

Litigators of the Week: Stephen Best of Brown Rudnick, Christopher Clark of Latham & Watkins and Thomas Melsheimer of Fish & Richardson



Christopher Clark

By Jan Wolfe
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For the last five years, Mark Cuban has been publicly criticizing the Securities and Exchange Commission's insider trading case against him. So it would have been a major embarrassment for the flamboyant billionaire if he lost. Thankfully for Cuban, a trio of defense lawyers—Stephen Best of Brown Rudnick, Christopher Clark of Latham & Watkins, and Thomas Melsheimer of Fish & Richardson—have cleared his name.

After just a few hours of deliberation, a Dallas jury on Wednesday rejected the SEC's claim that Cuban traded shares of the Internet company Momma.com Inc. based on confidential information in 2004, thereby avoiding a \$750,000 loss. The SEC wanted the business magnate to pay the \$750,000 along with a civil penalty of about \$2 million. Instead, Cuban and his lawyers beat the case and promptly lashed out at the SEC's enforcement priorities and tactics.

"When you take all these years of my life and try to make a point, it's personal," Cuban told reporters outside the courtroom. "It's just wrong the way this went down."

In a statement, SEC spokesperson John Nester said that "while the verdict in this particular case is not the one we sought, it will not deter us from bringing and trying cases where we believe defendants have violated the federal securities laws."

A small army of defense lawyers represented Cuban. (You can see many of them beaming in this priceless Bloomberg News photo of the postverdict media scrum.) The only ones who spoke at trial were Best, Clark and Melsheimer. Best and Clark have been on the case since 2008, when they were both partners in the doomed Dewey & LeBoeuf. Melsheimer, on the other hand, was a relatively recent addition to the trial team. His colleagues asked him to handle openings and closings, figuring that the Dallas lawyer would best connect with jurors there. Melsheimer handled a few witnesses as well, but Clark and Best took the lead on that front. Another Dewey refugee, Lyle Roberts (now at Cooley), was also part of the defense team.

In June 2004, Momma.com planned to raise capital through a stock offering known as a private investment in public equity, or PIPE. The PIPE would hurt existing shareholders like Cuban, who owned 6 percent of Momma.com. The company's CEO, Guy Faure, called Cuban to inform him of the transaction and ask if he wanted to participate. Cuban declined and instead dumped his 600,000 shares in the company before the PIPE was publicly announced, avoiding losses of \$750,000.

To prevail on its insider trading claims, the SEC had to show that Cuban agreed to keep the PIPE information confidential. Faure ended up becoming the SEC's star witness. In a videotaped deposition, Faure testified

that he told Cuban, "I've got confidential information." He recalled Cuban answering with a statement like "Uh huh, go ahead."

The SEC had a problem, however. Faure recited a different version of the events in his initial interview with defense counsel. In that interview, Faure made no mention of Cuban saying, "Uh huh, go ahead." According to Cuban's lawyers, Faure was being probed by the SEC when he first opened up about the conversation with Cuban. He changed his testimony and recalled Cuban's remarks only after the SEC dropped its investigation. "You're going to base a finding for the government on that testimony, from that witness, who won't even show up?" Melsheimer asked jurors during his closing.

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The defense team also had Clark put on an expert witness who testified that the PIPE information wasn't "material" and therefore couldn't be the basis of an insider trading case in the first place. The expert pointed out that the Momma.com PIPE had been announced on public message boards. He also cited an article written by the SEC's expert witness, who wound up not testifying at trial. In his closing, Melsheimer told jurors that the expert hightailed it out of Dallas after seeing how his own words were being used to acquit Cuban.

Cuban's lawyers still get riled up when discussing the SEC's handling of the case. Under "the rule of completeness," when one party introduces a portion of a statement, the other party is sometimes permitted to introduce the rest of the statement to provide context. Clark told us that, prior to this case, he only had to rely on the rule once in his entire career as a defense lawyer. Unlike the SEC, Clark said, "our side told the jurors everything, warts and all."

Best told us that when he was a prosecutor, he learned that the government shouldn't try to win at all costs. "The SEC follows a different paradigm than we were trained to do," he said. "I've never seen a government agency act like this before. This was an affront to the judicial process."