

THE
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Litigators of the Week: A Resounding Class Certification Win for Goldman Sachs at the 2nd Circuit

By Ross Todd
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We're just a week removed from the Second Circuit's big decision scuttling a class action against Goldman Sachs, but the early reviews have this ruling pegged as a blockbuster.

One securities defense lawyer told Bloomberg it was "a landmark decision" for folks on his side of these cases. Alison Frankel over at Reuters dubbed it a "boon for class action securities defendants." The folks over at **Willkie Farr & Gallagher**, who authored amicus briefs backing Goldman's position, began the headline of their client alert on the decision with "Finally!"

So we'll cement those early reviews with one of our own: Our Litigators of the Week are **Robert Giuffra** at **Sullivan & Cromwell** and **Kannon Shanmugam** of **Paul, Weiss, Rifkind, Wharton & Garrison** who teamed to persuade the Second Circuit that there was a mismatch between the targeted drop in Goldman's stock price and the bank's generic statements about conflicts of interest and business ethics.

Lit Daily: What was at stake for Goldman Sachs here?

Kannon Shanmugam: This case dates back to the 2008 financial crisis and alleged conflicts of interests relating to mortgage-related investment vehicles. The plaintiffs sued Goldman Sachs for securities fraud based on generic statements it had made about its corporate principles, and they sought \$13 billion in damages. That's an amount that would make anyone take notice. But beyond that, Goldman felt strongly that it had not engaged in any fraud and that the plaintiffs could not establish that the alleged misstatements affected its stock price, as is required for a class action to proceed. How strongly? Many defendants in securities cases are prepared to settle if they lose even a motion to dismiss; Goldman continued to defend its position.

More than a dozen years litigating, nearly a decade of which focused on class cert issues. Three trips to the Second Circuit. One to the Supreme Court. Has there ever been a securities case like this? And why was it so hard fought?

Bob Giuffra: This victory is a testament to Goldman's perseverance. I'm not aware of another big securities case that's been so hotly contested for so long. In 2012, when the district court denied Goldman's motion to dismiss in part, the law was



Courtesy photo/ALM

Robert Giuffra Jr., left, of Sullivan & Cromwell and, Kannon Shanmugam, right, of Paul Weiss.

less clear. Since then, courts have established that securities fraud cases can't be based on puffery statements, such as "Our clients' interests always come first," and a bank's general descriptions of its conflicts and risk management practices. On our first two trips to the Second Circuit, a majority of the judges believed that the Supreme Court's decision in *Amgen* barred any consideration, on class certification, of the generic nature of alleged misstatements in assessing whether those statements had price impact. We won on the third appeal after the Supreme Court clarified that courts must take the generic nature of such statements into account.

Who is on the team and how have you divided the work?

Giuffra: This has been an incredible team effort. We've worked with three great general counsel at Goldman—**Kathy Ruemler, Karen Seymour** and **Greg Palm**—who were willing to stay the course. We worked very closely with outstanding senior litigators at Goldman—**Michael Bosworth, Stephanie Goldstein** and **Norm**

Feit. At S&C, our team was first headed by **Rich Klapper**, who oversaw Goldman's financial crisis litigation. Also from day one, **David Rein** developed our critical expert strategy and drafted dozens of briefs. **Ben Walker** and **Julia Malkina** started as associates and became partners because of their work on this case. Our MVP on the third Rule 23(f) grant and most recent briefing in the Second Circuit was **Morgan Ratner** who joined us from the SG's office and is a brilliant lawyer.

Shanmugam: The client brought me in to lead the team that sought Supreme Court review of the Second Circuit's earlier decision permitting the class to go forward. My first call was to our star securities litigator **Audra Soloway**, who masterminded our strategy. Other than Audra and me, all of the Paul Weiss team members were associates: **Kristina Bunting**, **Sarah Prostko**, **Garrrett West**, and our former colleagues **Stacie Fahsel**, **Caroline Williamson** and **Aimee Brown**. We worked collaboratively with our friends at Sullivan & Cromwell on the briefing, and I presented oral argument before the Supreme Court and then the Second Circuit.

Companies more and more often are calling on multiple firms to come together to collaborate on cases of this magnitude. What were the keys to making this team come together successfully for Goldman?

Shanmugam: In the vast majority of cases I argue at the Supreme Court, we're brought in to work with another firm that handled the case below. The key is to operate as if we're one firm, and the team did that splendidly here. It helped that I've known Bob since he interviewed me when I was in law school. I was talking with David and Julia almost every day as we were preparing for the Supreme Court argument. All of the lawyers who worked on this case at both firms were fantastic.

Bob, you told me this is one of the biggest cases you've ever worked on, in terms of the impact on the client and the larger impact on the law—and you're no stranger to big cases. VW immediately comes to mind, and there have been others. What makes the Goldman case stick out to you?

Giuffra: The highs and the lows. I always hoped that Goldman would win, but I knew that most securities cases settle, that it's hard to get even one Rule 23(f) petition granted much less three, and that it's even harder to get a petition for a writ of certiorari granted. After we won the first Rule 23(f) appeal, we had a hard-fought evidentiary hearing in the district court. After class certification was granted again, our team worked over Labor Day to get in our second Rule 23(f) petition. So it was especially gratifying when the Supreme Court eventually clarified the law, and when the Second Circuit faithfully applied that decision here.

Kannon, does your approach to preparing for oral argument change in a case such as this one, where you've argued it earlier in its life cycle? (I guess at the very least you had at least one more precedential opinion to dig into with the Supreme Court's decision on class certification coming after your previous SCOTUS argument for Goldman.)

Shanmugam: I've now argued several cases on remand from the Supreme Court, and it's definitely an advantage to have argued the case once before. That said, the issues on remand were even more fact-intensive; this was a bear of an argument to prepare for. And of course, this panel was last seen upholding class certification, so we needed to bring at least one judge over to our side. The argument was memorable for a lot of reasons: it was the week that I had three arguments in the Second Circuit (this was the second one); it was Aimee's last day at Paul Weiss before leaving for the Solicitor General's Office; and the argument itself was extraordinary, going for almost an hour and a half. It was far from clear what was going to happen coming out of argument.

What can other securities defendants take from this result?

Giuffra: This case has established some important principles. The Supreme Court recognized that defendants can defeat class certification by showing a "mismatch" between allegedly fraudulent statements and "corrective" disclosures. The Second Circuit has added important guardrails to the increasingly used "inflation-maintenance" theory of securities fraud. The plaintiffs' bar often files these cases after an environmental disaster, data privacy breach, employment scandal or government investigation. This decision sends the strong message that such events cannot so easily be enough for a securities class action.

Speaking of all the appellate up-and-down and time spent on the case that I mentioned earlier: Is this all in the flow of the system at work or evidence of some dysfunction?

Shanmugam: It may seem like an odd thing to say when a case takes over a decade to litigate, but it's exactly how the system should work. The Second Circuit and Supreme Court did their job in reviewing the district court's repeated decisions to certify the class. This case presented some very complex legal and factual issues, so it's not surprising that it took the courts some time to sort through all of them. In the end, the Second Circuit reached the right result, and it provided much-needed clarification on the law governing securities class actions.

What will you remember most about this matter?

Giuffra: The importance of not giving up. I've settled many cases, but I didn't want to settle this one. It stuck in my craw that some of our other clients had obtained the dismissal of very similar cases, while Goldman faced the Hobson's choice of going to trial in a high-profile case where the plaintiffs claimed \$13 billion of shareholder losses or paying a big settlement.

Shanmugam: I'll remember the incredible camaraderie that we had on this team—not only between the firms, but with our client. In particular, it was a treat to litigate this case for Goldman's general counsel, Kathy Ruemmler, almost 20 years after we first worked together on the Enron prosecutions when we were young lawyers at the Justice Department. Goldman deserves enormous credit for having the fortitude to litigate this case through to what will hopefully be its conclusion.