

Elon Musk's SEC Feud Unique, But Not Unprecedented

By **Rachel Graf**

Law360 (March 14, 2019, 7:01 PM EDT) -- Few public figures embroiled in U.S. Securities and Exchange Commission disputes have criticized the regulator as sharply as Tesla CEO Elon Musk has, but the tactic is not unprecedented and doesn't necessarily foreshadow an unhappy ending for Musk at the company, attorneys say.

Through tweets and court documents, Musk has referred to the SEC as the "Shortseller Enrichment Commission" for supposedly benefiting investors who bet against his company, and **has called** the agency's legal arguments against him "unconstitutional."

Like Musk, Dallas Mavericks owner Mark Cuban **vigorously defended himself** against the regulator's proceedings, which for Cuban involved allegations of insider trading. A jury **cleared Cuban of wrongdoing** in 2013, and he shortly thereafter **attacked** individual SEC attorneys, calling them liars who should be held accountable for the way they challenged his integrity during the trial.

"What makes [Musk] and Mark Cuban have something in common is that they are people who have enough independent will or clout or celebrity — or whatever you want to call it — that they basically don't seem to care what other people think," said Ira Matetsky, a partner at Ganfer Shore Leeds & Zauderer LLP. "They're going to do what they want."

Musk's attorney John C. Hueston of Hueston Hennigan LLP declined to comment for this story.

Musk's dispute with the SEC began in September when the agency **filed a lawsuit** alleging the CEO had made a baseless assertion that he was prepared to take Tesla private at a significant premium to its stock price at the time. The parties **settled**, but Musk landed himself back in court months later for allegedly violating the terms of the deal by tweeting imprecise delivery projections for the electric-car maker.

In response to the SEC's attempt to have the court **hold him in contempt** for the tweet, Musk **claimed the agency** is "perhaps embarrassed" by his criticisms. The tweet did not violate the settlement because it didn't involve any new information and was therefore immaterial, Musk argued in the filing. The court has no reason to hold him in contempt, according to the filing.

During Cuban's insider trading case, he also argued the allegations weren't justified, and even convinced a Texas federal judge **to dismiss** the lawsuit in 2009 before it was revived on appeal.

Notably, Cuban saved some of his harshest criticism of the SEC until he had been cleared by a jury — a move former SEC attorney David Chase said is undoubtedly less risky than attacking the SEC during ongoing litigation.

But another high-profile individual might have paved the way for Musk, said Drinker Biddle & Reath LLP partner Mary Hansen.

In an unusual move, hedge fund manager Leon Cooperman voluntarily told investors in 2015 that his firm had been subpoenaed by the SEC, and spoke with a CNBC reporter about the investigation, saying the agency wasn't returning his calls. Cooperman and his firm settled the allegations of insider

trading and reporting violations for almost \$5 million, but he wasn't subject to an industry bar.

"I think that the case sort of perked people up in terms of maybe it's not always a bad thing to be super-aggressive and go on [TV] and wave your subpoena," Hansen said with a laugh.

Musk might also simply have the means to be more aggressive with the SEC. He and Cuban are both successful businessmen who can afford lengthy court battles.

Ordinary Americans are less likely to risk making an enemy out of the agency, Hansen said.

"They wouldn't dare think of doing what either of those two individuals have done because they don't have the resources to engage in long-term litigation," she said.

Cuban even referred to this imbalance after his trial, saying: "I'm glad this happened to me. I'm glad I'm able to be the person who can afford to stand up to them."

Of course, not everyone who does have the resources decides to disparage the SEC.

"Generally speaking you try not to — as a strategic matter — poke a sharp stick in the SEC's eye," said former SEC attorney Chase, who has since opened his own law firm.

Even if the judge doesn't decide to hold Musk in contempt, the SEC can bring future actions or just "make life difficult" by opening investigations and scrutinizing future deals, said Matetsky of Ganfer Shore.

Within the past year, the SEC has brought actions against public figures including **the boxer Floyd Mayweather and musician DJ Khaled**, former Theranos CEO **Elizabeth Holmes** and U.S. Rep. **Christopher Collins**. Their reactions, like many others, didn't drive the news cycle for days.

But Musk isn't like many others, said Dorsey & Whitney LLP partner Thomas Gorman.

"He's not your standard corporate executive. He's a very visionary, entrepreneurial kind of guy who wants to do what he wants to do," he said. "That's why people love him."

--Editing by Philip Shea and Alanna Weissman.