UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-10996

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant,

v.

MARK CUBAN,

Defendant-Appellee.

On Appeal From the United States District Court
for the Northern District of Texas

REPLY BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLANT

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INTRODUCTION

The sole issue in this appeal is whether defendant Mark Cuban's conduct was deceptive. As alleged in the Commission's complaint, Cuban owed a duty to disclose his plans to trade before trading – a duty arising from his agreement to keep information confidential – and he failed to make the required advance disclosure. Cuban does not dispute that a sufficient duty of disclosure can arise by agreement. The key question, therefore, is whether an agreement to keep information confidential encompasses an agreement not to trade on the information, such that trading without prior disclosure is deceptive.

This is not a difficult question. Contrary to Cuban's contentions, in the context of material, non-public information, one who agrees to keep information confidential, as Cuban did, has accepted duties both to keep the information secret and not to use it for trading. No one providing material, nonpublic information in reliance upon an agreement to keep the information confidential would believe that he was authorizing the recipient to trade on the information. Nor could any recipient of such information reasonably believe that he was authorized to trade. This common-sense notion is incorporated into Commission Rule 10b5-2(b)(1), which sets forth a duty to disclose before trading on a person who agrees to "maintain the information in confidence." 17 C.F.R. § 240.10b5-2(b)(1).

Companies often hold close their material, non-public information, until it is required to be disclosed by law, to avoid the market effect of disclosure. In this case, the only reasonable inference from the complaint is that Mamma.com, whose stock was traded on NASDAQ, wanted to protect the confidentiality of its plans (until its public announcement the next day) to add supply to the market, which necessarily would reduce the stock price. An agreement, like Cuban's, that induces another to provide property – confidential business information – of which the provider has a right of exclusive use produces a justifiable expectation on the part of the provider that the property obtained through the agreement will be faithfully safeguarded. That includes an expectation that the recipient will not exploit the property for his own benefit. It is inconceivable that Mamma.com was authorizing Cuban to engage in conduct – adding his large supply of shares to the market – that would have a predictably negative effect on the stock price while benefitting himself at the expense of Mamma.com and all other shareholders. Nor could Cuban have believed he was free to trade, as shown by his immediate statement – "Now I'm screwed. I can't sell."

Cuban's reliance on cases involving the issue whether certain relationships create a sufficient duty are beside the point. In those cases, the question for the courts was whether to imply such an obligation from the relationship between the parties, only because there was no agreement to maintain the information in

confidence. Where, as here, deception is based on a duty arising from an agreement, there is no need to address the more difficult question whether to imply a duty from the relationship.

Finally, whether a sufficient duty exists does not turn on contract or tort doctrines under state law. Rather, the meaning of "deception" under the antifraud provisions of the federal securities laws is a federal question that extends beyond the common law.

ARGUMENT

I. THE COMPLAINT ADEQUATELY ALLEGES DECEPTION BASED ON CUBAN'S TRADING WITHOUT DISCLOSURE, IN BREACH OF A DUTY TO DISCLOSE ARISING FROM HIS AGREEMENT TO KEEP INFORMATION CONFIDENTIAL.

A. A Fiduciary Relationship Is Not Required.

Although Cuban states that the Court "does not have to address the issue," and he did not make the argument below, he appears to argue that a sufficient duty of disclosure only arises from a full-fledged, traditional fiduciary relationship. (Brief of Mark Cuban 14-16 ("Br.").) As the Commission explained (Brief of the Securities and Exchange Commission 18-20 ("SEC")), the Supreme Court in United States v. O'Hagan, 521 U.S. 642 (1997), recognized that a fiduciary or similar obligation is sufficient. Although O'Hagan involved a traditional fiduciary relationship (attorney-client), that does not mean such a relationship is required.

Furthermore, as the Commission also explained, it is not necessary that the recipient of the information owe fiduciary-like duties to the provider of the information as to all matters. All that is needed for potential liability under the misappropriation theory is a duty to the provider not to use the information for personal benefit, such that a duty of disclosure arises and makes undisclosed trading deceptive. (SEC 23).

Cuban erroneously contends that the Second Circuit recently concluded that "there is a fiduciary relationship requirement for *any* alleged Section 10(b) violation" that is based on silence or nondisclosure. (Br. 15-16 (emphasis in original) (citing SEC v. Dorozhko, 574 F.3d 42, 48-49 (2d Cir. 2009)).) Dorozhko, however, concluded only that such alleged violations require a "duty to disclose," without determining any specific requirements as to what may give rise to that duty. 574 F.3d at 50. The Commission's complaint alleges that Cuban owed – and breached – a duty of disclosure. (See SEC 20; RE Tab 6, Compl. ¶¶ 25, 26.) Cuban's reliance on Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 389 (5th Cir. 2007) (Br. 14, 45, 46), is likewise misplaced. In that case, this Court described the requisite breach of duty as a "breach of some duty of candid disclosure." 482 F.3d at 389.

B. An Agreement to Keep Information Confidential Encompasses an Agreement Not to Trade.

Because Cuban concedes that a duty of disclosure can arise by agreement, and because a fiduciary relationship is not required, the key issue becomes whether an agreement to keep material, nonpublic information confidential includes the acceptance of a duty of non-use, such that undisclosed trading on the information obtained through the agreement deceives the source of the information.[1]

Cuban's argument that an agreement to keep information confidential does not give rise to a sufficient duty merely points to a distinction without a difference. Cuban concedes that "[t]here is nothing controversial" about the Commission's point that the requisite duty for liability may arise by agreement. (Br. 17.) He contends, however, that the terms of the undertaking must include more than an

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[1] Cuban's recitation of the facts may leave the mistaken impression that he did make prior disclosure to Mamma.com of his plans to sell his stock. (Br. 5 ("Mr. Cuban openly disclosed both his sale of Mamma.com shares and his reasons for selling.").) In fact, he did not file his Schedule 13G with the Commission disclosing his sales until July 1, 2004, after his sales on June 28 and 29. (USCA 95-99.) Cuban neglects to mention the complaint's allegation (Compl. ¶ 25) that he "never disclosed to Mamma.com that he was going to sell his shares prior to the public announcement of the PIPE." We also note that Cuban's discussion (Br. 7) of his motion for attorney's fees and expenses, filed in the district court after the district court dismissed the complaint, is not relevant to this appeal, and in any event lacks merit for the reasons given in the Memorandum of the Commission in Opposition (filed, Sept. 30, 2009).

agreement to keep the information confidential. He acknowledges that an agreement's terms would be sufficient if the recipient agrees to keep the information "*in trust*." (Br. 17 n.6 (emphasis in original)). As the Commission explained in its opening brief, confidential business information that one has agreed to keep confidential is information that one has agreed to keep in trust. (SEC 22 & n.6.)

Cuban ignores the bulk of the Commission's explanation that a recipient's undisclosed trading on material, nonpublic information after agreeing to keep it confidential is deceptive. (SEC 22-25.) He does not dispute that a company's confidential information is its property as to which it has a right of exclusive use. He does not address the Commission's reasoning that because a company's confidential information has economic value, a company does not disclose its information to give away trading profits but rather to further corporate purposes. And he ignores the impossibility of reconciling a recipient's commitment to keep information confidential (thereby preserving its economic value to the provider) with trading on the information (which converts the value of the information to the recipient). It is clear, under this undisputed reasoning, that no one providing confidential, material information in reliance upon an agreement to keep the information confidential would believe that he was authorizing the recipient to trade on the information. Nor could any recipient of such information reasonably

believe that he was authorized to trade.[2]

As the Commission showed in its opening brief (SEC 25-29), numerous insider trading cases support the view that an agreement to keep material, nonpublic information confidential encompasses an agreement not to trade. Cuban argues that "[i]n every decision cited by the SEC, the court also discusses the existence of a pre-existing confidential relationship." (Br. 32 (emphasis added.) The decisions in United States v. Chestman, 947 F.2d 551, 568-71 (2d Cir. 1991) (en banc), United States v. Falcone, 257 F.3d 226, 234 (2d Cir. 2001), and SEC v. Yun, 327 F.3d 1263, 1273 (11th Cir. 2003), all make clear that a pre-existing relationship and a confidentiality agreement are two separate, alternative means of establishing a sufficient duty under the misappropriation theory. The courts in these cases addressed the more difficult question whether a sufficient

[2] Cuban makes no response to the Supreme Court's declaration that "a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit . . . ." Carpenter v. United States, 484 U.S. 19, 27-28 (1987) (internal quotation marks omitted).

duty could be implied from a relationship between the parties only because there was no acceptance of a duty of confidentiality by agreement.[3]

Cuban argues that Falcone and CompuDyne Corp. v. Shane, cited by the Commission in support of its position, are inapposite, but he is mistaken as to both cases. He partially quotes Falcone to argue that the case requires acceptance of the "requisite duty," (Br. 33 n.11.), but he substitutes the term "requisite duty" for the court's actual term "duty of confidentiality." 257 F.3d at 234. The court's actual statement strongly supports the view that one who agrees to keep information confidential accepts a sufficient duty. Cuban argues that CompuDyne Corp. v. Shane, 453 F. Supp. 2d 807 (S.D.N.Y. 2006), is inapposite because it is "not an insider trading case." (Br. 33 n.11.) As the Commission noted (SEC 28), the case involved "misrepresentations in violation of Rule 10b-5." The court's conclusion that an agreement to keep information confidential meant "neither disclose the information nor use it for [personal] benefit," 453 F. Supp. 2d

[3] In the Commission's other cited cases, the discussion of other circumstances surrounding the relationship between the parties was not relevant to the courts' holdings that a confidentiality agreement was sufficient. SEC v. Nothern, 598 F. Supp. 2d 167, 175 (D. Mass. 2009) ("[T]he SEC's allegation that [the recipient] expressly agreed to maintain the confidentiality of [the source's] information is sufficient . . . .") (emphasis added); SEC v. Kornman, 391 F. Supp. 2d 477, 490 (N.D. Tex. 2005) (holding, independently and alternatively, that the allegations of a confidentiality agreement "bring this case within Rule 10b5-2(b)(1).").

at 819, is clearly relevant to the Commission's position that such an agreement encompasses an agreement not to trade.

Cuban cites two cases for the proposition that duties of non-disclosure and non-use are logically distinct (Br. 26 (citing Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp., 45 F. Supp. 2d 1164, 1205 (D. Kan. 1999) and Devon Robotics v. DeViedma, 2010 U.S. Dist. LEXIS 6219, at *3-6 (E.D. Pa. Jan. 25, 2010)).) Even assuming, for the sake of argument, that they are logically distinct, in the context of material, nonpublic information, an agreement to keep information confidential encompasses both. Thus, Cuban's two cases are inapposite. Neither case addresses the issue whether an agreement to keep information confidential merely prohibits disclosure or also encompasses an agreement not to use the information for personal benefit.[4]

Cuban maintains that the Commission's reliance on the dictionary definitions of "trust" and "confidence" is "wildly misplaced." (Br. 28-29.) The definitions, however, are relevant to the Commission's argument (discussed infra

[4] Cuban argues, based on two Commission filings and written form agreements for consideration of investment in PIPE offerings, that an agreement not to trade should contain more terms than Cuban's agreement here. (Br. 30-32.) The fact that certain agreements, formalized in writing with the benefit of legal counsel, might have both belts and suspenders does not mean an oral agreement to keep material, nonpublic information confidential does not encompass an agreement not to trade.

Section II.A.) that the Commission, in promulgating the Rule, "reasonably viewed an agreement to maintain information 'in confidence' as giving rise to a duty of trust or confidence, such that undisclosed trading on the information" involves deception. (SEC 21-22.) To be sure, the meaning of the word "confidential" is also relevant, as the complaint alleges that Cuban agreed to keep the information "confidential." (Compl. ¶ 14.) But the word "confidential" connotes trust, which Cuban acknowledges would be sufficient, as much as the word "confidence." "Confidential" means "[e]ntrusted with the confidence of another," American Heritage Dictionary of the English Language (4th ed. Houghton Mifflin Co. 2009), "of or showing trust in another," Webster's New World College Dictionary (Wiley Publishing, Inc. 2005), and "something treated with trust," Dictionary of Business Terms (Barron's Educ. Servs., Inc. 2000).

Finally, Cuban argues that "courts are uniform in their rejection of the idea that these agreements create a 'confidential relationship' that can lead to tort liability based on a breach." (Br. 19.) The handful of cases Cuban cites that applied state law, however, do not show that undisclosed trading based on material, nonpublic information after agreeing to keep the information confidential is not deceptive under a federal statute which Congress intended to go beyond the common law, see infra Section I.C.

C. The Existence of a Duty of Disclosure Under Section 10(b) and Rule 10b-5 Is a Federal Question That Is Not Determined Exclusively Under State Law.

Cuban argues that "the legal basis for determining what facts and circumstances give rise to the requisite duty of disclosure" must come exclusively from state law. (Br. 17-18.) He is mistaken. As discussed below (infra Section II), Rule10b5-2(b)(1) validly sets forth a sufficient duty binding on Cuban, and therefore controls based on the Supremacy Clause. U.S. Const. art. VI, cl. 2. In any event, as the Commission explained in its opening brief (SEC 33-34), Section 10(b) is "'not coextensive with common law doctrines of fraud'" given the statute's important purpose to "'rectify perceived deficiencies in the available common law protections . . . .'" (SEC 34 (quoting Herman & MacLean v. Huddleston, 459 U.S. 375, 388-89 (1983).) The Commission also explained that the leading misappropriation precedents did not rely exclusively on state law. (SEC 34).[5]

Cuban faults the Commission for not addressing O'Melveny & Meyers v. FDIC, 512 U.S. 79 (1994) and Santa Fe Industries, Inc. v. Green, 430 U.S. 462

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[5] See also Langford v. Rite Aid of Alabama, Inc., 231 F.3d 1308, 1313 (11th Cir. 2000) (noting in the closely analogous mail fraud context that "[i]n exploring the question of whether a duty to disclose exists in a particular situation, federal courts must go beyond state common law, and conduct an inquiry into relevant federal sources of authority"); United States v. Edwards, 458 F.2d 875, 880 (5th Cir. 1972) (citing cases).

(1977) (Br. 18 n.7), but those cases are irrelevant. The O'Melveny Court observed, as a threshold matter, that the causes of action in that case were "created by California law," not federal law. 512 U.S. at 83. It has long been established that where, as here, "a federal statute condemns an act as unlawful," the legal consequences are "federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted." Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942); see Atherton v. FDIC, 519 U.S. 213, 218 (1997).

Cuban contends that Santa Fe "reject[ed] creation of [a] 'federal fiduciary principle' for purposes of Section 10(b) liability." (Br. 17-18.) The holding of Santa Fe, which Cuban does not mention, is that the transaction at issue, "if carried out as alleged in the complaint, was neither deceptive nor manipulative and therefore did not violate either § 10(b) of the [Exchange] Act or Rule 10b-5." 430 U.S. at 474. The Court concluded that the statutory language was "dispositive," but expressed a concern in dicta that to permit a cause of action under Rule 10b-5 without an allegation of manipulation or deception would create a federal fiduciary principle in the absence of an indication of congressional intent. Id. at 478-79. The Court did not suggest that conduct that does involve deception, as in this case, should not be measured against federal standards under Section 10(b), a statute which clearly indicates congressional intent to create federal standards for

deceptive conduct in connection with securities transactions. Indeed, because the misappropriation theory requires deception, the Court concluded in O'Hagan that the theory is "consistent with Santa Fe." 521 U.S. at 655.

Finally, Cuban cites O'Melveny and Leach v. FDIC, 860 F.2d 1266, 1274 n.14 (5th Cir. 1988), for the proposition that the Supreme Court and this Court have rejected lack of uniformity as an argument against an exclusively state-law approach. (Br. 18 n.7.) Those decisions, however, held only that the federal interest in uniformity was insufficient to justify use of federal law on the particular issues raised by those cases. O'Melveny, as noted above, involved state-law claims, while Leach involved the meaning of the term "property" for purposes of standing under the Racketeer Influenced and Corrupt Organizations Act, 860 F.2d at 1274 n.14. These cases do not undermine the Commission's point that the meaning of the term "deceptive" in Section 10(b), which sets standards for civil (and criminal) liability in connection with securities transactions, should not vary from state to state.

II. COMMISSION RULE 10b5-2(b)(1), WHICH SET FORTH A DUTY NOT TO TRADE BINDING ON CUBAN BASED ON HIS AGREEMENT, IS VALID UNDER CHEVRON AS AN INTERPRETATION OF THE DECEPTION REQUIREMENT OF SECTION 10(b).

A. Section 10(b) Does Not Preclude the Commission's Interpretation of the Deception Requirement and the Commission's Interpretation Is Reasonable.

Commission Rule 10b5-2(b)(1) (the "Rule"), which provides that "'a duty of trust or confidence' exists . . . [w]henever a person agrees to maintain the information in confidence," applies by its terms to Cuban's alleged conduct and its application requires reversal of the judgment below. The Rule is properly viewed as a Commission interpretation of Section 10(b) and must be reviewed under the framework set out in Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984). As demonstrated in the Commission's opening brief (SEC 16-33) and above, an agreement to keep information confidential gives rise to a sufficient duty. If there were any doubt on that score, the Commission's determination in the Rule that a duty arises from an agreement to "maintain the information in confidence," is at least reasonable and therefore controlling. This is particularly true given the Supreme Court's repeated admonition that Section 10(b) should be construed "'not technically and restrictively, but flexibly to

effectuate its remedial purposes.'" E.g., SEC v. Zandford, 535 U.S. 813, 819 (2002).

Cuban contends that "the Supreme Court has held its construction of Section 10(b) unambiguously forecloses the SEC's interpretation with respect to the misappropriation theory." (Br. 43.) In support of this broad proposition, he discusses at length the Supreme Court's determinations (I) that what Section 10(b) "catches must be fraud" and not mere financial unfairness and (ii) that a deception based only on nondisclosure must involve a duty to speak. The Commission, however, does not dispute these general requirements and has satisfied them here.[6] Cuban confuses these general, undisputed requirements with the precise question in dispute in this case, which is whether one who has agreed to maintain information in confidence has undertaken a duty not to trade, such that his undislcosed trading constitutes deception. On this question, Section 10(b) is absolutely silent.

[6] Cuban states that the "SEC counters that even if Rule 10b5-2(b)(1) reflects a construction of Section 10(b) that differs from the Supreme Court's, the Rule nevertheless is valid because it is entitled to *Chevron* deference." (Br. 42.) This ignores the Commission's argument (SEC 18-25) that the Rule is consistent with the relevant Supreme Court decisions.

B. Rule 10b5-2(b)(1) Applies to Business Relationships.

Cuban argues (Br. 48-55) that Rule 10b5-2(b)(1), even if valid, does not apply to business relationships. As the Commission demonstrated (SEC 27 n.7), the Rule by its plain language applies to all agreements to maintain information in confidence. Cuban urges a departure from the plain language because "[t]he Rule's intent" not to apply to business relationships "is made clear in the SEC's proposing and adopting release." (Br. 49.) As the Commission explained (SEC 28 n. 7), although certain passages in the releases emphasize the Rule's application in the non-business context, those statements are best understood as indicating the Commission's focus on other subsections of Rule 10b5-2(b). See Donald C. Langevoort, Insider Trading Regulation § 6.7 n.23 (2009) (concluding that "there is nothing in the rule or its reasoning that would suggest" it does not apply to business relationships).

The cases upon which Cuban relies (Br. 51) are either inapposite or lack persuasive force. Although Safe Air for Everyone v. EPA stated the "'plain language of a regulation . . . will not control if 'clearly expressed [administrative] intent . . . to the contrary'" is found "in the published notices that accompanied the rulemaking process," the court's holding is that the plain meaning of the regulation controlled. 488 F.3d 1088, 1097-98, 1100 (9th Cir. 2007) (citations

omitted). Cuban fails to cite a case where a court disregarded the plain meaning of an agency regulation based on statements in a proposing or adopting release. Further, although Cuban relies (Br. 51) on this Court's decision in Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 629 (5th Cir. 2001), that case does not involve a supposed conflict between statements in an agency's proposing or adopting releases and a rule's plain meaning, but rather whether an agency's "alteration of an existing practice" was a rule subject to notice and comment under the Administrative Procedure Act. 238 F.3d at 627-29. Finally, the dicta in two district court decisions cited by Cuban (Br. 50-51 (citing United States v. Kim,184 F. Supp. 2d 1006 (N.D. Cal. 2002), and SEC v. Talbott, 430 F. Supp. 2d 1029, 1061 n.91 (C.D. Cal. 2006), reversed on other grounds, 530 F.3d 1085 (9th Cir. 2008))) have no persuasive force, for the reasons discussed above.

In addition, Cuban argues that "[i]f an agency expresses one view of a rule in the promulgating documents, but then adopts a different view in the enforcement of the rule once enacted – as the SEC did here – the agency effectively deprives the public of both fair notice of unlawful conduct and meaningful opportunity to comment on proposed regulations required by the Administrative Procedure Act." (Br. 51-52.) As discussed above, the Commission has not adopted a "different view" in enforcing the Rule. In any event, Cuban is barred from claiming, more than nine years after the Rule's

promulgation, that it suffered from procedural defects that violated the APA. See JEM Broadcasting Co., Inc. v. FCC, 22 F.3d 320, 325 (D.C. Cir. 1994); Dunn-McCampbell Royalty Interest, Inc. v. National Park Serv., 112 F.3d 1283, 1286-87 (5th Cir. 1997).

Finally, Cuban asserts (Br. 49), citing three comment letters submitted to the Commission after the Rule was proposed, that commenters "uniformly understood" the Rule to be limited to non-business relationships.[7] Any mistaken assumptions by commenters as to the Rule's scope provide no basis for overriding the Rule's plain meaning.

III. IN ANY EVENT, THE COMPLAINT ADEQUATELY ALLEGES DECEPTION BECAUSE IT REASONABLY CAN BE INFERRED FROM THE COMPLAINT THAT CUBAN EXPLICITLY AGREED NOT TO TRADE.

The Commission demonstrated in its opening brief (SEC 35-40) that, as a separate basis for reversal, the district court erred in failing to recognize that the complaint adequately alleges that Cuban explicitly agreed not to trade, making his subsequent undisclosed trading deceptive. As the Commission's brief explained, this inference can be reasonably drawn from the complaint's multiple allegations that Cuban agreed to keep the information confidential; that he stated after being

[7] Cuban's assertion of uniformity is incorrect. See, e.g., Comment of Richard H. Troy, www.sec.gov/rules/proposed/s73199/troy1.htm (discussing the Rule's potential application to business relationships).

told the information–"Well, now I'm screwed. I can't sell"; that he "acknowledg[ed] that he could not sell" prior to the information being made public; and that two contemporaneous internal Mamma.com emails reflect Cuban's agreement that he could not sell.[8] There is thus no merit to Cuban's assertion that the complaint contains "no allegations that Mamma.com's CEO sought an agreement not to trade or that Mr. Cuban entered into such an agreement." (Br. 37.) To the extent Cuban bases his assertion on a formalized, sequential offer and acceptance familiar to contract formation under state law, he misses the mark because, as discussed above, state law is not controlling. (See supra Section I.C.)

Cuban faults the Commission (Br. 38) for arguing that the two Mamma.com e-mails quoted in the complaint "confirmed" the existence of an agreement not to trade. An examination of the e-mails shows that they indeed "support an inference that Cuban had agreed not to trade." (SEC 38.) For example, one e-mail states that Cuban "recogniz[ed] that he was not able to do anything" until there was a

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[8] Cuban states that, "[a]ccording to company personnel, [he] was concerned that he would be unable to sell his shares until after the PIPE offering was announced." (Br. 4-5.) The actual allegation in the complaint, however, is not made "[a]ccording to company personnel," nor does it allege that he was only "concerned" that he "would be" unable to sell. The complaint alleges that after agreeing to keep the information confidential and learning about the offering, Cuban stated, "Well, now I'm screwed. I can't sell." Compl. ¶ 14 (emphasis added).

public announcement by Mamma.com. Cuban makes the irrelevant point that Mamma.com's unilateral expectations "did not create any obligation on the part" of Cuban. (Br. 39.) The Commission has acknowledged (SEC 39) and does not dispute that a duty cannot be imposed unilaterally. The Commission's argument is that the e-mails support the inference that Cuban accepted a duty not to trade, not merely that the e-mails show Mamma.com's expectations.

Finally, Cuban argues that the Court should not "strain" to find inferences in favor of the plaintiff (Br. 37), but he does not dispute that a complaint states a claim where it reasonably can be inferred that the defendant is liable (SEC 11). Based on the allegations discussed above, the inference that Cuban agreed not to trade must be granted to the Commission because it is a reasonable one.[9]

[9] The Commission noted in its opening brief (SEC 40 n.10) that it is also a reasonable inference from the complaint that Cuban, by trading a large block of Mamma.com stock, communicated information to the market, and cited two authorities as representative examples of the widely held view that trading communicates information to the market. Cuban faults the Commission for its "limited" survey of the academic literature. (Br. 25 n.9.) Many additional authorities could have been cited, if further support for this widely held view were needed. See, e.g., Sugato Chakravarty, "Stealth-trading: Which traders' trades move stock prices?" 61 Journal of Financial Economics 289, 305 (2001); Lisa K. Meulbroek, "An Empirical Analysis of Illegal Insider Trading," 47 Journal of Finance 1661, 1663 (1992).

* * * * *

The amicus brief filed by a group of four law professors fails to provide a basis for affirmance. (Brief of *Amici Curiae* Law Professors in Support of Defendant-Appellee ("Amicus").) The amicus brief does not make any arguments materially different from those advanced by Cuban, which as demonstrated above, lack merit. In any event, the amicus brief is based on a fundamental disagreement with the controlling Supreme Court decision adopting the misappropriation theory, and reflects a misunderstanding of how the theory applies to the facts alleged in the Commission's complaint. See generally Thomas Lee Hazen, "Identifying the Duty Prohibiting Outsider Trading on Material Nonpublic Information," 61 Hast. L. J. 882, 910 (forthcoming 2010), available at http://ssrn.com/abstract=1472090 ("the court's opinion in SEC v. Cuban took a much too narrow view of the misappropriation theory.)"

Amici assert (Amicus 5) that "the misappropriation theory of insider trading relied on by the SEC here, is, at best, tangential to the primary purpose of the antifraud provisions of the Exchange Act: to prevent the deception of investors and to facilitate disclosure of information to the market." To the contrary, as the Commission pointed out (SEC 30-31), the Supreme Court in O'Hagan stated that the misappropriation theory is "well tuned to an animating purpose of the

Exchange Act: to insure honest securities markets and thereby promote investor confidence." 521 U.S. at 658. Amici further incorrectly assert (Amicus 17) that under the misappropriation theory, "theft rather than fraud or deceit, seems the gravamen of the prohibition." O'Hagan made clear, however, that "deception through nondisclosure" is central to the misappropriation theory. 521 U.S. at 654. Amici also argue (Amicus 19-20) that, "[a]bsent clearly defined rules, anyone who receives confidential information regarding a public company is potentially at risk of becoming a target of an SEC investigation or litigation." The issue in this case, however, concerns insider trading liability for a person who agrees to maintain information in confidence but then trades on it without disclosure to the source, not anyone who merely receives information. Finally, amici argue (Amicus 27) that "the SEC's theory of liability here is 'rooted in the idea that the antifraud provisions require equal information among all traders.'" This case has nothing to do with requiring "equal information among all traders." The misappropriation theory, as made clear in O'Hagan, applies only where an informational advantage "stems from" deception, 521 U.S. at 658-59, and the complaint here alleges deception.

CONCLUSION

For the foregoing reasons, and those set forth in the Commission's opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

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April 2010

CERTIFICATE OF SERVICE

SEC v. Cuban (09-10996)

I hereby certify that 1) the foregoing Reply Brief of the Securities and Exchange Commission, Plaintiff-Appellant, complies with the required privacy redactions (5th Circuit Rule 25.2.13); 2) the electronic submission is an exact copy of the paper document (5th Circuit Rule 25.2.1); and 3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free from viruses.

I hereby certify that on the 12th day of April, 2010, the foregoing Reply Brief was electronically filed with the Clerk of the Court using the CM/ECF system, which will then send notification of such filing to the following ECF participants.

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CERTIFICATE OF COMPLIANCE

SEC v. Cuban (09-10996)

I hereby certify that the foregoing Reply Brief of the Securities and Exchange Commission, Plaintiff-Appellant, complies with the type-volume limitations of Fed. R. App. P. 29(d) and Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 5,092 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 11 in 14 point Times New Roman type.

s/ Michael L. Post
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