

Let The Light Of Day Shine

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By [Trace Schmeltz](#) | As just one example of what The GEE Blog hopes to accomplish, we want to spend a moment talking about an old subject—the Securities and Exchange Commission’s insider trading case against Mark Cuban—and Cuban’s new business venture that has resulted from that case. The case, the SEC’s handling of the matter, and Cuban’s reactions (then and now) say a lot about how “the G” does business and may even be revelatory in the future. As you recall, the SEC charged Cuban with insider trading in 2008. The case was originally dismissed by the trial court. The Fifth Circuit Court of Appeals reinstated the case, concluding that the inquiry into whether Cuban had, in fact, traded on the basis of material, non-public information was simply too fact-intensive for the trial court to have decided without a full factual inquiry. This, of course, is the problem with fraud-based government enforcement: the question of a person’s intent is difficult to determine without an expensive factual inquiry—and the costs of such an inquiry (combined with the potential consequences) are so high that many people settle with the G rather than seek to exonerate themselves. Historically, the SEC “extorted” settlements (not our view, necessarily, see [Al’s Emporium Commentary](#) in the *Wall Street Journal* Online Edition as of October 19, 2010) in reliance on this heavy burden. At the heart of the SEC’s effort was the “no admit or deny” settlement. In these settlements, the SEC would recite each allegation of wrongdoing against a defendant as well as the terms under which the defendant had settled the charges. The defendant would neither admit nor deny the SEC’s allegations. Since Mary Jo White took over at the helm of the SEC in April 2013, she purportedly has set a new course, requiring that defendants must admit wrongdoing in more and more settlements—whether or not that changes the seemingly extortive nature of these cases remains to be seen. But Cuban, with his seemingly unlimited resources and non-retiring personality, would not be extorted. He fought back, all the way through trial, and won. Ultimately, a jury of Cuban’s peers concluded (among other things) that the SEC had not proven that Cuban received confidential information, that he traded on such information, or that he had acted knowingly or recklessly (with “fraudulent intent”) when trading. (See the Associated Press’ “Big Story” on October 16, 2013, which has a [digital recreation of the jury verdict form](#)). When he walked out of the courtroom, Cuban went ballistic on the SEC. [See his comments on YouTube](#) – his specific comments about the SEC are found beginning about the 50th second of the clip. “When you put someone on the stand and accuse them of being a liar, it is personal,” he

said, criticizing specific members of the SEC's staff and, generally, the SEC's enforcement practices. Since then, Cuban has reinforced his criticism, stating: "There's such a revolving door, and [the SEC] was run by attorneys with an attorney's mind-set looking for their next job. It's a résumé builder," [Cuban] said. "No wonder they say or do whatever they damn well please. I'm like, 'OK, I'm going to start calling them out by name.'" ([WSJ's Law Blog](#)) Cuban isn't stopping with these castigatory remarks. He is putting his money where his mouth is. Cuban's latest business venture is to publicize SEC trial transcripts (which are not generally publicly available). Cuban hopes that, by publicizing trial tactics and tactics he believes are problematic, he will change the way this agency of the G does business. Stay tuned—we will let you know how he does! Indeed, in upcoming posts, The GEE Blog will further examine many of the issues raised here. Of course, we would like your thoughts and feedback, too. If you want to see The GEE Blog address an issue, let us know. Ultimately, we want The GEE Blog to be a resource you can count on.