

After a Wild 4-Year Ride, Wilson Sonsini Duo Has \$136M in Proof that Foreign Bribery Isn't a Victimless Crime

Moe Fodeman and Michael Sommer at Wilson Sonsini convinced a federal judge in Brooklyn to order hedge fund manager Och-Ziff Capital Management Group to pay restitution to clients who lost mining rights in a judicial bribery scandal in the Democratic Republic of the Congo.

By Ross Todd

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To anyone who might have the notion that foreign bribery is a victimless crime, take note: U.S. District Judge Nicholas Garaufis on Wednesday ordered a foreign subsidiary of hedge fund manager Och-Ziff Capital Management Group to pay \$138 million in restitution to former shareholders in a company which lost out on mining rights in the Democratic Republic of the Congo due to the fund's role in a judicial bribery scandal in the Central African country.

The judge's restitution order marks the end of a whirlwind four-year ride for **Moe Fodeman** and **Michael Sommer** at **Wilson Sonsini Goodrich & Rosati** and their clients, a group of former shareholders in Canadian mining company Africo.

Africo got hit with a double-whammy of judicial corruption in the DRC more than a decade ago. In 2006, a former Africo employee obtained a \$3 million ex parte default judgment for wrongful termination against the company and convinced a DRC court—in a scheme backed by Israeli businessman Dan Gertler—to auction off Africo's interest in the Kalukundi Mine to satisfy the judgment. After learning about the default judgment in 2017, Africo sought relief from the DRC's Supreme Court. But Gertler, with funding from an Och-Ziff subsidiary, paid bribes to have the decision delayed until he could mount a takeover bid for Africo's stake in the mine at a significant discount.

According to Fodeman and Sommer, all that backroom finagling was hidden from their clients until they read a Wall Street Journal article nearly a decade later detailing that the U.S. government was set to seek more than \$400 million from Och-Ziff to settle foreign bribery



Michael Sommer and Moe Fodeman of Wilson Sonsini Goodrich & Rosati (Photo: Courtesy Photo)

charges as part of a deferred prosecution agreement with the Justice Department and civil settlement with the U.S. Securities and Exchange Commission.

After the story broke, the shareholders quickly put together a steering committee to hire counsel. Fodeman, who served for nearly seven years as a federal prosecutor in the U.S. Attorney's Office for the Eastern District of New York, which was prosecuting the case, had a unique pitch: The shareholders should pursue recovery via the Mandatory Victim Restitution Act, the 1996 law which entitles victims of certain crimes to restitution for their losses.

"Everybody was talking about bringing civil cases and suing them in federal court," Fodeman said in a phone interview Wednesday. "We'd be at this for the next 20 years if that was our angle."

The fact pattern the Africo shareholders were sitting on was uniquely suited to harness the MVRA. Cases

brought under the Foreign Corrupt Practices Act often involve the payment of some government official to win a contract where it's hard to determine whether other companies that lost out on the contract are the victim. "This was different," Fodeman said. "They paid judges to steal something concrete."

The other nugget Fodeman was sitting on: Restitution is mandatory if the crime of conviction comes under Title 18 of the United States Code. Although the FCPA is in Title 15, the defendant pled guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA, and conspiracy is in Title 18.

"That little angle gave us the comfort that we should be getting restitution, and that it was mandatory," said Fodeman, who more typically represents individuals facing federal criminal charges. "The ironic thing is that in our line of work we're always begging the prosecutors to let our clients plead guilty to conspiracy, because it has a five-year maximum."

"Here it ended up hurting the defendant."

Sommer, who did a stint as a prosecutor in the Southern District of New York more than 20 years ago, said that when he and Fodeman were hired they thought they had a pretty straight-forward case. He said they had some initial conversations with government lawyers that indicated they saw things the same way.

"What happened was that, all of a sudden to our surprise, the government did a 180-degree turn and was suggesting to the court that we were not victims," Sommer said. "All of a sudden we were litigating not just against the defendant, but against the government."

The pair's clients said in court filings that the government's change of heart could have been for fear that the restitution might come from the \$213 million already set aside as a criminal penalty. But the government took the position in its own court papers that any damages to the Africo shareholders were too speculative to merit restitution since calculating them would depend on "many variables and unknowns that go far beyond the facts on which the parties are operating from the plea agreement."

Och-Ziff and its defense lawyers at **Cahill Gordon & Reindel**, meanwhile, took the position that the Africo shareholders were merely the part-owners of a company

that owned a DRC company that owned another DRC company that owned mining rights, not the underlying mine itself. They further argued that though they lost those mining rights in the default judgment in the DRC courts, they got a portion of them back in the takeover deal with Gertler.

After two years of litigation, in August 2019 Garaufis, however, sided with the shareholders in finding they were due restitution. "While the attenuated nature of claimants' interest in Africo's mining rights may make calculating restitution more difficult, it does not preclude claimants from being victims," he wrote.

Another year-plus was taken up with gathering expert reports about the value of the mining rights from all sides. Settlement talks between the parties landed the restitution amount at \$138 million, including \$136 million of Wilson Sonsini's clients and an additional \$2 million for other shareholders identified by the government in the meantime.

David Levine, chief legal officer for the defendant, which has emerged from a federal monitorship and changed its name to Sculptor Capital Management, said at the remote sentencing hearing before Garaufis Wednesday that "my company is a very different company today than the one that existed at the time of the offense."

Sommer, for his part, said that it was remarkable to "beat back both the defendant and the government and secure that kind of recovery for our clients, who never dreamed they'd see a penny."

Fodeman added: "It was nice to get justice for these people after literally 12 years of fighting to be made whole."

"For some of our clients, this really is life-changing," he said.

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