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Ex-Nortel Execs Beat Long-Simmering Securities Fraud Suit

By **Jack Newsham**

Law360 (April 11, 2018, 6:41 PM EDT) -- A nine-year-old investor lawsuit against two former top executives at defunct telecommunications firm Nortel Networks Corp. was dismissed by a New York federal judge on Wednesday, with the court ruling that there was no suggestion of misdirection or knowledge of wrongdoing by company officials.

A judge said the suit didn't contain all the required elements of a stock fraud case. She rejected the argument that then-Nortel CEO Mike Zafirovski's gung-ho remarks about the company's turnaround required him to admit that business was down, which the suit claimed was vital context. She also shot down arguments that then-chief financial officer Pavi Binning's sign-off on the goodwill figure was fraudulent, saying the number is a matter of opinion, not fact.

"Nortel's history of financial losses and the relatively low value of its non-goodwill assets were unremarkable in the context of the company's troubled history," U.S. District Judge Denise Cote wrote. "An expectation that Nortel's new management would be able to rebuild the company's fortunes does not constitute an intent to deceive or defraud investors."

The suit said Zafirovski and Binning overstated the company's business potential and overvalued its goodwill in a suit filed shortly after Nortel declared bankruptcy in 2009 and paused until last year, when its bankruptcy plan was approved.

According to the ruling, the suit accused the Nortel executives of taking too long to write down its goodwill, which was valued at $2.6 billion in May 2008. By that time, the complaint said, the company should have realized that Zafirovski's supposed turnaround was not going to happen and written down that figure, but they didn't do so until September.

That month, the ruling said, Nortel knocked $1.1 billion off its goodwill. In March 2009, after the company had filed for bankruptcy, it said it wrote down another $1.3 billion off of the goodwill valuation, the judge wrote. The suit accused the Nortel execs of keeping the figure high so they could get more money in a private placement, the decision said.

At bottom, the court ruled, the plaintiff investor, David Lucescu, didn't make a strong enough showing that the defendants knew their actions were wrong, known as scienter. The investor's argument relied strongly on confidential witnesses who spoke more about what the executives knew or should have known than their states of mind or their beliefs, Judge Cote wrote.

Joel Haims, a lawyer at Morrison & Foerster LLP who represented the defendants, called the ruling “a complete vindication” and said he believed it would survive even if Lucescu appealed.

"I think this is a very well-reasoned decision,” he said, noting that Judge Cote “found no material misstatement and she found no scienter."

Lawyers for the plaintiff didn’t respond to comment requests.

Lucescu is represented by Samuel H. Rudman, David A. Rosenfeld, Erin W. Boardman and Alan I. Ellman of Robbins Geller Rudman & Dowd LLP.

The Nortel executives are represented by Joel C. Haims, Jamie A. Levitt, James J. Beha II, Steven T. Rappoport, Lauren Gambier and Christina L. Golden of Morrison & Foerster LLP.

The case is Lucescu v. Zafirovsky et al., case number 1:09-cv-04691 in U.S. District Court for the Southern District of New York.

--Editing by Alanna Weissman.

Update: This story has been updated with additional counsel information.
