

DEWEY & LEBOEUF

Dewey & LeBoeuf LLP
1101 New York Avenue, NW
Suite 1100
Washington, DC 20005-4213

tel +1 202 346 8735
fax +1 202 956 3307
sbest@dl.com

August 4, 2010

Mr. Lyle W. Cayce
Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *SEC v. Cuban*, Docket No. 09-10996

Dear Mr. Cayce,

On behalf of Appellee Mark Cuban, we respectfully write to correct a statement made on August 2, 2010 by appellant's counsel at oral argument in the above-captioned matter regarding the record on appeal. Appellant's counsel, Randall W. Quinn of the Securities and Exchange Commission ("SEC"), made the statement in response to two direct inquiries from Judges King and Higginbotham during rebuttal. We note that Lyle Roberts, counsel for Mr. Cuban, raised this point with Mr. Quinn after the conclusion of oral argument and Mr. Quinn consented to counsel for Mr. Cuban filing a letter with the Court.¹

In the argument, Judge King discussed the purpose of the conversation between the CEO of Mamma.com and Mr. Cuban, inquiring of Mr. Roberts:

The question is whether the Commission can enforce the rule, ok? Yes, you are right there is another remedy, too. But the question is whether the Commission, which has the enforcement power, can go ahead and enforce this and do you have any question or do you take the position that the company did not have a perfectly legitimate reason to go to him and ask him whether he wanted to invest in – be a buyer in this offering.²

¹ We also note that your office indicated to us that the appropriate means of submitting this letter would be to use the Court's Electronic Case Filing system.

² All quotations herein from the August 2, 2010 oral argument were transcribed verbatim by counsel for Mr. Cuban from the recording of August 2, 2010 Oral Argument in *SEC v. Mark Cuban*, Docket No. 09-10996, made available

Mr. Lyle W. Cayce
August 4, 2010
Page 2

August 2, 2010 Oral Argument Recording at 19:14 – 19:44.

Mr. Roberts responded:

Your Honor, they may have had a legitimate reason or quite frankly an illegitimate reason because Mr. Cuban was a large – as you noted a 6% holder of the company – it would have been extremely inconvenient for the company to have him go out and trade his shares right before this PIPE offering so I don't think it is clear at all from the complaint from the record that there was in fact a good motive by the company; it may have been a motive to lock Mr. Cuban up.

Id. at 19:44 – 20:05.

Following up on the purpose of the call, Judge King stated:

When you're doing a private placement and particularly one that's going to cause dilution that the people that are the most likely buyers, the company is obviously doing it because it needs the money, or it wouldn't be doing it and it goes to the people who most likely might want to buy, which is somebody in the position of Mr. Cuban. So, the company has a need for the money, a legitimate reason to go to someone like Mr. Cuban and ask him whether he wants to participate in this private placement. It's a perfect – there's nothing wrong with what the company did here.

Id. at 20:05 – 20:43.

Mr. Roberts addressed Judge King's statement by explaining:

Well, but actually, though, Your Honor, if I can dispute that just a little bit because the actual facts as they are alleged in the Complaint, the documents relied upon on in the Complaint as we have argued in this case, actually show that that PIPE transaction was fully subscribed and they went to Mr. Cuban the day before that PIPE transaction was to close, so it doesn't quite have the connotation, I think, that you're suggesting which is this was a

Mr. Lyle W. Cayce
August 4, 2010
Page 3

completely legitimate, you would always go to your large investors and get them to participate in the PIPE. Not typically when it's already fully subscribed and not typically the day before the PIPE is going to close. Those are two quite contrary facts, I think.

Id. at 20:43 – 21:17.

During the SEC's rebuttal, Judge King and Judge Higginbotham returned to the question of whether the appellate record included the fact that the PIPE transaction was oversubscribed. Judge King inquired: "Let me ask a question he brought up. There's some question about this deal being oversubscribed, so there was something improper about calling this guy to begin with. Is that anywhere in these pleadings?" *Id.* at 45:37 – 45:49. Mr. Quinn replied, "That is not in the record of this case." *Id.* at 45:49 – 45:53.

In response, Judge Higginbotham stated: "Well, it's contrary to the email that was sent back, that he had told him about the arrangements we had for him to participate. I mean, that's inconsistent with that. So I don't know what the record shows about that, counsel opposite says that it was oversubscribed." *Id.* at 45:53 – 46:12. Mr. Quinn replied, "I am not aware that that is in the records. The record here is, is the complaint, and that is not, that is not in the complaint." *Id.* at 46:12 – 46:19.

In fact, the record on appeal in this case consisted of more than just the SEC's complaint. The record also included a July 28, 2004 email from Mamma.com's executive chairman, David Goldman, to the other Mamma.com board members (the "Goldman email"). (Complaint ¶ 15, USCA5 12.) In this email, which is liberally quoted (and thereby incorporated by reference) in paragraph 15 of the complaint, and which was attached in full to the Memorandum of Law of Mark Cuban in Support of Motion to Dismiss ("Motion to Dismiss"), Mr. Goldman stated that the "we may be slightly oversubscribed *at about \$17 million*" instead of the "\$15 million" that the Board had determined be raised. (Motion to Dismiss Appendix, Tab 3, USAC5 90 (emphasis added)). This email was written the same afternoon as (and shortly after) the June 28, 2004 phone call between Mr. Cuban and Mamma.com's CEO referred to in the complaint. In his Motion to Dismiss, Mr. Cuban pointed out the inconsistency between the SEC's claim that in that phone call Mamma.com wanted to invite Mr. Cuban to participate in the PIPE offering, and the Goldman email. (Motion to Dismiss at 3-4, USCA5 55-56).

There are a number of other references to the Goldman email in the record. Judge Fitzwater references the email three times in his July 17, 2009 Memorandum Opinion and Order (the "District Court Opinion") dismissing the SEC's complaint against Mr. Cuban. (*See* District Court Opinion at 3, USCA5 303; *id.*; and District Court Opinion at 27-28, USCA5 327-28). Moreover, the SEC itself references the Goldman email in its own filings, including its opening brief in this appeal. *See* Brief of the Securities and Exchange Commission, Plaintiff and

Mr. Lyle W. Cayce
August 4, 2010
Page 4

Appellant at 4-5, 38; *see also* Plaintiff Securities and Exchange Commission's Memorandum of Law in Opposition to Defendant Mark Cuban's Motion to Dismiss at 3, USCA5 225.

In light of the foregoing, we respectfully request that the Court take notice of the above-noted references to the Goldman email.

Respectfully submitted,

s/

Stephen A. Best

cc: Randall W. Quinn
Assistant General Counsel, United States Securities and Exchange Commission