

SEC's Mark Cuban Win Could Be Short-Lived

By **Shannon Henson**

Law360, New York (September 21, 2010) -- A federal appeals court's decision Tuesday to revive the U.S. Securities and Exchange Commission's insider trading case against self-made billionaire Mark Cuban marks a big win for the commission, but whether the agency will claim ultimate victory remains in doubt, attorneys said.

A three-judge panel of the U.S. Court of Appeals for the Fifth Circuit revived the case Tuesday, saying that it's plausible that Cuban could have thought he was restricted from trading on the information he obtained about an impending private investment in public equity offering. The finding overturned a lower court's 2009 dismissal of the case.

Lawyers said the decision wasn't surprising given the comments of the panel members during oral arguments. But the court's finding, they noted, is not about the merits of the case but whether the SEC's complaint was sufficiently pled.

"The narrow grounds of the reversal probably limited the SEC's delight in having an adverse opinion reversed," said Kenneth B. Winer, a partner with Foley & Lardner LLP.

The court of appeals is not saying Cuban violated the law, but merely that the SEC reached the threshold necessary to move forward with the case, said Trey Branham, managing partner of Goldfarb Branham LLP, who noted that a motion to dismiss is an "incredibly rare thing to win."

Cuban has "clearly signaled he doesn't believe he did anything wrong," Branham said. "I don't think he's going to just sit still."

Nicholas I. Porritt, a partner with Akin Gump Strauss Hauer & Feld LLP, said this is often the stage where a case like this one would settle.

"But so far neither side has publicly shown any interest in compromise," said Porritt, who penned an amicus brief for four law professors on behalf of Cuban.

The case has been unfolding since November 2008, when the SEC first accused Cuban of selling 600,000 shares in Mamma.com based on nonpublic information he had learned about the PIPE.

Cuban owned 6.3 percent of the company, a publicly traded Internet search engine entity now known as Copernic Inc., according to the suit. The company's then-CEO told Cuban about the PIPE the day prior to the offering, saying the information was confidential, the complaint claims.

The SEC says Cuban became angry at the news, saying the offer would dilute shares in the company. The complaint says that at the end of the call, Cuban told the CEO: "Well, now I'm screwed. I can't sell."

The SEC contends that Cuban sold all his Mamma.com stock by the end of the next day, June 29, 2004. Mamma.com announced the PIPE after the markets closed that day, prompting its stock to open June 30 at \$11.89, down 9.3 percent from the prior day's close of \$13.10. Cuban, who owns the Dallas Mavericks and Landmark Theaters, allegedly avoided a loss of more than \$750,000.

In July 2009, Judge Sidney A. Fitzwater of the U.S. District Court for the Northern District of Texas dismissed the case. He ruled that the SEC adequately pled that Cuban entered into a confidentiality agreement, but did not allege that Cuban agreed to refrain from trading on or using for his own benefit the information the CEO was about to share.

"Absent a duty not to use the information for personal benefit, there is no deception," Judge Fitzwater said.

The Fifth Circuit said Tuesday, however, that Cuban's statement to the CEO that he could not sell "can plausibly be read to express Cuban's view that learning the confidences regarding the PIPE forbade his selling his stock before the offering but to express no agreement not to do so."

However, Cuban then reached out for more information about the offering, the appeals court said.

"By contacting the sales representative to obtain the pricing information, Cuban was able to evaluate his potential losses or gains from his decision to either participate or refrain from participating in the PIPE offering," the Fifth Circuit said.

"It is at least plausible that each of the parties understood, if only implicitly, that Mamma.com would only provide the terms and conditions of the offering to Cuban for the purpose of evaluating whether he would participate in the offering, and that Cuban could not use the information for his own personal benefit," the appeals court said.

John Nester, SEC spokesman, lauded the decision, saying the commission is looking forward to presenting its case.

An attempt to get a comment from Cuban's attorney was unsuccessful.

The judges who sat on the panel for the Fifth Circuit were Judges Carolyn D. King, Patrick E. Higginbotham and Emilio Garza.

Cuban is represented by Dewey & LeBoeuf LLP.

The case is SEC v. Mark Cuban, case number 09-10996, in the U.S. Court of Appeals for the Fifth Circuit.

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