

SEC says it's not violating Elon Musk's right to free speech

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Tesla and SpaceX Chief Executive Officer Elon Musk speaks at the SATELLITE Conference and Exhibition in Washington. The U.S. Securities and Exchange Commission is denying allegations that it is violating Musk's free speech rights by trying to enforce a 2018 securities fraud settlement. The commission says in an appeals brief filed Thursday, Dec. 22, 2022, that Musk waived his First Amendment rights by agreeing to the settlement. Credit: AP Photo/Susan Walsh, File

The U.S. Securities and Exchange Commission is denying allegations that it is violating Elon Musk's free speech rights by trying to enforce a 2018 securities fraud settlement.

The commission, in an appeals brief filed late Thursday, said Musk, the chief executive of Tesla, waived his First Amendment rights by agreeing to the [settlement](#) and amendments. It also rejected Musk's argument to scrap the agreement because he signed it under financial duress and didn't understand it.

And the SEC argued that doing its job in the interest of shareholders and markets outweigh Musk's interest in being able to [tweet](#) about Tesla without Tesla's approval.

"Musk's agreement protects investors by ensuring that the information the public uses to make decisions about Tesla securities is accurate and consistent with what Tesla reports," the agency's brief said.

The dispute stems from an October 2018 agreement with the SEC that Musk signed involving his statements on Twitter, which Musk this year purchased for \$44 billion.

Musk and Tesla each agreed to pay \$20 million in civil fines over Musk's tweets about having the "funding secured" to take Tesla private at \$420 per share.

The funding was far from locked up, and the electric vehicle company remains public, but Tesla's [stock price](#) then jumped. The stock now trades around \$122. The settlement specified governance changes, including Musk's ouster as board chairman, as well as pre-approval of his tweets by a Tesla lawyer.

In April, U.S. District Judge Lewis Liman in New York rejected Musk's

bid to throw out the settlement. He also denied a motion to nullify a subpoena of Musk seeking information about possible violations.

Limon's ruling said that Musk made the tweets without getting pre-approval, but the judge later wrote that he didn't mean to pass judgment on that issue.

In his filing with the Second Circuit Court of Appeals, Musk lawyer Alex Spiro contended that the SEC is unlawfully muzzling the Tesla CEO, violating his [free speech rights](#) by continually trying to enforce the settlement.

Musk's appeal brief filed in September says the provision requiring prior approval before tweeting about the electric car company is an illegal "government-imposed muzzle on Mr. Musk's speech before it is made."

But the SEC said in its response that Musk "knowingly and voluntarily waived any First Amendment rights" by signing the settlement.

"Musk suggests that his waiver was somehow invalid, but it strains credulity to believe that the CEO of Tesla did not understand the agreements he negotiated and signed," the SEC wrote.

The settlement, the SEC wrote, doesn't stop Musk from tweeting about Tesla or other matters, and it doesn't place the court or the SEC in a position to review his tweets before publication. "Rather, it required him to adhere to Tesla's policies regarding oversight of material Tesla-related communications. It had no bearing on tweets or other communications unrelated to Tesla," the SEC wrote.

The SEC is investigating whether Musk violated the settlement with [tweets](#) in November of 2021 asking Twitter followers if he should sell 10% of his Tesla stock.

"The possibility that the Commission would continue to evaluate Musk's disclosures—and his compliance with Tesla's controls—was hardly unanticipated," the SEC wrote.

In his appeal brief, Musk attorney Alex Spiro contends that the SEC is continually investigating Musk for topics not covered by the settlement. It asks the court to strike or modify the prior approval provision.

Further, Musk's speech is chilled by the threat of SEC investigations and prosecution for contempt of court, the brief said.

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