No. 15-12831

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CHARLES L. HILL, JR.,

Plaintiff-Appellee,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia
(Civil Action No. 1:15-cv-01801-LMM)

MOTION OF MARK CUBAN FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE CHARLES L. HILL, JR. AND AFFIRMANCE

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Charles L. Hill, Jr. v. Securities and Exchange Commission, No. 15-12831

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel for *amicus curiae* Mark Cuban certifies that Mr. Cuban is an individual businessman, not a corporate party. In addition to those persons and entities listed in the briefs previously filed in this matter, the following persons or entities may have an interest in the outcome of this appeal:

1. Best, Stephen A.
2. Brown Rudnick LLP
3. Cuban, Mark
4. Lipman, Alex
5. Weddle, Justin S.

/s/ Stephen A. Best
Stephen A. Best

Counsel for Amicus Curiae Mark Cuban

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Mark Cuban hereby respectfully moves this Court for leave to appear as *amicus curiae* in this proceeding and to submit the accompanying brief in support of Plaintiff-Appellee Charles L. Hill. In support thereof, Mr. Cuban states:

1. Mr. Cuban is a successful businessman and investor who has successfully defeated an attempt by the U.S. Securities and Exchange Commission to sanction him as an "insider trader" based on the SEC's pursuit of a novel legal theory and defective facts. Following over five years of litigation in federal district court, a jury rejected the SEC's allegations against Mr. Cuban after less than four hours of deliberation. As a first-hand witness to and victim of SEC overreach, Mr. Cuban has an interest in responding to and opposing the SEC's appeal in this case.

2. As a businessman who has born the full brunt of misguided SEC enforcement litigation, Mr. Cuban offers a front-row perspective on the SEC's arguments that Mr. Hill suffers no irreparable harm from being forced to undergo a hearing before a defectively constituted tribunal, and that enjoining that hearing harms the public interest. Had Mr. Cuban been subjected to the treatment the SEC intends for Mr. Hill, without the procedural safeguards available in federal district court, Mr. Cuban likely would have been found liable by an in-house SEC judge on a legal theory that was found by a federal court of appeals to be unsound.

Moreover, had he been subjected to the procedural constraints of an SEC administrative proceedings, Mr. Cuban would likely had been stymied in developing his factual defenses. In short, Mr. Cuban is uniquely positioned to explain the palpable harm that could come from being subjected to a constitutionally defective proceeding. In addition, as a businessman, Mr. Cuban can attest to the value of a predictable legal environment for capital creation.

3. Accordingly, Mr. Cuban's perspective and experience is useful and relevant to the Court's determination of whether to affirm the stay of the administrative proceeding against Mr. Hill, pending the district court's review of its constitutionality. Mr. Cuban will assist the Court as *amicus curiae* by presenting arguments and insights that neither party to this appeal can address.

WHEREFORE, Mark Cuban respectfully requests that this Court grant him leave to appear as *amicus curiae* in this proceeding and to submit a brief in support of Plaintiff-Appellee Charles L. Hill, Jr.

Dated: September 15, 2015

Respectfully submitted,

/s/ Stephen A. Best

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2015, I electronically filed the foregoing Motion pursuant to 11th Cir. R. 25-3(a), which caused one copy to be delivered via electronic mail to counsel of record.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Stephen A. Best

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Stephen A. Best

Counsel for Amicus Curiae Mark Cuban

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INTEREST OF AMICUS CURIAE[1]

Mark Cuban is a successful businessman and investor who defeated an attempt by the U.S. Securities and Exchange Commission (the "SEC") to sanction him as an "insider trader" based on a novel legal theory and defective facts. As a first-hand witness to and victim of SEC overreach, Mr. Cuban has an interest in responding to and opposing the SEC's appeal in this case.

According to its website, "[t]he mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[2] Indeed, "the common interest of all Americans in a growing economy that produces jobs, improves our standard of living, and protects the value of our savings means that all of the SEC's actions must be taken with an eye toward promoting the capital formation that is necessary to sustain economic growth."[3] This mission can only be achieved if the securities laws are clear, well-defined, and applied in a fair, consistent, and unbiased manner. When the laws are applied inconsistently or the process by which they are enforced is rigged to favor the government, capital formation is impeded because market participants do not have clear rules for understanding their investment risks. Put

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[1] No counsel for any party authored this brief in whole or in part, and no person, other than the *amicus curiae* or its counsel, contributed money that was intended to fund preparing or submitting this brief.

[2] http://www.sec.gov/about/whatwedo.shtml (last visited Sept. 14, 2015).

[3] *Id.*

differently, investment risk stemming from lax enforcement of securities laws and regulations is no more a threat to capital formation than investment risk resulting from arbitrary and biased securities law enforcement; they are two sides of the same coin.

As a businessman who has faced down a misguided SEC enforcement litigation, Mr. Cuban offers a front-row perspective on the practical importance of the legal and constitutional issues at stake in this litigation. That is, as discussed below, the SEC's failure to appoint its ALJs properly is not a mere formality. Had Mr. Cuban been subjected to the treatment the SEC intends for Mr. Hill, without the procedural safeguards available in federal district court before a presiding person with the stature and power to ensure fairness, Mr. Cuban likely would have been found liable by an in-house SEC ALJ on an untested legal theory and based on incomplete and misleading facts. In short, Mr. Cuban is uniquely positioned to explain the palpable harm that could come from being subjected to a constitutionally defective proceeding and to attest to the value of a predictable legal environment for capital creation.

PRELIMINARY STATEMENT

The SEC's arguments that (1) Mr. Hill cannot show irreparable harm, and (2) that the public interest is harmed by the District Court's injunction in this case are incorrect. The public interest here is in fairness, not expedience, and it is

neither fair nor legally appropriate to force a litigant like Mr. Hill to challenge the very validity of an SEC tribunal within that tribunal.

Just as investing in the capital markets should not be a game in which anything goes, enforcement of the securities laws should not be a game in which anything goes and any procedural advantage should be pursued. But the SEC's arguments in this appeal send the opposite message. The SEC argues that holding a hearing before an administrative law judge that is a "mere employee" is constitutional and consistent with statute but does not even mention the applicable language from the very statute that provides the basis for a hearing—the Securities Exchange Act of 1934. That statute expressly states that "Hearings . . . may be held before the Commission, any member or members thereof, *or any officer or officers of the Commission designated by it* . . ." 15 U.S.C. § 78v (emphasis added).[4] There is no clearer indication that Congress intended individuals presiding over hearings under the Exchange Act to be "officers" than the use of the words "officer or officers of the Commission" in the section of the statute mandating the form of the hearings.

[4] The Exchange Act is not alone in requiring that hearings be conducted by the Commission or "any officer or officers of the Commission designated by it." Indeed, all of the major statutes enforced by the SEC have substantially the same language. Securities Act of 1933, 15 U.S.C. § 77u; Investment Advisors Act of 1940, 15 U.S.C. § 80b-12; Investment Company Act of 1940, 15 U.S.C. § 80a-40.

The Commission has not designated the ALJs as officers; indeed, the SEC has admitted in federal court proceedings, including this one, that the ALJs are hired by the Chief ALJ, and the SEC has argued that the ALJs are not officers but are mere employees. Indeed, in an Opinion issued September 3, 2015, the Commission itself not only stated that ALJs are mere employees, but it cast them as low-level functionaries who lack independence. *In re Raymond J. Lucia Cos., Inc.*, Admin. Proc. File No. 3-15006 at 3, 29 (S.E.C. Sept. 3, 2015).[5] And, the Commission has consciously refused to appoint ALJs as officers, thereby rendering them more independent and empowered, despite an invitation from two federal district court judges to do so to obviate the issue for cases going forward. *See Duka v. SEC*, No. 15 Civ. 357 (RMB), 2015 WL 4940057 (S.D.N.Y. Aug. 3, 2015); *Hill v. SEC*, No. 1:15-cv-1801-LMM, --- F. Supp. 3d ---, 2015 WL 4307088, at *20 (N.D. Ga. June 8, 2015) ("the ALJ's appointment could easily be cured by having the SEC Commissioners issue an appointment or preside over the matter themselves."). Thus, it is an entirely empty gesture for Mr. Hill to argue his challenge to the validity of the tribunal before the tribunal, and then to seek further review of that argument by the very Commission that has constituted the tribunal in this fashion, denied in other cases that doing so has created any legal issue, and

[5] https://www.sec.gov/litigation/opinions/2015/34-75837.pdf.

recently ruled that ALJs are not officers on the basis of its own interpretation of the Constitution. This by itself is irreparable harm to Mr. Hill.

In addition, the public interest is harmed not by the District Court's injunction, but by the unpredictability created by the SEC's current aggressive use of a (defective) administrative procedure to pursue complex and novel cases. Recent commentary has shown that the SEC virtually always wins in its in-house administrative proceedings, but it is far less successful when it litigates in federal court—Mr. Cuban's own case being only one example of a high-profile insider-trading case that has collapsed in federal court. When the SEC has the ability to significantly influence the outcome of a complex, credibility-based matter such as its insider trading case against Mr. Cuban—or its insider trading case against Mr. Hill—merely by placing it into an administrative proceeding rather than a federal court, investors' ability to predict the types of conduct that will, or will not, result in sanction is diminished, and the free flow of capital is impeded.
Mr. Cuban knows from his own experience litigating against the SEC in federal district court that his success depended on the procedural rules available to him, the independence of the judge enforcing those rules, and the independent fact-finding by the jury. He would have had none of these things in litigation before a "mere employee" of the SEC.

ARGUMENT

I. MR. HILL WOULD SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION

The District Court correctly found that Mr. Hill would suffer irreparable harm if the administrative proceedings were not enjoined pending the determination of Mr. Hill's legal challenges to the validity of that very proceeding. If forced to endure a protracted litigation before an invalid tribunal, Mr. Hill would have little recourse, if any at all, to recover from the financial and reputational toll the proceedings would take on him. In other words, Mr. Cuban's ability to litigate before an independent judicial officer, and with procedural rules capable of ensuring fairness in a complex, credibility-focused insider trading case, highlights the unfairness and harm that Mr. Hill will suffer absent the injunction.

A. BY TREATING ALJS AS EMPLOYEES, THE SEC UNDERMINES INDEPENDENCE

Mr. Cuban had the basic protection of litigating before a neutral and independent judicial officer with the stature to ensure that both he and his adversary (the SEC) stood before the tribunal as equals. The SEC seeks to force Mr. Hill to litigate similar issues before an ALJ that the SEC states has the status of a low-level functionary, a mere employee, with neither the stature (nor political accountability) of an officer nor the independence of a federal judge. Mr. Hill's harm stems first and foremost from having to submit to an inherently biased proceeding.

The statutory provisions governing Cease-and-Desist hearings relating to federal securities laws uniformly require that those hearings must be conducted by the Commission or "an officer or officers of the Commission designated by it." *See* Securities Act of 1933, 15 U.S.C. § 77u ("All hearings shall be public and may be held before the Commission or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept."); Securities Exchange Act of 1934, 15 U.S.C. § 78v ("Hearings may be public and may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it, and appropriate records thereof shall be kept."); Investment Advisers Act of 1940, 15 U.S.C. § 80b-12 (same); Investment Company Act of 1940, 15 U.S.C. § 80a-40 (same). On its face, this statutory language clearly states that only someone who is an officer of the Commission may be designated to hold these hearings. In addition, the fact that a hearing officer holds company with the Commission itself or a member of the Commission confirms that the hearing should be held before someone with the stature and political accountability of a constitutional officer—*i.e.*, an officer empowered to "exercise significant authority pursuant to the laws of the United States." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 486 (2010) (citing *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976)).

Indeed, similar statutory language is used to describe the persons who are empowered to exercise the significant investigatory powers of the SEC. *See* Securities Act of 1933, 15 U.S.C. § 77s(c) ("For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpoena witnesses, take evidence. . . ."); Securities Exchange Act of 1934, 15 U.S.C. § 78u(b) (similar); Investment Advisers Act of 1940, 15 U.S.C. § 80b-9(b) (similar); Investment Company Act of 1940, 15 U.S.C.§ 80a-41(b) (similar). This language is instructive because the manner in which the SEC executed it until recently shows that the SEC interpreted it as referring to constitutional officers. Thus, until recently, the Commission issued a document that specifically and formally designated individual staff attorneys as "officers" for purposes of conducting a particular investigation, and by so doing granted them the enumerated statutory powers such as the power to subpoena witnesses. In other words, just as the Appointments Clause contemplates, the Commission itself designated as officers the individuals imbued with the significant authority they needed to conduct investigations.

The SEC has consciously decided not to follow a similar procedure, and in so doing, has created the veneer of independence without the accountability

provided by officer status. "[T]he significant structural safeguards of the constitutional scheme . . . [are] designed to preserve political accountability relative to important Government assignments." *Edmond v. United States*, 520 U.S. 651, 659, 663 (1997); *see also Freytag v. Comm'r*, 501 U.S. 868, 884 (1991) ([I]n the Appointments Clause the Framers limited the "diffusion" of the appointment power in order to "ensure that those who wielded it were accountable to political force and the will of the people."); *see generally Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495-97 (2010) (analyzing how political accountability concerns underlie Article II and noting that the President "cannot . . . escape responsibility for his choices by pretending that they are not his own.").

The SEC's failure to appoint ALJs properly allows it to treat them as employees and to deprive them of all of the powers that are inherent in their office and that Congress, in the securities acts, expressly conferred on them. Thus, it is not surprising that in a recent *Wall Street Journal* article one former SEC ALJ was quoted saying she felt pressured to favor the division of enforcement in administrative proceedings. Jean Eaglesham, *SEC Wins with In-House Judges*, The Wall Street Journal (May 6, 2015 10:30 p.m.).[6] According to this retired Judge, the Commission expects in-house judges to place "the burden [] on the

[6] http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803.

people who were accused to show that they didn't do what the agency said they did." *See* Jean Eaglesham, *SEC Judge Declines to Submit Affidavit of No Bias*, The Wall Street Journal (June 11, 2015 7:11 p.m.).[7]

By contrast, Mr. Cuban's litigation was conducted before a properly constituted tribunal—federal district court. In that proceeding, the presiding officer was neither in function nor in name a mere employee of one of the litigants; the presiding officer was an independent officer with the power and stature to ensure a fair proceeding and a level playing field for both sides. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009) (explaining that the Due Process Clause does not require "proof of actual bias," and instead, the Court asks "whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'"); *cf. Gupta v. SEC*, 796 F. Supp. 2d 503, 514 (S.D.N.Y. 2011) ("The Commission, having approved the OIP . . . would be inherently conflicted in assessing [a collateral constitutional] claim . . . ."). In addition, in Mr. Cuban's case, his adversary played no part in choosing its own judge. *Cf. Caperton v. A.T. Massey Coal Co*., 556 U.S. at 870 ("Just as no man is allowed to be a judge in his

[7] http://blogs.wsj.com/moneybeat/2015/06/11/sec-judge-declines-to-submit-affidavit-of-no-bias.

own cause, similar fears of bias can arise when . . . a man chooses the judge in his own cause."). These factors were critical in ensuring that Mr. Cuban was afforded a fair hearing and a chance to vindicate himself against incorrect legal and factual positions advanced by his adversary.

In short, absent proper appointment, neither the SEC nor the SEC ALJs themselves view ALJs as sufficiently independent to satisfy constitutional and congressional dictates of impartiality and fairness. Forcing Mr. Hill to litigate his challenges to the tribunal's validity within that very tribunal and before the Commission that has refused to comply with the statutory command to hold hearings before "officers of the Commission" creates real harm that cannot be repaired or remedied.

Adding insult to injury, there is another structural bias in the administrative proceedings; the SEC prejudges the case and then essentially asks its employee, the ALJ, to validate its judgment. The enforcement division conducts an investigation, the culmination of which is a memorandum to the SEC recommending that an enforcement action be instituted. Securities and Exchange Commission Division of Enforcement, Enforcement Manual, § 2.5.1 at 22 (2015).[8] That memorandum is a detailed recitation of the facts of the case and, where applicable, the relevant law. *Id*. In its memorandum, the Enforcement Division addresses any defenses—

[8] http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

factual or legal—raised by the prospective respondent in his or her "Wells" submission (a formal memorandum to the Commission submitted by a potential respondent laying out the reasons an enforcement action is not warranted). *Id*. This memorandum is usually circulated to the General Counsel's Office and to other relevant SEC divisions. *Id*. The Enforcement Division also circulates a proposed complaint or a draft of an order instituting proceedings. The Commission considers the Division's recommendations in a closed meeting. *Id*. § 2.5.2.1 at 23. In that meeting, the Commission can have an unfettered discussion about the facts and the law with the Enforcement Staff and other interested staffers, and, following this discussion, the Commission votes on the Enforcement Division's recommendation to bring an enforcement action. *Id*.

With this as background, the ALJ receives an order of the Commission instituting proceedings that recites a set of facts and concludes that those facts constitute a violation. The ALJ is then put in the position of having the Division of Enforcement present the very same facts to him or her and ask him or her to come to the same conclusion the Commission already reached. Whatever findings its mere employee, the ALJ, makes are then reviewed on appeal by the Commission. Given the Commission's view that its ALJs are mere employees similar to its aides, it is no wonder that its views of the facts and law almost always prevail before an ALJ.

B. BASIC PROCEDURAL RIGHTS AVAILABLE IN FEDERAL COURT ARE CRITICAL IN CASES LIKE MR. HILL'S AND MR. CUBAN'S

The District Court's injunction also protects Mr. Hill from attempting to litigate his challenges in a forum that lacks the procedural tools required to reach a fair and accurate result. That is, ALJs are subject to SEC rules on how hearings are to be conducted and cannot deviate from those rules absent permission from the Commission. These procedures are woefully inadequate in complex securities fraud cases, such as insider trading cases, and even the SEC's General Counsel has recently acknowledged that it is reasonable to question whether the rules governing administrative proceedings are still appropriate and whether they should be updated. Daniel Wilson, *SEC Administrative Case Rules Likely Out Of Date, GC Says*, Law360 (June 17, 2014, 5:55 PM).[9] If forced to endure and underwrite a faulty administrative proceeding, Mr. Hill will be irreparably harmed by being denied the basic rights to defend himself adequately.

1. SEC Rules of Practice cannot accommodate complex, voluminous cases

Under the SEC rules of practice, when the Commission issues an Order Instituting Proceedings, it places the case in one of three categories of complexity. Based on that classification the Commission orders that an initial decision be

[9] http://www.law360.com/articles/548907/sec-administrative-case-rules-likely-out-of-date-gc-says.

issued within 120, 210, or, even in the most complex cases, no more than 300 days after the service of the order instituting proceedings. *See* 17 C.F.R. § 201.360(a)(2). "Under the 300-day timeline, the hearing officer shall issue an order providing that there shall be approximately 4 months from the order instituting the proceeding to the hearing, approximately 2 months for the parties to obtain the transcript and submit briefs, and approximately 4 months after briefing for the hearing officer to issue an initial decision." *Id*. In other words, even in the most complex cases, a trial *must* take place within four months of the initiation of litigation. Put yet another way, after taking whatever amount of time it needs (typically years) investigating and determining the timing of the charges, the SEC forces respondents in administrative proceedings to be ready for trial in only four months. Of course, this task is made ever more difficult in complex fraud cases which could involve millions of relevant documents. Rules of civil procedure and rules of evidence do not apply; there is no way to narrow the charges through a motion to dismiss, no interrogatories, no requests for admissions, no depositions, and no means of targeting document requests. *See generally* 17 C.F.R. §§ 201.232(a)-(b); 234(a). In effect, discovery under the Rules of Practice consists primarily of the SEC producing its investigative file to the respondent. That file has a major flaw: it is limited to evidence that the SEC sought and requested, often excludes sets of documents that respondents would seek, and necessarily excludes

materials relevant to determining collateral issues such as challenges to the proceedings themselves.

2. Mr. Cuban benefited from a motion to dismiss

The SEC pursued Mr. Cuban on an untested theory of insider trading that he was able to challenge and clarify through a motion to dismiss. As an initial matter, it is important to note that no federal statute expressly prohibits insider trading. Rather, the SEC pursues insider trading claims under the "catchall" fraud provisions of Section 10(b) of the Exchange Act and Rule 10b-5. However, what Section 10(b) "catches must be fraud." *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980). In particular, there is no general prohibition on the trading of securities based on material, nonpublic information. Although the SEC has often argued that any recipient of material, nonpublic information has potential insider trading liability, the U.S. Supreme Court has repeatedly rejected this view. Instead, the Court has insisted that in an insider trading case like this one, a fraud occurs *only if* the trader violates a fiduciary or similar duty of trust and confidence by knowingly using the material, nonpublic information for his own benefit. *Id*.

In other words, throughout the development of the law of insider trading, the SEC and the federal judiciary have not been aligned; the SEC has consistently and overtly attempted to expand the scope of insider trading liability, and the courts often have rejected those attempts. For example, in a speech shortly before the

filing of the enforcement action against Mr. Cuban, the SEC's Director of Enforcement made it clear that the Commission is bringing suits that "confront" the limits of insider trading law by challenging the Court's fiduciary duty requirement.[10] This type of aggressive push by the SEC is precisely what mandates the need for a neutral third party to preside over the proceedings. Indeed, the case against Mr. Cuban was just such a test case "confronting" the limits of the law. In short, the SEC initially alleged that Mr. Cuban violated the law by trading his shares of an Internet search company called Mamma.com because he did so based on confidential information. Complaint, *SEC v. Cuban*, No. 3:08-cv-02050 (N.D. Tex. Nov. 17, 2008), Dkt. No. 1, at 16, 26 ("Compl."). The SEC alleged that Mr. Cuban had agreed to keep certain information confidential, and that such an agreement itself created a fiduciary or fiduciary-like duty to act loyally to the source of the information and thus to disclose the information or refrain from trading.

Given the unsettled boundaries of insider trading law, the SEC's failure to allege in any detail the operation of the requisite duty left Mr. Cuban at a severe disadvantage in developing or articulating any factual defenses. Fortunately, as a

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[10] Linda C. Thomsen, Director, Division of Enforcement, SEC, *Opening Remarks to the Securities Industry and Financial Markets Association Regulatory Symposium on Insider Trading* (May 19, 2008), http://www.sec.gov/news/speech/2008/spch051908lct.htm (arguing that "duty is not what [Section 10(b)] requires").

federal litigant, Mr. Cuban had the tools at his disposal to address and correct this disadvantage.

Mr. Cuban filed a motion to dismiss, arguing that the SEC had failed to state a cause of action. Memorandum of Law of Mark Cuban In Support of Motion to Dismiss, *SEC v. Cuban*, No. 3:08-cv-02050 (N.D. Tex. Jan. 14, 2009) Dkt. No. 12, at 1. That motion, while ultimately not successful at the Fifth Circuit in disposing of the entire case, proved key. The District Court, in dismissing the complaint, held that the SEC failed to adequately plead that he "entered into an express or implied agreement with Mamma.com not to disclose material, nonpublic information about the PIPE offering and not to trade on it or otherwise use the information," as required to establish liability. *SEC v. Cuban*, 634 F. Supp. 2d 713, 727 (N.D. Tex. 2009). While the Fifth Circuit reversed, it did so because it found that the allegations provided "a plausible basis to find" that Mr. Cuban had entered into an agreement with Mamma.com not to trade. *SEC v. Cuban*, 620 F.3d 551, 557 (5th Cir. 2010). These opinions provided what the complaint did not—the operation and boundaries of the SEC's theory in Mr. Cuban's case—and thus, these decisions provided the necessary framework to guide Mr. Cuban's discovery and trial preparation.

Had Mr. Cuban's case been brought administratively, the SEC's Rules of Practice provide no corresponding mechanism to narrow, focus, or dismiss

allegations that lack sufficient articulation or that fail to allege sufficient facts. *See* 17 C.F.R. §§ 201.100 *et seq*. Instead, respondents are only permitted to move for "summary disposition," akin to summary judgment, and only after the Division has completed its case in chief or on leave of the ALJ. 17 C.F.R. § 201.250. Thus, respondents facing inadequately pled or deficient claims by the SEC have no means of dismissing or even narrowing such claims.

3. Mr. Cuban benefitted from federal court discovery

Mr. Cuban used the discovery allowed in federal court to decimate the SEC's factual case. The Federal Rules of Civil Procedure permit each side to engage in full discovery, for example through written requests for documents, interrogatories, or depositions. The purpose of these broad discovery devices, and the federal discovery regime as a whole, is "to enhance the truth-seeking process, to enable the attorneys to better prepare for trial, to eliminate surprise, and to promote an expeditious and final determination of controversies in accordance with the substantive rights of the parties." 27 C.J.S. Discovery § 2 (2013). As such, the ability to take depositions is essential for the parties to obtain full knowledge of the issues and facts before trial. *Hickman v. Taylor*, 329 U.S. 495, 500 (1947).

Mr. Cuban took the depositions of several witnesses prior to trial, which allowed him to preview and scrutinize their testimony, obtain key admissions and

impeachment evidence, and test legal theories. For example, although the SEC claimed that Mr. Cuban never disclosed his intention to sell his Mamma.com shares, with the aid of depositions, Mr. Cuban was able to elicit testimony from both the CFO and Chairman of Mamma.com that a key SEC witness told them that Mr. Cuban informed him that he intended to sell his shares of Mamma.com. Both witnesses' trial testimony directly contradicted SEC witness' testimony and the factual underpinnings of the SEC's case because it showed that he violated no duty to them in selling. In addition, Mr. Cuban was able to use a deposition to elicit the testimony of Mamma.com's PIPE placement agent to counter the SEC's claims that his conversation with Mr. Cuban involved the exchange of confidential information. The placement agent's trial testimony, which had been previewed and developed in an earlier deposition, directly refuted the SEC's claims that the information Mr. Cuban had been given was expected to be kept confidential. In sum, the core of Mr. Cuban's defense at trial, and the key evidentiary support for this defense, was made possible by the broad discovery devices provided by the Federal Rules of Civil Procedure, without which Mr. Cuban could not have prevailed.

In an administrative proceeding, he would have lacked these essential means of defending himself.

4. Mr. Cuban benefitted from adequate time to prepare for trial

Mr. Cuban also benefitted from federal case timelines, which permit adequate time to investigate and develop a full and robust factual record, in contrast to the mandatory fast-track under the SEC Rules of Practice. Because of the 300-day rule, in an administrative proceeding, a respondent is forced to investigate the SEC's allegations and prepare a full defense in a matter of months, no matter how many years the SEC has already spent investigating and preparing its case[11]—and no matter how massive the dump of documents assembled by the SEC. Under the Federal Rules of Civil Procedure, however, there is no such time restriction on the resolution of a complaint. Furthermore, federal courts permit parties to seek extensions of deadlines and amendments of scheduling orders, which are routinely granted to permit parties to complete discovery obligations.

Discovery in Mr. Cuban's case took nearly three years, time that was necessary to ensure that he could not only complete discovery and develop his defenses, but also to complete secondary litigation on the SEC's refusal to produce certain documents. For instance, Mr. Cuban had adequate time to fully litigate a motion to compel against the SEC, which resulted in the SEC's production of

[11] Although Dodd-Frank imposes time limits on the SEC's investigatory periods (15 U.S.C. § 78d-5), the SEC often enters into tolling agreements with potential respondents, giving it the luxury of longer investigations without running afoul of statutes of limitations.

portions of internal notes and summaries from interviews it conducted while investigating Mamma.com that mentioned Mr. Cuban or related to his case. Memorandum Opinion and Order, *SEC v. Cuban*, No. 3:08-cv-02050 (N.D. Tex. Mar. 15, 2013) Dkt. No. 180. As a result of this litigation, the SEC eventually produced the notes of an SEC attorney's interview of Mr. Cuban one day after the sale in question. This critical set of notes had previously been "lost." The notes showed that Mr. Cuban told the SEC, at the relevant time, that he had sold 100% of his position in Mamma.com, had conferred with his "compliance guys" about the sale, and that he did "not want to hold on" to his Mamma.com position. Simply put, these interview notes were critical in demonstrating that Mr. Cuban fully disclosed to relevant parties his intent to trade on the information; they constituted contemporaneous proof of his good faith.

Mr. Cuban also had the opportunity to pursue secondary litigation against the SEC under the Freedom of Information Act ("FOIA"), through which he sought and obtained helpful internal agency documents. *See Cuban v. SEC*, No. 1:09-cv-00996-RBW (D.D.C. May 28, 2009). Two years after the filing of the complaint, the district court ordered the SEC to conduct additional searches for records responsive to the FOIA requests and to produce various categories of records it had withheld on the basis of purported exemptions, documents which

proved useful to Mr. Cuban's defense. *Cuban v. SEC*, 744 F. Supp. 2d 60, 92 (D.D.C. 2010), *on reconsideration in part*, 795 F. Supp. 2d 43 (D.D.C. 2011).

Had Mr. Cuban's case proceeded in an administrative proceeding, without the freedom and flexibility available under the supervision of a federal district court judge, he would have been deprived of the ability to obtain and use key exculpatory evidence.

5. Mr. Cuban benefitted from an impartial jury

Given the contentious factual disputes in Mr. Cuban's case, only an unbiased assessment of witness credibility by an impartial jury could fairly determine the outcome. The role and ability of juries to assess witness credibility is a recognized cornerstone of the federal judicial system. *See* 9 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6262, at 185 (1997). The assessment and determination of the facts by an impartial jury, rather than a structurally-biased ALJ, proved to be the final component of Mr. Cuban's success. The federal jury returned a verdict in favor of him on all charges. Indeed, what matters most in many insider trading cases is the ability of a neutral party to assess the credibility of witnesses. In an ALJ proceeding, this critical function rests with an improperly appointed ALJ, and once inflicted, this type of harm is simply impossible to reverse.

C. THE APPEALS PROCESS CANNOT REMEDY IRREPARABLE HARM

The structural defects and procedural inadequacies of the administrative forum create irreparable harm that is only exacerbated by review by the Commission. That is, although the SEC claims that this review is *de novo* and a source of protection for respondents caught in an administrative proceeding, Brief for the Appellant ("Appellant Br."), at 30, in practical effect it is nothing of the sort. This is because of several factors. First, in a case like Mr. Cuban's, where credibility assessments are determinative, there is no substitute for a live assessment of witnesses by a neutral fact-finder. *See In re Pelosi*, Securities Act Release No. 3805, 2014 WL 1247415, at *2 (Mar. 27, 2014) ("The Commission gives considerable weight to the credibility determination of a law judge since it is based on hearing the witnesses' testimony and observing their demeanor. Such determinations can be overcome only where the record contains substantial evidence for doing so.") (footnote and internal quotation marks omitted). Second, as noted above in Part I.A., the ALJ is presented with the task of adjudicating facts and law presented by the Division of Enforcement *and already endorsed by the Commission*, all the while knowing that the Commission views him or her as a mere employee and that that same Commission will review his or her decisions. Third, any review of the Commission's orders in a federal Circuit Court of Appeals is pursuant to an arbitrary, capricious, and abuse of discretion standard (*see* 5

U.S.C. § 706). Such a standard is highly deferential, and presents little chance of prevailing on the discovery-dependent credibility issues that Mr. Cuban used to exonerate himself. And finally, a litigant running this gauntlet faces a crushing resource burden, for even if he or she succeeds in appeal in overturning an ALJ and Commission action in federal court, he or she would still have spent substantial time and substantial funds prior to arriving in that valid forum.

Suffering through such a lengthy appeals process that is so clearly stacked against a respondent is simply not the same as being able to bring a case in federal court and being able to directly appeal a verdict in a Court of Appeals. This is particularly so for cases like Mr. Hill's or Mr. Cuban's that involve not technical violations of SEC rules, but allegations of fraud and important legal questions regarding the scope of insider trading liability, both of which are the bread and butter of Article III courts. The review available from an ALJ proceeding is inadequate to ensure that cases turning on credibility are properly determined free from any structural bias built into the process.

Moreover, on legal issues as well the ALJ process presents structural bias in insider trading cases such as Mr. Cuban's and Mr. Hill's. Indeed, the Second Circuit's recent Newman decision (*United States v. Newman*, 773 F.3d 438 (2d Cir. 2014)) provides a recent example, echoing Mr. Cuban's case, of the disconnect between the way enforcement bodies and federal courts have

interpreted insider trading law. In both cases, enforcement bodies pressed for liability based on theories that sweep beyond those permitted by courts. If those enforcement bodies were litigating before SEC ALJs—mere employees of the SEC in the Commission's view—an ALJ finding in favor of the broader theory would not carry the appearance of impartiality.[12]

II. THE PUBLIC INTEREST WILL NOT BE HARMED BY THE DISTRICT COURT'S PRELIMINARY INJUNCTION

The District Court's preliminary injunction order, which stays the administrative proceeding against Mr. Hill while the court considers Mr. Hill's constitutional claims, does not impair or impede the SEC's mandate or

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[12] As the Honorable Jed S. Rakoff, U.S. District Judge for the Southern District of New York, has pointed out, "almost all the major advances in the development of the law of insider trading . . . have occurred in federal courts, usually either the Supreme Court or the Second Circuit." Jed S. Rakoff, *PLI Securities Regulation Institute Keynote Address: Is the S.E.C. Becoming a Law Unto Itself?* 8 (Nov. 5, 2014), http://assets.law360news.com/0593000/593644/Sec.Reg.Inst.final.pdf. As such, the consequence of the SEC increasingly bringing such cases as administrative enforcement actions, in an attempt to avoid publicized defeats in federal court, is that "the law in such cases would effectively be made, not by neutral federal courts, but by S.E.C. administrative judges." *Id.* at 10. As a result, this trend is "unlikely . . . to lead to as balanced, careful, and impartial interpretations as would result from having those cases brought in federal court." *Id.* at 11. It is also worth pointing out that while the SEC claims appellate review can cure any of its sins, it also asks for deference, relying on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), from the courts in interpreting federal securities laws and rules, including the anti-fraud provisions. *See, e.g.*, Brief of the SEC, Respondent, at 56, *Flannery v. SEC*, No. 15-1080 (1st Cir. July 15, 2015). Indeed, with *Chevron* deference, the Commission effectively performs the functions of the legislature, the prosecutor, and judge.

enforcement scheme, as the SEC claims. Instead, the real harm to the public interest comes from the unpredictability created by the SEC's aggressive use of administrative proceedings in complex cases, and its dogged attempts to prevent any federal court decision on the merits on the legal and constitutional validity of its administrative tribunals.

First, the preliminary injunction has not stifled the SEC's enforcement scheme. Since the entry of the order on June 8, 2015, the SEC has filed 212 new administrative proceedings. *See* Administrative Proceedings, U.S. Securities and Exchange Commission, http://www.sec.gov/litigation/admin.shtml (last updated Sept. 14, 2015).

Second, just as investors should have clarity about the rules of insider trading, the public should have clarity on whether SEC administrative proceedings are valid and whether the SEC will continue its efforts to force complex, credibility-based insider trading cases into those administrative proceedings. It seems to be no coincidence that there are several constitutional challenges to administrative proceedings currently winding their way through various federal courts or through the administrative process in preparation for an eventual federal court ruling. That is, although administrative proceedings have been conducted for decades without major complaint in simpler cases involving regulated individuals, only now that the SEC is forcing complex, credibility-dependent, and legally

aggressive cases into its in-house proceedings are these constitutional challenges proliferating. One explanation for these challenges is that they reflect not only the legal and constitutional defects of the administrative forum as presently constituted, but that they also reflect the fundamental appearance of unfairness of that forum for cases such as those of Mr. Hill or Mr. Cuban. Thus, the true public interest is not in permitting the SEC to cram more of these cases (and their attendant challenges) into the administrative forum, but rather for there to be a swift and full decision in a neutral federal court on the merits of these legal and constitutional issues. Only then might it appear that the SEC's administrative litigation strategy is anything but an attempt to win the game by any means at its disposal.

CONCLUSION

The stark procedural disadvantages facing respondents like Mr. Hill in administrative proceedings, as compared to their counterparts in federal court like Mr. Cuban, create inconsistent and uncertain outcomes for investors who already lack clear guidelines on the boundaries of lawful trading conduct. As a result, the SEC's growing practice of bringing these cases administratively increases risk to investors, harms the orderly and efficient operation of the markets, and discourages capital formation. Simply put, when the outcome and legality of an action is determined by the choice of forum rather than by a reasonable evaluation of the

evidence and law, no investor can easily determine, on the boundaries, what conduct is lawful and what conduct is not. Such uncertainty contracts market flow and impedes capital formation.

Respectfully submitted,

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September 15, 2015

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

Pursuant to Fed. R. App. P. 29(d), this *amicus* brief is proportionally spaced, has a type face of 14 points or more, and contains 6,599 words.

/s/ Stephen A. Best

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2015, I electronically filed the foregoing via the Court's ECF system pursuant to 11th Cir. R. 25-3(a), which caused one copy to be delivered via electronic mail to counsel of record. Pursuant to 11th Cir. Rule 31-3, seven paper copies of the foregoing have also been transmitted to the Court via Federal Express.

/s/ Stephen A. Best