



## Jonathan Rosenberg

Partner

New York

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Jonathan Rosenberg, firmwide Co-Chair of the Securities Litigation Practice, is a trial lawyer who focuses on securities, M&A, derivative, insurance-coverage, and other complex commercial litigation, as well as internal investigations and white collar criminal defense. Prior to joining the Firm, Jonathan was an Assistant US Attorney in the Southern District of New York for six years, where he spent two-and-a-half years in the Securities and Commodities Frauds Unit and served as Deputy Chief of the Criminal Division. Jonathan has tried dozens of cases in government and private practice including federal and state jury and bench trials, and has been lead counsel in many FINRA arbitrations. Jonathan has also argued many times before federal and state appellate courts.

Jonathan has been recognized by *Chambers USA* since 2009, where clients note he is “a best-in-class securities lawyer.” He is recognized in *The Legal 500 US* as a “Leading Lawyer” for Securities litigation defense. He was recently recognized by *New York Law Journal* as a “New York Trailblazer,” and *Benchmark Litigation* names him a Securities “Local Litigation Star (NY).” He has also earned the “Litigator of the Week” distinction from *The American Lawyer* for financial services litigation achievements, and *Law360* named him a Securities MVP.

### Admissions

#### *Bar Admissions*

New York

#### *Court Admissions*

US District Court, Eastern District of Wisconsin, Eastern District of Texas, and Eastern and Southern Districts of New York

US Court of Appeals, First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits

US Supreme Court

### Education

Northwestern University, J.D., 1984: *cum laude*; Order of the Coif; Managing Editor, *Northwestern University Law Review*

Columbia University, M.A., 1981

Queens College, B.A., 1980: *magna cum laude*; Phi Beta Kappa

## Experience

- Led an O'Melveny team as national coordinating counsel for all individual court and FINRA arbitration cases against a financial institution arising out of its sales of auction rate securities. Lead trial counsel in several FINRA arbitrations. Obtained dismissal in February 2011 of a putative class action alleging market manipulation and fraud in connection with ARS sales. *In Re: Bank of America Corp. Auction Rate Securities (ARS) Marketing Litigation*, MDL No. 09-2014 (JSW) (N.D. Cal. 2011). Also obtained a declaratory judgment in January 2013 that the broker-dealer's former ARS customer waived its right to arbitrate claims relating to its ARS purchases by serving as lead plaintiff in a federal putative class action against the broker-dealer relating to the same purchases. *Merrill Lynch, Pierce, Fenner & Smith Incorporated, et al. v. N.R. Hamm Quarry LLC*, 3:12-cv-02127-JSW (N.D. Cal. 2013).
- Obtained dismissal in September 2019 of Section 10(b) claim against a US-listed Chinese online service provider and its CEO in one of the first shareholder class actions seeking to exploit China's ban on initial coin offerings. *In re Xunlei Limited Securities Litigation*, 1:18-cv-00467-PAC (S.D.N.Y.)
- Obtained dismissal in June 2020 of shareholder class claims that a private-equity firm aided and abetted fiduciary breaches of the seller company's board members in a US\$1.4 billion go-private sale to a private equity firm. *Morrison v. Berry, et al.*, C.A. No. 12808-VCG (Del. Ch. 2019)
- Won dismissal of private equity firm and investment manager in action alleging that they participated in alleged wrongful conduct of the firm's portfolio company. *In re Trilegiant Corporation*, 2014 WL 1315846 (D. Conn. Mar. 28, 2014).
- Representing a private equity firm in a stockholder class action alleging the firm breached fiduciary duties as a controlling shareholder and aided and abetted director breaches in connection with the going-private sale of a public chemical company. *Frank Funds v. Apollo Global Management, et al.* (Del. Ch. 2020-0130-JTL)
- Successfully defended a large investment bank against shareholder derivative claims that by underwriting and providing advice concerning a biopharma company's two secondary stock offerings, our client aided and abetted breaches of fiduciary duties by the issuer's board. The Court dismissed the complaint on demand-futility grounds, and the Delaware Supreme Court affirmed in 2017. *Park Employees & Retirement Board Employees Annuity & Benefit Fund of Chicago vs Richard M Smith et al.*, (Del. Ch. No 11000-VCG).
- Lead trial counsel for the directors of a stock exchange in putative class action litigation challenging the exchange's merger with another company as a breach of the directors' fiduciary duties. The case settled during the injunction hearing with no change in the merger consideration. *In re New York Stock Exchange / Archipelago Merger Litigation*, Index No. 60146/05 (NY Sup. Ct., NY Cty.).
- Co-tried the defense of an eight-figure theft-of-corporate-opportunity and breach-of-fiduciary duty claims. Negotiated a settlement mid-trial resulting in client paying nothing.
- Won dismissal of a putative securities class action against a financial institution arising from alleged misrepresentations about its credit losses and subprime-asset exposure in connection with new preferred-stock issuances. *NECA-IBEW Pension Trust Fund v. Bank of America Corp.*, No. 10 Civ. 440, 2012 WL 3191860 (S.D.N.Y. Feb. 9, 2012); *NECA-IBEW Pension Trust Fund v. Bank of America Corp.*, No. 10 Civ. 440, 2013 WL 620257 (S.D.N.Y. Feb. 15, 2013) (denying motion for leave to amend as futile), *aff'd*, (2d Cir. June 15, 2015).

- Lead counsel for financial institution since 2009 in defending numerous federal and state cases alleging that financial institution succeeded to RMBS-related liabilities of mortgage loan originator and servicer. Obtained dismissal in April and October 2011 of successor-liability claims, alleging de facto merger and implied assumption of liability, and seeking to hold financial institution liable for billions of dollars in potential liability. *Allstate Insurance Company et al v. Countrywide Financial Corp. et al*, 11-cv-05236 (C.D. Cal. 2012). Lead trial and appellate counsel for an O'Melveny team handling remaining successor-liability claims against the financial institution.
- Obtained summary judgment dismissal in July 2013 of a multi-billion dollar federal antitrust class action against a private equity firm, alleging that the firm and other leading private equity firms conspired to allocate the market for large leveraged buyout transactions. *Klein et al. v. Bain Capital Partners, LLC*, No. 07 Civ. 12388 (D. Mass. July 16, 2013).
- Obtained dismissal in February 2009 of a US\$4 billion putative securities class action against a financial institution regarding alleged manipulation by short-selling hedge funds of a pharmaceutical company's stock. Previously obtained dismissal of a state court RICO action against the financial institution based on similar allegations. *Del Giudice v. S.A.C. Capital Mgmt., LLC, et al.*, No. 2:06-CV-01413 (D.N.J. 2009).
- Represented the special committee of a public media company's board of directors in a comprehensive internal investigation and resulting litigation in Delaware, Illinois, and Canada. The investigation and ensuing civil litigation resulted in ousting former senior management, the company obtaining nearly two hundred million dollars in recoveries, and criminal convictions of the company's former senior management. See *Hollinger International Inc. v. Black, et al.*, 844 A.2d 1022 (Del. Ch. 2004).
- Negotiated a favorable settlement on eve of jury trial in a major breach of contract and breach of fiduciary duty litigation against an insurer by its former global real estate division head. *Fitzpatrick, et al. v. American International Group, Inc. et al*, No. 1:10-cv-0142 (MHD) (S.D.N.Y.)
- Obtained dismissal in March 2015 of a putative class action against a financial institution alleging that it wrongfully debited customer accounts for charges associated with "payday" loan transactions. *David Andrichyn, et al., v. TD Bank, N.A.*, 14-CV-3863 (E.D. Pa 2014).
- Obtained summary judgment dismissal in 2012 for a public snack food and beverage manufacturer of a putative ERISA class action arising out of a change to the company's executive deferred compensation plan. *Cram v. PepsiCo Exec. Income Deferral Comp. Prog.*, 08 Civ. 10627, Memorandum Decision and Order (S.D.N.Y. Sept. 27, 2012).
- Represented a financial institution in shareholder class action regarding its acquisition of a mortgage finance company. The case settled with no change in the merger consideration. *Ark. Teacher Ret. Sys. v. Caiafa*, 996 A.2d 321 (Del. 2010). Obtained dismissal of derivative claims relating to same acquisition and successfully defended the dismissal to California Court of Appeals. *Villari v. Mozillo, et al.*, 2nd Civil No. B231432 (Cal. App.2d 2012).
- Obtained dismissal of Securities Act claims against an underwriting syndicate regarding the 2012 nationalization of a foreign energy company. *Monroe County Employees' Retirement System v. YPF Sociedad Anonima, et al.*, 13-Civ. 00842 (S.D.N.Y. 2013).
- Obtained plaintiffs' agreement to dismiss an underwriting syndicate in a Securities Act class action following fact discovery. *Fan Zhang, et al., v. Groupon, Inc., et al.*, 12-Civ. 02450 (N.D. Ill. 2012).

- Obtained dismissal of breach of fiduciary duty and fraud claims against a hedge fund manager. *Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955 (Del. Ch. 2004).
- Obtained district court dismissal in 2011, and Second Circuit affirmance in February 2013, of a complaint against an investment bank seeking treble damages under the Antiterrorism Act for engaging in financial transactions alleged to be tied to terrorism. See *Rothstein, et al. v. UBS AG*, 2013 WL 535770 (2d Cir. 2013).
- Negotiated favorable settlements in a major *qui tam* False Claims Act litigation against mortgage servicers alleging misrepresentations to the U.S. Treasury Department in connection with the servicers' participation in the Home Affordable Modification Program. *United States of America et al., v. Ocwen Loan Servicing LLC*, 4:12-cv-00543-ALM (E.D. TX 2017); *United States ex rel. Fisher v. JPMorgan Chase Bank, N.A.*(E.D. TX).
- Obtained dismissal in January 2016 of a *qui tam* action against a large insurance company alleging violations of the Medicare Secondary Payor rules. *USA ex rel Takemoto v. ACE Ltd. and ESIS, Inc. et al.*, 1:11-cv-00613 (W.D.N.Y.).
- Obtained dismissal in November 2008 of a complaint that sought to compel a public electronic games company to include in its proxy statement a shareholder proposal to adopt a by-law opting out of the federal proxy access framework. *Bebchuk v. Electronic Arts, Incorporated*, 1:08-cv-03716-AKH (S.D.N.Y.).
- Obtained dismissal in January 2010 of claims against the directors of a financial services firm in a bondholder putative class action in the District of Delaware arising out of the company's debt exchange offers. *Murchison v. GMAC LLC, et al.*, Civ. No. 09-169-SLR (D. Del. 2010).
- Obtained dismissal of securities fraud claims against an underwriter of mortgage-backed securities. *Manufacturers Life Ins. Co. v. Donaldson Lufkin & Jenrette Securities Corp.*, 2000 Fed. Sec. L. Rep. (CCH) 90,987 (S.D.N.Y. May 31, 2000).
- Obtained dismissal of a securities class action complaint against a former officer of a pharmaceuticals company alleging misrepresentations regarding the safety profile of the company's pain medications. *In Re: Pfizer Securities Litigation*, 04-Civ. 09866 (S.D.N.Y. 2004).
- Obtained dismissal of Section 10(b) claims against a member of the audit committee of a theatre production company in bankruptcy. *In re Livent, Inc., Noteholders Securities. Litigation*, 174 F. Supp. 2d 144 (S.D.N.Y. 2001); *In re Livent, Inc., Securities Litigation.*, 78 F. Supp. 2d 194 (S.D.N.Y. 1999).

In addition to successfully handling numerous significant securities and other complex commercial cases in state courts, federal courts, and in arbitration, Jonathan's white collar criminal and regulatory experience is similarly deep and varied. He has represented more than seventy individuals and entities in various federal and state criminal, and SEC and SRO enforcement matters. Jonathan also regularly advises companies, boards of directors, and special committees regarding regulatory and corporate governance matters, internal investigations, and M&A litigation matters.

Among his more significant public criminal matters are the following:

- Senior member of the defense trial team that obtained the 1997 acquittal of a manufacturer of thermal fax paper in a criminal price-fixing trial.
- Obtained probation, and then the early termination of probation, for a record company executive in the largest payola case the US Department of Justice has ever filed.

- Represented five employees of a bankrupt cable company in the SEC's and the Southern District of New York US Attorney's office investigation.
- As a prosecutor, proved after a two-week evidentiary hearing that the former CEO of a finance company, who had pleaded guilty to orchestrating a US\$400 million ponzi scheme, violated his cooperation agreement, resulting in a twenty-year sentence.
- Tried and convicted a former Wall Street high yield bond research analyst for participating in a kickback scheme involving the firm's bond trader.
- Obtained the conviction of the former chief of staff to a New Jersey governor for participating in a kickback scheme involving a municipal securities offering.

## Corporate & Government Experience

- Assistant US Attorney, US Attorney's Office in the Southern District of New York, including two-and-a-half years in the Securities and Commodities Frauds Task Force
- Deputy Chief, Criminal Division, US Attorney's Office

## Professional Activities

### Clerkships

- Honorable David N. Edelstein, US District Court, Southern District of New York

### Articles

- "The Pandemic's Impact on Interim Operating Covenants: Part II: An Update," *The M&A Journal* (February 2021)
- "The Pandemic's Impact on Interim Operating Covenants: Lessons From The Now-Resolved Sycamore - L Brands Dispute," *The M&A Journal* (August 1, 2020)
- "Dismantling the SEC's Federal Court Disgorgement Authority," *New York Law Journal* (January 10, 2020)
- "Ninth Circuit Creates Circuit Split for Section 14(e) Claims Regarding Tender Offers," *Westlaw Journal Mergers & Acquisitions* (May 2018)
- "Controlling-Shareholder Related-Party Transactions Under Delaware Law," Harvard Law School Forum on Corporate Governance and Financial Regulation (August 2017)
- "Loose Lips Sink Ships: The Importance of Director Confidentiality Programs," *Corporate Counsel Quarterly* (September 2009)
- "Making Sense of New York's Corporate Opportunity Doctrine," *New York State Bar Journal* (June 2008)
- "The Truck Stops Here: Closing the Loopholes in Loosely Written Public Company Advancement and Indemnification Bylaws," *Corporate Counsel Quarterly* (July 2006)
- "New York Securities Litigation Landscape Affected by Subtle Changes," *New York Law Journal* (December 16, 2002)
- "Reviewing Standards for Judicial Relief in ADR," *New York Law Journal* (January 16, 2002)
- "Recantation Defense in Federal Perjury Prosecutions," *New York Law Journal* (March 23, 1998)

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- “Criminal Liability of Private Citizens for Extortion Under Color of Official Right,” *New York Law Journal* (December 21, 1995)

## **Honors & Awards**

- Ranked Top Tier by *Chambers USA* in New York for Litigation: Securities (2018-2022)
- Named a Local Litigation Star for Securities by *Benchmark Litigation* (2019-2023)
- Recognized by *New York Law Journal* as a “New York Trailblazer” (2020)
- Recognized by *The Legal 500 US* (2012-2022)
- “Litigator of the Week,” *American Lawyer Litigation Daily* (February 9, 2012)
- “Most Valuable Player in Securities Litigation,” *Law360* (2011)
- A New York “Super Lawyer” for Securities Litigation, Criminal Defense: White Collar, Business Litigation, *Law & Politics Media Inc.* (2008-2022)