

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

MICROSOFT CORPORATION, a  
Washington corporation,

Plaintiff,

V.

JOHN DOES 1-2, CONTROLLING A  
COMPUTER NETWORK AND THEREBY  
INJURING PLAINTIFF AND ITS  
CUSTOMERS,

Defendants.

Civil Action No: 1:21-cv-01346 (LMB/WEF)

**DECLARATION OF HONORABLE S. JAMES OTERO (RET.)**

I, S. James Otero, declare as follows:

1. I currently serve as an independent mediator and arbitrator of complex cases. I was formerly U.S. District Judge for the Central District of California, sat by designation on the United States Court of Appeals for the Ninth Circuit, and am one of only two Central District Court judges to be invited to sit on the United States Court of Appeals for the Federal Circuit. Prior to my service as a federal judge, I was a judge on the Superior Court of California, County of Los Angeles for 14 years. Attached hereto as **Exhibit A** is a true and correct copy of my current curricula vitae. I make this declaration of my own personal knowledge or on information and belief where indicated. If called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. I understand that the Court in the above-referenced case is considering the possibility of appointing me as Court monitor for limited purposes to be defined by the Court.

Pursuant to that understanding and Rule 53(b)(3), I hereby aver that there are no grounds for my disqualification under 28 U.S.C. § 455 with respect to the above referenced case.

3. I have no personal bias or prejudice concerning the above-referenced parties, or personal knowledge of disputed evidentiary facts concerning the proceeding.

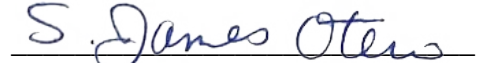
4. I have not served as a lawyer in the matter in controversy and have not worked with another lawyer that, during such association, worked as a lawyer concerning the matter, judged the matter, or have been a material witness in the matter.

5. I have not served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.

6. I do not, individually or as a fiduciary, have a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding. My spouse and any minor child residing in my household do not have a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

7. Neither I nor my spouse, nor a person within a third degree of relationship to either of us, nor the spouse of such a person: (i) is a party to the proceeding, or an officer, director, or trustee of a party, (ii) is acting as a lawyer in the proceeding, (iii) is known to have an interest that could be substantially affected by the outcome of the proceeding, (iv) is to my knowledge likely to be a material witness in the proceeding.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge. Executed this 4 day of August, 2022 in Glendale, California.

  
Hon. S. James Otero (Ret.)



## Hon. S. James Otero (Ret.)

### Case Manager

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## Biography

*Available to conduct virtual/remote mediations, arbitrations and other ADR proceedings on a variety of online platforms, including Zoom.*

**Hon. S. James Otero (Ret.)** comes to JAMS after serving for 30 years as a federal and state court judge in Los Angeles. Judge Otero has sat by designation on the United States Court of Appeals for the Ninth Circuit and is one of only two Central District Court judges to have been invited to sit on the United States Court of Appeals for the Federal Circuit. During his 16 years on the district court bench, Judge Otero presided over hundreds of trials and settlement conferences, including patent, trademark, copyright, defective product, catastrophic injury, securities, employment, class action and MDL antitrust lawsuits. As a senior district court Judge, Judge Otero was regularly sought by colleagues to settle complex disputes where prior settlement conferences proved unsuccessful.

Before his appointment to the federal bench, Judge Otero was a judge on the Superior Court of California, County of Los Angeles, where he served for 14 years, presiding over hundreds of complex civil trials and settlement conferences.

A graduate of Stanford Law School, Judge Otero started his career at the Los Angeles City Attorney's Office. He stayed there for a decade, moving on to one of Los Angeles's most powerful positions, Water and Power, representing various Southern California cities before the Federal Energy Regulatory Commission and in federal courts. He then became regional counsel for Southern Pacific Transportation Company.

Judge Otero now serves as a mediator, arbitrator, special master and case evaluator. In mediations, he has a reputation for being thoroughly prepared and having a vast experience in conducting settlement conferences to assist parties in identifying and overcoming obstacles to resolution. As an arbitrator and special master, Judge

Otero is known for his firm, efficient and timely resolution of matters. As a case strategy evaluator, he brings over 30 years of judicial experience assessing the strengths and weaknesses in complex litigations to achieve the most favorable outcome for all parties. Judge Otero also has hands-on experience handling top-secret, classified and highly sensitive information.

*"The Golden State Warrior: Judge S. James Otero."*

- Law360 "In Chambers"

*Judge Otero is "settlement savvy" and goes "all out to try to settle a case."*

- Los Angeles Daily Journal

*Judge Otero "really is a judge who is on the ball . . . He keeps a very orderly court, which I think promotes an overall feeling of fairness in trials."*

- Los Angeles Daily Journal

## ADR Experience and Qualifications

- 16 years as a U.S. District Court judge for the Central District of California
- 14 years as a California Superior Court judge for the County of Los Angeles
- Original member of the United States District Court's Patent Pilot Program
- Presided over 344 patent cases: A June 2018 Legal Metric report reflects a nearly even split in victory between the patent owner (47.8%) and the accused infringer (52.2%). The same report reflects that of the 13 cases that were later appealed, Judge Otero was affirmed, at least in part, in 90% of those cases.
- Past member of the Ninth Circuit Judicial Conference Executive Committee
- Speaker and panelist at forums hosted by the Association of Business Trial Lawyers, Federal Circuit Bar Association, American Bar Association, State Bar of California, Los Angeles County Bar Association and Los Angeles Intellectual Property Lawyers Association
- Speaker and panelist at international intellectual property-oriented conferences, including the Korea-U.S. Judicial Conference, the China Forum on Intellectual Property, the Taiwan Forum on Patent Damages and programs hosted by the United States Patent and Trademark Office of the Department of Commerce
- Panelist at the University of Southern California Gould School of Law Intellectual Property Institute
- Panelist at the University of Texas Intellectual Property Institute
- Sat by designation on the Federal Circuit and Ninth Circuit
- Judicial Advisor, Civil Jury Trial Project, NYU School of Law
- Panelist, Joint Regulatory Conference, U.S. Securities and Exchange Commission

## Representative Settlements

- Settled **copyright action** by one of the world's largest musical copyright holders against a company that provides in-flight entertainment content to airlines; the case involved 688 works and included claims for direct, willful and contributory infringement
- Settled 124 MDL **product liability claims** arising out of 124 fires that a carrier contends were caused by a manufacturer's defective dryer; plaintiffs asserted strict liability, negligence, design defect, manufacturing defect and failure to warn claims; defendant claimed the fires were caused by the failure to properly install and maintain the dryers
- Settled **product liability** and **personal injury claim** involving a pressure cooker that exploded, causing severe burns to the plaintiff
- Settled **patent infringement** and **trade secret action** involving a gastric balloon device used to treat

obesity; the dispute centered on the question of damages; plaintiff demanded a lump-sum upfront payment; defendants countered with a running royalty based on revenues

- Settled **trade dress** and **copyright infringement action**; plaintiff alleged that defendant's products mimicked the design, shape, size and color scheme of the plaintiff's products; the primary dispute involved whether plaintiff's trade dress was distinctive and/or had acquired secondary meaning
- Settled **§ 1983 action** for false arrest and retaliation for exercise of First Amendment rights; plaintiff, a homeless activist, claimed he was wrongfully arrested for filming police officers in the performance of their duties during a city street cleanup
- Settled **wrongful termination claim** brought by a plastic and reconstructive surgeon against a major hospital that withdrew accommodations that allowed the surgeon, who had disabilities, to treat patients
- Settled **wage and hour case** arising under federal Fair Labor Standards Act and California Labor Code for failure to pay minimum wages, failure to reimburse business expenses and illegal deductions from wages; the case centered on whether the plaintiff, a truck driver, was properly considered an employee or an independent contractor
- Settled **ADA Act claim** for alleged failure to accommodate; a minor, through his guardian *ad litem*, claimed that a teacher and school district subjected the special-needs student to ridicule, embarrassment and discrimination requiring that student to transfer to another school
- Settled **misappropriation of trade secrets, breach of fiduciary duty** and **fraud claims** arising out of a dispute between a startup and its former employee; plaintiff company connects assets to virtual platforms, wherein individuals can obtain interest in the assets using cryptologically secure blockchain transactions; plaintiff terminated defendant, and defendant allegedly failed to return and safeguard plaintiff's intellectual property
- Settled U.S. and China litigation involving **design and utility patents**; the dispute included invalidity and infringement claims; the case settled with the parties agreeing to design around the claimed invention, money damages and covenants not to sue

## Representative Matters

### High-Profile Cases

- Case involving the President of the United States, an adult film star and a nondisclosure agreement (NDA); issues included Article III case or controversy limitations, the testimonial privilege under the Fifth Amendment and the right to be free from prior restraint under the First Amendment; underlying these claims was the issue of the validity of the NDA
- Case of first impression concerning whether the Tokyo Convention requires deference to be given to the aircraft captain's decision, based on reports received from the cabin crew, to act in response to passenger conduct that may jeopardize the safety of the aircraft or of persons or property on board (*Eid v. Alaska Air, Inc.*, 621 F.3d 858 (9th Cir. 2010))
- Class action for injunctive relief brought by Public Counsel on behalf of parents detained in immigration custody by the Department of Homeland Security (DHS), whose minor children were then separated from them by DHS; plaintiffs claimed that the government's separation policy caused damage to their physical and mental health, and sought assessment and treatment of class members
- Case in which the government alleged defendant illegally exported surface-to-air missiles and other military equipment to Libya; as much of the evidence came from intelligence operatives, the case involved complex procedure protocols under the Classified Information Procedures Act, in which the court had to sort and determine the classified information required to be disclosed to the defense

### Antitrust

- Class action and multidistrict court litigation alleging defendant conspired to fix prices on passenger flights between the United States and a country in Asia; the case settled after pretrial rulings with the company agreeing to pay \$65 million to end the price-fixing suit

### Business and Commercial

- Case in which plaintiff alleged that an appliance manufacturer breached an agreement and committed business commercial interference torts by supplying plaintiff with defective products and then retaliating against it for reporting this fact to the Consumer Product Safety Commission
- Case involving a juice beverage company that accused a competitor of deceptively labeling and advertising its blend of flavored juices; the case went to the Supreme Court of the United States on the issue of whether the Food, Drug and Cosmetics Act precluded plaintiff's Lanham Act claim due to conflicts between the two statutes
- Case involving parties unable to agree to the terms of a contract concerning the importation of robotic vacuums into the United States
- Case involving the defense industry; defendant, a foreign manufacturer of aviation equipment, held a contract to supply aircraft parts for a United States Department of Defense program; defendant selected plaintiff to supply one of the critical components of an aircraft part; after years of working together, the relationship ended, and defendant allegedly cut plaintiff out of its contract; plaintiff contended it was entitled to damages

## **Civil Rights**

- Case against a city and police officer for the fatal shooting of decedent; the central issue was whether the officer was objectively reasonable in his belief that there was an immediate threat of serious physical injury at the time he shot the decedent
- Case involving the fatal shooting by police of a mentally or physically impaired woman
- Case involving a news outlet and whether a county violated the First Amendment right of the news outlet by failing to make newly filed court complaints available in a timely fashion
- Civil rights action brought by disabled and homeless veterans seeking to compel the Veterans Administration (VA) to build more supportive housing; a major issue was whether the VA acted outside its authority in leasing VA property to third parties for purposes not benefiting veterans

## **Class Actions and Mass Torts**

- Multidistrict/mass tort action alleging defendant, a pharmaceutical company, had a duty to warn that its drug presented a risk of osteonecrosis of the jaw
- Consumer class action on behalf of persons who cancelled their cruise and, per the cruise ship's cancellation policy, were charged a cancellation fee; a significant issue was whether the cancellation charge was unconscionable and amounted to a liquidated damages provision, which would have violated California law
- Consumer class action settlement alleging that pressurized toilets exploded, causing water damage to purchasers' homes
- Collective action brought by a group of racing associations that operate horse racing events in various states; the case involved the applicability of the Interstate Horseracing Act (IHA) as to defendant, an operator of a free online community for horse racing fans; the crux of the dispute hinged on whether defendant's online contests constituted pari-mutuel wagers under the IHA

## **Employment**

- Wage and hour class action on behalf of current and former hourly drivers of defendant, a transportation and trucking company
- Wage and hour class action settlement on behalf of supermarket employees who claimed their employer did not pay sufficient overtime wages and that their pay statements failed to accurately identify the number of hours they worked
- Wage and hour class action settlement by airport employees who claimed their employer failed to pay them according to their city's living wage ordinance
- Employment retaliation case involving a police officer who claimed he was retaliated against by his police department after he testified in another trial in which another officer sued the police department for violating the Fair Labor Standards Act; the case went to a jury trial, and the jury found for the plaintiff



- Class action labor dispute involving current and former employees of a group of insurance companies who alleged their employers failed to provide meal and rest periods

## **ERISA**

- Employee Retirement Income Security Act case concerning whether the residential treatment received by a beneficiary of the plan was a "medical necessity" as defined by the plan

## **Health Care**

- Qui tam action alleging that defendant, who competed with relator's dialysis company, charged patients for unnecessary procedures and gave kickbacks to a university

## **Insurance**

- Case alleging breach of contract and deceptive business practices brought by owners of 22 different life insurance policies; plaintiffs claimed defendant imposed monthly deduction rate increases that forced plaintiffs to either pay exorbitant premiums that defendant knew would reduce the policy values, or lapse and surrender their policies

## **Intellectual Property**

### **• Copyright**

- Copyright action settlement between one of the world's largest musical copyright holders and a company that provides inflight entertainment content to airlines
- Copyright infringement action involving a celebrity photographer who sued a foreign website for copyright infringement and sued two companies providing the infringing website with privacy services for contributory infringement
- Copyright infringement matter in which plaintiff claimed that defendant copied copyrightable portions of plaintiff's book in writing a screenplay for a film
- Copyright infringement action involving the adult entertainment industry; the case went to trial in 2005, and the jury returned a \$16-million verdict, which was reportedly the largest for adult entertainment producers in a copyright claim

### **• Patent**

- Patent infringement action between two pharmaceutical companies over defendant's product for treatment of a skin disorder; the chief dispute was whether a claim was indefinite under Section 112 of the Patent Act
- Patent infringement action between two pharmaceutical companies looking to capture a market sector for cancer immunotherapy; the patent at issue concerns genetically engineered chimeric antigen receptors, which harness the body's own immune system to target and attack specific antigens that appear on cell surfaces of certain lymphomas; following claim construction and summary judgment motions, the case proceeded to trial; the jury returned a complete verdict for plaintiffs, in the sum of \$752 million in damages
- Patent infringement action between medical technology firms related to improvements to oscilloscopes; the matter settled after claim construction
- Patent infringement action involving online classroom technology; the central issue was whether the claims were directed to patent-ineligible subject matter
- Patent infringement action concerning whether defendant's televisions infringed four of plaintiff's patents directed to LED semiconductor chips and phosphor materials that produced white light when combined; the case settled after claim construction and pretrial rulings
- Patent infringement action involving three patents related to vacuum toilets used in commercial aircrafts; issues included construction of certain key terms and whether the doctrine of assignor estoppel barred defendant from arguing that the asserted patents were invalid

### **• Trademark**

- Trademark infringement dispute between two companies over a word mark; defendant is a foreign-



based company that used the mark first, but only on cosmetic items; plaintiff is a clothing company that began using the mark on clothing in the United States 10 years later; plaintiff argued no likelihood of confusion and that laches barred defendant's infringement claims

- Trademark infringement action involving two noncompeting companies using the same word mark; after performing the Ninth Circuit's *Sleekcraft* analysis, the court determined that plaintiff had not met its burden of establishing a likelihood of consumer confusion
- Trademark infringement and preliminary injunction action brought by the leader of a popular Mexican band against a former member of the band using the mark

## Securities and Finance

- Securities class action stemming from defendant's failure to disclose what should have been a known risk involving faulty foreign manufacturing of certain cosmetic implants
- Securities class action brought by a class of plaintiffs that purchased or otherwise acquired stock in a company that produced materials for mobile communication devices; plaintiffs alleged that representatives of the company made public disclosures that were artificially inflated; a significant issue in the case was whether the heightened pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure apply to all the causes of action in a securities class action complaint or just the cause of action that alleges fraud
- Securities class action resulting from allegedly fraudulent material statements and related courses of conduct pertaining to the emission control systems of an auto manufacturer of diesel vehicles

## Honors, Memberships, and Professional Activities

### Honors

- Profiled in Law360's "In Chambers" series, featuring the nation's leading state, federal, and appellate judges
- Recipient, Distinguished Public Service Award, Los Angeles Intellectual Property Law Association
- Recipient, Benjamin Aranda III Judge of the Year Award, Mexican American Bar Association
- Recipient, Carlos Moreno Judicial Excellence Award, Mexican American Bar Association
- Recipient, Judicial Excellence Award, Philippine American Bar Association
- Recipient, Distinguished Alumni Award, California State University, Northridge
- Member, Ninth Circuit Judicial Conference Executive Committee
- One of only a few United States district court judges to be invited to sit by designation on the United States Court of Appeals for the Federal Circuit
- Nominated by President George W. Bush to serve as a judge on the United States District Court for the Central District of California; confirmed 96–0 by the United States Senate
- Vice President, California Judges Association
- Vice President, California Latino Judges Association

### Memberships and Professional Activities

- **Organizations**
  - Member, Board of Governors, Association of Business Trial Lawyers
  - Member, Judiciary Advisory Board, Association of Business Trial Lawyers
  - Founding Member and Executive Board Member, Judge Paul R. Michel Intellectual Property American Inn of Court
  - Member, Executive Committee for the Litigation Section, Los Angeles County Bar Association
  - Member, Federal Circuit Bar Association
  - Member, Los Angeles Intellectual Property Law Association
- **Speaking Engagements**
  - A Conversation with Justice Anthony Kennedy, Supreme Court of the United States, Ninth Circuit Judicial Conference
  - Federal Circuit Bench and Bar Conference, Case Management: Best Practices
  - University of Southern California Gould School of Law Intellectual Property Institute, Judicial Dialogue on the Protection of Intellectual Property Rights

- Association of Business Trial Lawyers, Effective Use of Demonstrative Evidence
- Federal Circuit Bench and Bar Conference, A Glimpse Behind the Curtain: Sitting by Designation at the Federal Circuit
- S. Securities and Exchange Commission, Joint Regulatory Conference
- Los Angeles County Bar Association, Federal Courts Symposium, Settlement Conferences: Insight on Best Practices
- Federal Circuit Bench and Bar Conference, New Developments and Procedures in the Trial Courts for Managing and Expediting Litigation
- BNA's Patent Litigation Strategies Update, The Judicial Prospective
- Association of Business Trial Lawyers, Trial Presentation Technology
- University of Texas Law, Advanced Patent Law Institute, Judicial Insight and Experiences Hearing and Trying Patent Cases
- University of Southern California Gould School of Law Intellectual Property Institute, A Closer Look at Enforcing Trademarks at the ITC v. U.S. District Court
- Federal Circuit Bench and Bar Conference, The Assessment on the Fifth Anniversary of the Patent Pilot Program
- Korea-US IP Judicial Conference, Speaker and Panelist, IP Rights
- Speaker and Panelist, The China Forum on Intellectual Property
- Panelist, International Air Transport Association, Berlin Conference, The Authority of a Pilot to Divert an International Flight, *Eid v. Alaska Air, Inc.*, 621 F.3d 858 (9th Cir. 2010)
- United States Department of Commerce, Programs Presented in the Republic of Azerbaijan and Morocco, Focusing on Trademarks and Copyrights

## Background and Education

- United States District Judge, U.S. District Court, Central District of California, 2003–2020
- Judge, Los Angeles Superior Court, 1990–2003
- Judge, Los Angeles Municipal Court, 1988–1990
- Regional Counsel, Southern Pacific Transportation Company, 1987–1988
- Attorney, Los Angeles City Attorney's Office, 1976–1987
- J.D., Stanford Law School, 1976
- B.A., California State University, Northridge, 1973

## News

- May 7, 2020  
**Hon. S. James Otero (Ret.) Joins JAMS in Los Angeles**  
<https://www.jamsadr.com/news/2020/hon-s-james-otero-ret-joins-jams-in-los-angeles>

## Practice Areas

- Antitrust & Competition
- Arbitration
- Business & Commercial
- Civil Rights
- Class Action & Mass Tort
- Employment Law
- Energy & Utilities
- Entertainment & Sports
- Federal Law
- Financial Markets
- Governmental/Public Agency
- Health Care
- Insurance
- Intellectual Property
- Personal Injury/Torts
- Pharmaceuticals/Mass Tort

- Securities
- Special Master/Discovery Referee

## Locations

- Los Angeles, California
- Century City, California
- San Diego, California
- Orange County, California
- Inland Empire, California
- San Francisco, California
- Silicon Valley, California

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