

Corporate & Financial Weekly Digest

Posted at 1:13 PM on September 24, 2010 by [Steven Shiffman](#)

SEC Case Against Mark Cuban Revived

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The U.S. Court of Appeals for the Fifth Circuit reversed a lower court ruling that had dismissed the Securities and Exchange Commission's securities complaint against Mark Cuban. The SEC alleged that Mr. Cuban violated the Securities Act of 1933 and the Securities Exchange Act of 1934, as well as Rule 10b-5, by trading stock in Mamma.com based on confidential information he allegedly misappropriated from its chief executive officer.

According to the complaint, Mr. Cuban, a significant minority shareholder in Mamma.com, was contacted by the company's CEO about a private investment in public equity, or PIPE, offering. The CEO allegedly told him that the information he was going to provide was confidential and must be kept confidential. Mr. Cuban became upset when he heard the offer because he understood that the PIPE offering would dilute his ownership stake in Mamma.com. At the close of the initial call, Mr. Cuban allegedly told Mamma.com's CEO: "[n]ow I'm screwed. I can't sell." Thereafter, the CEO emailed Mr. Cuban, referring him to a representative to provide additional details. Mr. Cuban called the representative and, the Fifth Circuit held, there is a reasonable inference that he obtained the details of the offering, including the prices available to PIPE participants. One minute later, Mr. Cuban contacted his broker and sold his entire position.

Once the PIPE offering was announced, Mamma.com's share price declined by as much as 39%. By selling when he did, Mr. Cuban saved \$750,000. Reading these allegations in a light most favorable to the SEC, as required on a motion to dismiss, the Fifth Circuit determined that the complaint provided a plausible basis to find that the CEO and Mr. Cuban agreed that Mr. Cuban was not to trade on the information he learned about Mamma.com's PIPE offering. By trading in violation of that agreement, he allegedly misappropriated the confidential information for his own benefit, providing the basis for the SEC's claims. As a result, the circuit court remanded the case for further proceedings, including discovery, consideration of summary judgment and, if reached, trial. (*SEC v. Cuban*, No. 09 Civ. 10996, 2010 WL 3633059 (5th Cir. Sept. 21, 2010))

One day after this opinion was issued, Mr. Cuban prevailed against the SEC with respect to an action under the Freedom of Information Act that he filed to obtain certain documents relating to Mamma.com, as well as other businesses he was affiliated with, at least some of which, according to the U.S. District Court for the District of Columbia, had been improperly withheld. (*Cuban v. SEC*, No. 09-0996 (D.D.C. Sept. 22, 2010))