



Argument on Motion to Compel Production by Morgan Stanley Entities

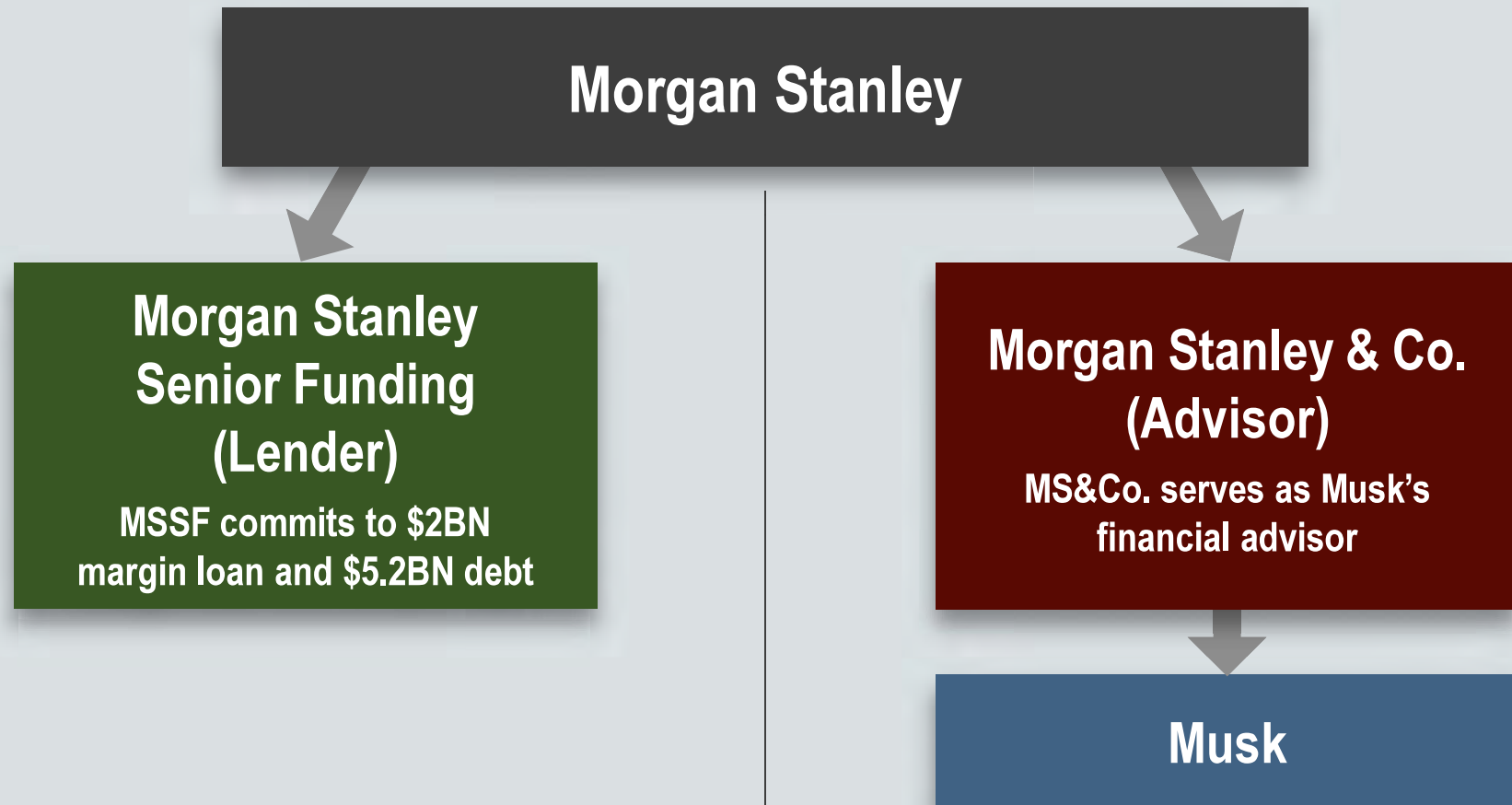
Twitter, Inc. v. Elon R. Musk, et al.

C.A. No. 2022-0613-KSJM

September 27, 2022

Morgan Stanley Entity Roles

Morgan Stanley Entity Roles



Morgan Stanley Entity Roles

Morgan Stanley Senior Funding (Lender)

Key Personnel: Leveraged Finance

- Andrew Earls
- Brian Sanderson
- Joel Carter
- Carter Adams
- Serkan Savasoglu

Morgan Stanley & Co. (Financial Advisor)

Key Personnel: M&A and Tech Industry

- Michael Grimes
- Kate Claassen
- Anthony Armstrong
- Kyle Corcoran
- Owen O'Keeffe
- Julian Mettmann
- Richard Polhemus

Musk Parties

Representatives

- Jared Birchall
- Elon Musk

Legal Representation

Skadden

- **Michael Ringler**
- Steven Messina
- Laura Kaufmann
- Belkhatat
- David Passes
- Peter Jones
- Sean Coburn
- Trevor Quick
- Rosemary Laflam
- Adeeb Sahar

Quinn Emanuel

- **Alex Spiro**
- Matthew Fox
- Ron Hagiz

Legal Standard

New York Law Applies

- ▶ State of New York holds greatest interest in the communications:

THIS COMMITMENT LETTER AND THE RIGHTS AND DUTIES OF THE PARTIES HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, **THE LAWS OF THE STATE OF NEW YORK**; PROVIDED THAT, NOTWITHSTANDING THE

THIS COMMITMENT LETTER AND ANY CLAIM, CONTROVERSY OR DISPUTE ARISING UNDER OR RELATED TO THIS COMMITMENT LETTER SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW TO THE EXTENT THAT THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION

objections to personal jurisdiction. **Both parties agree that New York law applies** to any dispute concerning this letter agreement or the engagement (including any claim against any Morgan Stanley affiliate), without regard to principles of conflicts of laws. You agree

No Common Interest Privilege

Common Interest Privilege

- ▶ The common interest privilege is a **narrow** exception
 - In [New York](#), requires that communications be among *codefendants, coplaintiffs or persons who reasonably anticipate* that they will become colitigants.
 - In [Delaware](#), requires persons to be co-joint venturers with shared legal, not commercial, interest.
- ▶ “Investment banker” privilege is narrow too: to facilitate *legal* advice.

No Common Interest Privilege Between MSSF and Musk

Accepted and agreed to as of
the date first above written:

X HOLDINGS I, INC.

By: 

Name: Elon R. Musk
Title: President, Treasurer and Secretary

X HOLDINGS II, INC.

By: 

Name: Elon R. Musk
Title: President, Treasurer and Secretary

MORGAN STANLEY SENIOR FUNDING INC.

By: 

Name: Andrew Earls
Title: Authorized Signatory

MORGAN STANLEY SENIOR FUNDING, INC.

By: 

Name: ANDREW EARLS
Title: AD

- ▶ MSSF = lender / counterparty to Musk
 - Through the Debt Commitment Letter and the Margin Commitment Letter, financial institutions agreed to commit \$25.5 Billion in financing to the Musk parties.
 - MSSF committed to provide Musk parties \$7.2 billion.
 - Largest commitment among the lenders.

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Slide Not Used During Oral Argument

No Common Interest Between Musk and MS&Co. After May 16

24 A We retained counsel on the 16th,
25 understanding that this could likely lead to
1 litigation if the parties can't agree on either
2 data sharing or after data sharing what the data
3 says, and whether or not there's a MAC or not a
4 MAC, and whether or not other merger agreement
5 provisions and reps and warranties are met. That
6 was not a certainty, but it seemed reasonably
7 likely. And in our professional judgment, it
8 would not be appropriate for us to be in the
9 middle of that, so we extracted ourselves, and I
10 think the client agreed.

11 Q "The client" being?

12 A Sorry. X Holdings, Team Musk. They
13 agreed with that judgment, I believe. I don't --

► By May 16, 2022, MS&Co. anticipated litigation, retained separate counsel, and “extracted” itself from Musk’s dispute with Twitter

30(b)(6) Testimony
Grimes Tr. at 242:24-243:10
Exhibit 1 at 427

No Common Interest Between Musk and MS&Co. After May 16

11 Q And did you also become aware that
12 lawyers for Mr. Musk began to also hunt for the
13 data?

14 A Yes. On the -- on the, what we'll call,
15 the gate data with respect to the 5 percent data,
16 I believe we extracted ourselves from that pretty
17 quickly after the 13th -- maybe by the 16th and
18 say, This should not be in our camp, and set it
19 aside, and we're going to be out of that from the
20 16th forward, is what I believe we arranged or
21 came to an agreement with, with the Musk parties.

30(b)(6) Testimony
Grimes Tr. at 242:11-21
Exhibit 1 at 427

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No Joint or Co-Client Representation

No Joint or “Co-Client” Representation

▶ New York

- “Joint” or “co-client” privilege applies only where the clients indisputably share a complete alignment of interests.

▶ Delaware

- For co-client privilege to apply, the clients’ legal interests must be identical (or nearly so).

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MSSF's Role in the Transaction

- Advice also given to the Leveraged Finance team on the **other side** of the transaction. MSSF committed to provide over \$7 billion in financing

Execution Version

MORGAN STANLEY SENIOR FUNDING, INC. 1585 Broadway New York, NY 10036	BANK OF AMERICA, N.A. BOFA SECURITIES, INC. One Bryant Park New York, NY 10036	BARCLAYS 745 Seventh Avenue New York, NY 10019	MUFG 1221 Avenue of the Americas New York, NY 10020
BNP PARIBAS BNP PARIBAS SECURITIES CORP. 787 Seventh Avenue New York, NY 10019	MIZUHO BANK, LTD. 1271 Avenue of the Americas New York, NY 10020	SOCIETE GENERALE 245 Park Avenue New York, NY 10167	

CONFIDENTIAL
April 25, 2022

X Holdings I, Inc.
X Holdings II, Inc.
2110 Ranch Road
620 S. #341886,
Austin, TX 78734
Attn: Elon R. Musk

Project X
Commitment Letter

Ladies and Gentlemen:

You have advised each of Morgan Stanley Senior Funding, Inc. (acting through such of affiliates or branches as it deems appropriate, "MSSF"), Bank of America, N.A. ("Bank of America"), BofA Securities, Inc. (or any of its designated affiliates, "BofA Securities"), Barclays Bank PLC ("Barclays"), MUFG Bank, Ltd. ("MUFG"), BNP Paribas ("BNP Paribas"), BNP Paribas Securities Corp. ("BNPP Securities") and, together with BNP Paribas, "BNPP"), Mizuho Bank, Ltd. ("Mizuho") and Societe Generale ("SocGen") and, together with MSSF, Bank of America, BofA Securities, Barclays, MUFG, BNPP and Mizuho, the "Commitment Parties", "we" or "us" that X Holdings, II, Inc., a Delaware corporation ("Bideo" or "you"), and X Holdings, I, Inc., a Delaware corporation ("Holdings" or "you"), formed at the direction of Elon R. Musk and his affiliates (collectively, the "Investors"), intend to acquire (the "Acquisition"), directly or indirectly, all of the outstanding equity interests of, or, directly or indirectly merge with, Twitter, Inc. (the "Company"). You have further advised us that, in connection with the foregoing, you intend to consummate the other Transactions described in the Transaction Description attached hereto as Exhibit A (the "Transaction Description"). Capitalized terms used but not defined herein shall have the meanings assigned to them in the Transaction Description and in the Summaries of Principal Terms and Conditions attached hereto as Exhibit B (the "Bank Facilities Term Sheet"), Exhibit C (the "Secured Bridge Term Sheet") and Exhibit D (the "Unsecured Bridge Term Sheet"; together with the Bank Facilities Term Sheet and the Secured Bridge Term Sheet, the "Term Sheets"; this commitment letter, the Transaction Description, the Term Sheets and the Summary of Conditions attached hereto as Exhibit E, collectively, the "Commitment Letter").

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Bank Administrative Agent:

MSSF will act as sole and exclusive administrative agent and collateral agent (in such capacity, the "**Bank Administrative Agent**") in respect of the Bank Facilities (as hereinafter defined) for a syndicate of banks, financial institutions and other institutional lenders reasonably acceptable to the Borrower and excluding any Disqualified Lenders (together with the Initial Bank Lenders, the "**Bank Lenders**"), and will perform the duties customarily associated with such roles.

Joint Bookrunners and Lead Arrangers:

Each of MSSF, BofA Securities, Barclays, MUFG, BNPP Securities, Mizuho and SocGen will act as a lead arranger and joint bookrunner (together with any additional joint bookrunner appointed pursuant to the Commitment Letter, each in such capacity, a "**Bank Lead Arranger**") and will perform the duties customarily associated with such roles.

Counsel to the Bank Lead Arrangers and the Bank Administrative Agent:

Davis Polk & Wardwell LLP.

MSSF's Role in the Transaction

MSSF had a real role

- ▶ Leveraged Finance team were identified as MSSF custodians
 - ▶ “Andrew Earls is the most comprehensive and substantive custodian for MSSF for the debt financing.”
 - ▶ “Joel Carter is the most comprehensive and substantive custodian for MSSF for the margin loan side of the financing”
- ▶ Leveraged Finance documents were produced on behalf of MSSF

Davis Polk
James I. McClammy
+1 212 450-4304
james.mcclammy@davispolk.com

Davis Polk & Woodwell LLP
400 Lexington Avenue
New York, NY 10017
davispolk.com

CONFIDENTIAL

September 8, 2022

Re: *Twitter v. Musk, et al.*, C.A. No. 2022-0613-KSJ (Del. Ch.)

Jacob R. Kirkham
Danielle Rose
Kobre & Kim LLP
800 North King Street, Suite 501
Wilmington, Delaware 19801
Jacob.Kirkham@kobrekim.com
Danielle.Rose@kobrekim.com

Dear Counsel:

On behalf of non-party Morgan Stanley Senior Funding, Inc. ("MSSF"), we are transmitting via secure file transfer production volume X_MSSF_VOL005, containing documents bearing bates numbers X_MSSF_00054212 - X_MSSF_00054295. The password to access the production volume will be provided via e-mail.

The documents contained in this production are being produced in response to Twitter, Inc.'s Subpoena Duces Tecum served upon MSSF on July 26, 2022 in connection with the above-referenced action (the "Action"), and subject to the Stipulation and Order for the Production and Exchange of Confidential and Highly Confidential Information entered on July 22, 2022 in the Action (the "Protective Order") and MSSF's Responses and Objections dated August 9, 2022. Certain documents in this production are designated "Confidential" under the terms of the Protective Order.

In making this production, MSSF does not intend to waive, and is not waiving, any potential objection or any claim of privilege to which it is entitled. Accordingly, to the extent any privileged or protected documents or information have been inadvertently produced, the production of such documents or information does not, and shall not be deemed to, constitute a waiver of the right of MSSF to assert any privilege, immunity, or other legal protection as to such documents or information. Any such inadvertently produced documents or information shall be treated in accordance with the terms of the Protective Order.

If you have any questions regarding the foregoing, please do not hesitate to contact me.

Very truly yours,

/s/ James I. McClammy
James I. McClammy

Electronic Delivery
cc: Bayard, P.A.

On behalf of non-party Morgan Stanley Senior Funding, Inc. ("MSSF"), we are transmitting via secure file transfer production volume X_MSSF_VOL005, containing documents bearing bates numbers

No Valid Joint or “Co-Client” Privilege

- ▶ Defendants identified Leveraged Finance custodian as being from MSSF—not MS&Co.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TWITTER, INC.,
Plaintiff and
Counterclaim-Defendant,
v.
ELON R. MUSK, X HOLDINGS I, INC.,
and X HOLDINGS II, INC.,
Defendants and
Counterclaim-Plaintiffs.

C.A. No. 2022-0613-KSJM

**DEFENDANTS' RESPONSES AND OBJECTIONS TO
PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANTS**

Pursuant to Court of Chancery Rules 26 and 33, Defendants and Counterclaim-Plaintiffs Elon R. Musk, X Holdings I, Inc., and X Holdings II, Inc. (“Defendants”), by and through their undersigned counsel, hereby respond and object to the First Set of Interrogatories to Defendants, dated July 22, 2022 (each an “Interrogatory” and together the “Interrogatories”), served by Plaintiff and Counterclaim-Defendant Twitter, Inc. in the above-captioned action (the “Action”).

GENERAL OBJECTIONS

The following general objections (the “General Objections”) apply to, and are hereby incorporated by reference into, each response to each of the Interrogatories. Defendants may repeat a General Objection below in their specific responses for emphasis or for some other reason. Defendants’ failure to expressly repeat the

INTERROGATORY NO. 2:

Identify all Persons with knowledge concerning, information relevant to, and/or possession, custody, or control over Documents or Communications relating to Your efforts to arrange, obtain, syndicate, and/or consummate the Debt Financing or the Equity Financing, including without limitation (i) any law firm, financial

5. **Morgan Stanley.** Anthony Armstrong, Owen O’Keefe, Michael Grimes, Kate Claassen. Knowledgeable as to financial analysis and negotiation of the transaction.

6. **Morgan Stanley Senior Funding, Inc.** Andrew Earl. Knowledgeable as to the debt financing of the Merger.

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