

9th Circ. Won't Revive Investor Suit Over Twitter Ad Glitches

By Sarah Jarvis

Law360 (March 23, 2022, 10:06 PM EDT) -- The Ninth Circuit on Wednesday upheld a lower court's decision to toss a proposed investor class action brought against Twitter Inc. alleging the social media giant issued misleading statements about its targeted advertising feature, finding, on the contrary, the statements at issue were "qualified and factually true."

Circuit Judge Kenneth K. Lee, writing the opinion for the panel, said co-lead plaintiffs the Weston Family Partnership LLLP and the so-called Twitter Investor Group, which consists of three individual investors, failed to state a claim under 10(b) of the Securities and Exchange Act. The panel rejected the investors' suggestion that Twitter had a legal duty to disclose to the investing public a setback it faced in dealing with software bugs plaguing its program, noting a company only has to disclose a negative internal development if omitting it would make other statements materially misleading.

"While society may have become accustomed to being instantly in the loop about the latest news (thanks in part to Twitter), our securities laws do not impose a similar requirement," Judge Lee said.

The disputes stem from when Twitter announced in August 2019 that it had located and fixed issues with its targeted advertising, but the fixes allegedly impacted the advertising function and caused a decline in advertising revenue, unbeknownst to investors. The investors alleged that Twitter's revenue decline contributed to a plunge in the company's stock after it disclosed its financial performance for the quarter.

Shareholder Khan M. Hasan filed suit in September 2019, and shareholder Khafre Barclift followed with a similar suit that December. U.S. District Judge Yvonne Gonzalez Rogers consolidated the cases in February 2020 and named the Weston Family Partnership LLLP and the Twitter Investor Group co-lead plaintiffs.

The consolidated class action complaint alleged violations of the Securities and Exchange Act, among other laws, and included a claim against Twitter's former CEO Jack Dorsey and Chief Financial Officer Ned Segal for control person liability.

Judge Gonzalez Rogers dismissed the case in December 2020, finding Twitter's statements constitute puffery and weren't rooted in fact. The investors appealed that month, according to the case docket.

The investors argued that Twitter's failure to disclose the impact of the software bugs in July 2019 was materially misleading because prior statements allegedly left a "misimpression" that the work to

improve its Mobile App Promotion, or MAP, was on track.

But the Ninth Circuit panel said Wednesday that the statements offered "a much more qualified and less definitive characterization of the MAP program," pointing to a shareholder letter and financial filing that stated the company was "continuing [its] work to increase the stability, performance, and flexibility of [its] ads platform and [MAP] ... but we're not there yet."

The panel said the company's CFO also explained that the company was "still in the middle of that work" related to MAP, and that the work was ongoing. Judge Lee said none of those statements suggests the company's MAP program was "on track," rather, they "suggest a vaguely optimistic assessment that MAP, like almost all product developments, has had its ups and downs, even as the company continues to make progress."

In a footnote, Judge Lee said that, even in everyday conversation, phrases like those don't reflect that everything is on track and without a hitch.

"Suppose someone is building an item of IKEA furniture and a spouse asks about its status," Judge Lee said. "A response such as 'I'm in the middle of it, but I'm not there yet,' 'I'm continuing it,' or 'It's ongoing' does not misleadingly suggest that the person has not suffered setbacks (e.g., finding a mysterious extra screw) in building that piece of furniture."

The appellate panel also found that the investors didn't sufficiently allege that the software bugs disclosed in August 2019 had affected revenue in July 2019. The judges also found that statements the company made in July 2019 fall within the Securities and Exchange Act's safe harbor provision.

Counsel for the parties didn't immediately respond to requests for comment Wednesday.

Circuit Judges Kenneth K. Lee and Daniel P. Collins, along with U.S. District Judge Jill A. Otake of the District of Hawaii sitting by designation, sat on the panel for the Ninth Circuit.

The investors are represented by Tamar Weinrib and Jeremy A. Lieberman of Pomerantz LLP, Jeffrey P. Campisi, Robert N. Kaplan, Jason A. Uris, Laurence D. King and Mario M. Choi of Kaplan Fox & Kilsheimer LLP and Shannon L. Hopkins and Andrew E. Lencyk of Levi & Korinsky LLP.

Twitter is represented by Susan E. Engel, Michele D. Johnson, Andrew Clubok, Elizabeth L. Deeley, Whitney Weber, Matthew Peters, Nicholas Rosellini and Wes Horton of Latham & Watkins LLP.

The case is Weston Family Partnership LLLP et al. v. Twitter Inc. et al., case number 20-17465, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Dave Trumbore.