

Schnader Defeats \$8M Malpractice Suit Over Deal Advice

By **Morgan Conley**

Law360 (March 17, 2021, 7:44 PM EDT) -- A New York federal judge has ended malpractice claims against Schnader Harrison Segal & Lewis LLP lodged by a Canadian investment company seeking to blame the firm for \$10 million in losses from an investment in an electric vehicle company.

U.S. District Judge Lewis J. Liman said Monday that Terracap Ventures Inc. and an affiliate aren't the ones who took the financial hit when an investment in an electric vehicle company "went south," but rather its president and other investors. Since none of them are involved in the litigation nor were they clients of the firm, there is no basis for the \$8 million in damages sought through the suit, the court held, granting summary judgment.

And even if Terracap was the one that suffered losses, it can't absolve itself of its own decision-making by "unfairly" pinning the blame on Schnader Harrison and its former attorney Joel Handel for a deal it "knowingly entered into but that apparently went south," the court said.

Judge Liman said there is no reason Schnader Harrison and Handel should continue to face malpractice claims from Terracap, which attempted to hold Handel and the firm liable for failing to warn Terracap that it lacked the rights to block a future stock dilution of Brammo Inc., a manufacturer of batteries and electric motorcycles.

The court **agreed with the firm and Handel** that while it may be legal malpractice to explain a contract provision incorrectly, precedent holds that it is not legal malpractice to not explain a contract provision they were never asked to weigh in on.

"Defendants cannot be negligent for failing to do something that they were never asked to do and never agreed to do," Judge Liman said.

The ruling **ends the suit** that focused on Terracap's deal in 2014 with Oregon-based Brammo. In that deal, Terracap put up \$3.5 million and intellectual property assets it had from the liquidation of an Israeli electric vehicle technology company in exchange for chunks of Brammo Series D preferred and common stock.

Terracap alleged Handel, who had represented the company for some two decades on numerous corporate matters, was aware that Terracap's primary concern in the deal was having "unambiguous contractual protections" against stock-value dilution as Brammo raised future capital. It claimed that as a result of Handel's advice, the company incurred \$8 million in damages, including the cost of the stock itself and the money it spent maintaining the joint venture at the heart of the transaction after the stock was diluted.

The company had **attempted to argue** Handel and the firm were aware that Aviva Investors Affiliated Funds, which was at the time of the deal already a Brammo investor and held a board seat, was a likely source of additional funding and was in a position to get voting control over the Series D stock, according to its complaint.

But the terms negotiated by Handel on Terracap's behalf didn't provide "full anti-dilution protection" and ultimately opened the door to Brammo amending its corporate charter and in 2015 issuing a new

Series R preferred stock. That transaction also converted all other preferred stock to common stock and vastly diluted Terracap's ownership stake.

"In these circumstances, defendants were not required to assume that plaintiffs lacked the knowledge of a reasonable person engaged in the transaction in which plaintiffs were engaged, especially where the undisputed evidence shows plaintiffs knew enough to distinguish between full ratchet anti-dilution rights and weighted average anti-dilution rights," Judge Liman said in the opinion Monday. "It was reasonable, as a matter of law, for defendants to assume that if plaintiffs had a question and did not understand such a central provision, plaintiffs would have asked."

Counsel for Schnader Harrison and Handel declined to comment on the decision Wednesday. Counsel for Terracap didn't immediately respond to requests for comment.

Terracap and affiliate EVIP Canada Inc. are represented by Frank S. Occhipinti and Anthony Princi of Stewart Occhipinti LLP.

Schnader Harrison and Handel are represented by Howard I. Elman and David L. Barres of Elman Freiberg PLLC.

The case is EVIP Canada Inc. et al. v. Schnader Harrison Segal & Lewis LLP et al., case number 1:18-cv-11456, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Andrew Strickler, Kevin Penton and Emma Cueto. Editing by Kelly Duncan.

Correction: A previous version of this story misspelled the name of counsel for Schnader Harrison. The error has been corrected.