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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Ex-Juniper GC's Bid To Toss Backdating Suit Nixed

By **Erin Fuchs**

Law360, New York (May 18, 2009) -- A federal judge has rejected a motion to dismiss a class action against the former general counsel of Juniper Networks Inc., who is accused of deceiving the public to orchestrate and conceal a \$900 million backdating scheme.

On Friday, Judge James Ware of the U.S. District Court for the Northern District of California, San Jose Division, denied the motion to dismiss filed by lawyers for ex-general counsel Lisa C. Berry, who also served as vice president, secretary and as a member of the stock option committee.

The judge upheld securities fraud and control person claims against Berry, who has also come under fire from the U.S. Securities and Exchange Commission for allegedly playing a role in backdating at Juniper and KLA-Tencor Corp.

Berry's lawyers argued in their motion that the class hadn't adequately pleaded her primary liability for lying or omitting facts, alleged her scheme liability, provided the facts to infer scienter or stated a claim for control person liability.

But Judge Ware determined that the plaintiffs had sufficiently alleged primary and misstatement liability and primary scheme liability. They also fulfilled strict scienter requirements under the Private Securities Litigation Reform Act, he found.

The PSLRA requires plaintiffs to specify the particular statements they allege to be misleading.

Judge Ware found that the plaintiffs in this case had pointed to at least two documents that they sufficiently alleged were false and misleading. The first was a proxy statement that plaintiffs alleged neglected to disclose that Juniper had backdated in-the-money stock options for officers, directors or employees between June 1999 through 2003.

The second document was a notes statement that plaintiffs claimed didn't reveal facts related to mispricing stock options and backdating; plaintiffs also alleged that the notes statement inflated its ratio of earnings to fixed charges.

Furthermore, Judge Ware found that the plaintiffs had sufficiently alleged substantial participation on Berry's part, since they claimed that she not only signed the proxy and note statements but also helped draft them.

Judge Ware cited the U.S. Supreme Court's decision in *Stoneridge Investment Partners LLC v. Scientific-Atlanta Inc.*, which precluded private actions against "mere aiders and abettors in a securities fraud."

The defendant in this case argued that Stoneridge, therefore, precluded the suit against Berry. But Judge Ware disagreed. He determined that this case could be distinguished from Stoneridge because the Supreme Court case had involved a third-party that issued financial statements.

"Unlike Stoneridge, this case involves allegations of the systematic perpetration and concealment of improper stock option granting practices by a high-level corporate insider, who is also alleged to have had a role in the dissemination of false financial information," Judge Ware concluded.

The lead plaintiff in this class action against Berry is the New York City Employees Retirement System, and the class members consist of investors who bought securities between Jan. 15, 2003, and Aug. 10, 2006.

The attorneys representing the plaintiffs were not immediately able to reach their clients for comment on Monday, and the attorneys for the defendants did not immediately respond to a request for comment.

In August 2007, Juniper reached a settlement with the U.S. Securities and Exchange Commission over alleged backdating practices without admitting or denying any wrongdoing.

The SEC, which did not fine the company, alleged that Juniper hid expenses from investors and exaggerated income as a result of its practice of backdating options grants for employees and executives between 1999 and 2003.

Lowey Dannenberg Cohen & Hart PC represent the plaintiffs in this case, and Orrick Herrington & Sutcliffe LLP represent the defendant.

The case is *New York City Employees' Retirement System et al. v. Lisa C. Berry*, case number 08-00245, in the U.S. District Court for the Northern District of California, San Jose Division.

--Additional reporting by Erin Coe and Shannon Henson