

WilmerHale Press Release on SEC, DOJ Dismissal of Charges Against Michael Carroll

JULY 23, 2021

JULY 21, 2021 - In an extraordinary triumph of justice, former Brixmor CEO Michael Carroll has been cleared of all criminal and civil securities fraud charges brought simultaneously by the US Attorney's Office in the Southern District of New York (SDNY) and the Securities and Exchange Commission (SEC), respectively.

On July 19, 2021, the SEC announced that it was voluntarily dismissing all charges against Mr. Carroll in *SEC v. Carroll, et al.*, a case filed on August 1, 2019. The SEC's decision to "end the litigation of this matter" followed an earlier decision by SDNY to dismiss the charges that were simultaneously filed against Mr. Carroll, having concluded that the evidence did not support the allegations against him.

The decisions of the SEC and SDNY followed years of advocacy by WilmerHale and Cleary Gottlieb lawyers. The WilmerHale team included [Peter Neiman](#), [Anjan Sahni](#), [Bill McLucas](#), [Brenda Lee](#), [Michelle Nicole Diamond](#), [Jeremy Schiffres](#), [Spencer Todd](#) and [Emma Bennett](#), and the Cleary Gottlieb team included Victor Hou, Rathna Ramamurthi, and Brad Lenox.

Mr. Carroll spent 24 years working his way up from an entry-level leasing position to become CEO of the company that would come to be known as Brixmor Property Group, a real estate investment trust (REIT). In 2016, following a flawed five-week investigation into allegations raised through internal channels, Brixmor asked Mr. Carroll, along with Brixmor's Chief Financial Officer and two other accounting employees, to resign.

Mr. Carroll was subsequently indicted in 2019 and charged by SDNY with conspiracy to commit securities fraud, securities fraud, and making false statements and certifications in filings with the SEC. In a separate civil action, the SEC charged him with securities fraud, alleging violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, Regulation G, and Rule 13a-14 thereunder. In their charging documents, SDNY and the SEC alleged that Mr. Carroll had conspired with others to fraudulently "smooth" same property net operating income ("SP-NOI") growth, a non-GAAP metric that reflects a REIT's performance in a given quarter compared to the same quarter in the prior year. The purpose of this non-GAAP metric is to disclose net operating income of a stable set of properties, so as to present performance of a consistent, comparable

portfolio. The government's theory was that Mr. Carroll and others sought to manipulate Brixmor's SP-NOI numbers to project consistent growth in three ways: (1) by storing income in a deferred income account for later use, (2) by including lease settlement income (portions of payments made by tenants to get out of their leases early) in reported SP-NOI numbers without disclosing this practice, and (3) by making adjustments to prior-period results to increase SP-NOI growth in the current period.

Mr. Carroll's defense team conducted its own methodical review of the evidence around these issues and ultimately uncovered documents and evidence that undermined the government's theory and any notion that Mr. Carroll had engaged in any fraudulent conduct. Mr. Carroll—an active participant in his own defense—and his legal team decided to present this information to the government rather than await a trial on the merits, a decision that carried significant risk in terms of exposing his defenses in advance of trial.

The joint WilmerHale-Cleary Gottlieb team made extensive presentations to SDNY and to the SEC concerning accounting adjustments that were alleged to be part of the purported fraud and argued that the evidence in fact demonstrated Mr. Carroll's innocence. Among other things, the defense team demonstrated that the most significant of the deferred accounting entries were proper corrections of old bookkeeping errors, not fraud; that the allegedly fraudulent lease settlement income practices in fact were widely disclosed to investors and auditors who deemed the practice as appropriate; and that allegedly fraudulent adjustments made to prior period performance were likewise both disclosed to and highlighted for the auditors, who expressed no concern with those adjustments.

Following those presentations, SDNY asked the court to dismiss the indictment against Mr. Carroll, stating "we do not believe it is in the interest of justice to continue this prosecution." In a letter to the court on March 31, 2021, the government explained that after it "received information, including presentations from counsel," the government "concluded that we cannot prove beyond a reasonable doubt" the charges alleged.

The next day, April 1, Chief Judge Colleen McMahon entered an order of *nolle prosequi*, dismissing all charges. Then on May 24, in another extraordinary ruling, Chief Judge McMahon granted a request by counsel for Mr. Carroll to expunge Mr. Carroll's record, commenting: "It is indeed unfortunate that the government's pre-arrest investigation was not sufficiently thorough, such that the government did not learn of the evidence that convinced it that it could not prove him guilty of any crime."

Following these decisions, on July 19, the SEC notified Judge Analisa Torres that the Commission was voluntarily dismissing the related civil securities fraud claims. Judge Torres ordered the dismissal on the same day.

WilmerHale partner Peter Neiman applauded the decisions to dismiss the criminal and civil charges against Mr. Carroll: "The SEC has now reached the only conclusion warranted by the evidence: Michael Carroll acted honestly and appropriately at all times, and the charges should never have been brought."

Brenda Lee, also a partner with WilmerHale, added that “the legal team is pleased that its efforts on behalf of Mr. Carroll were successful in persuading both the US Attorney’s Office and the SEC to do the right thing—drop these charges which were simply not supported by the evidence.”

Victor Hou of Cleary Gottlieb stated: “We are gratified that the SEC joined the SDNY in hearing us out and by now dismissing charges that should never have been brought against Michael Carroll in the first place.”

As for Mr. Carroll, he made the following statement: “I am grateful that my name has been cleared and for the tireless work by my legal team from WilmerHale and Cleary. While I am pleased with the outcome, the decision to bring these ill-considered charges was based on a less than robust investigation and incomplete information. These were cases that never should have been brought, and I’m grateful that government authorities finally reached that conclusion.”

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