



Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Optionable Shareholder Suit Dead In The Water

By **Christine Caulfield**

Law360, New York (October 21, 2008) -- A federal judge overseeing shareholder litigation against Optionable Inc. has dismissed the suit after denying a bid by the lead plaintiffs to examine a Deloitte & Touche LLP report they argued was crucial to their case against the energy derivatives brokerage.

Issuing his order Monday, Judge Lewis Kaplan of the U.S. District Court for the Southern District of New York said he saw no merit in the plaintiffs' motion to partially lift the discovery stay, which had, at any rate, been filed late.

The lead plaintiff, KLD Investment Management LLC, asked the judge for relief from the stay two weeks ago, saying the auditor's report would form the cornerstone of a revamped complaint. The original complaint accused Optionable of hiding improper deals with its largest client, Bank of Montreal.

KLD had been granted time to seek leave to file an amended lawsuit after Judge Kaplan dismissed its initial complaint on Sept. 15 for lack of proof of fraud. But it had only until Oct. 6 to seek the leave, and did not seek to lift the stay until Oct. 8, the judge said.

"Plaintiffs offer no explanation for their failure. I see no reason to relieve them of their default," Judge Kaplan said, adding that even if he set aside their tardiness he would see no justification for the motion.

The judge said the plaintiffs had been aware of the existence of the Deloitte report for "many months" and had relied on press reports of it in their opposition to Optionable's dismissal motion.

The plaintiffs had told the court the report, which was commissioned by BMO, contained the results of a probe into a "serious mismarking of the book of natural gas options" involving Optionable and its employees.

Judge Kaplan had ruled the complaint deficient despite the press reports, saying “the articles did not attribute BMO's losses to Optionable's mispricing or suggest that Optionable purposely gave inaccurate prices.”

“In these circumstances, plaintiffs obviously seek discovery of the Deloitte report in the hope that they will turn up something beyond what appeared in the press reports,” said the judge, noting that the plaintiffs were seeking an exception to the discovery stay under the Private Securities Litigation Reform Act that would “swallow the rule.”

“As the Ninth Circuit has held, it is impermissible to lift the PSLRA discovery stay 'so that [plaintiffs] might uncover facts sufficient to satisfy the act's pleading requirements',” Judge Kaplan said. “The 'stay of discovery' provision of the act clearly contemplates that 'discovery should be permitted in securities class actions only after the court has sustained the legal sufficiency of the complaint.’”

Optionable was first sued by shareholders in the wake of BMO's announcement in April 2007 that it would take losses of between \$300 million and \$400 million due to its natural gas options trading made through Optionable and would suspend its business relationship with the brokerage.

KLD, which was appointed lead plaintiff last November after claiming a loss of \$3.7 million when the value of Optionable's stock tanked, represented the class of plaintiffs who bought securities in the brokerage between Jan. 22 and May 14 2007.

Named as individual defendants in the consolidated complaint were Optionable founder Mark Nordlicht, former CEO Kevin Cassidy, Chairman and President Edward J. O'Connor, Chief Financial Officer Marc-Andre Boisseau and former Director Albert Helmig.

The plaintiffs alleged that the defendants violated securities laws by making misleading statements about the company's business prospects and growth. Optionable should have disclosed that its business was extremely dependent on BMO, which accounted for 86 percent of the brokerage fees, the complaint alleged.

The company was only able to retain BMO because it helped the bank's star options trader, David Lee, mismark options, falsify the trading price at which BMO traded those options and hide massive losses incurred by BMO as a result of those trades, according to the complaint.

“But for this fraudulent and undisclosed practice, Optionable would not have had BMO as a client and would not have been as successful as it was,” the complaint said.

The litigation alleged that while the stock was trading at artificially inflated prices, “company insiders” sold shares worth about \$28.9 million.

The plaintiffs claimed that the defendants' statements regarding the quality of Optionable's brokerage services concealed the fact that it had schemed to misprice BMO's options.

They also claimed certain statements failed to disclose BMO's contribution to the company's revenue, concealed Cassidy's prior convictions for credit card fraud and tax evasion, and misled investors into thinking BMO would not cut its ties with Optionable.

But Judge Kaplan, in granting the defendants' motion to dismiss, said the complaint had relied on insufficient facts and inferences to support the claims.

"Many of plaintiffs' factual allegations are not based on an adequate source or are unsupported by the purported source," Judge Kaplan said. "Those allegations that are based on adequate sources do not support the inference that defendants' statements were false or misleading with regard to a material fact."

The lead counsel for KLD is Kahn Gauthier Swick LLC. Optionable is represented in this matter by WilmerHale LLP. Cassidy is represented in this matter by Lawrence Gelber, O'Connor by Liam O'Brien and Helmig by Connell Foley LLP.

The case is In re: Optionable Securities Litigation, case number 1:07-cv-03753, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Anne Urda and Shannon Henson