SEC V. CUBAN: THE MISAPPROPRIATION THEORY AND ITS APPLICATION TO CONFIDENTIALITY AGREEMENTS UNDER SECTION 10(B) AND RULE 10B5-2 OF THE SECURITIES EXCHANGE ACT OF 1934

ABSTRACT

Section 10(b) of the Securities Exchange Act of 1934 was designed to prevent manipulative and deceptive conduct in connection with the purchase or sale of securities. Its purpose is to promote fairness and integrity in the securities markets. Pursuant to its intended purpose, individuals are liable under section 10(b) when they engage in insider trading—an individual’s deceptive acquisition and use of material nonpublic information in the purchase or sale of securities. Insider trading can be analyzed in two separate contexts: the classical theory, which focuses on corporate insiders; and the misappropriation theory, which extends insider trading liability to certain corporate outsiders. The issue most often debated under the misappropriation theory is determining which relationships fall within the scope of section 10(b) liability.

In 2000, the Securities and Exchange Commission (SEC) promulgated Rule 10b5-2 in an attempt to codify the types of relationships that are within the purview of the misappropriation theory. Although the rule was enacted pursuant to congressional authority, courts have sharply divided on whether or not it has inappropriately extended the scope of section 10(b).

This comment takes the position that Rule 10b5-2 is valid and will discuss how it provides much needed clarity to the misappropriation theory. Rule 10b5-2 will be evaluated in light of the District Court for the Northern District of Texas’s recent decision in SEC v. Cuban. Ignoring Rule 10b5-2, the court held that Mark Cuban’s sale of his 6.3% stake in Mamma.com, a web search technology company, based on confidential information that he received from the company’s CEO, was not a violation of insider trading under the misappropriation theory because he did not also acquiesce to a no-use agreement. This comment takes the position that Cuban was improperly decided, and its decision to ignore Rule 10b5-2 will further exacerbate the problems of fairness and clarity in federal securities law.1

1On January 22, 2010, the SEC submitted an appellate brief to the United States Court of Appeals for the Fifth Circuit. See Brief of Plaintiff-Appellant, SEC v. Cuban, No. 09-10996 (5th Cir. Jan. 22, 2010) [hereinafter SEC Appellate Brief]. While this paper was drafted before this appeal, it is important to note that many of the arguments in this paper are consistent with the
I. INTRODUCTION

Similar to the Securities Act of 1933, the main driving force that led to the development of the Securities Exchange Act of 1934 (Exchange Act) was the desire to promote fairness and clarity in the federal securities laws for all participants in the financial market. Within that construct, section 10(b) of the Exchange Act was enacted to prevent the use of "any manipulative or deceptive device" in the purchase or sale of securities. From this statute, and the promulgation of Rule 10b-5 thereunder, the concept of insider trading has emerged. The classical theory of insider trading holds corporate insiders liable when they use material non-public information, obtained from their unique position within a corporation, for their own personal advantage in the securities market. The United States Supreme Court later adopted the misappropriation theory of insider trading and extended liability to certain corporate outsiders that traded on SEC's appeal.

2Id. §§ 77a–77mm.
4The legislative history of section 10(b) clearly indicates that it was intended to be a broad, anti-fraud provision designed to cover the full range of fraudulent conduct that "human ingenuity can devise." Chiarella v. United States, 445 U.S. 222, 236 (1980) (internal quotes omitted). The Supreme Court has recognized that section 10(b), as implemented by Rule 10b-5, "was designed as a catch-all clause to prevent fraudulent practices." id. at 226 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 202, 206 (1976)); see also Eric C. Chaffee, Standing Under Section 10(b) and Rule 10b-5: The Continued Validity of the Forced Seller Exception to the Purchaser-Seller Requirement, 11 U. PA. J. BUS. L. 843, 889 (2009) (stating lawsuits under section 10(b) and Rule10b-5 are designed "to augment the government's efforts to enforce the security laws").
515 U.S.C. § 78j(b).
617 C.F.R. § 240.10b-5 (2009). The Rule states:
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
(c) 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.

Id.
7The concept of insider trading first emerged in an SEC release. See Cady, Roberts & Co., 40 S.E.C. 907, 907 (1961) (describing the case as "one of signal importance in [the] administration of the Federal securities acts"). It was not until 1980 that the United States Supreme Court affirmed that insider trading violated section 10(b) of the Exchange Act. See Chiarella, 445 U.S. at 227-28 (discussing the historical roots of fraud for failure to disclose information).
8See Chiarella, 445 U.S. at 227.
confidential in breach of some duty owed to the information's source. In the wake of the Supreme Court's adoption of the misappropriation theory, however, lower courts struggle to define its parameters. This unpredictable and fragmented approach reared its ugly head again in the widely publicized case of SEC v. Cuban.

In Cuban, the United States District Court for the Northern District of Texas held that Mark Cuban (Cuban) was not guilty of insider trading because his explicit agreement to maintain confidential insider information regarding Mamma.com did not include an additional agreement to abstain from the sale of his own stock based on that information. This decision adds a further wrinkle to insider trading jurisprudence by its narrow—and in this author's opinion, erroneous—interpretation of the scope of the misappropriation theory.

The misappropriation theory requires courts to focus on whether a fiduciary relationship, or similar relationship with a "duty of trust or confidence," exists. The Cuban court's ruling rests on the belief that a "duty of trust or confidence" in a non-fiduciary relationship must contain an agreement not to sell securities. This comment argues that the court improperly relied on the false distinction between a confidentiality agreement and a duty not to sell, and advocates the need for the courts to establish a consistent approach to the misappropriation theory via Rule 10b5-2.

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10See infra Part II.B.
12Mark Cuban is a billionaire entrepreneur most recognized as the owner of the Dallas Mavericks, an NBA team.
1417 C.F.R. § 240.10b5-2(b) (2009); see, e.g., United States v. Falcone, 257 F.3d 226, 232 (2d Cir. 2001) (focusing on the misappropriator's duty to refrain from using confidential information); United States v. Kim, 184 F. Supp. 2d 1006, 1014 (N.D. Cal. 2002) (noting that the primary focus of the misappropriation liability is a fiduciary type of relationship).
15Cuban, 634 F. Supp. 2d at 725.
16The applicable portion of the rule states:

(a) Scope of Rule. This section shall apply to any violation of Section 10(b) of the Act and [Rule 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
Part II discusses the development of insider trading jurisprudence, with a brief overview of both the classical and misappropriation theories of liability. Part III analyzes the facts and underlying justifications the court provides for reaching its decision in Cuban. Part IV argues for a more consistent application of the misappropriation theory based on Rule 10b5-2. Specifically, this section argues that Cuban's liability under the misappropriation theory stems from his deceptive use of information he agreed to keep confidential, and not from whether there was an additional agreement not to sell. This comment notes, in the alternative, that even under the court's own rubric, the factual allegations support a finding of insider trading liability. Part V concludes that a clearer standard for applying the misappropriation theory of insider trading is necessary both to provide judicial consistency and further the Exchange Act's goal of providing fairness and clarity in the securities market.

II. THE DEVELOPMENT OF INSIDER TRADING

A. The Classical Theory

Originally, section 10(b) provided a general prohibition against the use of "any manipulative or deceptive device" in the buying or selling of securities. In In re Cady, Roberts & Co., the first attempt by the SEC to combat insider trading, the SEC determined that it was a violation of section 10(b) for a director of a corporation to sell his stock in that company after receiving non-public information. The SEC found the director liable under the broad language of section 10(b) because that section was "designed to encompass the infinite variety of devices by which undue advantage may be taken of investors and others." There is an inherent unfairness, the SEC noted, in allowing a corporate insider to use non-public

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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 . . .

17 C.F.R. § 240.10b5-2 (citation omitted).
17 As an aside, in federal securities law, deceptive conduct is clearly distinguished from illegal conduct in regard to how confidential information is obtained and used. By definition, "misappropriation" means "[t]he application of another's property or money dishonestly to one's own use." BLACK'S LAW DICTIONARY 1088 (9th ed. 2009).
20 Id. at 911.
information to the detriment of other innocent investors in securities markets.\(^\text{21}\)

After the Supreme Court's decision in *Chiarella v. United States*, federal courts have recognized the validity of the classical theory of insider trading.\(^\text{22}\) In *Chiarella*, the defendant was found not liable for insider trading because he received his confidential information as a clear outsider to the corporation.\(^\text{23}\) The Court reasoned that an individual must refrain from trading securities on the basis of non-public information because of his fiduciary relationship with shareholders as a corporate insider.\(^\text{24}\) Although the Court did not list all relationships that give rise to insider trading, it clearly distinguished between a duty to refrain from trading and one's mere possession of non-public information.\(^\text{25}\)

As insider trading became more prevalent, courts were forced to address less clear-cut claims. In *Dirks v. SEC*,\(^\text{26}\) the Supreme Court refused to extend section 10(b) liability to an outsider who received non-public information from a corporate insider who was attempting to expose corporate fraud.\(^\text{27}\) The outsider, Dirks, was not liable because he did not have a fiduciary relationship with the corporate insider, nor did he use the information for his own advantage.\(^\text{28}\) Dirks' subsequent disclosure to other investors, according to the Court, was not a violation of section 10(b) because the ultimate purpose of the original disclosure was to ferret out

\(^{21}\)Id. at 912.

\(^{22}\)See *Chiarella v. United States*, 445 U.S. 222, 227 (1980) (describing an insider's duty to "abstain from trading" unless there is disclosure (citing *Cady, Roberts & Co.*, 40 S.E.C. at 907)).

\(^{23}\)Id. at 231-33. The petitioner in this case, Chiarella, was a printer who had several jobs printing announcements of corporate takeover bids. Id. at 224. Although the names were concealed, Chiarella was able to determine the names of the company prior to printing. Id. He would then purchase shares in the target company and sell them immediately after the public announcement of the takeover. Id. Currently, similar conduct would be considered a violation of Rule 14e-3, which prohibits an individual from using material non-public information once a tender offer is substantially on its way. 17 C.F.R. § 240.14e-3 (2009).

\(^{24}\)Chiarella, 425 U.S. at 228. The Court in *Chiarella* noted that the reason a corporate insider must disclose non-public information is the "necessity of preventing a corporate insider from . . . tak[ing] unfair advantage of the uninformed minority stockholders." Id. at 228-29 (quoting *Speed v. Transamerica Corp.*, 99 F. Supp. 808, 829 (D. Del. 1951)).

\(^{25}\)Id. at 225.

\(^{26}\)463 U.S. 646 (1983).

\(^{27}\)Id. at 667. Dirks, an officer of a New York broker-dealer firm, received information from Ronald Secrist, a former officer of a life insurance and mutual fund company, that the company's assets were overstated due to fraudulent activity. Id. at 648-49. Subsequently, Dirks shared this information with a number of his clients. Id. at 649.

\(^{28}\)See id. at 662 ("Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure.").
corporate fraud. The Court explained, however, that a recipient of non-public information could assume a fiduciary duty to the holder of the securities in some circumstances. Namely, when a corporate insider—the tipper—divulges information to another—the tippee—for personal gain, and the tippee is aware of this gain, the tippee assumes a duty either to abstain from trading or disclose the information. Failure by the tippee to disclose the information or abstain from trading under these circumstances gives rise to liability under section 10(b) and Rule 10b-5.

B. The Misappropriation Theory

It was only a matter of time before insider trading would be extended beyond the strict confines of corporate insider and tipper/tippee liability. In United States v. O'Hagan, the Supreme Court held that a partner in a law firm could be held liable under section 10(b) for trading based on non-public information he received about one of the firm's clients. The

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29See id. ("[T]he test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders.") In United States v. Chestman, 947 F.2d 551 (2d Cir. 1991), the SEC brought an action against a broker, Chestman, who used non-public information. Id. at 555. Chestman learned this information from a conversation with his wife. Id. The court held that marriage alone does not create a fiduciary relationship. Id. at 568. Since there was no explicit confidentiality agreement between Chestman and his wife, he did not violate section 10(b) by purchasing shares based on the non-public information. Id. at 570-71.

30See Dirks, 463 U.S. at 660.

31A "tipper" is "[a] person who ... possesses material inside information ... and who selectively discloses that information for trading or other personal purposes." BLACK'S LAW DICTIONARY 1621 (9th ed. 2009).

32A "tippee" is "[a] person who acquires material nonpublic information from someone in a fiduciary relationship with the company to which the information pertains." Id.

33See Dirks, 463 U.S. at 659 ("Not only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they also may not give such information to an outsider for the same improper purpose of exploiting the information for their personal gain.").

34See id. at 660.

[As] tippee assumes a fiduciary duty to the shareholder of a corporation not to trade on material non-public information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach.

Id.

35See Barbara Bader Aldave, The Misappropriation Theory: Carpenter and its Aftermath, 49 OHIO ST. L.J. 373, 380 (1988) (stating that "[w]ithout the aid of the misappropriation theory, section 10(b) and rule 10b-5 would lose much of their efficacy as weapons against trading on nonpublic information, since they would no longer extend to trading by 'outsiders'").


37Id. at 647.
partner, O'Hagan, though not working on the transaction, received non-public information regarding a potential tender offer for the Pillsbury Company.\textsuperscript{38} He then purchased a large number of call options, which he sold for a substantial profit following the tender offer.\textsuperscript{39} Although O'Hagan was neither a corporate insider nor a \textit{Dirks} tippee, he was found liable under section 10(b) through the misappropriation theory.\textsuperscript{40}

The Court held that under the misappropriation theory, an individual breaches a duty to the owner of confidential information by using that information to his advantage in the securities market, constituting a deceptive device prohibited by section 10(b).\textsuperscript{41} The Court further explained that the misappropriation theory is based on a "fiduciary-turned-trader's deception."\textsuperscript{42} The corollary to this pronouncement is that the misappropriation theory will not apply if the individual discloses to the source his plans to trade on the information, thereby cleansing the transaction of any "deceptive device."\textsuperscript{43} O'Hagan's undisclosed use of the confidential information, considering his fiduciary-like relationship to the source of the information, was a violation of section 10(b) of the Exchange Act.\textsuperscript{44}

The \textit{O'Hagan} decision discussed the misappropriation theory very generally, leaving lower courts to determine the extent of its application.\textsuperscript{45} In \textit{United States v. Falcone}, the Second Circuit applied the misappropriation theory to a tipper/tippee case.\textsuperscript{46} The court held that a tippee who traded on non-public information received from a non-insider

\begin{footnotes}
\item[38] Id. at 647-48.
\item[39] Id.
\item[40] See \textit{O'Hagan}, 521 U.S. at 650 (stating "criminal liability under § 10(b) may be predicated on the misappropriation theory").
\item[41] Id. at 652. There is much debate regarding the application of the misappropriation theory. Compare Donna M. Nagy, \textit{Insider Trading and the Gradual Demise of Fiduciary Principles}, 94 IOWA L. REV. 1315, 1336 (2009) ("Given its concern with investor confidence and market integrity, the Court [in \textit{O'Hagan}] should have employed a broader theory that captured insider trading by non-fiduciary thieves and fiduciaries who disclose their intention to trade.") \textit{with} Larry E. Ribstein, \textit{Federalism and Insider Trading}, 6 SUP. CT. ECON. REV. 123, 128 (1998) ("\textit{O'Hagan} actually extends the duty to apply to what seems to be no more than a breach of fiduciary duty or common theft.").
\item[42] O'Hagan, 521 U.S. at 652.
\item[43] id. at 655.
\item[44] See id. at 647-49.
\item[45] See Ribstein, supra note 42, at 125 ("[T]he absence of a general principle for deciding these cases leaves the way open to further confusion and an unpredictable expansion of insider trading liability."). There is also disagreement over whether the misappropriation theory focuses on a wrong to the owner of the information or the protection of investors. See id. at 132.
\item[46] 257 F.3d 226, 233-35 (2d Cir. 2001).
\end{footnotes}
tipper was liable under section 10(b) despite the lack of any benefit to the tipper. 47 This decision expanded O'Hagan by finding liability when the tippee knowingly received the information from a misappropriating tipper who had a duty to keep the information confidential. 48 Courts, such as the Second Circuit in Falcone, began to retreat from the fiduciary principle concept and extend section 10(b) liability to other deceptive methods of obtaining confidential information. 49

Yet although the misappropriation theory and tipper/tippee liability have extended the scope of section 10(b), 50 some courts refuse to apply the misappropriation theory in situations where there is an explicit confidentiality agreement between an individual and the source of confidential information. 51 In an attempt to follow the Supreme Court's O'Hagan decision, the District Court for the Northern District of California held that an express confidentiality agreement—to give rise to liability under the misappropriation theory—must bear "the hallmarks of a fiduciary relationship." 52 In United States v. Kim, the court premised this fiduciary relationship on dominance or superiority. 53 Viewed through this perspective, the defendant's use of confidential information was not a violation of section 10(b) because the parties were on equal footing with each other. 54 The court came to this conclusion even though the non-public information was obtained via a direct and explicit confidential

47 Id. at 231-32.
48 See id. at 234; see also United States v. Evans, 486 F.3d 315, 323 (7th Cir. 2007) ("Where an insider is duped into breaching her duty of confidentiality and the tippee who induces that breach willfully relies on the information, knowing its disclosure to be improper, there is still liability [for the tippee].").
49 See Nagy, supra note 42, at 1347 ("[In United States v. Evans], a court jettisoned fiduciary principles where the facts evidenced the use of improperly obtained confidential information.").
50 See, e.g., Evans, 486 F.3d at 321-22; SEC v. Rocklage, 470 F.3d 1, 6 (1st Cir. 2006); SEC v. Yun, 327 F.3d 1263, 1269-70 (11th Cir. 2003); SEC v. Maio, 51 F.3d 623, 631 (7th Cir. 1995).
51 See United States v. Chestman, 947 F.2d 551, 568 (2d Cir. 1991) ("The misappropriation theory requires us to consider not only whether there exists a fiduciary relationship but also whether there exists a 'similar relationship of trust and confidence.'); see also United States v. Kim, 184 F. Supp. 2d 1006 (N.D. Cal. 2002) (dismissing indictment for wire and securities fraud because common membership in an industry organization does not implicate a fiduciary-like relationship).
52 Kim, 184 F. Supp. 2d at 1010,1015.
53 See id. at 1011 ("[F]iduciary-like dominance generally arises out of some combination of 1) disparate knowledge and expertise, 2) a persuasive need to share confidential information, and 3) a legal duty to render competent aid.").
54 Id. at 1011-12.
relationship. The holding dismissed newly promulgated Rule 10b5-2, because in their opinion, the "rule was designed to establish new law, not clarify existing law." In contrast to the Kim decision, the court in SEC v. Nothern took a more liberal approach in determining when a sale made on information subject to a confidentiality agreement violates the misappropriation theory. Nothern dealt with a tipper/tippee situation where the tipper, Davis, provided confidential information regarding the suspension of thirty-year bonds to the tippee, Nothern. Nothern responded by purchasing $14.25 million worth of thirty-year bonds to capitalize on the eventual spike in their price. Although there was a dispute regarding the timing of the disclosure, the court held that misappropriation liability may occur "[w]henever a person agrees to maintain information in confidence; and [2] [w]henever the [tipper and tippee] have a history, pattern, or practice of sharing confidences." The tipper in this case, an attendee at a private Treasury conference, was thus prohibited from disclosing the information based solely on a confidentiality agreement.

Some judges and proponents of the misappropriation theory have espoused a more expansive interpretation under the parity of information rule. In SEC v. Texas Gulph Sulfur, Co., for example, the Second Circuit held that an investor is prohibited from using non-public information to his advantage, regardless of how the investor received the information.

55Id. at 1008-09. This justification was based on the court's interpretation of the confidentiality agreement as one of moral and ethical duty, but not a legal one. Id. at 1013.
56Kim, 184 F. Supp. 2d at 1014.
57598 F. Supp. 2d 167, 176 (D. Mass. 2009). The court explicitly noted that its interpretation of Rule 10b-5 runs counter to that of the Second Circuit. Id. "[T]his Court... is free to determine that a 'similar relationship of trust and confidence' exists even in the absence of a scintilla of superiority or dominance, as other courts (including some federal district courts within the Second Circuit) have done." Id.
58Id. at 169-70.
59Id. at 170.
60Id. at 174; see also SEC v. Talbot, 430 F. Supp. 2d 1029, 1055 (C.D. Cal. 2006) ("The existence of an express confidentiality agreement... is persuasive evidence that the parties had a relationship of trust and confidence."); rev'd on other grounds, 530 F.3d 1085 (9th Cir. 2008).
61Nothern, 598 F. Supp. 2d at 170.
62See, e.g., Victor Brudney, Insiders, Outsiders, and Informational Advantages under the Federal Securities Laws, 93 HARV. L. REV. 322, 339-40 (1979) (stating that the parity of information rule seeks "to deny informational advantage to any person dealing in the securities market over any other person with whom he deals").
63See 401 F.2d 833, 848 (2d Cir. 1968).
[A]nyone in possession of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in
justification for this expansive interpretation was to ensure all investors were provided with equal access to information.\textsuperscript{64} Chief Justice Burger's dissent in \textit{Chiarella} also embraced this expansive view.\textsuperscript{65} The Chief Justice argued that section 10(b) and Rule 10b-5's policy of providing investors with equal access to information clearly supports this position.\textsuperscript{66}

While \textit{O'Hagan} provided an important foundation for the misappropriation theory, the SEC saw a gap in the theory and decided to fill it.\textsuperscript{67} The SEC's promulgation of Rule 10b5-2 was to provide a straightforward approach to the misappropriation theory and avoid a fragmented approach by lower courts.\textsuperscript{68} The pertinent portion of Rule 10b5-2 for purpose of this note's analysis is as follows:

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

\begin{itemize}
  \item or recommending the securities concerned while such inside information remains undisclosed.
\end{itemize}

\textit{Id. (emphasis added).}

\textsuperscript{64}\textit{Id.; see also Rebecca S. Smith, Note, O'Hagan Revisited: Should a Fiduciary Duty Be Required Under the Misappropriation Theory?, 22 GA. ST. U. L. REV. 1005, 1026-27 (2006) ("[T]he parity of information rule rests on the integrity of the market theory, which states investors will be more confident and more likely to participate in the market if they feel confident they can trade without being at an informational disadvantage.").}


\textsuperscript{66}\textit{See id. ("[T]he broad language of section 10(b) and Rule 10b-5] negates the suggestion that congressional concern was limited to trading by 'corporate insiders' or to deceptive practices related to 'corporate information.'").}


\textsuperscript{68}\textit{See id. at *25 ("By providing more of a bright-line test... we believe the rule will mitigate... the need to examine the details of particular relationships in the course of investigating suspected insider trading.").}
(1) Whenever a person agrees to maintain information in confidence.

III. THE CUBAN DECISION AND FURTHER CONFUSION OF THE MISAPPROPRIATION THEORY

A. Factual and Procedural History

On November 17, 2008, the SEC filed a complaint against Dallas Mavericks owner, Mark Cuban, for insider trading under section 10(b) of the Exchange Act. At the time, Cuban was the largest stockholder in Mamma.com, a publicly traded company. The SEC claims that Cuban's sale of his entire interest in Mamma.com, immediately following the receipt of confidential information, falls within the intended reach of the misappropriation theory.

The situation began when the CEO of Mamma.com contacted Cuban to invite him to participate in an upcoming PIPE offering. Before disclosing the planned PIPE offering, Mamma.com's CEO made it clear that the information must remain confidential, and Cuban agreed. As the CEO predicted, Cuban was angry when he learned of the prospects of a PIPE offering. At the end of the conversation Cuban stated, "Well, now I'm

71Complaint, supra note 71, ¶¶ 1-2, 9-10, 12.
72See id. ¶ 1.
73A "PIPE" offering is a private investment in public equity. See Marc I. Steinberg & Emmanuel U. Obi, Examining the Pipeline: A Contemporary Assessment of Private Investments in Public Equity ("PIPS"), 11 U. PA. J. BUS. L. 1, 3-5 (2008). A PIPE offering is used as a means to raise capital when other methods—such as a public offering or debt financing—are not viable. Id. at 19.
74Complaint, supra note 71, ¶ 12.
75Id. ¶ 12. "The CEO prefaced the call by informing Cuban that he had confidential information to convey to him, and Cuban agreed that he would keep whatever information the CEO intended to share with him confidential." Id. ¶ 14.
76Id. The risk of a PIPE offering is that it will "flood the market and have the unfortunate effect of diluting the value of shares held by other shareholders of the issuing company." Steinberg & Obi, supra note 74, at 32.
screwed. I can't sell." Subsequent e-mails to the executive chairman indicated that the CEO's understanding was that Cuban would sell, but not until the PIPE offering was announced.78

Based on the CEO's reliance on Cuban's agreement to keep all information confidential and abstain from selling for the time being, Cuban was provided with the terms and conditions of the PIPE offering from the sales representative from Merriam (the investment bank conducting the PIPE offering).79 Following his conversation with the sales representative, and before the announcement of the PIPE offering, Cuban authorized his broker to sell his entire share of stock in Mamma.com.80 The announcement of the PIPE offering occurred after the market closed on June 29, 2004.81 The next day, the stock was down 9.3% when the stock market opened and subsequently dropped a total of 39% over the next week.82 Cuban's sale saved him more than $750,000.83

Following the complaint brought by the SEC, Cuban filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.84 The court granted the motion, concluding that Cuban never undertook a duty to refrain from trading on the confidential information.85 In its analysis, the court affirmed that liability is triggered under the misappropriation theory when an individual trades on confidential information in which he has "a duty owed to the source of [that] information."86 But the court did not find such a duty in the SEC's complaint.87 Although there was a confidentiality agreement, the lack of an

77Complaint, supra note 71, ¶ 14 (internal quotations omitted).
78Id. ¶ 15.
79Id. ¶¶ 16-17.
80Id. ¶¶ 17-18. Cuban's broker sold 10,000 shares during after-hours trading on June 28, 2004. Id. ¶ 19. The Broker was able to sell the remainder his 600,000 shares on June 29, 2004, during regular trading hours. Id. ¶ 21.
81Complaint, supra note 71, ¶ 22.
82Id. ¶ 23.
83Id. ¶ 24.
84See Memorandum of Law of Mark Cuban in Support of Motion to Dismiss, SEC v. Cuban, 634 F. Supp. 2d 713 (N.D. Tex. 2009) (No. 3-08CV2050-D) [hereinafter Motion to Dismiss].
85Cuban, 634 F. Supp. 2d at 731. Although the court granted Cuban's motion to dismiss, it provided the SEC with thirty days to amend the complaint. Id. The SEC instead requested that a final judgment against it be entered, most likely to provide it with the opportunity to consider an appeal. See Kara Scannell, SEC Won't File Amended Complaint Against Mark Cuban, WALL ST. J., Aug. 12, 2009, http://online.wsj.com/article/SB125011422556327163.html.
87See id. at 731 ("[U]nder the misappropriation theory . . . it is the undisclosed use of confidential information for personal benefit, in a breach of a duty not to do so, that constitutes the
explicit duty not to sell was fatal to the SEC’s case. Following this
decision, the SEC appealed to the United States Court of Appeals for the
Fifth Circuit.

B. The Parties’ Arguments

In its complaint, the SEC argues that Cuban, with the requisite
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sold his share of securities in violation of section 10(b) of the
Exchange Act and Rule 10b-5. The SEC’s primary argument is that
Cuban’s breach of an agreement to keep business information confidential is
precisely the type of conduct prohibited by Rule 10b5-2. The SEC also
 contests Cuban’s argument that the promulgation of the rule exceeded the
SEC’s statutory authority. Based on the undisputed facts of the case, the
SEC argues that there was an explicit confidentiality agreement between the
CEO of Mamma.com and Cuban, the breach of which was a violation of the
misappropriation theory of insider trading.

In response to the SEC’s complaint, Cuban filed a motion to dismiss
for failure to state a claim. In his motion, Cuban argued that his
confidentiality agreement with the CEO of Mamma.com failed to reach the
status of a fiduciary relationship. Cuban further argued that Rule 10b5-2

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88 See id. at 730-31 ("A mere confidentiality agreement lacking a non-use component . . .
cannot . . . establish Cuban’s liability under the misappropriation theory.").
89 See SEC Appellate Brief, supra note 1. Certain individuals believe the SEC would not
have appealed the case if Cuban, subsequent to being granted his motion to dismiss, did not file
suit for reimbursement of legal fees. See Garrett W. McIntyre, Cuban’s Demand for Legal Fees
90 The term ‘sciente’ refers to a mental state embracing intent to deceive, manipulate, or
inside information is found if the trader was aware of the information at the time of the sale. SEC
Release, supra note 68, at *22.
91 Id. at 11-14. The SEC notes that Cuban ignored the fact that the Commission’s
interpretation of Rule 10b5-2 is given deference under Chevron. Id. at 12-13. The SEC relied on
its expertise as well as public comments when promulgating the rule. Id. at 12.
92 Id. at 20-22.
93 See Motion to Dismiss, supra note 85, at 7-8 (citing the standard of review for a motion
to dismiss for failure to state a claim upon which relief may be granted); see also Amicus Curiae
Brief in Support of Defendant’s Motion to Dismiss at 1, Cuban, (No. 3-08CV2050) (arguing that “a
confidentiality agreement alone is insufficient to create a fiduciary or similar relationship of trust
and confidence between the parties”).
94 Motion to Dismiss, supra note 85, at 12. Although not a focus of this comment, and
is in-valid if it attempts to attach section 10(b) liability on the basis of a mere agreement of confidentiality. The motion to dismiss argued, in the alternative, that if Rule 10b5-2 is valid, it only applies to family and other non-business relationships.

C. The District Court's Decision

The district court's opinion began with an overview of both the classical and misappropriation theories of insider trading. In discussing the misappropriation theory, the court stated that liability under section 10(b) depends on a "breach of a duty owed to the source of the information," This is because the result of such a breach would deprive the principal of the information's exclusive use.

The court concluded that the SEC exceeded its rulemaking authority under section 10(b) by adopting Rule 10b5-2, which premises misappropriation theory liability on "a mere confidentiality agreement lacking a non-use component." Rule 10b5-2 was promulgated to define situations that give rise to a duty of "trust or confidence" in applying the misappropriation theory. In particular, the SEC rule finds such a duty "[w]henever a person agrees to maintain information in confidence." The court sharply criticized this component of the rule as an impermissible extension of the scope of insider trading.

In the court's interpretation of Supreme Court precedent, the mere use of information obtained pursuant to a confidentiality agreement does not violate section 10(b) of the Exchange Act. An outsider's use of public

although the SEC filed the suit under federal law, Cuban argued that state law determines whether the tipper and tipppee had a fiduciary-like relationship. See id. at 11-12.

"See id. at 7 ("No court has ever held . . . that a confidentiality agreement alone creates a fiduciary or fiduciary-like duty to act loyally to the source of the information.")."

"See id. at 21-22.

"Cuban, 634 F. Supp. 2d at 719-21.

"Id. at 720 (quoting United States v. O'Hagan, 521 U.S. 642, 652 (1997))."

"Id.

"Id. at 730-31.

"Cuban, 634 F. Supp. 2d at 720-21. Rule 10b5-2 applies "to any violation of Section 10(b) . . . 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." 17 C.F.R. § 240.10b5-2 (emphasis added).

"See Cuban, 634 F. Supp. 2d at 731 ("To permit liability based on Rule 10b5-2(b)(1) would exceed the SEC's § 10(b) authority to prescribe conduct that is deceptive.")."

"See id. at 722-25 ("In the context of the misappropriation theory . . . trading on the basis of material, nonpublic information cannot be deceptive unless the trader is under a legal duty to refrain from trading on or otherwise using it for personal benefit.")."
information for personal benefit does not run afoul of section 10(b) unless 
he is under a duty not to sell and "he does not disclose to the source that he 
intends to trade on or otherwise use the information."107 Thus, under the 
court's formulation, an outsider can avoid liability in the face of an explicit 
confidentiality agreement as long as the agreement does not have a non-use 
portion, and there is no independent legal duty to refrain from using the 
information.108

Although the court disagreed with Cuban’s argument that there must 
always be a pre-existing fiduciary relationship, it refused to extend the 
confidentiality theory to encompass the breach of an explicit 
confidentiality agreement as set forth under Rule 10b5-2.109 In effect, the 
court framed section 10(b) liability on the undertaking of a dual obligation 
agreement.110

The court explicitly rejected Rule 10b5-2.111 It held that the rule 
impermissibly expands the scope of section 10(b)'s proscription against 
trafalger conduct.112 As a result of its interpretations of section 10(b) and 
O’Hagan, the court determined that imposing liability for the violation of 
any confidentiality agreement is inappropriate.113 Specifically, Cuban could 
not be liable under section 10(b) on the basis of his promise to the CEO of 
Mamma.com that he would keep information regarding a planned PIPE 
offering confidential.114 The agreement, at most, constituted a unilateral 
expectation on the CEO's part that Cuban would not sell on the information, 
and therefore did not give rise to a duty that falls within the reach of the 
confidentiality theory.115

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107Id. at 724.
108Id. at 724-25.
109See Cuban, 634 F. Supp. 2d at 725 ("The agreement . . . must consist of more than an 
express or implied promise merely to keep information confidential.").
110Compare id. at 725 ("A person who receives material, nonpublic information may in 
fact preserve the confidentiality of that information while simultaneously using it for his own 
gain."), with SEC v. Yun, 327 F.3d 1263, 1273 (11th Cir. 2003) (stating that "a breach of an 
agreement to maintain business confidences would also suffice" to trigger insider trading liability).
111Cuban, 634 F. Supp. 2d at 731.
112Id. at 728-31.
113See id. at 730-31 ("[U]nder the misappropriation theory of liability, it is the undisclosed 
use of confidential information for personal benefit, in breach of a duty not to do so, that 
constitutes the deception.").
114Id. at 731.
115Cuban, 634 F. Supp. 2d at 728.
IV. EVALUATION OF THE CUBAN DECISION

A. Rule 10b5-2's Role in the Misappropriation Theory

Before discussing the merits of the rule, it is important to note that under administrative law, courts are bound to give great deference to an agency's interpretation of its own statutes. The SEC has the express authority under section 10(b) of the Exchange Act to prescribe rules which provide for a clearer understanding of its reach and impact.

Analysis under Chevron examines whether a federal agency's rule is a permissible construction of a congressional statute. The first step in the Chevron analysis asks whether the statute in question "directly address[es] the precise question at issue." If the statutory language is not on point, the second part of the Chevron analysis asks whether the agency's interpretation is a reasonable and permissible construction of the statute. Under Chevron's second step, the SEC has great authority to determine what is manipulative or deceptive under section 10(b), so long as its rulemaking is not "arbitrary, capricious, or manifestly contrary to the statute." The language in section 10(b), "any manipulative or deceptive device" in the purchase or sale of securities, certainly does not address the precise issue regarding confidentiality agreements. The court in Cuban rejected the SEC's interpretation of section 10(b), but provided no evidence suggesting the interpretation was arbitrary, capricious, or manifestly contrary to the statute.

116See Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").
1175 U.S.C. § 78j(b) (2006); see Bragdon v. Abbott, 524 U.S. 624, 642 (1998) ("It is enough to observe that the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944))).
118Chevron, 467 U.S. at 843.
119Id. at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency.").
120Id.
1215 U.S.C. § 78j(b).
122While O'Hagan addressed the misappropriation theory, it did not define its boundaries with explicit terms. As the SEC noted in its appeal to the Fifth Circuit Court of Appeals, "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." SEC Appellate Brief, supra note 1, at 22 n.6 (citing Nat'l Cable & Telecommms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-85 (2005)).
Rule 10b5-2 was promulgated to provide lower courts with a bright-line rule to determine when the misappropriation theory applies to parties who trade on the basis of non-public information. In doing so, the rule takes the middle ground between the more expansive parity of information theory and a strict fiduciary requirement.\(^{123}\) Those espousing the parity of information rule argue for equal access to all information, while proponents of a fiduciary-only requirement seek to limit section 10(b) to a narrowly defined category of relationships.\(^{124}\) Both of these theories have been expressly rejected by the Supreme Court.\(^{125}\) In promulgating Rule 10b5-2, the SEC recognized that the focus should be on the deceptive acquisition of information through relationships that are grounded in trust and confidence.\(^{126}\)

The SEC cited several clear benefits resulting from Rule 10b5-2. With Rule 10b5-2, the SEC provided a clear and straightforward approach to insider trading under the misappropriation theory.\(^{127}\) Specifically, the SEC clarified the unsettled issue of "when insider trading liability arises in connection with a person's 'use' or 'knowing possession' of material nonpublic information."\(^{128}\) By attaching section 10(b) liability to any individual that "agrees to maintain information in confidence," investors will have a greater level of confidence in the integrity and efficiency of the securities market.\(^{129}\) At the same time, it does not conflict with Supreme Court precedent because it requires, at minimum, a confidentiality agreement as a prerequisite to section 10(b) liability.\(^{130}\)

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\(^{123}\)For an example of the parity of information rule, see Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961), which states that insider trading may be found in any relationship that either directly or indirectly gives access to non-public information.


\(^{125}\)Compare United States v. O'Hagan, 521 U.S. 642, 663 (1997) ("There is no 'general duty between all participants in market transactions to forgo actions based on material, nonpublic information.'" (internal quotations omitted)), with id. ("[A] person who gains nonpublic information through misappropriation in breach of a fiduciary duty [does not escape liability] when, without alerting the source, he trades on the information.").

\(^{126}\)See 17 C.F.R. § 240.10b5-2 (2009).

\(^{127}\)See Plaintiff's Brief in Opposition, supra note 93, at 12 ("[T]he Commission issued a release proposing, among other things, the adoption of a rule codifying the common-sense notion, acknowledged in Reed and Chestman, that reasonable expectations of confidentiality, and corresponding duties, can be created by an agreement between two parties.").

\(^{128}\)SEC Release, supra note 68, at 35.

\(^{129}\)See id. at 28.

\(^{129}\)See Chiarella v. United States, 445 U.S. 222, 235 (1980) ("We hold that a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information.").
The "duty problem" is at the heart of the controversy over Rule 10b5-2.131 "The duty problem is the uncertainty surrounding which relationships courts recognize as creating a fiduciary or fiduciary-like duty under the misappropriation theory of insider trading."132 While the Supreme Court explicitly approved the misappropriation theory, it did not provide clear guidance on what particular relationships would fall under its ambit.133 Rule 10b5-2 directly addresses the "duty problem." By defining a "duty of trust and confidence," Rule 10b5-2 clarifies when the misappropriation theory is applicable.134 Without the rule, investors—insiders and outsiders alike—are left in the dark to determine when insider trading liability arises.135

Since its inception, Rule 10b5-2 has been effectively in various lower court decisions. In Northern, an analyst was charged with insider trading pursuant to Rule 10b5-2 when he informed clients of confidential information obtained through a confidential press release.136 The court's decision utilized Rule 10b5-2 in determining insider trading under the misappropriation theory.137 Despite Northern's "novel" theory that Rule 10b5-2 improperly expands the scope of section 10(b), the court held that the rule "properly defines those circumstances under which misappropriation liability can arise."138 In SEC v. Yun, the court found that an agreement to maintain business confidences was sufficient to establish liability under the misappropriation theory.139 The court held that the duty of loyalty and confidentiality between an insider and outsider is established when the insider provides "access to confidential information in reasonable reliance on a promise that [the outsider] would safeguard the

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132Id. at 806.
134See Thomas M. Madden, O'Hagan, 10b5-2, Relationships and Duties, 4 HASTINGS BUS. L.J. 55, 72 (2008) (stating that Rule 10b5-2 is "an attempt to better define the circumstances where the misappropriation theory applies").
135See Capeci, supra note 132, at 806 (arguing that ambiguity in this area is "detrimental to the [SEC], the courts, and the market players").
137Id. at 174.
138Id. The court also rejected Northern's argument that Rule 10b5-2(b) is only meant to apply to non-business relationships. Id. at 174-75 ("Neither the SEC release describing . . . Rule 10b5-2 nor the text of the Rule itself indicates . . . that its scope is limited to only non-business relationships.").
139SEC v. Yun, 327 F.3d 1263, 1273 (11th Cir. 2003).
information.\textsuperscript{140} This is the approach that the district court in Cuban improperly side-stepped in its analysis of Cuban's insider trading charges.\textsuperscript{141}

\textbf{B. The No-Use Agreement}

In Cuban, the district court found support in Supreme Court precedent for the necessity of a no-use agreement in the absence of a pre-existing fiduciary relationship,\textsuperscript{142} citing both O'Hagan and Chiarella.\textsuperscript{143} Specifically, the court interpreted O'Hagan's analysis of fiduciary relationships to require, at minimum, a no-use agreement to trigger insider trading liability where two parties do not stand in a fiduciary relationship.\textsuperscript{144}

In doing so the court missed the forest for the trees. While O'Hagan dealt with a fiduciary's violation of the misappropriation theory, its focus was on the deceptive conduct of one entrusted with confidential information and the impact on innocent investors.\textsuperscript{145} In the Supreme Court's own words, this deception can occur in a "fiduciary, contractual, or similar obligation."\textsuperscript{146} The Supreme Court, however, failed to discuss what would be considered a "similar obligation."\textsuperscript{147} The Supreme Court did specifically repeat throughout its opinion, however, that an individual's "deceptive nondisclosure is essential to the § 10(b) liability at issue."\textsuperscript{148}

\textsuperscript{140}Id.

\textsuperscript{141}See SEC v. Cuban, 634 F. Supp. 2d 713, 726 n.7 (N.D. Tex. 2009). Because none of these cases analyzes the nature of the agreement that is required for misappropriation theory liability, none is contrary to the court's holding today that an agreement must include both an obligation to maintain the confidentiality of the information \emph{and} not to trade on or otherwise use it.


\textsuperscript{143}Id. at 724-25.

\textsuperscript{144}Id. at 725. This note is not the first to question this analysis. "[S]ince the O'Hagan duty is based on deception of the owner of the information, arguably a lie to the owner about the intent to keep the information confidential should be enough." Posting of Larry Ribstein to Ideoblog, \url{http://busmovie.typepad.com/ideoblog/2009/07/the-cuban-case.html} (July 18, 2009, 08:27 EST).

\textsuperscript{145}See United States v. O'Hagan, 521 U.S. 642, 654-56 (1997). "A misappropriator who trades on the basis of material, nonpublic information, in short, gains his advantageous market position through deception; he deceives the source of the information and simultaneously harms members of the investing public." \textit{Id.} at 656.

\textsuperscript{146}Id. at 663 (quoting Barbara Bader Aldave, \textit{Misappropriation: A General Theory of Liability for Trading on Nonpublic Information}, 12 Hofstra L. Rev. 101, 122 (1984)).

\textsuperscript{147}See Nagy, \textit{ supra} note 42, at 1339. The O'Hagan decision discussed fiduciary principles, but did so in a very broad manner. \textit{Id.} "[O]ther than emphasizing the hallmarks of trust, loyalty, and confidentiality, the Court provided little analysis concerning fiduciary parameters." \textit{Id.}

\textsuperscript{148}O'Hagan, 521 U.S. at 660.
The district court's requirement of a no-use agreement, in addition to the confidentiality agreement, detracts from the purpose of the Exchange Act, specifically section 10(b). Section 10(b) was designed to prevent a broad range of manipulative and deceptive conduct in the securities market. While the court noted the various policy objectives discussed in O'Hagan, it fails to mention how requiring a no-use agreement will further any of those goals. The outcome of Cuban illustrates the tension between the policy goals underlying the misappropriation theory. It suggests that a non-fiduciary outsider, after explicitly agreeing to keep information confidential, may use that information to take unfair advantage of innocent investors. This added gloss is superfluous, leading to the further fragmentation of lower courts in applying section 10(b) liability under the misappropriation theory.

C. Cuban's Agreement

Even assuming the court's analysis is correct, it still failed to reach the proper conclusion under its own rubric. In refusing to apply Rule 10b5-2, the court held that when premising insider trading liability on an agreement, there must be both an agreement to keep the information confidential and not to sell. The court noted, however, that this dual obligation agreement may be either express or implied. Despite the district court's acknowledgement of section 10(b) liability based on an implicit agreement not to sell, the court did not find that one existed under the facts of Cuban.

But there is evidence in both the complaint and the court's opinion that Cuban's conduct was indicative of an implicit agreement not to sell. When Cuban was informed of the PIPE offering he stated, "Well, now I'm screwed. I can't sell." This statement itself may be considered an acknowledgement of a duty not to sell. Based on Cuban's implicit duty, the

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151 Id. at 728; see also Posting of Stefan Padfield to Akrow Law Cafe, http://www.ohioverticals.com/blogs/akron_law_cafe/2009/07/caveat-emptor-insiders-trading/ (July 23, 2009) ("[Cuban] could get information otherwise only available to insiders by agreeing to keep it confidential, but absent a specific agreement not to trade on that information he was free to use that information to dump his stock on some other unwitting investor.").
152 Cuban, 634 F. Supp. 2d at 725.
153 Id. ("Where misappropriation theory liability is predicated on an agreement, however, a person must undertake, either expressly or implicitly, both obligations.").
154 Id. at 728.
155 Complaint, supra note 71, ¶ 14.
CEO sent him an e-mail with the PIPE sales representative's contact information in order to receive further non-public information.\textsuperscript{156} It was after Cuban actively deceived the CEO into providing him additional confidential information that he sold all of his stock in Mamma.com.\textsuperscript{157} His interaction with the CEO was consistent with the implicit agreement that he would not sell his shares until after the PIPE offering was publicly announced.

Based on the facts alleged by the SEC in \textit{Cuban}, the complaint was sufficient to survive a motion to dismiss.\textsuperscript{158} Based on the requisite burden of proof, and the court's reasoning, the SEC's complaint provided a plausible claim against Cuban. The complaint did not allege a mere conversation where confidential information was exchanged.\textsuperscript{159} Initially, the conversation was premised on an agreement between the CEO of Mamma.com and Cuban to keep the information about the PIPE offering confidential.\textsuperscript{160} At the conclusion of the conversation, Cuban's statement "Well, now I'm screwed. I can't sell," suggests an implicit indication that Cuban understood that he was required to hold his shares until a public announcement of the PIPE offering.\textsuperscript{161} Based on the representations of confidentiality that Cuban made to the CEO, he was further entrusted with the contact number of the sales representative of the PIPE offering.\textsuperscript{162} As a result, Cuban was able to obtain specific confidential details about the planned PIPE offering he would not have otherwise received if the CEO believed Cuban would sell his shares prematurely.\textsuperscript{163} Cuban's conduct was sufficient, at least in deciding a motion to dismiss, to support a finding that there was an implicit no-use agreement between himself and the CEO.

\textsuperscript{156}Id. ¶ 16. "In reliance on Cuban's acceptance of a duty of confidentiality and his acknowledgement that he could not sell until after the public announcement, the CEO, several hours after their conversation, sent Cuban a follow-up email . . . " Id.
\textsuperscript{157}See id. ¶¶ 17-18.
\textsuperscript{158}See \textit{In re Katrina Canal Breaches Litig.}, 495 F.3d 191, 205 (5th Cir. 2007) (deciding a motion to dismiss requires the court to accept "all well-pled facts as true, viewing them in the light most favorable to the plaintiff" (internal quotations omitted)). The court must deny a motion to dismiss if there are "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
\textsuperscript{159}See Complaint, supra note 71, ¶ 14.
\textsuperscript{160}Id.
\textsuperscript{161}Id.
\textsuperscript{162}Id. ¶ 16.
\textsuperscript{163}See Complaint, supra note 71, ¶¶ 16-20.
V. APPEAL TO THE FIFTH CIRCUIT COURT OF APPEALS

On January 22, 2010, the SEC filed an appeal to the Court of Appeals for the Fifth Circuit. The SEC argues that Cuban's agreement to keep information confidential led to a duty not to trade under section 10(b) and Rule 10b-5, and was supported by the Supreme Court's adoption of the misappropriation theory. The SEC further argues that Rule 10b5-2 sets forth a clear duty to disclose or abstain from trading on a confidentiality agreement, regardless of whether there was also a no-use agreement. This rule, the SEC argues, is a valid interpretation of section 10(b) and is entitled to Chevron deference. In the alternative, the SEC argues that Cuban is guilty of insider trading because he explicitly agreed not to trade on confidential information.

The Fifth Circuit's decision will impact securities law and the usefulness of Rule 10b5-2 in future insider trading litigation. Rule 10b5-2 and the SEC's rulemaking authority will suffer a devastating blow if the court affirms the district court's decision. It will provide an avenue for other courts to apply this dual obligation approach that directly conflicts with an agency rule. Affirming the lower court's decision will also allow courts to dismiss other agency rules they disagree with, despite the great amount of deference these rules are to be provided. This is especially troubling in cases such as this, where the court refuses to defer to the SEC while admitting that "no court appears to have analyzed the precise question that this court examines."

By reversing the district court, the Fifth Circuit will affirm Rule 10b5-2's rightful place under the misappropriation theory. The support of this bright-line rule will ensure that the federal securities markets are protected by all deceptive uses of confidential information; further promoting the fairness and integrity of the markets for all participants. It

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164 See SEC Appellate Brief, supra note 1.
165 Id. at 13.
166 Id. at 15-16.
167 Id. at 16.
168 SEC Appellate Brief, supra note 1, at 35.
169 See SEC v. Cuban, 634 F. Supp. 2d 713, 725 (N.D. Tex. 2009) (holding that misappropriation theory liability predicated on a confidentiality agreement requires both a promise to keep the information confidential and to refrain from trading on it).
171 Cuban, 634 F. Supp. 2d at 726.
will also affirm the fact that, despite a court's disagreement with an agency's statutory interpretation, a great amount of deference must be afforded.\footnote{See \textit{Chevron}, 467 U.S. at 842-45.}

VI. CONCLUSION

The court's opinion in \textit{Cuban} adds another layer of judicial confusion to the misappropriation theory of insider trading. Instead of adhering to the clear guidelines of Rule 10b5-2, as other courts have, the district court insisted on a new judicially created no-use agreement requirement. In ignoring the SEC's rulemaking authority, the district court's reasoning may have a propensity to reduce investor confidence in the market by providing those who misappropriate with additional protection from insider trading liability.

The Fifth Circuit should reverse the district court's motion to dismiss. This reversal should be grounded in the validity of Rule 10b5-2. In the alternative, the court should reverse the motion because Cuban's conduct provided a firm basis that there was an implicit agreement not to sell. Ultimately, the Supreme Court should resolve this issue to prevent the further inconsistency and fragmentation in the application of federal securities law.

\textit{Robert Bailey, Jr.}