that didn't seem like it was just a coincidence.

*Id.* at 13. He later testified,

. . . the fact that they closed Mamma.com one day and several days later they were taking testimony about me and focusing on me, particularly when this person worked for a convicted felon. I mean, how could you not just at least want to investigate the fact that maybe he was being guided by this felon, and how could you not presume that by letting this slide and telling them that they were off the hook in this case that you weren't going to get the benefit of letting them off the hook. That's just common sense, you know, to any person.

*Id.* at 52.

As discussed in the next section, the OIG found evidence that Enforcement staff intended to close the earlier HO-09900 investigation by September 30, 2006, several weeks before **Attorney 1** opened a MUI into Mark Cuban's trading. While a letter informing Mamma.com of the closing of the matter was not sent until a year later, and during that year a separate group of Enforcement staff was conducting investigative work in the matter related to Mr. Cuban, the OIG did not find any evidence substantiating the allegation that closing the earlier investigation had any effect on the investigation into Mr. Cuban's trading or in any way induced the Mamma.com executives to give different testimony. The only Mamma.com executive the Enforcement staff got additional information from was Faure in his second investigative testimony. Moreover, the OIG found that the two investigations were separate and there was very little interaction between the investigative teams, except to request certain transcripts of testimony taken years earlier.

**1. The Evidence Showed that There Was an Intent to Close the Earlier Investigation of Mamma.com Before the Investigation of Mr. Cuban was Opened**

The OIG investigation revealed that the Enforcement staff had documented its intention to close the earlier investigation, numbered HO-09900, by late September 2006, before a MUI was opened in the Cuban matter, numbered HO-10576.

The OIG obtained an October 17, 2006 internal Enforcement case status memorandum to Associate Director Chion and Assistant Director **Assistant Director 2** which stated that staff had intended to close the HO-09900 matter by September 30, 2006. Exhibit 96 at 2. **Attorney 4** testified that in "late 2006, early 2007. . . it was questionable how we were going to proceed with the case." **Attorney 4** Tr. at 40 & 41. This intent to close the case was



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documented several weeks before [Attorney 1] opened the MUI into Mark Cuban's trading in HO-10576.

Despite this document indicating an intention to close the matter in September 2006, on March 21, 2007, [Attorney 4] wrote to [Assistant Director 2] "Need to touch base with you on Mamma. Their counsel called me last week. I have been busy . . . and have not drafted a closing memo yet . . ." <sup>27</sup> Exhibit 98. [Attorney 4] testified that Mamma.com counsel Greenberg was "consistently calling the SEC" asking for a status on the matter, and if the matter was going to be closed, Greenberg was asking for a termination letter. [Attorney 4] Tr. at 41-42. [Attorney 4] testified that while the case "had not progressed as we thought it would," he still felt he should try to make a request through the SEC's Office of International Affairs ("OIA") for documents specific to [Subject] involvement in Mamma.com. *Id.* at 44-45.

As noted in section I.B. of this report of investigation, a focus of the HO-09900 investigation was [Subject] involvement with Mamma.com. [Attorney 4] Tr. at 36. However, despite not being able to "establish that connection," [Attorney 4] determined to try one more avenue before closing the case definitively. *Id.* at 40. [Attorney 4] testified that,

I'd actually asked that we try another route before deciding to close the case off. I believe it was late 2006, early 2007, [I] asked that we go and try to run down some bank records to see where money from some of the transactions that I identified went to . . . . And I did a request for OIA and Mr. [Assistant Director 2] I think I mentioned that to him too – we might want to try that before, you know, we closed the case out permanently.

[Attorney 4] Tr. at 41.

[Attorney 4] further testified:

I was making requests through OIA to get more information . . . . And OIA takes a very long time, sometimes, to get your documents. So I don't know when

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<sup>27</sup> Zelinsky had been responsible for supervising the HO-09900 investigation from its initiation in March 2004. Exhibit 97 at 1. Zelinsky confirmed the intent to close the case in October 2006 in his April 19, 2010 declaration:

By October 17, 2006, the Enforcement staff assigned to HO-09900 stated that they were 'plan[ning] on closing the matter.' . . . The final decision not to recommend any enforcement action arising out of HO-09900 was made by Antonia Chion (Associate Director, Division of Enforcement) in late August-early September 2007. Counsel for Mamma.com was informed of this decision in a letter dated September 19, 2007.

*Id.* at 2.

those documents actually came in, but the general consensus was, you know, it intimated there was [not] much there. . . . I made that last request to get information through OIA. But other than that, I mean my sense of the things were back then too . . . . but it didn't seem like there was much there.

*Id.* at 44-45 & 47.

On September 6, 2007, Assistant Director 2 e-mailed Attorney 4 "Attorney 4 -- Greenberg called Toni [Chion] again and she wants to return his call. What was the additional follow-up you wanted to do before we issued a termination letter? Please let me know ASAP. Thanks." Exhibit 99. Attorney 4 however, had not uncovered the evidence necessary to bring the case and Enforcement moved forward to send the termination letter to Greenberg. Attorney 4 Tr. at 44-47.

On September 19, 2007, Assistant Director 2 sent a letter to Mamma.com's counsel stating, "This investigation has been completed as to your client, Mamma.com, Inc., against whom we do not intend to recommend any enforcement action by the Commission." Exhibit 100.<sup>28</sup> As of September 30, 2007, Chion and Assistant Director 2 received a case status memorandum confirming, "We plan on closing this matter, and a termination letter was sent to the company during this quarter." Exhibit 101. It was also noted in the Hub Case Report for this matter that as of January 1, 2008, the termination letter had been sent to Mamma.com, advising them that no Enforcement action was contemplated at that time. Exhibit 24 at 2.

## 2. There is Insufficient Evidence of Improper Coordination Between the Different Investigative Teams

The OIG found that the two investigations were separate and distinct, with different staff on each investigation. The formal orders for each investigation do not list any individuals authorized to appear in both matters. Exhibits 25 & 40. The HO-10576 team only became aware of the HO-09900 investigation after checking on the Enforcement internal case tracking database, NRSI, to determine whether there was already an ongoing investigation into Mr. Cuban's sale of his Mamma.com shares.

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<sup>28</sup> In addition, the Hub case report indicated that as of October 23, 2009, a draft closing memorandum had been circulated to the Associate Director for review. Exhibit 24 at 2. HO-09900 was not officially closed, according to the Hub report, until September 13, 2010. *Id.* Friestad testified that it is typical that Enforcement staff take this much time to close a matter "[b]ecause people would rather work on something that's active; and, you know, rather than something that's historical and boxing up documents and that sort of thing, and so it's an ongoing challenge to get cases closed." Friestad Tr. at 38 & 39. Attorney 4 testified that he was not sure why there was a delay between deciding to close the case in late 2006 and officially closing the case in 2010, but indicated that it could have been because he had been assigned to another case that was taking much of his time. Attorney 4 Tr. at 45.

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Thereafter, the OIG found, there was little communication between the teams, other than a request by the HO-10576 team for transcripts.<sup>29</sup>

Friestad, Assistant Director 1 and Attorney 1 all confirmed in sworn testimony that the HO-09900 investigation was separate and distinct from their investigation into Mr. Cuban's trading in Mamma.com. Attorney 3 also told the OIG that the matters were separate. Exhibit 17 at 2 & 3. In fact, Attorney 3 told the OIG that it was rare for investigations to overlap or that the same people would work on different cases such as these because they were in different associate director groups, which he said tended to be separate in conducting their work. *Id.* at 2-3. Similarly, Attorney 4 testified that "Enforcement things are kind of siloed. So, you know, you really don't get involved in other people's cases . . . . There's no prohibition, but I mean you kind of stay in your own silo." Attorney 4 Tr. at 50-51.

Kaplan filed a declaration in the ongoing litigation on September 30, 2009 in Support of Plaintiff Securities and Exchange Commission's Opposition to Mark Cuban's Motion for Attorneys' Fees and Expenses. In that declaration, Kaplan stated,

I supervised one of two temporally and substantively distinct investigations involving Mamma.com. The earlier investigation, assigned internal reference number HO-09900, was conducted by one team of investigators, under different supervision. A second, subsequent investigation into Mark Cuban's trading in Mamma.com, assigned reference number HO-10576, was conducted by a different team of investigators, under my supervision. The earlier Mamma.com investigation, HO-09900, was not closed at the request of anyone assigned to HO-10576. No direct or indirect exchange or inducement for testimony concerning Cuban's trading, including the closing of the earlier Mamma.com investigation, was provided to any witness in the investigation. There was no quid pro quo of any sort exchanged by the SEC for allegedly perjured or any other testimony from Mamma.com executives concerning Cuban.

Exhibit 102 at 3. Kaplan testified to the OIG that he prepared the above-quoted declaration after he had conversations with Friestad, Attorney 3 and Attorney 1 Assistant Director 1 Tr. at 21-24.

Assistant Director 1 further testified that the only coordination of any kind between the two investigative teams was to request, and obtain, copies of transcripts for certain witness

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<sup>29</sup> Mr. Cuban testified that he believed there should have been a "Chinese wall" between the two investigative teams just as there was when he was looking to buy the Chicago Cubs. Cuban Tr. at 50-51. However, the OIG found no requirement in the SEC Enforcement Manual that Enforcement staff not communicate with other teams on separate matters where there is overlapping work. *See generally* Enforcement Manual.

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testimonies which he himself requested. *Id.* at 18. Assistant Director 1 told the OIG he believed his team obtained those transcripts in the summer of 2007, as they were beginning to schedule the second testimony of Faure and interviews with Mamma.com board members Witness 2 and Witness 5. *Id.* Assistant Director 1 noted that NRSI showed that the other investigative team had taken testimony of certain individuals. *Id.*

Consistent with Assistant Director 1 testimony, Attorney 1 testified, "I think the only time I talked to Attorney 4 [Attorney 4] about their matter was to get some transcripts from that team in the summer of '07." Attorney 1 Tr. at 16. She added, "I think Assistant Director 1 talked to somebody, and I physically got them from Attorney 4. *Id.* at 32. In fact, Attorney 1 testified, "The only reach-out I was aware of was to get the transcripts I just mentioned [of Faure, Witness 2 and Attorney 3 Witness 3. *Id.* at 30 & 32. Attorney 4 testified that he recalled speaking with a woman for about 15 or 20 minutes regarding "what the case was about, the gist of it . . . . But other than the initial contact, I really didn't have any other contact." Attorney 4 Tr. at 50 & 51. Attorney 1 testified that she knew very little about the earlier investigation except that it was a market manipulation investigation. Attorney 1 Tr. at 29. Attorney 1 also told the OIG she did not share any information learned from her investigation with the other investigative team, nor did they ask for any. Attorney 1 Tr. at 35. Attorney 4 testified that no Enforcement staff consulted him in any way about the decision to open the investigation into Mark Cuban's trading in Mamma.com. Attorney 4 Tr. at 50 & 51.

Friestad testified that he did not believe a single person who worked on the investigation of Mr. Cuban overlapped with the Enforcement staff who worked on the earlier investigation of Mamma.com. Friestad Tr. at 27. He further testified that the different teams had minimal contact with each other. *Id.* In fact, Friestad explained that when they began their investigation of Mr. Cuban, the other investigation "was essentially completed and was not active at any point in time when our investigation was active." *Id.* at 28. Moreover, he added, "They weren't really doing anything as far as I was aware, so there wasn't a whole lot to coordinate." *Id.* Friestad confirmed for the OIG that the Enforcement staff had asked for copies of transcripts of some of the witnesses from the earlier investigation. *Id.* But he explained that those were "historical" and had already been taken, so "It wasn't like they were asking the other staff to ask certain questions or to coordinate what would be asked or anything like that." *Id.*

Friestad also testified that Enforcement has "no restrictions on staff's ability to share information with each other." *Id.* at 29. He told the OIG he did not believe there should be a prohibition on different teams sharing information testifying,

I think that in many cases it's highly useful to make sure that we're not duplicating efforts or overlapping with each other. . . . And some of those investigations [involving large institutions] can be quite burdensome on the parties involved, and I think it's important for the staff to be able to share information with each other to make sure that we aren't subjecting parties that are involved in our investigations to unnecessary burdens . . . .

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*Id.* With that said, Friestad testified that there are times when access to certain information about investigations should be restricted, but that does not mean there should be a general prohibition against it. *Id.* at 29-30.

The OIG investigation did not find evidence of improper coordination between the teams or that either team influenced the other.

**3. There is Insufficient Evidence that the Enforcement Staff Investigating Mr. Cuban Had Any Involvement in Closing the Earlier Investigation into Mamma.com**

The OIG did not find evidence to suggest that the HO-10576 team investigating Mr. Cuban's sale of his Mamma.com stock had any impact on the investigation or closing of HO-09900. As outlined above, the evidence shows that the HO-09900 team intended to close the matter in September 2006, before the investigation of Mr. Cuban was even contemplated.

Friestad, Assistant Director 1 and Attorney 1 all testified similarly that they had no involvement whatsoever in closing the HO-09900 investigation. Attorney 1 testified that when she made the trip to Montreal to interview Witness 2, Witness 3 and Witness 4 in early September 2007 she did not know whether the earlier investigation was closed. Attorney 1 Tr. at 34-35. In fact, in her OIG testimony, Attorney 1 stated, "I don't even know if it's closed today." *Id.* at 35.

Friestad testified he was not involved at all in deciding to close the earlier investigation. Friestad Tr. at 32. Friestad testified he was aware of the HO-09900 investigation status generally, but was not sure how he learned the other investigation was closed:

I think I knew fairly early on that it was not a particularly active investigation and that it was destined to be closed. It was sort of my assumption. I don't recall exactly how I learned that, but that was sort of my general assumption throughout. I only recall one or two personal interactions with anyone on the other investigation, and that was actually towards the very end, right before we went up to the Commission with our recommendation.

Friestad Tr. at 33. He told the OIG he believed he reached out to Assistant Director 2 likely by e-mail, to inquire whether any individuals in their investigation had received Wells notices, including Faure. *Id.* at 34. Assistant Director 1 testified that he only became aware that the HO-09900 investigation was being closed because Mamma.com put out a press release about it. Assistant Director 1 Tr. at 21. Assistant Director 1 stated, "... I remember someone telling me from my team that they had just seen a press release or they had just seen a news item that it had been closed and that was literally the first time we even heard that it was going to be closing

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was when we basically read about it.” *Id.* Attorney 3 also told the OIG he was not aware that HO-09900 was closed, and said that he learned about that after it had happened, although he was not sure how he learned about it. Exhibit 17 at 3. He added that he was not consulted or involved in any way in the decision to close HO-09900. *Id.*

In addition, the Enforcement staff investigating Mr. Cuban all testified there was no inducement or promises made to witnesses to encourage them to cooperate with the staff's investigation of Mr. Cuban. *See* Friestad Tr. at 41; Assistant Director 1 Tr. at 25; Attorney 1 Tr. at 35-36; Exhibit 17 at 3. Assistant Director 1 further testified that in preparing his declaration filed in opposition to Mr. Cuban's motion for attorney's fees, he went to Assistant Director 2 and others on the HO-09900 team “to confirm that they had no [sic] closed or made any . . . salacious side deals with anybody at Mamma.com in connection with closing that investigation” in order to be as complete as possible when executing the affidavit. Assistant Director 1 Tr. at 58.

In the ongoing litigation, Mr. Cuban's counsel cited as evidence of the *quid pro quo* a July 18, 2007 letter from Greenberg, counsel for Mamma.com, to Assistant Director 2 renewing their request to meet and resolve the HO-09900 investigation of Mamma.com. Exhibit 103. That letter stated, “The Company has fully cooperated with the Investigation as well as in other important SEC matters.” *Id.* But the letter did not directly mention the investigation of Mr. Cuban, nor did it suggest that only if or when the HO-09900 investigation is closed would they cooperate with the investigation of Mr. Cuban. *Id.*

In fact, the evidence shows that Mamma.com had cooperated with the SEC from the beginning of the investigation into Mr. Cuban's trading -- Faure provided an interview and then testimony and documents and Mamma.com's counsel provided proffers and other documents -- all of which supported the SEC's case. The only thing that was obtained from Mamma.com after the HO-09900 matter was closed was Faure's second testimony, which was taken just after Mr. Cuban's second Wells submission. Therefore, without more than this letter from Mamma.com to Assistant Director 2 the OIG does not find there is sufficient evidence to show a *quid pro quo*.

Friestad, Assistant Director 1 and Attorney 4 testified that they were unaware of what the other “important matters” were in which Mamma.com had cooperated with the SEC, as referenced in the letter. Friestad Tr. at 41; Assistant Director 1 Tr. at 26 & Attorney 4 Tr. at 55. In addition, both Friestad and Assistant Director 1 did not believe that this letter invited a *quid pro quo*. Friestad Tr. at 42 & Assistant Director 1 Tr. at 26. Attorney 4 testified that he was “never privy to a conversation where there was a *quid pro quo* discussed. I never learned later on, then or now, that there was any *quid pro quo* relationship in this case.” Attorney 4 Tr. at 56. Friestad testified about the letter, “This suggests to me there have been at this point in time almost more discussions underway for more than a year, since April 2006, about the possibility of closing the other investigation long before the investigation, [sic] Mr. Cuban, was even begun.” Friestad Tr. at 42. In fact, Friestad pointed out that neither he nor his staff were copied on the letter, and testified that he read the letter as “. . . suggesting to Assistant Director 2 why Assistant Director 2 should close Assistant Director 2 investigation, and nothing more than that.” *Id.* at 43.

In all, the OIG did not find sufficient evidence to substantiate the allegation that there was any involvement by the HO-10576 team in closing the HO-09900 matter or that there was a *quid pro quo* for closing the earlier matter.

**C. The OIG Did Not Find Sufficient Evidence to Substantiate the Allegation that the Investigation was Motivated by Politics or Other Improper Motives, Nor was the Allegation that Mr. Cuban was Targeted Because he Was High-Profile Substantiated**

The OIG investigation revealed that [Attorney 1] opened this investigation as a result of finding instant messages while searching for the term “jail” while conducting another investigation, as discussed in Section I.A. [Attorney 1] Tr. at 154-155. [Attorney 1] testified that she was not searching for Mark Cuban’s name. *Id.* She further testified that if she had come across this message and it involved some unknown person, and she learned the same set of facts, she would have opened an investigation and pursued it just the same.<sup>30</sup> *Id.* at 155. While [Attorney 1] was aware of who Mr. Cuban was, [Attorney 3] and [Assistant Director 1] told the OIG that they were not aware of who Mr. Cuban was. [Attorney 1] Tr. at 41; Exhibit 17 at 2; [Assistant Director 1] Tr. at 36.

The OIG investigation did not find specific evidence that anyone on the Enforcement staff was motivated to bring a case against Mr. Cuban because he was well-known or a high-profile individual. The OIG also did not uncover evidence that the Enforcement staff used derogatory or inflammatory language related to Mr. Cuban. The OIG investigation further revealed that the Enforcement staff only learned about the existence of the Norris/Cuban e-mail exchanges the day before the Wells meeting, and there was no evidence it had any bearing on their investigation. [Assistant Director 1] [Attorney 3] and [Attorney 1] all told the OIG that they were not told much about the e-mails and no one specifically remembered being told who in the Fort Worth office was e-mailing Mr. Cuban. [Assistant Director 1] Tr. at 30; Exhibit 17 at 155 & 156; [Attorney 1] Tr. at 36 & 37. In addition, the OIG found that no one on the Enforcement staff knew of or discussed Mr. Cuban’s political views, even after reading the Norris/Cuban e-mail exchanges. [Assistant Director 1] at 36 & 37; Exhibit 17 at 1; [Attorney 1] Tr. at 39 & 40.

**1. There was Insufficient Evidence to Show that the Enforcement Investigation was Motivated by Politics**

As outlined in Section I.D.4., the OIG also found that former Chairman Cox recused himself from the November 2008 meeting and vote to authorize suit against Mr. Cuban, and apparently did so only as a cautionary matter since he had been a recipient of some of the Norris/Cuban e-mail exchanges months earlier. Uhlmann Tr. at 28-30. The OIG found no evidence that former Chairman Cox had any other involvement in getting this case authorized. *Id.* The OIG uncovered evidence which showed that the Cuban

<sup>30</sup> PII

PII

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matter was calendared a couple of times in early 2008, but likely was delayed because of the difficulty of obtaining a quorum of the Commissioners at that time. *Id.* at 55 & 56.

In the September 21, 2007 letter to Friestad from Ferrara, Mr. Cuban attached the Norris/Cuban e-mail exchanges, along with a "reconstituted spreadsheet" and timeline of those e-mails and argued, among other things:

More important, Mr. Cuban was concerned that the staff's decision to initiate a law enforcement proceeding may have been motivated by political animus. Mr. Cuban's concern was heartfelt and not without foundation. . . . In the time period leading up to Mr. Cuban's receipt of a Wells notice, however, a senior SEC enforcement attorney in the Ft. Worth office subjected Mr. Cuban to a series of astonishing and threatening e-mails, some of which also appear to have been shared with Chairman Cox.

. . . I believe Mr. Cuban is entitled to know directly from the Commission whether Mr. Norris, or the Chairman's office prompted by Mr. Norris' e-mails to him, played any role in the staff's decision to recommend that a fraud action be brought against Mr. Cuban. If Mr. Cuban is to have his business hobbled by government allegations of fraud, those allegations should not be rooted in suspicions over his patriotism or loyalty to President Bush. Outside of the beltway, even prominent businessmen believe that the government is monolithic. It has been difficult to convince our client that the diatribes leveled by Mr. Norris have not played some role in the decision to prosecute him.

Exhibit 26; Exhibit 91 at 2 & 4.

According to Friestad, this was the first time Mr. Cuban raised the issue of the Norris/Cuban e-mail exchanges. *Id.* at 180-181. On September 24, 2007 Friestad responded to Ferrara's letter as follows:

I am writing in response to your September 21, 2007 letter. The above-referenced investigation [HO-10576], which was opened earlier this year, has been conducted entirely by the Home Office staff. Mr. Norris, who works in the Commission's Fort Worth Regional Office, has not had, and will not have, any role in the investigation. Indeed, although it does not excuse the conduct, my understanding is that Mr. Norris was not even aware of the investigation at the time of his e-mail communications with Mr. Cuban. Rest assured, political considerations and personal opinions



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will not have any bearing on any decisions that are made during this investigation. All of the decisions that we have made, and will make, regarding your client will be based upon our review of the facts and the evidence.

Exhibit 104. These allegations are also the subject of the ongoing litigation.

**2. There is Insufficient Evidence to Show that the Enforcement Staff Targeted Mr. Cuban Because he Was High-Profile**

Mr. Cuban and his counsel also alleged that they believed the investigation into Mr. Cuban's trading was motivated by his high-profile public persona. Mr. Cuban testified,

Not only [am I] relatively speaking high profile individual, but I'm apolitical, so you can do a public search along with my donations, and you don't see any contributions to any side. You know, so it's not likely they're going to upset somebody on one side of the aisle or on the other. And the other thing about this, there's no downside for them to pursue a high profile individual.

Cuban Tr. at 15. Mr. Cuban added, ". . . when they were coming after me, Linda Thomsen said in one of her presentations, we're out there finding big, high profile, insider trading cases." *Id.* at 48. The OIG did find that in a speech given by Thomsen on November 6, 2008 at the Fordham University Law School entitled, "True to Our Mission: Why We Need the SEC," Thomsen stated, "While the pursuit of high profile insider trading cases is one example of how the SEC promotes investor confidence in our markets, the SEC's enforcement actions provide far more than just confidence." Exhibit 105 at 5. However, the OIG found no evidence that Thomsen or any other Enforcement staff mentioned Mr. Cuban specifically on any occasion or speaking engagement.

The OIG found that, around this timeframe, Enforcement was touting its success in, and the deterrent effect of, insider trading cases. According to Friestad, Thomsen gave a number of speeches about high-profile insider trading cases before this case was filed. Friestad Tr. at 207. He believed that Enforcement's focus at that time was not to bring cases against a single defendant, but against many; Friestad specifically pointed to Enforcement's focus on professionals such as attorneys who have "repeat access to material, non-public information, and are essentially engaged in the business of insider trading." *Id.* at 207-208. However, Friestad testified that he never felt pressure to bring cases against more well-known, high-profile persons. *Id.* at 208.

To the contrary, Coggins testified as to his belief that Enforcement would want a case against a recognizable individual:

This is a case I look at as a former prosecutor I would never file a case, whether its civil or criminal, based on someone like Guy Faure, unless I had extremely strong corroboration. So my sense was, Mark is a very high profile guy and I thought that to some extent the fact that he was such a high profile individual, was coming back to hurt you in this instance. That this was a case that probably wouldn't have been brought against a less noteworthy individual.

Coggins Tr. at 25. Likewise, Mendrygal testified, "I'm speculating, but I think it doesn't hurt to have a high-profile target, you know, to help further your enforcement agenda." Mendrygal Tr. at 32.

Attorney 3 did not remember any excitement about the case because Mr. Cuban was high-profile, and added that he was particularly interested in the case because he was especially interested in the PIPEs cases, which was a new area for the SEC at the time. Exhibit 17 at 2. He also did not remember any push from Thomsen to bring high-profile cases. *Id.*

In all, the OIG found that while Thomsen gave a speech about the SEC's Enforcement program and mentioned the deterrent effect of bringing high-profile cases just before the SEC filed its complaint against Mr. Cuban, there is no evidence that this gave rise to the investigation of Mr. Cuban, opened nearly two years earlier. Moreover, the evidence shows that Thomsen was unaware of the Enforcement investigation of Mr. Cuban until just before the formal order was requested at the end of February 2007. The OIG also found no evidence, either in testimony or through the review of more than 400,000 e-mails, that Mr. Cuban was targeted by the Enforcement Division because he was a high-profile individual.

**3. There is No Evidence that the FWRO Trial Attorney Who E-Mailed Mr. Cuban Had Any Involvement in the Investigation into Mr. Cuban's Trading or that the E-Mail Exchanges Played a Role in the Investigation of Mr. Cuban**

The OIG investigation revealed ample evidence that Norris had no involvement in the investigation into Mr. Cuban's sale of his Mamma.com shares, nor did anyone on the Enforcement staff become aware of the e-mails exchanges between Norris and Mr. Cuban until after the Wells notice.

Norris wrote an undated lengthy letter of apology to Mr. Cuban, released during the ongoing litigation of this matter, after he was removed from federal service. Exhibit 106. In that letter, Norris wrote, among other things:

. . . I never had any role in the investigation or litigation of the SEC's civil enforcement action against you. In fact, I

was not even aware that the SEC had an investigation focusing on you until well after our exchange took place. I had no role in any decisions made during the investigation or after the SEC commenced its lawsuit. Indeed, to this day, I have never discussed the case with any of the enforcement attorneys assigned to it and I remain largely ignorant of the evidence and allegations.

*Id.* at 4.

In Kaplan's September 30, 2009 declaration filed in the ongoing litigation of this matter Kaplan stated, among other things:

Former Commission trial attorney Jeffrey Norris, located in the Commission's Fort Worth Regional Office at the time, did not participate in the Commission's investigation and had no role in the review, recommendation, or litigation of this case. Further, Norris had no direct or indirect supervisory relationship or role with anyone working on the investigation. The investigation was conducted entirely by the enforcement staff in Washington, D.C. The Norris/Cuban email exchanges and the matters referenced therein were not a factor in, and had no effect on, the initiation or continuation of the investigation or the staff's decision to recommend that the Commission file insider trading charges against Cuban.

Exhibit 102 at 1-2. Kaplan testified that he based these statements on the fact that he supervised the Enforcement team working on the Cuban matter and that he "knew for a fact . . . Mr. Norris had nothing to do with the investigation." Kaplan Tr. at 37. He also testified that for that same reason he knew that the Norris/Cuban e-mail exchanges were not in any way a factor in the investigation. Kaplan Tr. at 39.

Friestad testified that before receiving the e-mail exchange between Norris and Cuban on May 9, 2007 from Norris, he did not know that Norris had been e-mailing Cuban, nor had Norris ever discussed Mr. Cuban with him. Friestad Tr. at 44 & 48-49. Attorney 3 told the OIG that Norris had no involvement whatsoever in the insider trading case against Mr. Cuban and that the e-mail exchange containing "political nonsense" had no bearing on the investigation. Exhibit 17 at 7. Similarly, Attorney 1 testified that the Norris/Cuban e-mail exchanges, which she saw for the first time when Mr. Cuban's counsel attached them to their second Wells submission, had no bearing on their investigation of Mr. Cuban and that Norris had no involvement whatsoever in their investigation. Attorney 1 Tr. at 40-41.

The OIG investigation found there is no evidence that Norris had any involvement in the investigation into Mr. Cuban's sale of his Mamma.com shares, or that his e-mails had an impact on the investigation.

**4. Associate Director Friestad Failed to Promptly Inform Agency Officials of the Inappropriate E-Mail Exchanges**

The OIG found that Friestad became aware of some of the inappropriate e-mail exchanges between Norris and Mr. Cuban in early May 2007, and failed to promptly report the inappropriate e-mail exchanges to anyone at the agency, including Thomsen, the FWRO, OHR, or the OIG to ensure appropriate disciplinary action was initiated. In fact, the OIG found that no immediate action was taken until the Chairman's office became aware of the e-mail exchanges on or about July 13, 2007. We found that Friestad did immediately contact Norris and told him to stop communicating with Mr. Cuban, and alerted Norris that there was an ongoing investigation related to Mr. Cuban.

As discussed in Sections I.D.2.&3., Friestad's immediate response when he was forwarded Norris's May 5, 2007 e-mails to Mr. Cuban was to call Norris and tell him to stop communicating with Mr. Cuban. Friestad testified that he realized Norris's actions raised "potential personnel issues" beyond having an impact on the investigation of Mr. Cuban and explained the additional actions he took after learning about Norris e-mailing Mr. Cuban. Friestad Tr. at 54. According to Friestad, he wanted to learn more about the exact sequence of events and,

shortly after this interchange, and by shortly I mean two or three weeks or a month, I had had communications with someone I know in the Chairman's office who confirmed to me that Mr. Norris had in fact sent these e-mails to the Chairman. And not only what I was aware of, but substantially more than I was aware of.

*Id.* at 54-55. He further testified that it may have been when he had the "follow-up communications" with the Chairman's office that he learned of the additional March 28-29, 2007 e-mail exchanges Norris had with Mr. Cuban. *Id.* at 55. Friestad testified that he talked to [Counsel] in the Chairman's office and that it probably occurred in mid-June 2007. *Id.*

As noted in Section I.D.3., Friestad suggested in his testimony before the OIG that he may have first contacted the Chairman's office about the Norris/Cuban e-mail exchanges, but the OIG investigation showed that the Chairman's office reached out to him and Thomsen in Enforcement and others at the agency about it. When asked if he took any immediate action after talking to Norris, Friestad testified, "I don't recall when I first had [initial] contact with Mr. [Counsel] but it was at some point between those time periods, I believe." *Id.* at 56. Friestad admitted, however, he did not contact OHR at that time, nor did he speak with Thomsen about it "until I heard back from [Counsel] [Counsel] in the Chairman's office." *Id.* When asked what he was doing in the period of time

between when he spoke to Norris about his e-mailing Mr. Cuban and learning from the Chairman's office that the Chairman had been copied on those e-mails, Friestad testified, "Well, there's a limit to what I could do. I couldn't contact Mr. Cuban to ask him." *Id.*

When asked in his OIG testimony why he did not reach out to OHR or Thomsen or the FWRO, Friestad responded, "That's what we did do when I learned more details about what had happened."<sup>31</sup> *Id.* at 57. Friestad admitted, "I didn't really have a reason" for waiting to tell Thomsen about the e-mail exchanges. *Id.* When asked if he recalled reaching out to [Counsel] Friestad testified that he did not have a "great recollection" about the sequence of events. *Id.* But he did testify that the same day [Counsel] informed him the Chairman had received the e-mail exchanges, "[Counsel] [Counsel] and I, went to talk to Linda." *Id.* at 59. Then, according to Friestad, he and Thomsen notified the OIG, and shortly thereafter called the FWRO and spoke with Romero or Korotash. *Id.* Friestad testified that they called Romero and Korotash because they were Norris's supervisors, and he recalled that they were shocked by these e-mails, but not surprised it was Norris. *Id.* at 62-63.

In contrast to Friestad's testimony in which he implied that he may have contacted [Counsel] first about whether the Chairman had in fact been copied on these e-mail exchanges, (testifying he did not talk to Thomsen, "until I heard back from [Counsel] [Counsel] in the Chairman's office"), Uhlmann and [Counsel] both testified that [Counsel] reached out to Friestad first. As discussed in Section I.D.3., [Counsel] testified he recalled that he went to Friestad's office and informed him about the Norris/Cuban e-mail exchange and that "at some point during the conversation, he indicated some familiarity with the e-mail." [Counsel] at 18. Similarly, Uhlmann recalled that [Counsel] reported back to him that [Counsel] had spoken to Friestad and learned that there was an active investigation ongoing of Mr. Cuban and that Friestad was aware of the e-mails. Uhlmann Tr. at 15 & 18. According to [Counsel] and also contrary to Friestad's testimony, he went to Thomsen's office by himself to inform her about the Norris/Cuban e-mail exchange and while he was in her office, Thomsen picked up the telephone and called Romero and the Inspector General. [Counsel] Tr. at 18-20. [Counsel] testified that he had the impression that Thomsen, unlike Friestad, was not aware of the Norris/Cuban e-mail exchanges until he informed her of them. *Id.* at 19.

In all, the OIG finds that Friestad failed to promptly report Norris's misconduct of sending Mr. Cuban inappropriate e-mails from his SEC computer. As noted above, SEC employees have long had a duty to report misconduct.<sup>32</sup> Although the investigation

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<sup>31</sup> In a July 23, 2007 e-mail Korotash informed Romero, "I spoke with Jeff [Norris]. He assures me that he has had no further contact with Mr. Cuban subsequent to learning from Friestad that Cuban was the subject of a Commission investigation . . ." Exhibit 107.

<sup>32</sup> Mr. Cuban alleged that Friestad's failure to promptly report this misconduct violated SEC policy. Specifically, he alleged that the Enforcement Manual required staff to report attorney misconduct to the Ethics Office. Exhibit 1 at 8. But the section that he cited, Section 5.5.5 of the October 2008 version of the Enforcement Manual, merely states that the Ethics Office should be contacted when the staff is considering referring an attorney to a professional licensing board for misconduct. Exhibit 108. It does not provide guidance on the procedure for reporting employee misconduct. *Id.* In addition, he claimed that the OIG's

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revealed that Friestad did promptly instruct Norris to stop communicating with Mr. Cuban, and Norris was eventually disciplined by his superiors in the FWRO in August 2007 for this conduct, action against Norris may have been taken earlier had Friestad immediately reported Norris's misconduct to Norris's supervisors, OHR or the OIG. Accordingly, we are recommending that Friestad receive counseling to ensure that any future misconduct by another employee is promptly reported to the appropriate officials.

#### **D. The Allegation that the Enforcement Staff had a Preconceived Bias of Mr. Cuban's Guilt was Not Substantiated**

The OIG investigation did not substantiate the allegation that the Enforcement staff had a preconceived bias against Mr. Cuban. The OIG did not uncover any evidence that Enforcement staff knew of, or discussed, Mr. Cuban's political views. The OIG also did not find that <sup>Attorney 2</sup> and Thomsen's comments made during the Wells meeting, or Friestad sending photographs of Mr. Cuban to other senior officials without any commentary, evidenced a bias against Mr. Cuban in its investigation.

##### **1. Enforcement Staff Were Unaware of Mr. Cuban's Political Views**

Friestad testified that before the MUI was opened, he knew Mr. Cuban was the owner of the Dallas Mavericks, that he had had a television show called, "The Benefactor," and "generally associated him with having been an entrepreneur involved with a dot com company." Friestad Tr. at 88-89. Similarly, <sup>Attorney 1</sup> testified that she knew of Mark Cuban when she opened the MUI, but just knew that he owned a basketball team but "I don't even think I knew which one." <sup>Attorney 1</sup> Tr. at 41. <sup>Attorney 2</sup> testified that he "knew of Cuban, generally, from his self-created, celebrity persona."

<sup>Attorney 2</sup> Tr. at 82. <sup>LE/DP</sup>  
<sup>LE/DP</sup>  
<sup>LE/DP</sup> <sup>Assistant Director 1</sup> Tr. at 53. The OIG confirmed this fact by listening to the tape recording of that meeting.

<sup>Assistant Director 1</sup> testified he did not know who Mr. Cuban was when the Enforcement staff opened the investigation. <sup>Assistant Director 1</sup> Tr. at 36. He testified,

. . . there was a view that as we would talk about the case or as the -- when my team came to me to talk about the case I didn't know who he was. When we had first talked about the matter with Linda [Thomsen] she didn't know who he was. There was some discussion of whether it was a litmus

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website stated that SEC employees are "responsible for reporting . . . misconduct affecting Commission programs and operations." Exhibit 1 at 8. As outlined above, SEC employees have long been reminded of their duty to disclose waste, fraud, abuse and corruption to appropriate authorities, such as to supervisors or the Office of Inspector General.

test of whether you were a sports fan whether you had ever heard of him. I had not heard of him.

*Id.* Attorney 3 also told the OIG he did not know who Mr. Cuban was prior to his involvement in the investigation. Exhibit 17 at 2. Therefore, according to Attorney 3 he had not formed any opinions of Mr. Cuban and had “no personal feelings about him one way or another.” *Id.* As discussed in section II.D.3., according to Friestad, neither Thomsen nor Joan McKown (“McKown”) knew of Mark Cuban either when they learned of the investigation. Friestad Tr. at 91-92.

According to Uhlmann, former Chairman Cox also did not know who Mark Cuban was. Uhlmann Tr. at 11. Friestad testified that he knew Norris was very conservative, but he did not know anything about Mr. Cuban’s political views before opening the case nor did he know anything about Mr. Cuban’s alleged backing of a movie called, “Loose Change.” Friestad Tr. at 48-49. No one else on the Enforcement staff was familiar with the alleged backing of the movie either. Assistant Director 1 Tr. at 36; Attorney 1 Tr. at 40; Attorney 2 Tr. at 93. Mr. Cuban himself testified that he is “apolitical” and is not aligned with any particular party. Cuban Tr. at 15.

## 2. Attorney 2 and Thomsen made Comments Alleged to be Inappropriate at the Wells Meeting

### a. Attorney 2 Comment about Mr. Cuban

Mr. Cuban alleged that there was “an apparent violation of the SEC’s standard of conduct toward parties and their counsel” when trial attorney Attorney 2 Attorney 2 stated, “Mr. Cuban takes irrational and silly risks every day” and that his alleged actions in their investigation were consistent with that. Exhibit 1 at 3. Mr. Cuban alleged that Attorney 2 made this comment in response to Mr. Cuban’s counsel making the argument, during the Wells meeting, that it would be illogical for Mr. Cuban to have risked his reputation on the relatively small amount of money that the Enforcement staff claimed Mr. Cuban had saved by engaging in his alleged insider trades. *Id.* Specifically, Mr. Cuban alleged that Attorney 2 comment was not “temperate” or “impartial,” as required by 17 C.F.R. § 200.69, and that it showed a “preconceived notion of Mr. Cuban” and a “propensity to prejudge him without regard to the facts.” *Id.*

The OIG found that the evidence established that Attorney 2 made the comment, “Mr. Cuban takes irrational and silly risks every day” or similar words to that effect in the Wells meeting on July 19, 2007. The comment was confirmed by Coggins and Mendrygal, memorialized in a memorandum prepared the next day from notes taken during the meeting, and Attorney 2 acknowledged a comment like that was made.

The OIG further found that although the comment was made as part of a back-and-forth conversation in a Wells meeting about the strengths and weaknesses of the case against Mr. Cuban, and Mr. Cuban’s propensity to take risks was not altogether irrelevant to the merits of the SEC’s case (particularly when his counsel raised the argument that

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Mr. Cuban would not risk everything he had and his reputation for the amount of dollars at stake), <sup>Attorney 2</sup> could have been more temperate in his language. An argument that Mr. Cuban has taken certain risks that would undermine the argument made by his counsel that he would not risk his reputation on a relatively small amount of money may have been an appropriate response. But <sup>Attorney 2</sup> stating that Mr. Cuban "takes irrational and silly risks every day" is not productive to a professional dialogue about the facts of a case, even in the context of a discussion of litigation risks.<sup>33</sup> Accordingly,

33 LE/WP  
LE/WP

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Exhibit 53 at 8. The OIG investigation revealed that the Enforcement staff did make a demand for a jury trial in the Cuban matter. <sup>LE/WP</sup>  
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while the OIG does not conclude that <sup>Attorney 2</sup> comment is so inappropriate as to justify a recommendation that disciplinary action be taken against him, nevertheless, we are recommending that <sup>Attorney 2</sup> be counseled on this matter.

But such a statement, standing alone, does not evidence a bias against Mr. Cuban, particularly when it was made in the moment of responding to Mr. Cuban's counsel's argument. Moreover, <sup>Attorney 2</sup> was appointed to the case only just before the Wells meeting and well after the Wells notice was provided.

**b. Former Director of Enforcement's Comment**

Mr. Cuban also alleged that in the Wells meeting Thomsen gave the appearance that the staff's early initiation of the Wells process might have been motivated by a preconceived notion of Mr. Cuban's supposed culpability. Specifically, in the memorandum prepared by Fish & Richardson on the day following the Wells meeting, it stated that in response to Coggins arguing that there were credibility issues surrounding Faure, "Ms. Thomsen explained that 'This is a one-on-one case -- if there was a confidentiality agreement, we win. If not, we lose.' Ms. Thomsen then said that everything else Paul [Coggins] discussed is 'noise.'" Exhibit 71 at 2. Coggins, according to the memorandum, argued that it is not just "noise" because the SEC admitted this is a credibility contest between Mr. Cuban and Faure. The SEC responded that this information by Coggins was irrelevant, according to Coggins. *Id.*

Mr. Cuban testified about his view of Thomsen's alleged comment,

... to just dismiss what we were working on as noise is very presumptuous anyways, particularly when we were referring to somebody that had a 48 count indictment from the Department of Justice. How in the world is that noise, and how could she be objective? And particularly knowing what we know about <sup>Subject</sup> <sup>Subject</sup> to say it's noise, and particularly when she knows how important it is to us in our preparation to dismiss it, it just shows that she had already come to a conclusion.

Cuban Tr. at 40.

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<sup>E/WP</sup>

<sup>E/WP</sup>

<sup>E/WP</sup>

The OIG found that Thomsen did make this comment, which Friestad and Assistant Director 1 recalled, but that the comment was not inappropriate in and of itself, nor did it evidence a bias or predetermined agenda against Mr. Cuban. While perhaps Thomsen could have chosen a different word to describe her view that certain arguments were irrelevant or extraneous to the merits of the case against Mr. Cuban, the word "noise" in this context is not sufficiently impertinent to be considered inappropriate.

### **3. Sending Photographs of Mr. Cuban to Senior Officials Who Were Not Familiar with Mr. Cuban Did Not *Per Se* Evidence a Bias Against Him**

The OIG found that Friestad sent Thomsen and another senior official photographs of Mr. Cuban after Thomsen first became aware of the investigation against Mr. Cuban and told Friestad she did not know who he was. Mr. Cuban has alleged in the ongoing litigation that this also showed a bias against their client and was inappropriate.

On February 26, 2007, Friestad sent Thomsen and McKown, then Chief Counsel of Enforcement, an e-mail entitled, "Mark Cuban," attaching six photographs of Cuban. Exhibit 110. Three of the photographs of Mr. Cuban show him in an animated state, and two of the photographs are of him smiling, including one apparent publicity shot of him holding stacks of money. *Id.* Thomsen responded to the e-mail saying, "Charming." *Id.* McKown responded, "Now I feel fully informed. The picture with the money is particularly helpful and certainly speaks a 1,000 words (if not more)." Exhibit 111. Friestad testified that on or around this date is the first time he informed Thomsen that they were investigating Mark Cuban. Friestad Tr. at 91. Friestad added:

And as I recall, we were at that point in time very close to sending a memo to the Commission to obtain a formal order and we had been in contact with the Chairman's Office and considering among ourselves that we should request that the formal order recommendation be considered by the Commission in Executive Session. . . . And then I went to Linda's [Thomsen] office to tell her that that was happening, and she sort of questioned me as to why it was important that it be an executive session. . . . And I said, 'Because it involves potential insider trading by Mark Cuban,' and she had never heard of him before. So I told her I find that hard to believe, but she said she didn't, and then she called Joan [McKown] from her office while I was standing there; asked Joan if she had ever heard of Mark Cuban. And Joan said, 'No,' she had never heard of Mark Cuban. And so I tried to explain to them that, you know, who he was . . . .

*Id.* at 91-92. Friestad explained that shortly after that discussion, he went back to his office and conducted a quick "Google" Internet search of Mark Cuban, which resulted in

his finding several photographs of Mr. Cuban. *Id.* at 93. Friestad testified that he did not give the search a lot of thought, but “tried to pick representative photos from what popped up when you do a Google search . . . .” *Id.* According to Friestad, he cut and pasted the photographs and e-mailed them to Thomsen and McKown. *Id.* at 93-94. Friestad testified he had no further discussions with Thomsen about these photos, and had no further discussions with McKown about Mr. Cuban personally. *Id.* at 97 & 98.

Friestad testified that he did not believe that his sending these photographs showed he had a bias against Mr. Cuban, and said that it was not his intent nor the context of his e-mail. *Id.* at 98-99. When asked, “would you agree that none of these photos are particularly flattering photos of Mark Cuban?” Friestad testified, “Actually, no. I don’t agree with that.” . . . “I think the biggest one and the first one is a nice picture of him. I think he has a nice smile . . . .” *Id.* at 94. He explained that he did not say anything pejorative or disparaging about Mr. Cuban and added, “I don’t think I have [spoken that way] to anybody during the course of this investigation.” *Id.* at 98.

The OIG found that while not all of the photographs were necessarily flattering to Mr. Cuban, the mere act of conducting an Internet search of Mr. Cuban and e-mailing a few photographs that were located in the search to two SEC officials who were not familiar with Mr. Cuban, without any commentary, is not sufficient to show evidence of a bias against Mr. Cuban that could have tainted the investigation.

**E. The OIG Did Not Find Sufficient Evidence to Support the Allegation that the Enforcement Staff “Tamped Down” a Witness**

In the complaint letter filed with the OIG and in the September 21, 2007 letter from Ferrara to Friestad, Mr. Cuban alleged that his ability to compile a “full factual record” was complicated and delayed by at least three factors. Exhibits 1 & 91. First among those reasons was:

. . . many of the witnesses expressed concern that cooperating with our investigation would cause them problems with the SEC. At least one entity indicated that it had received a call from a member of the SEC’s enforcement team expressly discouraging it from making a witness available -- in the words of one person, ‘tamped down’ by the SEC staff.

Exhibit 91 at 4. Mr. Cuban’s counsel wrote to the OIG that the Enforcement staff made it clear that they were annoyed that Mr. Cuban’s counsel was conducting their own investigation and were “outraged” when they learned Mr. Cuban’s counsel had spoken to some witnesses before they had. Exhibit 1 at 4. They also claimed that the Enforcement staff suggested they had the “exclusive right” to these witnesses. *Id.* During the litigation of this matter, and in the June 2, 2011 complaint letter from Mr. Cuban’s counsel to the OIG, they made a specific allegation that Attorney 1 “effectively instructed Mr. Aguilar not to permit Mr. Cuban’s counsel to speak with Witness 1 Witness 2 . . . .” Exhibit 3 at

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2. They alleged that this violated the District of Columbia Rules of Professional Conduct, where Attorney 1 is a member of the bar. *Id.* at 4-5.

Mr. Cuban alleged that in or around early or mid-2007, but no later than June 6, 2007, Mr. Witness 1 counsel, Aguilar, told Coggins that he had received what he characterized as a “tamp down” call, or what he described as “an unofficial don’t make your witness available call” from the SEC. *Id.* Specifically, Mr. Cuban alleged that Attorney 1 “effectively instructed Mr. Aguilar not to permit Mr. Cuban’s counsel to speak with Witness 1 the Merriman employee who had spoken with Mr. Cuban about the PIPE in 2004.”<sup>34</sup> *Id.*

In an August 15, 2007 memorandum prepared by Dewey & LeBoeuf for their file which documented a telephone call with Aguilar from the day before, it stated, among other things, that Aguilar told them that Attorney 1 made the alleged “tamp down” call to him “about 4-5 months ago” (*i.e.*, March or April 2007), and shortly before he was first contacted by Fish & Richardson. Exhibit 112 at 2. The memorandum further stated:

He [Aguilar] stated that this call was what he, as a prosecutor, used to call a ‘tamp-down call.’ He clarified that a tamp-down call is ‘an unofficial don’t make your witness available call.’ He stated that ‘we all know what that means and doesn’t mean.’

*Id.* The memorandum further noted:

Mr. Aguilar received a second call from Attorney 1 approximately 2-3 weeks ago, requesting Mr. Witness 1 testimony under oath but, according to Mr. Aguilar, only sworn testimony ‘under the shroud of the [SEC’s] investigatory procedures,’ rather than a formal deposition. Mr. Aguilar recalled that Attorney 1 expressed no time urgency regarding this testimony and that although he initially proposed a mid-September date, it conflicted with Rosh Hoshanna; no date was agreed upon before Mr. Aguilar left on vacation, nor has a date been agreed upon since.

...

When Mr. Ferrara inquired as to whether Mr. Aguilar would make Mr. Witness 1 available for at least an interview

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<sup>34</sup> The OIG contacted Aguilar in early May 2011 to request his testimony or an interview in this matter. Aguilar informed the OIG that he had counsel, so we contacted his counsel to make our request. Aguilar’s counsel informed us that Aguilar would not provide the OIG with an interview or testimony, but may be willing to answer written questions. The OIG, therefore, sent Aguilar’s counsel a few questions in early June 2011 related to this “tamp-down” allegation against Attorney. To date, the OIG has not received a response from Aguilar or his counsel to those questions.

with LeBoeuf prior to the September 7, 2007 due date for the Supplemental Wells Submission, Mr. Aguilar explained that he has been resisting the same request from F & R [Fish & Richardson] for months. He reiterated the two reasons for doing so mentioned above: 1) the tamp-down call and 2) his desire to avoid having Mr. [Witness 1] give multiple statements.

...

Mr. Aguilar said that he would determine whether to make Mr. [Witness 1] available for an interview after returning to the office on August 27, 2007. . . . Mr. Aguilar stated that he needed to speak with Mr. [Witness 1] and the SEC before he made this decision. . . . Mr. Aguilar then explained that he wanted to speak to the SEC only for coordination purposes, because he did not want Mr. [Witness 1] to end up having two interviews/transcripts, which Mr. Aguilar believes would result in Mr. [Witness 1] using the first transcript to refresh his recollection throughout any second interview.

*Id.* at 2-4.

In the February 12, 2010 Declaration of Christopher Luis Aguilar, submitted by Mr. Cuban's counsel in the ongoing litigation, however, Aguilar declared that the tamp-down call happened in August 2007. Exhibit 113 at 6. In that declaration, Aguilar stated that from March 27, 2000 until April 1, 2009, he was General Counsel of Merriman and that from October 2004 until November 2008, he was the Chief Compliance Officer of Merriman. *Id.* at 1. Aguilar also declared that he spoke to [Attorney 1] to coordinate and conduct a telephone interview of [Witness 1] in December 2006 and that he later arranged for [Witness 1] to provide sworn testimony to the SEC in October 2007. *Id.* at 2. He further swore:

On a few occasions in the spring and summer of 2007, I was asked by attorneys for Fish & Richardson, counsel to Mr. Cuban, if they could interview Mr. [Witness 1]. I refused counsel's request because I did not believe such an interview would be in the best interests of Merriman Curhan or Mr. [Witness 1].

In August 2007, I was contacted by attorneys from Dewey LeBoeuf, counsel to Mr. Cuban. They asked me if they could conduct a formal, recorded interview of Mr. [Witness 1] concerning the Company's PIPE transaction and Mr. Cuban. Following that request, I telephoned [Attorney 1] and told her I had been asked by Mr. Cuban's counsel to make Mr. [Witness 1] available for an interview with Mr.

Cuban's counsel. I asked <sup>Attorney 1</sup> whether she had any objection. <sup>Attorney 1</sup> stated that she would prefer that I did not produce Mr. <sup>Witness 1</sup> to Mr. Cuban's counsel for an interview but that I could do what I wanted.

My conversation with <sup>Attorney 1</sup> was very short and she did not explain why she preferred that I not produce Mr. <sup>Witness 1</sup> for an interview. In a subsequent telephone call with Dewey LeBoeuf, I explained that I thought it could be a 'tamp down' effort -- an unofficial term I used to describe a government official's suggestion to an attorney not to make a witness available to counsel for an individual who is the subject or target of an SEC investigation or criminal proceeding.<sup>35</sup>

*Id.* at 2-3 (emphasis added). In addition, Aguilar declared that he did make <sup>Witness 1</sup> available to Mr. Cuban's counsel before <sup>Witness 1</sup> provided sworn testimony to the SEC:

I later decided that a formal, recorded interview with Mr. Cuban's counsel was not in Mr. <sup>Witness 1</sup> or Merriman Curhan's best interests. I did permit Mr. <sup>Witness 1</sup> to participate in an informal, unrecorded conversation with Dewey & LeBoeuf lawyers on September 5, 2007. I also permitted Mr. <sup>Witness 1</sup> to provide a short affidavit to Dewey & LeBoeuf. Mr. <sup>Witness 1</sup> later provided sworn testimony to the SEC Staff in October 2007.

*Id.* at 3.

<sup>Attorney 1</sup> testified that she believed Aguilar was referring to a conversation in which Aguilar contacted her in an attempt to schedule <sup>Witness 1</sup> testimony. <sup>Attorney 1</sup> Tr. at 121. She described the call:

He was very agitated during the call, and he told me that he had to get back to Dewey and LeBoeuf later that afternoon.

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<sup>35</sup> There was at least one earlier version of this declaration, apparently prepared by Dewey & LeBoeuf and released during the ongoing litigation, which stated, among other things, "In a telephone conversation I had with <sup>Attorney 1</sup> several months after the SEC's December 11, 2006 interview of Mr. <sup>Witness 1</sup> she made it clear to me that the SEC was opposed to Mr. <sup>Witness 1</sup> being made available to Mr. Cuban's counsel, and she discouraged me from giving Mr. Cuban's counsel access to him." Exhibit 114 at 4. That draft declaration also stated, "Through this 'tamp down' conversation I understood Mr. <sup>Attorney</sup> to be suggesting that if Merriman Curhan assisted or cooperated with Mr. Cuban or his counsel, the SEC would look with disfavor on Merriman Curhan in its future dealings with the SEC." *Id.* <sup>Attorney</sup> testified that the original Aguilar's draft declaration stated that she had made the purported tamp-down call in connection with the request from Fish & Richardson and that she had opposed making <sup>Witness 1</sup> available to them. <sup>Attorney</sup> Tr. at 126. <sup>Attorney</sup> testified that this was inaccurate and was "obviously later rejected by him [Aguilar] in . . . the signed declaration." *Id.*

And I said, 'That's fine, but we've had our subpoena pending for a month. We want to talk to your client. We want to talk to him first if possible,' and that was it.

...

And I told him we needed to schedule another call. I needed to talk to my supervisor, and we were going to have another call in the afternoon, and he needed to give us a date, and that was the call. I never told him not to make Witness 1 available to Cuban's counsel.

*Id.* at 121. Attorney 1 explained that she wanted to speak to Witness 1 before Mr. Cuban's counsel did "[b]ecause of the calls I had been getting from counsel about the threats that Dewey & LeBoeuf were making about potentially suing their clients, and we were concerned that people's stories might change if Dewey LeBoeuf talked to them first." *Id.* at 122. According to Attorney 1 Aguilar brought up these threats telling her that Dewey & LeBoeuf was "pressuring him or turning up the heat, something like that." *Id.* at 123. Attorney 1 reiterated that she did not tell Aguilar she would prefer he not produce Witness 1 to Mr. Cuban's counsel testifying, "The only preference I expressed was wanting the SEC to go first with the testimony." *Id.* at 125 & 126.

Assistant Director 1 recalled that in late August, he believed August 27, 2007, he sat in on a call with Attorney 1 to Aguilar. Assistant Director 1 Tr. at 135. He testified that at that point the SEC had been getting reports from counsel that Dewey & LeBoeuf were pressuring witnesses to give statements on the record and threatening them with legal action if they declined to do so. *Id.* He explained that Attorney 1 was attempting to schedule Witness 1 testimony at that time, and that Aguilar called Attorney 1 "similarly unhappy" that they were pressuring him to make Witness 1 available for a statement. *Id.* According to Assistant Director 1, the Enforcement staff was "extremely distressed" by this conduct, and so he participated in a call to Aguilar to "find out the circumstances upon which he [Witness 1] was being asked to sit for a statement." *Id.* at 135-136.

Assistant Director 1 testified that during that call with Aguilar, he probed to determine what threats or inducements were being made to pressure Witness 1 to sit for a meeting with Mr. Cuban's counsel. *Id.* at 136. Assistant Director 1 described what happened during that call, which he testified "remember, this is a call that we had placed because we thought Mr. Aguilar was looking to us for some manner of assistance . . . .":

In the middle of that call Mr. Aguilar -- I'll characterize it as 'turns on a dime' and says, 'I know what you're trying to do, you're trying to tamp me down.' And Attorney 1 and I both looked at each other and I think I said, 'What does that mean?' And he says, "You're trying to discourage us from making Mr. Witness 1 available to Mr. Cuban's counsel.' At which point we said, 'Whoa, no, we're telling you you don't have to talk to Mr. Cuban's counsel. If you want to

talk to him do whatever you want, but you're not obligated to talk to opposing counsel.'

And I don't remember that much more about the call other than I think we worked out some scheduling issues, I think there was a question of when Mr. [Witness 1] would be available. But it was a bizarre call and I think afterwards [Attorney] and I had sort of talked about it a little bit about what - - how that went in a bizarre direction because we thought we were helping somebody out and certainly that was never our intention to make -- to encourage him to make sure that Mr. [Witness 1] wasn't made available to Mr. Cuban's counsel.

*Id.* at 136-137.

According to Mr. Cuban's counsel, "even if the facts bear out that [Attorney 1] simply articulated her preference as to the timing of presenting MCF [Merriman] employees to defense counsel, [Attorney 1] conduct violated basic standards of conduct applicable to every executive branch lawyer." Exhibit 3 at 4. They cited 5 C.F.R. § 2635.101 which states the basic obligation of public service is public trust and requires Executive Branch employees to avoid even the appearance of unlawful or unethical conduct. They further asserted that even this preference for timing "arguably violated the D.C. Bar Rules of Professional Conduct." *Id.* Mr. Cuban's counsel cited, among other cases, to *In re: PRB File No. 2004.208, Decision No. 78 before the State or Vermont Professional Responsibility Board*, attached hereto as Exhibit 115, because they stated that DC Bar Rule 3.4 is identical to the Vermont Rule of Professional Responsibility 3.4. In that case, respondent was admonished for violating Rule 3.4 ("requesting a person other than a client to refrain from voluntarily giving relevant information") when, after opposing counsel wrote a letter to several of respondent's witnesses asking for an informal interview or a deposition, respondent wrote to the witnesses stating that it was his client's request "that you not speak with [opposing counsel] or anyone from his office in an informal interview."<sup>36</sup> *Id.* at 1.

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<sup>36</sup> We find that the facts in this Vermont case are not precisely analogous to this matter. While the attorney in that case was intending to convey his preference that witnesses speak to opposing counsel via deposition rather than informal interviews, the letter did not make that clear. *Id.* [Attorney 1] however, did not request [Witness] not to provide an interview or testimony, in writing or otherwise. The record establishes that [Attorney] at most, orally stated her preference to [Witness 1] counsel Aguilar that [Witness] not be made available to Mr. Cuban's counsel but [Attorney] also clearly stated that Aguilar could do what he wanted. See Exhibit 113. Finally, the record establishes that [Witness] was made available to Mr. Cuban's counsel, even before the SEC could take his testimony, unlike some of the witnesses in the Vermont case who testified they understood the letter to be more directive than advisory and declined the interview. *Id.* & compare Exhibits 87 & 89.

Mr. Cuban's counsel also cited to two criminal cases in support of their position. In one of those cases, the prosecutor told witnesses not to talk to anyone, including defense counsel, unless he was present, which the court found to be effectively denying him counsel. *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966). In the other case, *United States v. Rich*, 580 F.2d 929 (9th Cir. 1978), the court held that an FBI agent's advice to witnesses that they need not confer with defense counsel did not demonstrate that the



Mr. Cuban's counsel further argued that even accepting [Attorney 1] version of events, that she simply advised Aguilar of her preference that the SEC speak to [Witness 1] before Mr. Cuban's counsel, she did not "maintain a posture of strict neutrality." They wrote:

The 'tamp down' call was particularly insidious because MCF [Merriman], whose personnel [Attorney 1] sought to discourage from speaking, is a regulated entity and, therefore, logically more susceptible to being influenced by regulators. It is a blatant attempt to frustrate the foundational principle of the professional rules of conduct that counsel be free from interference of unfettered access to fact witnesses.

It is entirely reasonable to surmise that [Attorney 1] did not want Mr. Cuban or his counsel to hear what Mr. [Witness 1] had to say because it did not comport with the Staff's unsupported view of the facts of the case.<sup>37</sup>

Exhibit 3 at 7. But, as discussed below at Section II.F., [Witness 1] had given the Enforcement staff supporting statements in his initial interview.

In all, the OIG did not find evidence substantiating the claim that [Attorney 1] made an inappropriate "tamp-down" call in an attempt to keep witnesses from Mr. Cuban's counsel. According to [Attorney 1] and substantiated by [Assistant Director 1] [Attorney 1] merely stated that Aguilar did not have to make [Witness 1] available for an interview with Mr. Cuban's counsel and [Attorney 1] noted that the "only preference I expressed was wanting the SEC to go first with the testimony." [Attorney 1] Tr. at 125 & 126; [Assistant Director 1] Tr. at 136. Even according to

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government improperly influenced its witnesses because appellant conceded that the government witnesses were not prohibited from discussing the case with defense counsel.

<sup>37</sup> Mr. Cuban's counsel further asserted that [Attorney] threatened [Witness] by,

. . . intimating that he may have violated federal securities laws for telling the Staff something 'untrue' during a prior interview, in an undisguised attempt to get Mr. [Witness] to change his sworn testimony and/or the statements contained in his declaration dated September 5, 2007.

Exhibit 3 at 7 n.5. The OIG found, however, that [Witness] did change his story from the time SEC staff had initially interviewed him to when he submitted his declaration to Mr. Cuban's counsel. Compare Exhibits 29 & 87. During the SEC testimony, when [Witness] gave a different response from his December 2006 interview, [Attorney] reminded [Witness] that he had been informed in that initial interview that it would be a violation of the federal securities laws for him to knowingly say something untrue. Exhibit 87. Thus, the conversation between [Attorney] and [Witness] could have been an attempt to determine why his story had changed. [Assistant Director 1] testified that it was frustrating that [Witness] had ". . . walked away from statements he had made in his interview on some key points . . ." [Assistant Director 1] Tr. at 131.

Aguilar's declaration, [Attorney 1] merely "stated that she would prefer that I did not produce [Witness 1] to Mr. Cuban's counsel for an interview but that I could do what I wanted." Exhibit 113 at 2. Moreover, we do not find that [Attorney 1] articulating her preference as to the timing of presenting employees to defense counsel would violate standards of conduct or State bar rules.<sup>38</sup>

**F. The OIG Did Not Find Sufficient Evidence to Substantiate the Allegation that the Enforcement Staff Engaged in Misconduct When Questioning [Witness 1]**

Mr. Cuban alleged that the Enforcement staff had "... already made up its mind about Mr. Cuban long before the staff conducted its interviews of key witnesses in the fall of 2007." Exhibit 1 at 5. He claimed this was "readily apparent" in the testimony [Attorney 1] took of [Witness 1] in October 2007. Specifically, his counsel wrote that "... [Attorney 1] [Attorney 1] *scrupulously avoided asking Mr. [Witness 1] about any of the foregoing critical facts,*" *i.e.*, the differences between Enforcement's December 2006 interview of [Witness 1] and Dewey & LeBoeuf's affidavit of [Witness 1] *Id.* (emphasis added). Those differences that should have been explored, according to Mr. Cuban's counsel, included that [Witness 1] did not ask Mr. Cuban to maintain the information concerning the PIPE confidential; that [Witness 1] did not send Mr. Cuban a non-disclosure agreement; and that Mr. Cuban did not inform [Witness 1] that he would maintain any information he learned about the PIPE in confidence. *Id.*

Mr. Cuban further alleged that [Attorney 1] only asked about the Merriman procedures in place in 2007, not in the relevant time period of 2004 when the trade was made. *Id.* His counsel asserted, "[Attorney 1] [Attorney 1] apparent motive in nevertheless questioning Mr. [Witness 1] about them was to manufacture extraneous and potentially misleading testimony that would leave the reader of the transcript of Mr. [Witness 1] interview in the dark as to the true facts regarding Mr. Cuban's contact with Mr. [Witness 1] *Id.* at 5-6.

In reviewing the transcript from the October 17, 2007 testimony of [Witness 1] the OIG found that [Attorney 1] did ask [Witness 1] about the procedures in place in 2004, when he had contact with Mr. Cuban about the Mamma.com PIPE offering. Specifically, [Attorney 1] asked [Witness 1] "I want to go through generically what the procedures were at the different time periods starting when Mr. [Witness 1] was first at Merriman and whether those changed during the period." Exhibit 87 at 17. [Witness 1] testified that he began at Merriman in May 2003. *Id.* at 12. Later, [Attorney 1] questioned [Witness 1] specifically about this point, asking, "In June 2004 was your call to Mr. Cuban consistent with your standard practice of making courtesy calls to notify large investors of impending PIPE transactions?" *Id.* at 58.

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<sup>38</sup> The DC Rules of Professional Conduct at Rule 3.4 (f) states an attorney "shall not request a person other than a client to refrain from voluntarily giving relevant information to another party . . ." As discussed above, the OIG investigation revealed that [Attorney 1] merely stated that Aguilar did not have to make [Witness 1] available for an interview with Cuban's counsel. The OIG also does not find [Attorney 1] violated the SEC's Conduct Regulation which requires SEC staff members to "avoid any action which would result or might create the appearance of . . . losing complete independence or impartiality" or "affecting adversely the confidence of the public in the integrity" of the SEC. 17 C.F.R. § 200.735-3(a)(2)(iii) & (v).

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Moreover, the OIG review of the transcript found that many, if not most, Attorney 1 questions to Witness 1 were direct, and not leading.

The Witness 1 transcript also showed that Attorney 1 focused on asking Witness 1 about his telephone conversation with Mr. Cuban. Attorney 1 also asked Witness 1 many questions about his declaration dated September 2007, including the circumstances in which he provided it to Mr. Cuban's counsel. *See id.* at 34-68. Mr. Cuban alleged that Attorney 1 did not ask Witness 1 about the content of their declaration of Witness 1 which stated that he did not ask Mr. Cuban to maintain the information concerning the PIPE confidential; that Witness 1 did not send Mr. Cuban a non-disclosure agreement; and that Mr. Cuban did not inform Witness 1 that he would maintain any information he learned about the PIPE in confidence. *Id.*

But the OIG found that Attorney 1 did ask Witness 1 several questions about whether he informed Mr. Cuban the information he conveyed to him was confidential. For example, Attorney 1 asked Witness 1 about the procedures and protocol in place at Merriman when soliciting potential investors in PIPES, particularly regarding its confidentiality. *See, e.g., id.* at 16-21. Attorney 1 specifically asked Witness 1 "Did you preface the conversation with Mr. Cuban by telling him you had confidential information to convey to him?" *Id.* at 44. This question was directly related to the Witness 1 declaration stating, "At no time during the June 28, 2004 call did I inform Mr. Cuban that the information I conveyed to him was to be held in confidence." Exhibit 89 at 5.

Assistant Director 1 who was present with Attorney 1 during the October 2007 testimony of Witness 1 testified he thought "she did a perfectly fine job" although it is always frustrating any time a witness walks away from statements he had made in his initial interview, like Witness 1 did. Assistant Director 1 Tr. at 131. He further testified that it was not a part of their case whether Witness 1 followed the Merriman procedures in "bringing Cuban over the wall, so I'm not surprised there's not a lot of discussion of that." *Id.* at 130. In addition, Assistant Director 1 testified he did not recall that she asked particularly leading questions of Witness 1 but "there's nothing improper about doing that." *Id.* at 131. He added, "It didn't strike me that the questioning was abusive either in tone or in substance." *Id.* In fact, Assistant Director 1 testified, that if he had felt that critical questions that had not been asked, he would have asked them himself. *Id.* at 132.

In all, the OIG did not find evidence that Attorney 1 attempted to manufacture extraneous and potentially misleading testimony from Witness 1. Therefore, the OIG did not find sufficient evidence to substantiate the allegations of misconduct by Attorney 1 in questioning Witness 1.

#### **G. The OIG Did Not Find Sufficient Evidence to Substantiate the Allegation that the Enforcement Staff Mischaracterized Evidence as "Contemporaneous"**

Mr. Cuban alleged a mischaracterization of evidence in the October 2009 follow-up letter to the OIG, when noting that Attorney 1 told Mr. Cuban's counsel in the initial Wells call that the Enforcement staff had "contemporaneous supporting documentation" of the

relevant telephone call between Mr. Cuban and Faure. Exhibit 2 at 1. The expert report submitted with that letter differentiated between the evidentiary admissibility of that evidence and concluded that the Enforcement staff's representation of that evidence as contemporaneous "painted an extremely false picture of the evidence that the SEC had" which could have affected how Mr. Cuban's counsel responded to the SEC. *Id.* at 10.

As discussed in Section I.E.1., Attorney 1 admitted that during the Wells call, Enforcement staff discussed that there was contemporaneous evidence that the telephone call between Faure and Mr. Cuban happened. Attorney 1 Tr. at 74. Assistant Director 1 testified about his recollection of this during the Wells call,

I think we did describe the documents as corroborating or contemporaneous or both and I actually think it could have been me who said it because I believe that they were doubting the existence of the call and for us there was no doubt that the call had happened. . . . I believe we probably said they were contemporaneous and corroborating.

Assistant Director 1 Tr. at 74-75. Assistant Director 1 explained that those documents were the e-mails that were sent to Mamma.com board members originating from Witness 2 and one of which was signed "Dave and Guy." *Id.* at 75.

Attorney 1 Assistant Director 1 and Friestad all testified that they believe it was accurate to describe the Witness 2 e-mails as contemporaneous. Attorney 1 explained that she believed this was contemporaneous evidence of the call happening, "Because they were drafted at or around the time of the call that Cuban had with Faure." Attorney 1 Tr. at 74-75. Assistant Director 1 also testified that he believes this was and is an accurate description of the evidence,

Because they were written right about the same time, within a couple of days of the time that Mr. Faur[e] spoke to Mr. Cuban and they were corroborating because . . . it clearly wasn't the case that these were created a year after the discussion or two years, they were done within a couple of days and squarely addressed some of the issues that Mr. Faur[e] had testified to.

*Id.* at 75-76. Friestad testified that whether Attorney 1 described the Witness 2 e-mails as contemporaneous, corroborating or both, he believes those are accurate descriptions. Friestad Tr. at 126 & 128. He elaborated,

Contemporaneous in my mind means that the documents were created back in 2004, or whenever the conduct occurred, at a time when no one in their wildest dreams imagined that that conduct was going to be investigated by the SEC. So it was whether it was contemporaneous, meaning within five minutes, or, you know, within the 24-

hour cycle they were at or about the time of the events in question that those documents were created. . . . They were done in real time at the time.

*Id.* at 127.

The OIG found that the Enforcement staff did describe the e-mail evidence as contemporaneous, but did not find that this description was necessarily a mischaracterization of the evidence. Contemporaneous is defined as “existing, occurring or originating during the same time.” See <http://www.merriam-webster.com/dictionary/contemporaneous>. The [Witness 2] e-mails were sent hours and the next day after Faure spoke to Mr. Cuban, which could be construed as originating roughly during the same time as the telephone call to Mr. Cuban.<sup>39</sup>

Mr. Cuban further alleged that [Attorney 1] compounded the error of describing these e-mails as contemporaneous evidence by attempting to create the impression that Mr. Cuban also agreed with [Witness 1] to keep the information he learned about the 2004 PIPE confidential when she told Fish & Richardson that [Witness 1] “followed up on Mr. Faure’s call [with Mr. Cuban] and spoke with [Mr. Cuban] about the terms of the PIPE deal.” Exhibit 2 at 2. According to Mr. Cuban’s counsel, they assumed that [Witness 1] must have told the SEC the same information during the December 2006 interview that he supplied to them in September 2007, which resulted in the affidavit discussed in Section I.I.3. -- *i.e.*, that [Witness 1] never once told Mr. Cuban that the information he gave him about the PIPE transaction was confidential. *Id.* Moreover, Mr. Cuban’s counsel alleged that this information clearly tends to exonerate Mr. Cuban and that [Attorney 1] “***intentionally omitted to mention any of this critical exculpatory information we would only learn from Mr. [Witness 1] many months later.***” Exhibit 2 at 3 (emphasis in original).

The OIG did not find sufficient evidence to substantiate this allegation, however. In reviewing the [Witness 1] December 2006 interview memorandum, it is clear that [Witness 1] provided different information to the SEC early in the investigation than he later provided to Mr. Cuban’s counsel and even to the SEC in testimony in October 2007. Specifically, the interview memorandum prepared by Enforcement staff noted that [Witness 1] told the staff he did not have a specific recollection of whether he followed his usual two-step confidentiality warning protocol but “believes that, consistent with his usual process, he would have generically described Mamma.com and then subsequently provided Mamma.com’s name.” Exhibit 29 at 2. [Witness 1] described to the Enforcement staff, according to the memorandum, his usual two-step process: 1) he first explained he had confidential information about an issuer interested in doing a PIPE and generically described the issuer, and if the potential investor expressed an interest, 2) he provided its name. *Id.* In addition, [Witness 1] told [Attorney 1] and [Attorney 3] he also tells potential investors

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<sup>39</sup> We also note that The Honorable Judge Higginbotham of the United States Court of Appeals for the Fifth Circuit, in the oral argument held in August 2010 in this matter, himself described the [Witness 2] e-mails as the “CEO’s contemporaneous e-mail.” See <http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx>.

that the SEC may consider the information about the private placement to be material, non-public information. *Id.* Therefore, the allegation is not substantiated.

#### H. The OIG Did Not Find Sufficient Evidence to Substantiate the Allegations of Misconduct by the Enforcement Staff in Unrelated Cases

Mr. Cuban also claimed that Friestad, Attorney 1 Assistant Director 1 and Attorney 3 have “been found by federal courts to have overreached in similar cases involving claims of insider trading in shares of companies offering PIPEs.” Exhibit 1 at 6. Specifically, his counsel argued that courts have rejected the SEC’s attempts to assert insider trading claims under Section 5 of the Securities Act of 1933. *Id.* In addition, Mr. Cuban’s counsel asserted that in the case *SEC v. Mangan*, the Enforcement staff was misleading. *Id.* In yet another matter, according to Mr. Cuban’s counsel, the court in *SEC v. Lyon* found that the Enforcement staff’s position had no support in the text or purpose of Section 5 and “chided staff for the ‘inherent logical implausibility’ of its core argument.” *Id.* They claimed that Friestad and Attorney 1 were involved in that case. *Id.*

The OIG found, however, that these claims were not substantiated. The OIG found, for example, the *Mangan* case was litigated by the Philadelphia office and no one on the Enforcement staff investigating Mr. Cuban was involved in that matter. In addition, while these cases involved Section 5 allegations and some courts have rejected the SEC’s Section 5 arguments, Enforcement did not bring Section 5 claims against Mr. Cuban. *See* Exhibit 4. Moreover, the allegation that the Enforcement staff was misleading in the *Lyon* case was not substantiated. As outlined below, the judge in the *Lyon* case initially wrote that a reference to an SEC release by Enforcement staff was misleading. But the court issued an amended opinion after the Enforcement staff noted that the court was looking at the wrong section of the release.

According to Friestad, the *Mangan* case was brought by the Philadelphia Regional Office. Friestad Tr. at 210. He testified, “So I never had any role, and neither did Mr. Assistant Director 1 with that case . . . .” *Id.* at 210-211. Assistant Director 1 testified that the *Mangan* case was “not even one of Scott’s [Friestad’s] cases.” Assistant Director 1 Tr. at 126. Assistant Director 1 explained that the judge in *Mangan* got extremely frustrated with trial counsel from the Philadelphia office and that there was a rebuke of the SEC in that case.<sup>40</sup> *Id.*

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<sup>40</sup> The OIG asked Assistant Director 1 about a November 24, 2008 EconomicPolicyJournal.com article entitled, “The Coming Bizarre Show Trial of Mark Cuban,” about the SEC’s case against Mr. Cuban, in which Assistant Director 1 was reported to be “recently under Congressional investigation for possible misconduct.” Exhibit 118. That article also stated, “Another SEC attorney involved with the case, Scott Friestad, recently lost a case in North Carolina and the judge found it appropriate to rebuke Friestad’s tactics during the trial.” *Id.* Assistant Director 1 testified that he has never been under investigation by Congress for misconduct or anything else, to his knowledge, and that he does not even know what this article could possibly be referring to. Assistant Director 1 Tr. at 124-125. In addition, Assistant Director 1 testified that the allegation against Friestad was incorrect because it referenced a case brought by the SEC’s Philadelphia office and that Friestad was not assigned to that case. *Id.* at 126.

According to Attorney 1 in November 2008 when the Cuban case was filed the Commission had brought about a half dozen other similar PIPEs cases. Attorney 1 Tr. at 149-150. She testified that several of them settled, including the *Gryphon* case, which settled after the SEC got a positive opinion on the insider trading portion of the case. *Id.* at 150. Attorney 1 told the OIG that the Section 5 claims made in the *Gryphon* and *Berlacher* cases were dismissed, but that there were no Section 5 allegations in the Cuban matter. *Id.* at 150-153. Attorney 1 explained that in the *Gryphon* case, also known as *SEC v. Lyon*, the court made a couple of mistakes in its opinion dismissing the Section 5 claims, specifically, that the SEC misled the court in its citing of a Corporation Finance Release. *Id.* at 151. Attorney 1 testified that the SEC went back to the court to explain that the court was looking at the wrong section of the release. *Id.* at 151-152. The court issued a corrected opinion. *Id.* at 152 & Exhibit 116.

After Assistant Director 1 testified before the OIG, he sent a testimony clarification about Attorney 1 participation in the *SEC v. Lyon* case. Exhibit 117. Assistant Director 1 explained,

In my Assistant Director group, we brought a total of eight cases out of the investigation entitled *In the Matter of Gryphon Partners* (HO-09867). Those cases were worked out of Attorney 3 Attorney 3 branch, and staffed by Attorney 1 Attorney 1 and Attorney 5 Attorney 5 Attorney 1 served as lead investigative attorney on six cases (*SEC v. Langley Partners, L.P. et al.*; *In the Matter of Spinner Asset Management et al.*; *SEC v. Joseph Spiegel*; *SEC v. Berlacher, et al.*; *SEC v. TCMP3 Partners, L.O. et al.*; and *SEC v. Ladin*). Attorney 5 Attorney 5 served as lead investigative attorney on two cases (*SEC v. Lyon, et al.*, and *In the Matter of Ram Capital Resources, LLC, et al.*).

Since my testimony, however, I have determined (by means other than speaking to Attorney 1 that Attorney 1 did serve a secondary role in the investigation and litigation of the *Lyon* case (with Messrs. Kidney and Attorney 5 serving the primary roles). While I do not know the extent to which she participated in the briefing identified during my testimony, I do believe that she participated in the matter

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*Id.* Attorney 3 told the OIG that he remembered that Chris Clarke and other members of Ralph Ferrara's team at Dewey & LeBoeuf defended the *Gryphon* case, which eventually settled to a fraud charge. Exhibit 17 at 5. According to Attorney 3 Enforcement had good relations with defense counsel and was not aware of any allegations of Enforcement staff wrongdoing. *Id.* In addition, Attorney 3 said that Attorney 5 Attorney 5 was the staff attorney on the *Gryphon* case, but that Attorney 1 may have helped out. *Id.*

On August 12, 2009, the Commission issued a Litigation Release entitled, "Edwin B. Lyon, IV and the Affiliated Gryphon Funds Ordered to Pay \$778,016 to Settle PIPE-Related Securities Fraud Charges." Exhibit 119. That release stated that Lyon and each Gryphon Partners entity consented to the entry of a final judgment permanently enjoining them from future violations of Sections 17(a) and 10(b), but that the Section 5 claims had been dismissed by the court.<sup>41</sup> *Id.* Therefore, the OIG did not find sufficient evidence to substantiate the allegation that the Enforcement staff engaged in misconduct in these other unrelated cases.

### Conclusion

In all, the OIG concluded that there was insufficient evidence to substantiate Mr. Cuban's claims that the SEC Enforcement staff engaged in misconduct in conducting their investigation into Mr. Cuban's sale of his Mamma.com stock shares. Specifically, the OIG investigation found that there was insufficient evidence to substantiate the claim that Enforcement improperly provided Mr. Cuban with a "Wells" notice before the investigation was substantially complete. The OIG investigation also did not find sufficient evidence to substantiate Mr. Cuban's claim that an earlier investigation into Mamma.com was closed as a *quid pro quo* for the investigation relating to Mr. Cuban.

The OIG investigation further found that although Norris, a former FWRO trial attorney, engaged in inappropriate e-mailing of Mr. Cuban from his SEC computer in March and May 2007, we did not find that Norris was involved in any way in the investigation into Mr. Cuban's sale of Mamma.com shares, and there is no evidence that Mr. Norris had any knowledge of the ongoing investigation into Mr. Cuban's sale of his shares when he was e-mailing Mr. Cuban.

The OIG investigation also did not find sufficient evidence to establish that the investigation into Mr. Cuban's sale of Mamma.com shares was motivated by politics or other improper motives or that Mr. Cuban was targeted by the Enforcement staff because he is high-profile. In addition, the OIG investigation also did not find sufficient evidence to substantiate the allegation that the Enforcement staff had a preconceived notion or bias of Mr. Cuban's guilt. Although the investigation did establish that during the Wells meeting <sup>Attorney 2</sup> made the comment, "Mr. Cuban takes irrational and silly risks every

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<sup>41</sup> In an August 11, 2009 e-mail from a Deputy Director in the Division of Corporation Finance ("CorpFin") to Director of Enforcement Robert Khuzami entitled, "Your team on Gryphon," the Deputy Director wrote to tell him "what a great job your investigative team in Enforcement did on the Gryphon case . . . ." Exhibit 120. The Deputy Director added, in part,

In particular <sup>Attorney 5</sup> and <sup>Attorney 10ney</sup> really were great. They worked on a number of complicated PIPEs cases . . . . They appreciated the critical importance to Corp Fin of Section 5 cases and were willing to pursue them because they are mission critical to my Division even though they are not viewed as exciting cases. Even though the judges didn't rule in our favor on those points, I think the Commission (and certainly the Division) are better off for the work your investigative team did.

*Id.*



day” or words to that effect, and that **Attorney 2** could have been more temperate in his language, this comment and Thomsen’s comment, “That’s just noise,” or words to that effect, in response to Mr. Cuban’s counsel’s arguments about Faure’s credibility, standing alone, do not establish a preconceived bias against Mr. Cuban, particularly since they were made in the moment of responding to Mr. Cuban’s counsel’s arguments. We also did not find evidence to establish that Friestad sending photographs to Thomsen and another senior SEC Enforcement official without commentary demonstrated evidence of a bias against Mr. Cuban that could have tainted the investigation.

Furthermore, the OIG investigation did not find sufficient evidence to establish that **Attorney 1** or anyone on the Enforcement staff had engaged in a “tamp down” of a witness, in an effort to keep witnesses from Mr. Cuban’s counsel. The OIG also did not find sufficient evidence to show that SEC Enforcement staff engaged in misconduct when questioning **Witness 1** in testimony in October 2007. In addition, the OIG found that there was insufficient evidence to support the allegation that members of the Enforcement staff investigating Mr. Cuban had engaged in misconduct in other cases.

While the OIG did not find sufficient evidence to substantiate any allegations of misconduct, we are referring this matter to the Director of Enforcement, the Deputy Chief of Staff, Office of the Chairman, Commissioner Elisse Walter, Commissioner Luis Aguilar, Commissioner Troy Paredes, the General Counsel, and the Acting Associate Executive Director for Human Resources for consideration of appropriate counseling for Friestad for his failing to promptly report Norris’s misconduct, and for consideration of appropriate counseling for **Attorney 2** for his comment about Mr. Cuban taking irrational and silly risks every day in the July 19, 2007 Wells meeting.

Submitted:	<b>OIG Attorney 1</b>	Date:	<u>8/22/11</u>
Concur:	<b>OIG Attorney 2</b>	Date:	<u>8/22/11</u>
Approved:	<u>H. David Kotz</u> H. David Kotz	Date:	<u>8/22/11</u>