



Michael G. Bongiorno

PARTNER

Co-Chair, Securities Litigation and Enforcement Practice Group

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Michael Bongiorno concentrates his practice on securities litigation and enforcement matters. He has served as first-chair lead defense counsel and argued motions to dismiss in dozens of securities class action and derivative suits across the country. His clients have achieved dismissal in the vast majority of such matters. He is an experienced appellate advocate, having successfully argued for the affirmance of many dismissals of securities cases. His successful defense in such cases spans a variety of industries and jurisdictions, and he is a recognized leader in securities litigation and enforcement matters, particularly in matters against biotech, life science, medical device, and medical product companies, and has handled cases in many other industries and areas as well, including energy, construction, education, high tech, shipping, and retail.

His successful representations as lead defense counsel in securities class actions include the dismissal of cases against companies such as Karyopharm Therapeutics Inc., Iterum Therapeutics PLC, Renewable Energy Group, Inc., Synacor, Inc., Top Ships, Inc., Ocular Therapeutix, Inc., Assertio, Inc., Jos. A. Bank Clothiers, Inc., Glencore PLC, Golar LNG, Limited, Electronics for Imaging, Inc., Solid Biosciences, Inc., Argos Therapeutics, Inc., Tetrphase Pharmaceuticals, Inc., LogicBio Therapeutics, Inc., Voyager Therapeutics, Inc., Apollo Education Group, Inc., Nabriva Therapeutics, PLC, ConforMIS, Inc., Britannia Bulk Holdings Inc., Optionable, Inc., DryShips Inc., InVivo Therapeutics Holdings Corp., AVEO Pharmaceuticals, Inc., VeraSun Energy Corp., Technical Olympic, S.A., EDAP TMS, S.A., Medtronic, Inc., AtheroGenics, Inc., and many others.

Mr. Bongiorno also has extensive experience leading internal investigations and securities enforcement matters, including matters before the Securities and Exchange Commission, the Department of Justice, various state securities regulators and FINRA. He regularly advises boards of directors and board committees with regard to disclosures, corporate governance issues, and matters related to litigation, enforcement, derivative and document demands, and crisis management.

Mr. Bongiorno has substantial trial experience in federal and state courts in various contexts. Trial successes include the successful defense of a company and its officers against fraud and other related claims in Massachusetts Superior Court (affirmed on appeal), the successful defense of a finance and investment company in Federal District Court in Boston against claims of breaches of fiduciary duty brought by a closely held corporation, and a five-week trial in the US Bankruptcy Court for the Southern District of New York regarding corporate governance and fiduciary duty claims (resulting in an extraordinarily favorable settlement for his clients). He has tried more than 20 civil and criminal matters in his career in various tribunals, including federal and state court jury and bench trials, as well as AAA and FINRA arbitrations.

Solutions

Class Actions

Commercial Litigation

Cross-Border Investigations
and Compliance

Investigations

Life Sciences

Litigation

Securities Enforcement

Securities Litigation

Trials

Experience

Mr. Bongiorno currently serves as lead counsel for a variety of companies in securities litigation matters. His recent victories at the appellate level include the following decisions:

- *In re Renewable Energy Group, Inc. Sec. Litig.*, 2022 WL 17930 (S.D.N.Y. Jan. 20, 2022), *aff'd* 2022 WL 14206678 (2nd Cir. Oct. 25, 2022).: Obtained dismissal of securities class action matter claiming defendants deceived investors by failing to disclose accounting errors and internal control issues, then successfully argued for the affirmance of the decision on appeal to the Second Circuit.
- *In re Karyopharm Sec. Litig.*, 552 F. Supp. 3d 77 (D. Mass. 2021), *aff'd sub nom. Thant v. Karyopharm Therapeutics Inc.*, 43 F.4th 214 (1st Cir. 2022).: District Court dismissed securities fraud class action against biopharmaceutical company on a variety of grounds, including lack of falsity and scienter, in matter arising out of claims that company failed to disclose serious adverse events and other issues related to its Phase III clinical trials. Successfully argued in favor of affirmance of decision at the First Circuit.
- Successfully argued at the Second Circuit to affirm the dismissal with prejudice and denial of request to replead of securities class action alleging that a technology company made false statements and omissions concerning its projections of annual revenue, internal controls and other issues. *Lefkowitz et al. v. Synacor, Inc., et al.*, 2019 WL 4053956 (S.D.N.Y. Aug. 28, 2019), *aff'd sub nom. Shreiber v. Synacor, Inc.*, 832 Fed. Appx. 54 (2nd Cir. 2020).
- Successfully represented Blue Apron in landmark case, establishing that Delaware corporations may legally enact forum selection clauses requiring Securities Act

class actions to be filed only in federal court. *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. Supr. Ct. 2020).

- Successfully argued at the Second Circuit to affirm on appeal the dismissal of a class action alleging securities fraud and market manipulation arising out of a shipping company issuing large quantities of securities to outside institutional investors and effecting reverse stock splits. *Onel v. Top Ships, Inc.*, 806 Fed. Appx. 64, Fed. Sec. L. Rep. P 100,789 (2nd Cir. 2020). The District Court had dismissed the case without leave to replead. *Brady v. Top Ships Inc.*, 2019 WL 3553999 (E.D.N.Y. Aug. 5, 2019).
- *In re Ocular Therapeutix Sec. Litig.*, 2019 WL 1950399 (D. Mass. April 30, 2019), *aff'd sub nom. Mehta v. Ocular Therapeutix*, 955 F.3d 194 (1st Cir. 2020): obtained dismissal after oral argument in securities class action alleging company failed properly to disclose substance of FDA Form 483 letters in response to manufacturing inspections, then argued successfully for the affirmance of the dismissal at the First Circuit.
- *Battle Constr. Co. v. InVivo Therapeutics Holdings Corp.*, 101 F. Supp. 3d 135, *aff'd sub nom. Ganem v. InVivo Therapeutics Holdings Corp.*, 845 F.3d 447 (1st Cir. 2017): successfully argued for the dismissal of a securities fraud complaint at the federal district court level and affirmance of dismissal before the First Circuit in this action arising out of the defendant company's disclosures related to communications with the FDA regarding the timing of a study of a new biomaterials device.
- *Luger v. McCarthy*, 65 N.E.3d 671 (Mass. App. Ct. 2017): successfully argued before the state trial court for the dismissal of this shareholder derivative action arising out of disclosures related to FDA studies, and for the affirmance of that dismissal before the Massachusetts Court of Appeals.
- Successfully defended a company and its executives at trial in Superior Court in Massachusetts against claims by former officer for breach of contract, fraud, and unfair trade practices, and successfully argued for affirmance of the judgment on appeal. *Wecker v. Performance Indicator, LLC*, 86 Mass. App. Ct. 1118 (2014).

His success in obtaining dismissals for clients in various industries over the years at the trial court level include the following:

- *Goucher et. al v. Iterum Therapeutics, PLC, et. al.*, 2022 WL 17976164 (D. Ill. Dec. 29, 2022) Court dismissed complaint arising out of claims that company failed adequately to disclose supposed flaws in clinical trial design, weaknesses in clinical data, and communications with FDA, finding that information was publicly available, defendants had made adequate risk disclosures, and that defendants' statements were not misleading. Plaintiffs did not attempt to replead or appeal.
- *Hackel v. AVEO*, 2020 WL 4274542 (D. Mass. July 24, 2020): Court dismissed entire case with prejudice based on various warnings and cautionary statements about possible delays in projected timing of announcement of results of Phase 3 clinical trial for drug in development. Plaintiff did not appeal.
- Obtained the dismissal of a securities class action complaint arising out of an alleged failure to disclose a Form 483 letter after an FDA inspection of an overseas contract manufacturing facility for a developer of an antibiotic. *Schaeffer v. Nabriva Therapeutics PLC*, 2020 WL 7701463 (S.D.N.Y. Apr. 28, 2020). The matter was later favorably resolved.
- *Huang v. Assertio*, 2019 WL 1245136 (N.D. Cal. March 18, 2019): successfully argued for dismissal of an action against an FDA-regulated company based on allegations that the company promoted its product off-label and failed to disclose

regulatory risks associated with its sales practices. The court later dismissed all claims with prejudice after an amended complaint, further briefing, and additional oral argument. *Huang v. Assertio*, 443 F. Supp. 3d 1031 (N.D. Cal. 2020). The matter was then favorably resolved on appeal.

- Successfully obtained transfer from New York to issuer’s home state of Massachusetts and then the voluntarily dismissal of a securities class action against a biotech company arising out of disclosures related to the status and enrollment of a clinical trial. *Garity v. Tetraphase*, 2019 WL 2314691, (S.D.N.Y. May 30, 2019).
- Similarly, he has also obtained voluntary dismissals of suits against Voyager Therapeutics, Inc., LogicBio Therapeutics, Inc., and AtheroGenics, Inc. after successfully moving to transfer securities class action suits from federal courts in other jurisdictions to respective companies' home states.
- Obtained dismissal with prejudice in matter in which plaintiff alleged that accounting and internal control issues led to delay in reporting of financial results and stock drop. *In re Electronics for Imaging, Inc. Sec. Litig.*, 2019 WL 397981 (D.N.J. Jan. 31, 2019). The Third Circuit appeal was later dismissed. 2019 WL 5152343 (3rd Cir. Sept. 24, 2019).
- Obtained dismissal of a defendant in a class action alleging securities fraud based on claims of bribery of a foreign official and various statements regarding good corporate governance and internal disclosure controls. *Das v. Rio Tinto, et al.*, 332 F. Supp. 3d 786 (S.D.N.Y. 2018).
- Successfully argued in well-publicized ruling that Massachusetts state courts cannot maintain nationwide class actions in Securities Act cases, leading to a stay of a state court securities case, then obtained a voluntarily dismissal of both the federal and state court cases, ending all pending securities litigation. *Lowinger v. Solid Biosciences, Inc.*, 35 Mass. L. Rptr. 133, 2018 WL 3711305 (Mass. Super. June 24, 2018) and *Watkins v. Solid Biosciences, Inc.*, No 18-cv-10639 (D. Mass.).
- *Harrington v. Tetraphase Pharm. Inc.*, 2017 WL 1946305 (D. Mass. May 9, 2017): obtained dismissal four days after oral argument in a securities fraud claim arising out of stock drop after announcement of disappointing results of a Phase 3 clinical trial. The decision was closely watched and received substantial attention because of its ruling regarding the protection afforded to sales made pursuant to 10b5-1 trading plans. The First Circuit appeal was later dismissed.
- Successfully represented Apollo Education Group in a securities class action lawsuit based on the University of Phoenix's military recruiting practices and its transition to a new online learning platform. The initial amended complaint was dismissed without prejudice after oral argument in July 26, 2017, *Lominkit v. Apollo Education Group, Inc.*, 275 F. Supp. 3d 1139 (D. Ariz. 2017), and after repleading and further oral argument, the matter was then dismissed with prejudice, 2017 WL 633148 (D. Ariz. Feb. 16, 2017). The matter was then favorably resolved on appeal.
- *Cody v. ConforMIS, Inc.*, 199 F. Supp. 3d 409 (D. Mass. 2016): successfully argued for the dismissal of this action arising out of the recall of a medical device as a result of certain manufacturing concerns. No appeal was taken.
- *In re EDAP TMS S.A. Sec. Litig.*, No. 14 Civ. 6069, 2015 WL 5326166 (S.D.N.Y. Sept. 14, 2015): obtained dismissal with prejudice of this action arising out of disclosures related to a “Major Deficiency Letter” from the FDA. No appeal was taken.
- *In re AVEO Pharma., Inc. Sec. Litig.*, No. 1:13-cv-11157-DJC, 2015 WL 1276824 (D.

Mass. March 20, 2015) and after repleading, dismissal with prejudice, slip op. (Nov. 18, 2015), and *Van Ingen v. Ha-Ngoc*, No. 1:14-cv-11672-DJC, slip op. (D. Mass. Apr. 28, 2015): after multiple oral arguments, obtained dismissals of class action and derivative suits arising out of disclosure of the status of FDA application for approval of new drug.

- Obtained dismissal of securities fraud case under Section 10 of the Exchange Act and Section 11 of the Securities Act in the Eastern District of Missouri in 2012 arising out of various transactions and follow-on offerings (*Rabbani v. DryShips Inc.*, 2012 WL 5395787 (E.D. Mo. Nov. 6, 2012)). In addition, he successfully obtained the dismissal of an unrelated shareholder derivative suit against the board of DryShips filed against it in the Republic of the Marshall Islands, where the company was incorporated. He then successfully argued for the affirmance of that dismissal at the Supreme Court of the Marshall Islands, the first such matter argued in that country.
- Represented all defendants in the dismissal of a class action lawsuit filed against former officers of VeraSun Energy Corporation regarding its pricing and hedging practices. *Gissin*, 739 F. Supp. 2d 488 (S.D.N.Y. 2010). Plaintiff did not appeal.
- Obtained the dismissal in 2009 of a class action arising out of a foreign shipping company's initial public offering (*In re Britannia Bulk Sec. Litig.*, 665 F. Supp. 2d 404 (S.D.N.Y. 2009), and the denial in 2010 of a Rule 60 motion to re-open the same matter (2010 WL 446529 (S.D.N.Y. Feb. 9, 2010)). No appeal was taken.
- *In re Medtronic Sec. Litig.*, 618 F. Supp. 2d 1016 (D. Minn. 2009), *aff'd sub nom. Detroit Gen. Ret. Sys. v. Medtronic, Inc.*, 621 F.3d 800 (8th Cir. 2010), obtained dismissal of securities class action that alleged that the failure to warn of adverse events and potential defects of a medical device that eventually led to a voluntary recall of the product constituted an actionable failure to disclose. The 8th Circuit affirmed the dismissal on appeal. The dismissal of a related ERISA class action was also upheld on appeal in *Brown v. Medtronic, Inc.* 628 F.3d 451 (8th Cir. 2010).
- Obtained the dismissal in a securities class action alleging violations of the Exchange Act of 1934 against an entity that served as a broker of natural gas and other energy derivatives (*In re Optionable Sec. Litig.*, 577 F. Supp. 2d 681 (S.D.N.Y. 2008)), and successfully argued against a Rule 60 motion seeking to re-open the same matter in 2009. Plaintiff did not appeal.

Other significant matters include:

- Co-lead trial counsel for Getty Petroleum Marketing's liquidating trust in its trial against its former parent and affiliate entities regarding the sale of the majority of Getty's assets. After five weeks of trial in the Southern District of New York Bankruptcy Court, obtained an extremely favorable settlement for the trust.
- Represented a major New York investment bank in a FINRA enforcement investigation regarding leveraged and inverse ETFs.
- Defended many merger-related cases in state and federal courts nationwide, as counsel both to acquirers and targets, including successfully arguing for the denial of an injunction in 2016 in Delaware Chancery Court in an action seeking to halt a multi-billion dollar transaction.
- Overturned class certification for a medical products company in "a case of first impression" in the First Circuit in the context of defining an efficient market for purposes of the "fraud on the market" doctrine in securities fraud matters; then presented live expert testimony and obtained a decision denying recertification following a full evidentiary hearing in Federal District Court in Boston, after remand from the First Circuit.

Recognition

- Named a Thomson Reuters Stand-out Lawyer – independently rated and selected by clients.
 - Selected by his peers for inclusion from 2020–present in *Best Lawyers in America* for his securities litigation practice.
 - Recognized as a leader in Securities Litigation from 2019–present in *Chambers USA*.
 - Named a 2021 Healthcare/Life Sciences Trailblazer by *The National Law Journal*.
 - Recommended by *The Legal 500 United States* for his securities litigation defense practice 2016–present.
 - Named a "Life Sciences Star" in *LMG Life Sciences* for non-IP litigation and enforcement 2016–present.
 - Recognized by *New York Super Lawyers* and *Massachusetts Super Lawyers* for securities litigation 2012–present.
 - Recipient of New York Legal Aid Society Pro Bono Service Award 2010–14.
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Credentials

EDUCATION

JD, Harvard Law School, 1991

cum laude

AB, Dartmouth College, 1988

summa cum laude

Phi Beta Kappa, Rufus Choate

Scholar, Charles Howe

Woodberry Law Prize

ADMISSIONS

New York

Massachusetts

New Hampshire

GOVERNMENT EXPERIENCE

State and Local Government

*Special Assistant District
Attorney, Middlesex County,
Massachusetts*