



## *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, as well as appeals affirming dismissals in federal and state courts. His clients have achieved dismissal in the vast majority of such matters. His successful defense in such cases spans a variety of industries and jurisdictions, and he is a recognized leader in securities litigation, particularly in matters against biotech, life science, biomaterials, medical device, and medical product companies, and has handled cases in many other industries and areas as well, including energy, education, technology, shipping and retail. His successful representations as lead counsel in securities class actions include the dismissal of cases against companies such as Assertio, Inc., Electronics for Imaging, Inc., Ocular Therapeutix, Inc., Tetrphase Pharmaceuticals, Inc., Apollo Education Group, Inc., ConforMIS, Inc., Britannia Bulk Holdings Inc., Optionable, Inc., DryShips Inc., InVivo Therapeutics Holdings Corp., AVEO Pharmaceuticals, Inc., VeraSun Energy Corp., EDAP TMS S.A., Medtronic, Inc., AtheroGenics Inc., and many others.

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

Mr. Bongiorno has substantial trial experience in federal and state courts in various contexts. Trial successes include the defense of a company and its officers against fraud and other related claims in Massachusetts Superior Court (affirmed on appeal), 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 federal and state courts, including jury trials, bench trials, as well as AAA and FINRA arbitrations.

## Professional Activities

- Former Special Assistant District Attorney, Middlesex County, Massachusetts

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## Solutions

Class Actions

Life Sciences

Securities Litigation

Cross-Border Investigations  
and Compliance

Litigation

Investigations

Securities Enforcement

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## Experience

- - Mr. Bongiorno has had an extraordinary amount of experience and success in defending FDA-regulated entities, such as biotechnology and medical device companies and their officers and directors, in federal securities fraud class action suits, derivative suits, and SEC investigations related to disclosures surrounding the progress of clinical trials, the FDA approval process, and the safety and efficacy of their products. Dismissals of securities fraud and derivative suits in this area in the past several years include the following decisions:
  - *In re Ocular Therapeutix Sec. Litig.*, 2019 WL 1950399 (D. Mass. April 30, 2019): obtained dismissal in securities class action alleging company failed properly to disclose substance of FDA Form 483 letters in response to manufacturing inspections
  - *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.
  - *Harrington v. Tetrphase 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.
  - *Battle Constr. Co. v. InVivo Therapeutics Holdings Corp*, 101 F. Supp. 3d 135, *aff'd*, 845 F.3d 447 (1st Cir. 2017): successfully argued for the dismissal of a securities fraud complaint at the federal district court level and before the United States Court of Appeals for 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 (2017): successfully argued before the state trial court and appeals for the dismissal of this shareholder derivative action arising out of disclosures related to FDA studies.

- *Cody v. ConforMIS, Inc.*, 199 F. Supp. 3d 409 (2016): successfully argued before the federal district court for the dismissal of this action arising out of the recall of a medical device as a result of certain manufacturing concerns.
  - *In re EDAP TMS S.A. Sec. Litig.*, No. 14 Civ. 6069, 2015 WL 5326166 (S.D.N.Y. Sept. 14, 2015): obtained dismissal of this action in federal court in the Southern district of New York arising out of disclosures related to a “Major Deficiency Letter” from the FDA.
  - *In re AVEO Pharma., Inc. Sec. Litig.*, No. 1:13-cv-11157-DJC, 2015 WL 1276824 (Mar. 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. (Apr. 28, 2015): after multiple oral arguments before the United States District Court in Boston, obtained dismissals of both class action and derivative suits arising out of disclosure of the status of FDA application for approval of new drug.
- Mr. Bongiorno has overseen numerous board and audit committee investigations involving a variety of issues, including revenue recognition, corporate misconduct, disclosures, financial reporting and accounting issues. He regularly represents both companies and individuals in investigations and enforcement actions by various regulatory agencies such as the Securities and Exchange Commission and Department of Justice.
  - Mr. Bongiorno currently serves as lead counsel for a variety of companies. His success in various industries over the years includes companies in sectors such as technology, energy, shipping, education, retail, and many others. Representative successes include:
    - 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. 2019).
    - Successfully represented Apollo Education Group in a securities class action lawsuit filed against it 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 in February, 2017, *Lomingkit v. Apollo Education Group, Inc.*, 2017 WL 3172861 (D. Ariz. Feb. 16, 2017), and after repleading, was then dismissed with prejudice, 2017 WL 633148 (D. Ariz. July 27, 2017).
    - 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 in 2013, obtained an extremely favorable settlement for the trust
    - Successful defense at trial in Superior Court in Massachusetts of a privately owned company against claims by former officer for breach of contract, fraud, and unfair trade practices, and affirmance of the judgment on appeal before the Massachusetts Court of Appeals in 2014
    - Represented a major New York investment bank in a FINRA enforcement investigation regarding leveraged and inverse ETFs
    - Represented entire underwriting syndicate of more than twenty investment banks in dismissal with prejudice of all claims against the banks in a 2012

#### Southern District of New York decision

- Defended many merger-related cases in state and federal courts nationwide, as counsel both to acquirers and targets, including the denial of an injunction in 2016 in Delaware Chancery Court in an action seeking to halt a multi-billion dollar transaction
- 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 secondary offerings (*Rabbani v. DryShips Inc.*, 2012 WL 5395787 (E.D. Mo. Nov. 6, 2012))
- 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)
- Obtained the dismissal in 2009 of all claims in a Section 11 class action filed in the Southern District of New York 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))
- Obtained the dismissal in a securities class action in the Southern District of New York in 2008 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
- 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, after remand from the First Circuit
- Defended a variety of direct and derivative claims against individual directors and officers alleging breaches of fiduciary duties and other similar allegations in a variety of contexts, including matters before Chancery Court in Delaware and elsewhere

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## Recognition

- Recommended by *The Legal 500 United States* in 2016, 2017 and 2018 for his securities litigation defense practice
- Named a Life Sciences Star in the 2016–18 editions of *LMG Life Sciences* for non-IP litigation and enforcement
- Recognized by *New York Super Lawyers* for Securities Litigation in every year since 2012
- 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*