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

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

The Securities and Exchange Commission requests oral argument. The district court, in dismissing the Commission's complaint alleging insider trading violations, erroneously failed to apply a valid Commission rule that, by its plain terms, applies to Cuban's conduct as alleged in the complaint. The district court also failed to recognize that, even apart from the Commission rule, the complaint states a claim under the relevant caselaw. Further, the district court failed, as required on a motion to dismiss, to draw reasonable inferences from the complaint in the Commission's favor. Oral argument may assist the Court in its consideration of these issues.

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STATEMENT OF JURISDICTION

The district court had jurisdiction to hear the Commission's claims under Sections 21(d), 21(e), and 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78u(d), 78u(e), and 78aa. Final judgment of dismissal with prejudice was entered for the defendant on August 13, 2009, RE Tab 3 (and amended August 13, 2009, RE Tab 4), and the Commission timely filed its notice of appeal on October 7, 2009, RE Tab 2. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES PRESENTED

This is an appeal by the Securities and Exchange Commission from a final judgment in a civil law enforcement action alleging insider trading violations of the antifraud provisions of the federal securities laws. Defendant Mark Cuban, as alleged in the complaint, agreed in advance to keep material, non-public information about a company's imminent securities transaction confidential. The complaint further alleged that Cuban, after receiving the confidential information, responding, "Well, now I'm screwed. I can't sell," and receiving more confidential information, sold his stock without disclosure to the company before the information was made public, avoiding losses of over $750,000. The district court dismissed the complaint on the ground that it did not adequately allege that Cuban's trading was deceptive. The issues presented are:

1. Whether the district court erred in failing to apply Commission Rule 10b5-2(b)(1) – pursuant to which an agreement to keep material, non-public information confidential gives rise to a duty not to trade, such that trading on that information without disclosure is deceptive and violates Section 10(b) and Rule 10b-5.

2. Whether, even apart from Commission Rule 10b5-2(b)(1), trading after agreeing to maintain information in confidence is deceptive under Section 10(b) and Rule 10b-5.

3. Whether, in any event, the Commission's complaint sufficiently alleges that Cuban explicitly agreed not to trade, where the complaint alleges that (a) Cuban agreed to maintain the material, nonpublic information in confidence and then, after hearing the negative information, responded, "Well, now I'm screwed – I can't sell;" and (b) Cuban obtained additional material, nonpublic information from the company (through its agent), which relied on Cuban's acknowledgment that he could not sell his shares until after the public announcement.

STATEMENT OF THE CASE

A. Nature of the Case

The Commission's complaint alleged that defendant Mark Cuban, after agreeing to maintain the information in confidence, was entrusted with material, nonpublic information by a corporation called Mamma.com when he was solicited

to participate in a private securities offering. The complaint further alleged that he traded in the market on the basis of the information in breach of a duty to his source, avoiding losses in excess of $750,000. The complaint charged Cuban with insider trading in violation of Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, thereunder.[1]

The district court granted Cuban's motion to dismiss based on its conclusion that the Commission's complaint failed adequately to allege that Cuban owed a duty to his source not to use the confidential information, and therefore his trading was not deceptive as required by Section 10(b).

B. Facts

On a motion to dismiss, the facts alleged in the complaint are accepted as true. The following factual account therefore is drawn from the Commission's complaint.

In March 2004, defendant Mark Cuban purchased 600,000 shares of Mamma.com, a 6.3% stake in the company. RE Tab 6, Compl. ¶ 10. In the spring of 2004, Mamma.com, at the suggestion of investment bank Merriman Curhan

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[1] As the district court stated, SEC v. Cuban, 634 F. Supp. 2d 713, 717 n.2 (N.D. Tex. 2009), the parties agreed that, in this case, liability would be examined under Section 17(a) according to the same standards as under Section 10(b) and Rule 10b-5.

Ford & Co. ("Merriman"), decided to raise capital through a private placement known as a PIPE ("private investment in public equity"). Id. ¶ 11. Mamma.com engaged Merriman to serve as the placement agent for the offering. Id.

At the end of June 2004 and as the PIPE progressed toward closing, Mamma.com decided to invite Cuban to participate in the PIPE. Id. ¶ 12. The company's CEO was instructed to invite Cuban and to first make sure that Cuban understood that he would have to keep the information about the offering confidential. Id. ¶ 12. On June 28, 2004, Mamma.com's CEO spoke with Cuban by telephone for over eight minutes. Id. ¶ 13. The CEO prefaced the call by informing Cuban that he had confidential information to convey to him. Id. ¶ 14. Cuban agreed that he would keep in confidence whatever information the CEO intended to share with him. Id. Relying on Cuban's agreement to keep the information confidential, the CEO told Cuban about the PIPE offering. Id. Cuban became upset and angry during the conversation, saying, among other things, that he disliked PIPEs because they dilute stock value for existing shareholders. Id. At the end of the conversation, Cuban told the CEO, "Well, now I'm screwed. I can't sell." Id.

Shortly thereafter, Mamma.com's executive chairman emailed other Mamma.com board members updating them on PIPE-related items, including the

CEO's conversation with Cuban. Id. ¶ 15. He wrote that "[a]s anticipated [Cuban] 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 . . . ." Id.

Later on June 28, again relying on "Cuban's acceptance of a duty of confidentiality and his acknowledgment that he could not sell until after the public announcement" of the PIPE offering, the CEO sent him a follow-up email stating "[i]f you want more details about the private placement please contact . . . [Merriman]" and provided the telephone number of the Merriman sales representative. Id. ¶ 16. Cuban called the Merriman sales representative that afternoon and spoke with him for eight minutes about the PIPE. Id. ¶ 17. During that call, the salesman provided additional confidential details about the PIPE, and, in response to Cuban's questions, told him that the PIPE was being sold at a discount to the market price and offered other incentives for the PIPE investors. Id. One minute after hanging up with the sales representative, Cuban called his broker and told him to liquidate his entire 600,000 share position in Mamma.com. Id. ¶ 18.

The next day, on June 29, 2004, Mamma.com's executive chairman emailed the board and said "we did speak to Mark Cuban ([through our CEO] and,

subsequently, our investment banker) to find out if he had any interest in participating to the extent of maintaining his interest. His 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." Id. ¶ 20.

At 6:00 p.m. on June 29, after the markets had closed, Mamma.com publicly announced the PIPE offering. Id. ¶ 22. The stock price closed on June 30, 2004, at $11.99, down 8.5 % from the June 29 closing price. Id. ¶ 23. Cuban avoided losses in excess of $750,000 by selling his Mamma.com shares prior to the public announcement. Id. ¶ 24. Cuban never disclosed to Mamma.com that he was going to sell his shares prior to the public announcement of the PIPE, but later publicly stated that he had sold his shares because the company was conducting a PIPE. Id. ¶ 25.

C. Proceedings in the District Court

On November 17, 2008, the Commission filed a complaint against Cuban in the District Court for the Northen District of Texas, alleging that he had traded based on material, nonpublic information in violation of Section 17(a), Section 10(b), and Rule 10b-5. See RE Tab 6, Compl. ¶¶ 27-33. The complaint alleged that Cuban, after orally agreeing to maintain in confidence information he learned from an executive at Mamma.com, was given material, nonpublic information

regarding an imminent PIPE offering by the company and traded on the basis of that information in breach of his duty of trust or confidence to Mamma.com. See, e.g., id. ¶ 26. The Commission sought an injunction against future violations, disgorgement of Cuban's avoided losses, plus prejudgment interest, and a civil penalty. See, e.g., id. ¶ 3.

Cuban moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. He argued that the Commission had not adequately alleged that his conduct was deceptive, as it must be to set forth a claim for violating Section 10(b). See SEC v. Cuban, 634 F. Supp. 2d 713, 718, 721 (N.D. Tex. 2009). The court agreed with Cuban's general contention that an agreement to maintain the information in confidence was insufficient to support liability. See id. at 725-26. The court, however, did not take this view based on any argument made by Cuban. The court held instead that an agreement must, either explicitly or implicitly, include an undertaking by the recipient of material, nonpublic information both to keep it in confidence and not to trade on it or otherwise use it for personal benefit. See id. at 725. The court asserted that, in the context of information, non-disclosure and non-use are logically distinct. See id. The court held that one who has undertaken to maintain information in confidence has accepted only a duty of non-disclosure, and is free to use the information for

personal benefit. See id. The court opined that "[a] person who receives material, non-public information may in fact preserve the confidentiality of that information while simultaneously using it for his own gain." Id. The court concluded that the Commission's complaint failed to allege the "non-use component." Id. at 730-31.

The court rejected Cuban's contentions that a duty not to trade on material, nonpublic information may not arise from agreement alone, and instead requires a preexisting fiduciary or fiduciary-like relationship, or an agreement creating a relationship that bears all the hallmarks of a traditional fiduciary relationship (such as superiority, dominance, or control), and that the existence of a fiduciary or fiduciary-like relationship is governed exclusively by state law. See id. at 721-27. The court reasoned that the essential duty is not to use the information for personal gain and that there is "no apparent reason" why this duty cannot be undertaken by agreement. Id. at 724.

The court considered whether Commission Rule 10b5-2 validly imposed a duty not to use the information. Rule 10b5-2(b)(1) provides that "'a duty of trust or confidence' exists . . . [w]henever a person agrees to maintain information in confidence." 17 C.F.R. 240.10b5-2(b)(1). The court concluded that the Rule, by its terms, purports to impose liability based on an agreement that lacks the requisite duty not to trade on or otherwise use the confidential information. See

634 F. Supp. 2d at 730. The court therefore held that to impose liability under the Rule would exceed the authority granted to the Commission by Congress pursuant to Section 10(b) to proscribe conduct that is deceptive. See id. at 731. The court noted that, in light of its conclusion on this issue, there was no need to address Cuban's argument that the Rule does not apply to his business relationship with Mamma.com because the Rule is limited to family and other personal relationships. See id. at 728 n.9. The court nevertheless stated that, if it were to reach this question, it would reject such a limitation on the Rule. See id.[2]

SUMMARY OF ARGUMENT

Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder prohibit deception in connection with the purchase or sale of securities. A person who obtains material, nonpublic information by agreeing with the source of the information to maintain the information in confidence, and then trades securities based on that information without disclosure to the source, as Cuban did here, falls within the scope of the misappropriation theory of insider trading, as adopted by the Supreme Court. The district court dismissed the complaint on the ground that it did not adequately allege that Cuban deceived the source of the information. In

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[2] Cuban also moved to dismiss under Federal Rule of Civil Procedure 9(b), but the court rejected this argument, holding that "the complaint is sufficiently particular to satisfy Rule 9(b)." 634 F. Supp. 2d at 719 n.3.

so doing, the court made three errors, each of which provides an independent basis for reversal.

First, the district court concluded, without citation to authority, that an agreement to keep information confidential does not encompass an agreement not to trade, and therefore trading securities even after agreeing to keep information confidential does not deceive the source of the information. The district court failed to give proper deference to Commission Rule 10b5-2(b)(1), which provides that an agreement to maintain information in confidence gives rise to a duty that makes trading on the confidential information without disclosure deceptive. Because the text of Section 10(b) allows the interpretation of deception embodied in Rule 10b5-2(b)(1), and because that interpretation of Section 10(b) is reasonable, the Rule is entitled to Chevron deference.

Second, the district court's conclusion is wrong even apart from Rule 10b5-2(b)(1). Trading on material, nonpublic information after agreeing to maintain it in confidence is deceptive under the more general terms of Section 10(b) and Rule 10b-5.

Third, in any event, the complaint sufficiently alleges that Cuban explicitly agreed not to trade, making his subsequent undisclosed trading deceptive. This is not only a reasonable inference, but the most reasonable inference to draw from

Cuban's statement–made after agreeing to keep information confidential and then being told the information–"Well, now I'm screwed. I can't sell." In addition, the complaint alleged that Cuban "acknowledg[ed] that he could not sell" prior to the information being made public.

STANDARD OF REVIEW

The grant of a motion to dismiss is reviewed de novo. See Harrington v. State Farm Fire & Cas. Co., 563 F.3d 141, 147 (5th Cir. 2009). Dismissal is inappropriate unless a complaint, construed with all well-pleaded facts accepted as true and viewed in the light most favorable to the plaintiff, see, e.g., Gonzalez v. Kay, 577 F.3d 600, 603 (5th Cir. 2009), petition for cert. filed, 78 U.S.L.W. 3295 (U.S. Oct. 9, 2009) (No. 09-542), fails "to state a claim to relief that is plausible on its face," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT THE COMPLAINT FAILED ADEQUATELY TO ALLEGE DECEPTION AS REQUIRED UNDER SECTION 10(b) AND RULE 10b-5.

The only element of an insider trading violation under Section10(b) and Rule 10b-5 in dispute here is the requirement of "deception." The district court erred in holding that the complaint failed to allege that Cuban deceived Mamma.com by trading on material, nonpublic information he had agreed to maintain in confidence. The central premise of the district court's holding is that there is a "logical[]" difference between an agreement to maintain information in confidence and an agreement not to trade on it. 634 F. Supp. 2d at 725. Commission Rule 10b5-2(b)(1) explicitly is to the contrary, stating that a "'duty of trust or confidence' exists . . . [w]henever a person agrees to maintain information in confidence." That rule is a reasonable interpretation of Section 10(b) and, as such, is entitled to deference from this Court. Even in the absence of Rule 10b5-2(b)(1), caselaw, logic, and experience make clear that an agreement to maintain information in confidence encompasses an agreement not to trade on the information. Accordingly, the complaint sufficiently alleged that Cuban owed a duty to his source of information not to trade, and his trading without disclosure to his source was therefore a deceptive breach of that duty.

A. Cuban's Agreement to Keep Information Confidential Gave Rise to a Duty Not to Trade, and His Undisclosed Trading Was Therefore Deceptive, in Violation of Section 10(b) and Rule 10b-5.

1. The misappropriation theory of insider trading, as adopted by the Supreme Court, prohibits trading on the basis of material, nonpublic information in breach of a duty to the source of the information.

In United States v. O'Hagan, 521 U.S. 642 (1997), the Supreme Court reviewed the language and purposes of Section 10(b) and Rule 10b-5 and adopted the misappropriation theory of insider trading. Under this theory, "a person commits fraud 'in connection with' a securities transaction, and thereby violates § 10(b) and Rule 10b-5, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." 521 U.S. at 652. O'Hagan was a partner in a law firm that was hired to represent a company considering making a tender offer. See id. at 647. The client company shared its confidential tender offer plans with one of O'Hagan's partners, and that partner shared the information with O'Hagan. See id. O'Hagan then traded in the securities of the target company based on the information for a personal profit. See id.

The Court noted that under the classical theory of insider trading, a corporate insider is liable when he trades in the securities of his corporation on the basis of material, nonpublic information. See id. at 651-52. This trading involves

the use of a "deceptive device" within the meaning of Section 10(b) because insiders with access to the corporation's confidential information are in a relationship of trust and confidence with the corporation's shareholders with whom they trade. Id. at 652. That relationship gives rise to a duty either to disclose the information or abstain from trading so as not to take advantage of uninformed shareholders. See id.

Under the complementary misappropriation theory, adopted in O'Hagan, a person commits fraud in connection with a securities transaction "when he misappropriates confidential information for securities trading purposes, in breach of a duty owed" not to the person with whom he trades, as under the classical theory, but "to the source of the information." Id. Under this theory, the misappropriator defrauds his source of the exclusive use of the information. See id. at 654 (deeming such fraud "akin to embezzlement"). The theory targets trading on the basis of material, nonpublic information by any "outsider" to a corporation who trades "in breach of a duty owed not to a trading party, but to the source of the information . . . who entrusted him with access to confidential information." Id. at 652-53.[3]

[3] The Court observed that, "[b]ecause the deception essential to the misappropriation theory involves feigning fidelity to the source of information," if the trader fully discloses to the source that he plans to trade on the information, there is no "deceptive device" and thus no Section 10(b) violation. Id. at 655.

2. Commission Rule 10b5-2(b)(1), by its plain terms, sets forth a duty on Cuban under Section 10(b) and Rule 10b-5 not to trade because he agreed to maintain the information in confidence.

Commission Rule 10b5-2(b)(1) interprets Section 10(b) of the Exchange Act and implements the misappropriation theory of insider trading. Section 10(b) provides that it is unlawful to use or employ, in connection with the purchase or sale of any security, any manipulative or deceptive device in contravention of Commission rules. As noted, deception is the only element of a Section 10(b) violation at issue in this case. Rule 10b-5, 17 C.F.R. 240.10b-5, provides, in relevant part, that it shall be unlawful to employ any device, scheme, or artifice to defraud, or to engage in any act which operates as a fraud on any person.

Rule 10b5-2, 17 C.F.R. 240-10b5-2, entitled "Duties of Trust or Confidence in Misappropriation Insider Trading Cases," states that it applies to any violation of Section 10(b) and Rule 10b-5 that "is based on the purchase or sale of securities on the basis of, or the communication of, material nonpublic information misappropriated in breach of a duty of trust or confidence."

The Rule enumerates circumstances giving rise to a duty of trust or confidence. Of particular relevance here, Rule 10b5-2(b)(1) provides that a "duty of trust or confidence" exists "[w]henever a person agrees to maintain information in confidence."

In this case, the complaint alleged that Cuban "agreed that he would keep whatever information the CEO intended to share with him confidential." RE Tab 6, Compl. at ¶ 14. Rule 10b5-2(b)(1) therefore applies here by its plain terms. Pursuant to the Rule, Cuban was required either to abstain from trading or to disclose to Mamma.com that he was going to trade before the public announcement of the offering. By trading in breach of the duty arising from his agreement, Cuban deceived Mamma.com and violated Section 10(b) and Rule 10b-5.

3. Commission Rule 10b5-2(b)(1) embodies a valid interpretation of the deception requirement of Section 10(b) and is entitled to Chevron deference.

The Commission's adoption of Rule 10b5-2(b)(1) is subject to review under the analytical framework set out in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984). See National Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 980-81 (2005); United States v. Royer, 549 F.3d 886, 899 (2d Cir. 2008) (giving Chevron deference to Commission Rule 10b5-1). Under Chevron, courts must defer to the Commission's interpretation of Section 10(b) if Congress has not "unambiguously forbidden [the interpretation] and it is . . . 'based on a permissible construction of the statute.'" Northpoint Tech. v. FCC, 414 F.3d 61, 69 (D.C. Cir. 2005) (quoting

Chevron, 467 U.S. at 842-43). Under the first step of Chevron, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. The Commission's interpretation passes the first step if the statute's "plain terms" do not "'directly addres[s] the precise question at issue.'" Brand X, 545 U.S. at 986 (quoting Chevron, 467 U.S. at 843).

Under the second step of the Chevron analysis, the question is whether the Commission's interpretation embodied in Rule 10b5-2(b)(1) of "any deceptive device or contrivance" is a "permissible," that is, "reasonable," construction of that phrase. Chevron, 467 U.S. at 843-44. A court may not set aside the Commission's reasonable interpretation in favor of an alternatively plausible (or even better) one. See Brand X, 545 U.S. at 980. The Court should apply the Chevron analysis here mindful of the Supreme Court's repeated admonition that Section 10(b) should be construed "'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" SEC v. Zandford, 535 U.S. 813, 819 (2002) (quoting SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963)).

The Commission's interpretation of Section 10(b) embodied in its rules consists of two parts. First, Rule 10b5-2(b)(1) considers undisclosed trading in breach of a duty that is undertaken solely by agreement to be deceptive, even in

the absence of a pre-existing fiduciary relationship. Second, Rule 10b5-2(b)(1) considers such undisclosed trading to be deceptive in the face of an agreement to maintain material, nonpublic information in confidence even if the agreement itself does not explicitly prohibit trading. The Rule is valid under Chevron. Each of these aspects of the Commission's interpretation is reasonable and neither is unambiguously forbidden by the text of Section 10(b).

a. Under Section 10(b), a duty of trust or confidence may arise by agreement.

As Rule 10b5-2(b)(1) provides, a duty of trust or confidence may arise by agreement, such that trading on the confidential information, while pretending to faithfully safeguard it, deceives the source of the information and therefore satisfies the "deception" requirement of Section 10(b). This interpretation is fully consistent with Section 10(b).

The Supreme Court in O'Hagan made clear that undisclosed trading after agreeing to keep information confidential is a type of deception within the scope of Section 10(b). Whether or not a person who has agreed to maintain information in confidence is a hornbook fiduciary, that status is not essential to Section 10(b) or the type of deception targeted by the misappropriation theory recognized in O'Hagan. Certainly nothing in the text of Section 10(b) itself requires fiduciary status. The O'Hagan case, although involving a fiduciary (an attorney), did not

hold that application of the misappropriation theory to fiduciaries was the only permissible construction of Section 10(b). After citing to an article by Professor Aldave several times in support of its adoption of the misappropriation theory, the O'Hagan Court approvingly quoted the article's statement that the theory bars "trading on the basis of information that the wrongdoer converted to his own use in violation of some fiduciary, contractual, or similar obligation to the owner or rightful possessor of the information." 521 U.S. at 663 (emphasis added) (quoting Barbara Bader Aldave, "Misappropriation: A General Theory of Liability for Trading on Nonpublic Information," 13 Hofstra L. Rev. 101, 122 (1984)).

The district court, after noting that the essential duty for misappropriation liability is a duty not to use the information for personal gain, which makes the undisclosed trading on the information deceptive, correctly concluded that there is "no apparent reason" why this duty cannot be undertaken by agreement. Cuban, 634 F. Supp. 2d at 724. The district court also correctly stated that there is even greater reason to impose a duty where one specifically and directly undertakes it by agreement than where the duty indirectly arises from a fiduciary relationship by operation of law. See id. at 725.[4] And, as the district court recognized, imposing a

[4] See Thomas Lee Hazen, 5 LAW OF SECURITIES REGULATION §14.22 (6th ed.) n.95.15 (available on Westlaw) ("[T]he applicable statutory language requires *deceptive* conduct and it would appear that promising to uphold a confidence and then breaching the duty so created can properly be characterized

duty by agreement is fully consistent with the Supreme Court's admonition that a duty of disclosure in the insider trading context does not run to every participant in the marketplace, but must arise from a relationship between two parties. See id. at 724-25. Here, the duty runs only from the confidant turned trader to the other party to the confidentiality agreement.

Finally, this Court has observed, based on statements in several Supreme Court decisions (including O'Hagan), that "a device, such as a scheme, is not 'deceptive' unless it involves breach of some duty of candid disclosure." Regents of the Univ. of Calif. v. Credit Suisse First Boston, 482 F.3d 372, 389 (5th Cir. 2007). We have such a breach of duty here. Cuban traded without making any disclosure to the source of the information, or obtaining consent to trade from the source. We note, nevertheless, that the Supreme Court has made clear in Stoneridge Investment Partners LLC v. Scientific-Atlanta, 552 U.S. 148 (2008), that Section 10(b) is broad enough to cover deceptive conduct absent a breach of duty. See Stoneridge, 552 U.S. at 158 (rejecting lower court's view that deception under Section 10(b) is limited to "misstatements, omissions by one who has a duty

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(footnote continued ...)
as deceptive. It would follow that Rule 10b5-2 is not beyond the SEC's rulemaking authority. Accordingly, breach of a contractual confidentiality agreement can form the basis of a Rule 10b-5 insider trading violation.")

to disclose, and manipulative trading practices.”). See also SEC v. Dorozhko 574 F.3d 42, 49 (2d Cir. 2009):

> “Chiarella, O’Hagan, and Zandford all stand for the proposition that nondisclosure in breach of a fiduciary duty “satisfies §10(b)’s requirement ... [of] a ‘deceptive device or contrivance,’” O’Hagan, 521 U.S. at 653, 117 S.Ct. 2199. However, what is sufficient is not always what is necessary, and none of [these cases] . . . require[s] a fiduciary relationship as an element of an actionable securities claim under Section 10(b).”

b. An agreement to maintain information in confidence includes an agreement not to trade.

The Commission – in adopting Rule 10b5-2(b)(1) – 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 provided in reliance on that agreement involves deception within the meaning of Section 10(b). The district court disagreed, asserting, without citation to any authority, that in the context of information, agreeing not to disclose information and agreeing not to use information are logically distinct. See Cuban, 634 F. Supp. 2d at 725. The court held that an undertaking to maintain information in confidence meant only non-disclosure, and therefore trading without disclosure would not be deceptive. See id.

Any difference between an agreement not to disclose and an agreement not to trade does not, however, respond to the Commission’s determination – reached

after public notice and comment and on the basis of its expertise in regulating the securities markets – that an agreement to maintain information "in confidence" gives rise to a duty of "trust or confidence." The Commission's determination hews closely to the literal meaning of "confidence." Indeed, a "confidence" (a secret) is by definition information entrusted by one person to another in "confidence."[5]

This is consistent with O'Hagan. The Court, as noted, did not limit the scope of the misappropriation theory to previously recognized types of fiduciary relationships.[6] The Court reasoned that where one is a fiduciary and acquires confidential information from his principal, the principal is the rightful owner of the information. 521 U.S. at 663. As the Court stated, "[a] company's confidential

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[5] "Confidence" connotes "[a] trusting relationship;" "trust or faith in a person . . .;" "[a] feeling of assurance;" The American Heritage Dictionary of the English Language, Fourth Ed. (Houghton Mifflin 2009); and "a relationship as confidant;" Webster's New World Dictionary (Wiley Publishing, Inc. 2005). "Trust" is defined as "assured reliance on the character, ability, strength, or truth of someone or something." Merriam-Webster Online Dictionary.

[6] Even if the O'Hagan Court had opined that deception requires something more than an agreement to keep information confidential, the Commission's subsequent reasonable interpretation controls. As the Supreme Court held in Brand X, a court's prior construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. Brand X, 545 U.S. at 982-85. O'Hagan certainly did not hold that a requirement of fiduciary status followed from the unambiguous terms of Section 10(b).

information . . . qualifies as property to which the company has a right of exclusive use." Id. at 654. If a fiduciary uses information for personal trading purposes, he is misappropriating the principal's property and does so in breach of his duties of loyalty and confidentiality to his principal.

Similarly, a company that entrusts its material, nonpublic information to another is giving him the use of a corporate asset, which has value in the securities markets. The promise to maintain the information in confidence is in essence to preserve the economic value of the information, which becomes worth less (or worthless) upon publication. The company entrusts the information to the third party, not to give away trading profits, but to further corporate purposes. The provider trusts the recipient of the information not to destroy the value of the information by making it public and not to convert the information to his own use by trading upon it. One cannot reconcile an undertaking to keep information confidential (thereby preserving its value to the provider) and trading by the recipient (which appropriates the value of the information to the trader).

The agreement thus creates a special relationship between the two parties that is, with particular respect to the recipient's ability to use the information for his personal benefit, the functional equivalent of a traditional fiduciary relationship. As the Supreme Court has declared, "'[i]t is well established, as a

general proposition, 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 but must account to his principal for any profits derived therefrom.'" Carpenter v. United States, 484 U.S. 19, 27-28 (1987) (quoting Diamond v. Oreamuno, 24 N.Y.2d 494, 497 (N.Y. 1969) and citing Restatement (Second) of Agency §§ 388 Cmt. c, 396c) (1958)).

Here, Mamma.com entrusted confidential business information to Cuban to solicit his interest in participating in its securities offering. That information was Mamma.com's property – a business or economic asset to which it had a right of exclusive use. It did not disclose the information to give Cuban a trading advantage over other market participants. It disclosed the information for the limited business purpose of inviting Cuban to participate in the offering, and enabling him to consider participating in the offering, only after securing his commitment to maintain the information in confidence.

Indeed, Mamma.com and Cuban must have understood that it was important to Mamma.com that Cuban both refrain from disclosing that Mamma.com was planning an offering, which would drive down the value of the stock (see RE Tab 6, Compl. ¶¶ 23-24), and refrain from trading on the information, which would

have a similar (though smaller) effect. Having secured Cuban's agreement to maintain the confidentiality of the information he received for the purpose of considering participating in the offering, Mamma.com officials were duped by Cuban's undisclosed trading.

Numerous insider trading cases support the view that an agreement to maintain information in confidence necessarily includes an agreement not to trade. Because an undertaking of a duty of confidentiality by agreement is typically easily determined, the published cases primarily grapple with the more difficult issue of when, in the absence of an agreement, a sufficient duty can be implied from the relationship between the information provider and recipient. While this more involved analysis is not necessary where, as here, a duty is undertaken by agreement, the analytical framework employed in these cases shows that a confidentiality agreement establishes a sufficient duty.

The leading pre-O'Hagan misappropriation case, United States v. Chestman, 947 F.2d 551 (2d Cir. 1991) (en banc), recognized that a duty can be established either by the acceptance of a duty or on the basis of a fiduciary relationship. In Chestman, a wife told her husband about a pending tender offer for her family's company but neither sought nor received her husband's agreement to keep the information confidential. Id. at 555-56, 571. The court observed that fiduciary

status could be established through either of two means: "a pre-existing fiduciary relation or an express agreement of confidentiality . . . ." Id. at 571 (emphasis added). Noting the "absence of evidence of an explicit acceptance by [the husband] of a duty of confidentiality," the court then proceeded to conduct the more difficult analysis – whether, based on factors such as "reliance, and de facto control and dominance," a fiduciary-like relationship sufficient to imply a duty existed between the husband and wife. Id. at 568-71. Had the husband explicitly accepted a duty of confidentiality, it is clear from the opinion that the court would not have had any occasion to analyze whether a duty could be implied from their pre-existing relationship. The agreement would have sufficed.

After O'Hagan, the Second Circuit again recognized that a confidentiality agreement alone establishes a sufficient duty under the misappropriation theory. The court observed that "a fiduciary relationship, or its functional equivalent, exists only where there is explicit acceptance of a duty of confidentiality or where such acceptance may be implied from a similar relationship of trust and confidence between the parties." United States v. Falcone, 257 F.3d 226, 234 (2d Cir. 2001) (emphasis added).

The Eleventh Circuit, in SEC v. Yun, 327 F.3d 1263 (11th Cir. 2003), recognized that a duty of trust and confidence can be established either by

confidentiality agreement or a pre-existing fiduciary relationship. 325 F.3d at 1273. The court stated that the Commission could establish a duty under the misappropriation theory by "present[ing] evidence that [the defendant] had agreed in this particular instance to keep the information confidential," and further stated that "[o]f course, a breach of an agreement to maintain business confidences would . . . suffice" to yield insider trading liability. Id. The Yun court noted that its conclusion was "bolstered" by Rule 10b5-2, which became effective after the conduct at issue. Id. at 1273 n.23.

Several district court decisions provide further support. In SEC v. Nothern, 598 F. Supp. 2d 167 (D. Mass. 2009), the court expressly rejected the argument that a confidentiality agreement cannot give rise to a duty for purposes of misappropriation liability. See 598 F. Supp. 2d at 173-76 ("[T]he SEC's allegation that [the tipper] expressly agreed to maintain the confidentiality of . . . information is sufficient to state a claim that he had a 'similar relationship of trust and confidence' upon which [tippee's] misappropriation liability may be premised.").[7] In addition, in Compudyne Corp v. Shane, 453 F. Supp. 2d 807

[7] The court did not rely upon Rule 10b5-2(b)(1) because the defendant argued that the Rule does not apply to business relationships, and the court thought the issue was "not entirely clear." 598 F. Supp. 2d at 175. The Rule, however, does apply to business relationships. Its plain language applies to all agreements to maintain information in confidence. See El Comite Para El Bienestar de Earlimart v. Warmerdam, 539 F.3d 1062, 1071-72 (9th Cir. 2008).

(S.D.N.Y. 2006), the court considered a motion to dismiss a complaint alleging misrepresentations in violation of Rule 10b-5. The defendant allegedly agreed to keep information about a PIPE offering confidential, but then schemed to sell stock in the issuer short and cover the short sales with stock purchased in the offering. The court observed that "[i]t is antithetical to the concept of keeping information private or secret that the information be used by the person receiving the information for [his] own personal benefit without obtaining the express approval to so use it." 453 F. Supp. 2d at 819. The court concluded that "[a] reasonable reading of [the defendant's] representation [that she would keep the information confidential] is that she confirmed that she would neither disclose the information nor use it for her benefit." Id.

Moreover, in SEC v. Kornman, 391 F. Supp. 2d 477 (N.D. Tex. 2005), in addition to conducting a facts-and-circumstances analysis regarding the relationship between the defendant and his two sources, the court held that "the

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(footnote continued ...)
Although certain passages in the Commission's proposing and adopting releases for the Rule discuss the application of the Rule to personal and family relationships, those statements are best understood as indicating the Commission's focus on Rules 10b5-2(b)(2) and (3), which specifically address family and other personal relationships. See Pittston Coal Group v. Sebben, 488 U.S. 105, 115 (1988). Moreover, restricting Rule 10b5-2(b)(1) to non-business relationships would be contrary to the Rule's overall purpose of protecting investors from the unfair trading advantage gained by persons who misappropriate material, nonpublic information.

complaint adequately alleges that [the adviser] agreed to safeguard the confidential information he obtained from the executives" and that the allegations "bring this case within Rule 10b5-2(b)(1)." 391 F. Supp. 2d at 490. Finally, in SEC v. Kirch, 263 F. Supp. 2d 1144 (N.D. Ill. 2003), the court granted summary judgment for the Commission and held that, because the defendant attended a presentation at a CEO roundtable in which he was told that the information shared was confidential and because the group had a confidentiality policy, he had unlawfully misappropriated the presenting CEO's material, nonpublic information. 263 F. Supp. 2d at 1149-51. The court held that "the Roundtable relationship and the circumstances of the [CEO's] disclosure of nonpublic information under such express confidentiality constraints call for application of the 'misappropriation theory' here." Id. at 1150-51.

Various common law doctrines also support the view that agreeing to maintain information in confidence includes agreeing not to trade. In the context of misappropriation of trade secrets, one who acquires knowledge of a trade secret in a confidential capacity is under an obligation not to disclose or use it for his own advantage even in the absence of a contract to that effect. See generally 6 WILLISTON ON CONTRACTS, § 13:14 (4th ed. 2009). Moreover, in the context of contracts, courts generally imply into an agreement a covenant of good faith and

fair dealing which precludes conduct that evades the spirit of an agreement. See Dearborn Indus. Mfg. Co., LTD v. Soudronic Finanz AG, 1997 WL 156589, at *5 (N.D. Ill. April 1, 1997) ("[A]ny court, faced with a claim that confidential information disclosed pursuant to a non-disclosure agreement had been converted or misappropriated, would imply a prohibition on misappropriation. Whether one were to conclude that stealing confidential information is equivalent to disclosing it, or whether one were simply to hold that such a misappropriation would violate the implied covenant of good faith and fair dealing, . . . this court believes that the . . . Agreement at least implicitly prohibited . . . theft of . . . confidential and proprietary information."); see also North Atlantic Instruments, Inc. v. Haber, 188 F.3d 38, 48 (2d Cir. 1999) (the provisions in an employment agreement that an employee keep and retain customer lists in the "strictest confidence" "by its very terms precludes using that confidential information for the benefit of a competitor business").

Finally, public policy supports viewing an agreement to keep material, nonpublic information confidential as including an agreement not to trade. The district court's approach would undermine the purposes of the Exchange Act and Rule 10b-5 "to insure honest securities markets and thereby promote investor confidence." O'Hagan, 521 U.S. at 658. The O'Hagan Court concluded that the

misappropriation theory, as defined in that decision, is "well tuned" to these purposes. Id. The Court well recognized that investors would be reluctant to "venture their capital in a market where trading based on misappropriated nonpublic information is unchecked by law." Id. at 658. A misappropriator's informational advantage "stems from contrivance" and deception, and cannot be overcome by other investors with research or skill. Id. at 658-59; see id. at 656. Consequently, some investors would "incur costs [either] to avoid dealing with such transactors or corruptly to overcome [such transactors'] unerodable informational advantages." Id. at 659.

Trading based on misappropriated information by one in Cuban's situation harms investors and the markets in this manner no less than the trading in O'Hagan. Cuban's informational advantage over other investors was not based on research or skill. Rather, he secretly used Mamma.com's property to avoid losses virtually risk-free through securities transactions. His informational advantage stemmed no less from contrivance and deception simply because he undertook a duty of confidence by agreement with Mamma.com rather than one implied from a relationship between the two parties.

Moreover, the district court's approach would cause anomalies with respect to other federal securities law requirements. First, it would result in the

prohibitions on tipping and trading becoming disjointed. Under this approach, one in Cuban's situation could not tip another person who then trades because the tip would breach a confidentiality agreement, but would be free to trade himself. Second, the district court's approach would conflict with Commission Regulation FD, which incorporates the principle that a person who agrees to keep information confidential cannot lawfully use that information for trading. Regulation FD was adopted simultaneously with Rule 10b5-2 as part of a broad rulemaking initiative. Regulation FD provides that "when an issuer, or person acting on its behalf, discloses material nonpublic information to certain enumerated persons (in general, securities market professionals and holders of the issuer's securities who may well trade on the basis of the information), it must make public disclosure of that information." Selective Disclosure and Insider Trading, Adopting Release, 2000 WL 1201556, at *42 (Aug. 15, 2000). One exception to Regulation FD's general rule is where an issuer discloses material, nonpublic information to a person who agrees to maintain the information in confidence. See 17 C.F.R. 243.100(b)(ii). As the Adopting Release explains, the reason for that exception is that "misuse of the information for trading [by a person who agreed to keep the information confidential] would . . . be covered under . . . the misappropriation theory of insider trading." 2000 WL 1201556, at *8. In short, because the

Commission understood that an issuer's disclosure of material, nonpublic information to a person who agreed to keep the information confidential would not allow the recipient legally to trade, the Commission did not believe it necessary to impose the Regulation FD prohibition against selective disclosure in that situation.

4. Even apart from Rule 10b5-2(b)(1), undisclosed trading after agreeing to keep information confidential is deceptive under Section 10(b) and Rule 10b-5.

Even apart from Rule 10b5-2(b)(1), the Commission's complaint adequately alleged deception under Section 10(b) and Rule 10b-5. The complaint alleged that Cuban agreed to keep the information provided to him by Mamma.com confidential. As discussed in detail above, *supra* Section A.3.b., agreeing to keep information confidential means agreeing not to trade. Indeed, numerous cases show that a duty to disclose before trading is owed by one who has undertaken a duty of confidentiality by agreement. That trading in breach of that duty is deceptive.

The caselaw does not require, as Cuban argued below (see 634 F. Supp. 2d at 721-22), that Texas law solely determines whether a duty exists sufficient for liability under the misappropriation theory. Because the Exchange Act is a federal statute, the question whether the defendant has breached a duty is federal and does not turn on the application of any one state's law. It has long been established that

> the antifraud provisions of the securities laws are not coextensive with common law doctrines of fraud. Indeed, an important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common law protections by establishing higher standards of conduct in the securities industry.

Herman & MacLean v. Huddleston, 459 U.S. 375, 388-89 (1983) (footnote omitted). Accordingly, courts applying the misappropriation theory do not base their decisions on the precise contours of particular states' common law doctrines. Instead, they either assume the existence of a duty in situations where it is universally recognized, see, e.g., O'Hagan, 521 U.S. at 653 (employee-employer, attorney-client); United States v. Carpenter, 791 F.2d 1024, 1028 & n.5 (2d Cir. 1986) (employee-employer, agent-principal), aff'd by equally divided court, 484 U.S. 19 (1987), or else advert generally to the common law as a useful starting point. See, e.g., Chestman, 947 F.2d at 567-70. See also Langford v. Rite Aid of Alabama, Inc., 231 F.3d 1308, 1313 (11th Cir. 2000) ("In 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") (citing cases).[8]

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[8] Moreover, Cuban's state-law-only approach, if adopted, would result in an undesirable lack of uniformity, with standards for liability under federal law – Section 10(b) and Rule 10b-5 – depending on the law of fifty states.

B. In Any Event, the Complaint Adequately Alleged That Cuban's Conduct Was Deceptive Because He Explicitly Agreed Not to Trade and Then Traded Based on the Confidential Information.

The complaint adequately alleged that Cuban explicitly agreed not to trade, and his subsequent trading based on the confidential information therefore was deceptive.[9] At the beginning of the call with the Mamma.com CEO, Cuban agreed to keep whatever information he learned confidential. After learning the initial information about the PIPE offering, which upset him and which he opposed because it would dilute existing shareholders like himself, he stated, "Well, now I'm screwed – I can't sell." Cuban's express and contemporaneous recognition that he could not sell evidences his understanding that he had agreed at the beginning of the call to abstain from trading on the basis of the confidential information. Certainly it is a reasonable inference from Cuban's statement that he had agreed at the beginning of the call not to trade.

Based on Cuban's agreement to treat the information confidentially and not sell, the company was induced to convey even more nonpublic confidential information to him. The complaint makes an explicit allegation concerning Cuban's "I can't sell" statement which the district court ignored. The complaint

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[9] While this case involves an explicit agreement not to trade, the district court correctly recognized that an implicit agreement not to trade would be sufficient. Cuban, 634 F. Supp. 2d at 725, 727-28, 731.

alleges that "in reliance on Cuban's acceptance of a duty of confidentiality <u>and his acknowledgment that he could not sell until after the public announcement</u>," the CEO provided Merriman contact information to Cuban to obtain further details about the offering. RE Tab 6, Compl. ¶ 16 (emphasis added). In response to Cuban's questions, the Merriman placement agent provided Cuban additional confidential details about the offering, including that the offering was being sold at a discount to the market price and that it included other incentives for investors. Thus, even if Cuban were not viewed as having agreed not to trade at the beginning of the call with the CEO, the complaint sufficiently alleges that he had an understanding by the end of that call (which he acknowledged to the CEO) that he had undertaken not to trade until the public announcement. Having acknowledged that understanding to Mamma.com, he then obtained further confidential information from Mamma.com's agent and also used that information for trading.

The district court was required to view the allegations in the light most favorable to the Commission and to grant the Commission reasonable inferences from the allegations. <u>See, e.g.</u>, <u>Gonzalez</u>, 577 F.3d at 603. By concluding that the allegations were insufficient, however, the district court effectively concluded that it was <u>unreasonable</u> to infer from the allegations that Cuban had agreed not to

trade on the information. This was reversible error. It would be difficult to comprehend why, if Cuban had not intended to agree to refrain from trading, he would have considered himself "screwed" and unable to sell. Indeed, the most reasonable inference is that Cuban had undertaken (and recognized that he had undertaken) a duty not to trade on the information.

The district court reached the conclusion it did only by improperly speculating about possible inferences in favor of the defendant. The court believed that Cuban's "[n]ow I'm screwed[] I can't sell" statement expressed his "belief, at least at that time, that it would be illegal for him to sell . . . ." Cuban, 634 F. Supp. 2d at 728. In other words, the district court hypothesized that Cuban believed he could not sell, not because he had agreed not to trade, but because he mistakenly concluded that his agreement to keep the information confidential was enough for liability. The district court's version of events, therefore, is as follows: (1) Cuban agrees to keep the information confidential but does not agree not to trade; (2) Cuban, at least at that time, does not realize that a confidentiality agreement alone is insufficient to disable him from trading and believes it would be illegal for him to sell; (3) Cuban accordingly states that he is "now . . . screwed" and can't sell; (4) Cuban, a short time later that same day, somehow realizes that it would actually be lawful for him to sell and proceeds to sell. The

implausibility of this version of events is only further apparent from the district court's own recognition that it was the first court to consider whether a confidentiality agreement must contain a particularized non-use component. See id. at 726 ("Although no court appears to have analyzed the precise question that this court examines . . . .").

Furthermore, the complaint made allegations regarding two emails sent within Mamma.com that further support an inference that Cuban had agreed not to trade on the information. In addition, these allegations indicate that Mamma.com shared Cuban's understanding that he had agreed not to trade. Shortly after the call from the CEO to Cuban on June 28, Mamma.com's executive chairman sent an email to other Mamma.com board members updating them on PIPE-related items, including the CEO's conversation with Cuban. He stated in the email that "[a]s anticipated [Cuban] 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 . . . ." RE Tab 6, Compl. ¶ 15 (emphasis added). On June 29, 2004, Mamma.com's executive chairman wrote an email to the board that said "we did speak to Mark Cuban ([through our CEO] and, subsequently, our investment banker) to find out if he had any interest in participating to the extent of maintaining his interest. His 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." Id. ¶ 20 (emphasis added).

The court dismissed these allegations as relevant only to the issue whether Mamma.com had a unilateral expectation that Cuban would refrain from trading on the information. It is true that a unilateral expectation on the part of the provider of information is insufficient to create a predicate duty for misappropriation liability. Here, however, the allegations did not just support an inference that Mamma.com expected Cuban not to trade, but, as noted, were relevant to the scope of Cuban's actual agreement and Mamma.com's understanding of Cuban's actual agreement. The court elsewhere in its opinion recognized the important difference between a mere unilateral expectation of non-use and a "legitimate and justifiable expectation." Compare Cuban, 634 F. Supp. 2d at 725-26 with id. at 728. It is unclear, however, why the court limited its consideration of the relevance of these allegations in the complaint. Thus, it can be reasonably inferred from the complaint that Cuban explicitly agreed not to trade

on the information, and deceptively breached his resulting duty by selling his entire stake without disclosing to Mamma.com his plans to trade.[10]

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[10] In any event, it is a reasonable inference from the complaint that Cuban, by trading a large block of stock (more than 6% of Mamma.com's outstanding shares), communicated information about Mamma.com, in breach of his agreement to keep the information about the company confidential. Trading communicates information to the market. See, e.g., Larry Harris, TRADING AND EXCHANGES: MARKET MICROSTRUCTURE FOR PRACTITIONERS, 224 (NY: Oxford University Press 2003) ("Informed traders, like all other traders, often significantly impact prices when they trade. Their buying tends to push prices up, and their selling tends to push prices down."); Joel Hasbrouck, "Measuring the Information Content of Stock Trades," 46 The Journal of Finance 179 (1991)("Central to the analysis of market microstructure is the notion that in a market with asymmetrically informed agents, trades convey information and therefore cause a persistent impact on the security price.").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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FRAUDULENT INTERSTATE TRANSACTIONS

Section 17. [77q] (a) Use of interstate commerce for purpose of fraud or deceit--It shall be unlawful for any person in the offer or sale of any securities or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly–

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. * * * *

MANIPULATIVE AND DECEPTIVE DEVICES

Section 10. [78j] It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange-- * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. * * * *

EMPLOYMENT OF MANIPULATIVE AND DECEPTIVE DEVICES

17 C.F.R. § 240.10b-5

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

©) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

DUTIES OF TRUST OR CONFIDENCE IN MISAPPROPRIATION INSIDER TRADING CASES.

17 C.F.R. § 240.10b5-2

Preliminary Note to § 240.10b5-2: This section provides a non-exclusive definition of circumstances in which a person has a duty of trust or confidence for purposes of the "misappropriation" theory of insider trading under Section 10(b) of the Act and Rule 10b-5. The law of insider trading is otherwise defined by judicial opinions construing Rule 10b-5, and Rule 10b5-2 does not modify the scope of insider trading law in any other respect.

(a) Scope of Rule. This section shall apply to any violation of Section 10(b) of the Act (15 U.S.C. 78j(b)) and § 240.10b-5 thereunder that is based on the purchase or sale of securities on the basis of, or the communication of, material nonpublic information misappropriated in breach of a duty of trust or confidence.

(b) Enumerated "duties of trust or confidence." For purposes of this section, a "duty of trust or confidence" exists in the following circumstances, among others:

(1) Whenever a person agrees to maintain information in confidence;

(2) Whenever the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality; or

(3) Whenever a person receives or obtains material nonpublic information from his or her spouse, parent, child, or sibling; provided, however, that the person receiving or obtaining the information may demonstrate that no duty of trust or confidence existed with respect to the information, by establishing that he or she neither knew nor reasonably should have known that the person who was the source of the information expected that the person would keep the information confidential, because of the parties' history, pattern, or practice of sharing and maintaining confidences, and because there was no agreement or understanding to maintain the confidentiality of the information.

CERTIFICATE OF SERVICE

SEC v. Cuban (09-10996)

I hereby certify that, on January 22, 2010, I caused the Brief of the Securities and Exchange Commission, Plaintiff-Appellant to be sent by electronic mail, by written consent, to

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and seven copies of the Brief of the Securities and Exchange Commission, Plaintiff-Appellant and an electronic version of the brief to be sent by next-business-day delivery to

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CERTIFICATE OF COMPLIANCE

SEC v. Cuban (09-10996)

I hereby certify that this brief 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 9,254 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.

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