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Litigators of the Week: Defense Verdict Secured By Quinn Emanuel in Multibillion Securities Trial Over Musk's Go-Private Tweets

Quinn's Alex Spiro, Andrew Rossman and Bill Price got a defense verdict finding Elon Musk and Tesla weren't liable for investor losses after Musk's 2018 tweet that he had "funding secured" to take Tesla private.

By Ross Todd
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"Funding secured," tweeted Elon Musk back in August 2018 announcing a potential deal to take Tesla private at $420 a share.

"Not true," is essentially what Senior U.S. District Judge Edward Chen in San Francisco ruled last year on summary judgment in a securities class action centering on the tweet finding it and a follow-up sent hours later were false and reckless.

That was the state of play facing our Litigators of the Week—**Alex Spiro**, **Andrew Rossman** and **Bill Price** of **Quinn Emanuel Urquhart & Sullivan**—over the past couple of weeks as they faced off at trial with plaintiffs lawyers attempting to pin billions in shareholder losses on Musk's tweets. After less than three hours of deliberations, a federal jury in San Francisco last week found Musk and Tesla weren't liable for investor losses in the wake of the tweets.

Courtesy photos

(l-r) Alex Spiro, Andrew Rossman, and Bill Price, of Quinn Emanuel Urquhart & Sullivan.

Lit Daily: I usually ask 'who was your client,' but I think everybody knows who your client is. How would you characterize what was at stake here?

Andrew Rossman: First and foremost, this was a matter of principle. But, of course, securities class actions are about money, and plaintiffs' counsel sought a lot of it. In their summation, they claimed there were investor losses of $12 billion as a result of the tweets. We contested both that number and the notion that it was the tweets that caused the alleged harm. Undoubtedly, there were billions of dollars at stake.

Who was on your team and how did you divide the work?

Rossman: An extraordinary team made this win possible. Our partners **Mike Lifrak** and **Ellyde Thompson** served as day-to-day leads; their

brilliance and tirelessness drove this victory. Mike focused on the factual presentation and witness prep, while Ellyde focused on the legal briefing and jury instructions. Both were flawless in their stand-up roles at trial, too, with Mike putting up Elon's chief of staff and Tesla's head of investor relations, among others. Ellyde called the chairperson of the board and two other directors.

New partner **Jesse Bernstein**, a true securities law guru, played a central role in the damages and causation case. Senior associates **Alex Bergjans**, **Kyle Batter** and **Phil Jobe** were instrumental in witness prep and evidentiary issues as well as briefing. Rounding out the team were **Anthony Alden**, **Doug Post** and **Stephanie Kelemen**, as well as legal assistants **Kayla Fleming**, **Mario Guitierrez** and **Gabby Trevino** and trial assistants **Rebecca Lopez-Jantzen** and **Amber Burns**.

At trial, Alex opened and closed and called Elon as well as other witnesses, Bill crossed the lead plaintiff and the plaintiffs' corporate governance/'going private' expert and examined two other witnesses, and I put on the former CFO and crossed plaintiffs' causation and damage experts.

You asked to transfer or delay this trial arguing that jurors in the Northern District were exposed to "excessive and adverse pretrial publicity" causing potential bias concerning Mr. Musk and his use of Twitter. Did your experience during jury selection do anything to allay those concerns?

Bill Price: Anyone with a smartphone or a TV knows who Elon Musk is, and many have opinions about him, as the juror questionnaires showed. In San Francisco, that became a heightened concern because of his recent acquisition of Twitter, which is headquartered there. In voir dire, to try to avoid tainting the jury pool, we questioned some jurors one-on-one about whether their attitudes toward Mr. Musk created even implicit bias. Ultimately, Alex asked potential jurors if they would commit to keeping an open mind and judging the case solely on the evidence. We're grateful that they did.

Judge Chen had already found that the tweets here were false and reckless. But it was clear from Mr. Musk's testimony that he thought what he was saying was accurate, if incomplete. How did you navigate dealing with the court's prior summary judgment ruling while putting on your defense at trial?

Price: We stayed laser-focused on materiality. Specifically, that plaintiffs had to prove that the difference between the tweets already adjudged to be false by the court—like "funding secured"—and the actual state of affairs was a material one. Given the judge's instruction to the jury to assume the tweets were false, we walked a bit of a tightrope to say that while the tweets may have been technically inaccurate, the reality was nearly the same. We put in evidence that the Saudi PIF had made a verbal commitment to provide funding and had ample resources to do it. We elicited testimony that Elon's deals were always oversubscribed and showed the jury contemporaneous notes and presentations from financiers Goldman and Silver Lake indicating that "funding is not an issue."

Our final point was that the deal did not fail based on lack of funding but for the very reason Elon identified, that Tesla shareholders wanted the company to stay public.

Some securities trials come down to a battle of the experts. But I gather here that the fact witnesses—in particular the additional Tesla officials who had a similar understanding to Musk about the Saudi Public Investment Fund's interest in funding a go-private deal—were key to your defense. What do you think?

Rossman: I agree, in part. The fact witnesses were critical. In addition to Elon, we were fortunate to have two highly credible witnesses to the key meeting about funding a take-private with the Saudi PIF and a third witness who was nearby. Our strategy was to bring the jury into the "room where it happened" by walking through the scene, lining it up against contemporaneous texts and emphasizing real-time reactions that corroborated our account, such as the head of investor relations expressing concern about losing his job if Tesla were to go private.

But the experts were the backbone of plaintiffs' case, so it was every bit as important that we knock down their causation and damages case. I've always believed that a "battle of the experts" is a coin-toss, and I'd rather win outright by getting the other side's experts to admit you're right. Here, we did that by getting both of their experts to admit they did not disaggregate the undeniably truthful part of the tweet—"Am considering taking Tesla private at 420"—from the assertedly false part—"funding secured." Without separating the two, they had no statistical evidence that the stock movements were caused by a false statement.

We had world-class experts, but ultimately decided not to call them. Alex summed it up in closing: "Sure, we could have called our own experts to repeat what their experts had to admit on the stand. But I don't need a weatherman to know which way the wind blows."

Mr. Spiro, during your closing, you said: "Just because it's a bad tweet doesn't make it fraud." That sounds like a summation of your whole case. Was that line workshopped or spontaneous?

Alex Spiro: Spontaneous. But I prefer the ice cream cone remark. (Editor's note: Spiro's closing also alluded to a major Tesla shareholders email to Musk saying: "Get an ice cream cone. Just don't use Twitter.")

You also mentioned that Musk hadn't been coached as a witness. You said: "I'd ask simple questions like: 'Don't you talk to retail shareholders on Twitter every day?' And he looked at me and said: 'Well, not every day.'" How do you prepare for direct for someone like Musk, who is accustomed to running the show?

Spiro: Elon was sincere, and that's what matters.

Is there anything that other securities litigation defendants can take from your trial experience here? Or is Mr. Musk's use of Twitter and the "funding secured" case a one-of-one?

Rossman: I've been handling securities class actions since the PSLRA became law, and the common wisdom has been that the cases almost never go to trial because the risks are too great. This trial upends that wisdom.

We showed that with the right team, the right plan and the right execution, corporate defendants can take securities class actions to trial and win.

What will you remember most about this matter?

Spiro: The team.

Rossman: The last few minutes of Alex's closing stood out for me. He handed the case to the jury with such solemnity and appreciation for their role in this process that you couldn't help feeling they were duty-bound to get to the truth.

Price: What I'll remember most are the hours of sitting in a conference room strategizing and exchanging ideas about themes and examinations, especially cross-examinations. That's a thrilling process when your colleagues are the world's best trial lawyers. I like stealing from the best.