

Lawsuit Filed on Drkoop Options

By Amanda Bronstad

Austin Business Journal – November 19, 1999

Dr. C. Everett Koop, chairman of Austin-based drkoop.com Inc., is expected to file a deposition this month in a \$30 million shareholder lawsuit against the Internet health care company.

The suit was filed last spring in Travis County district court against drkoop.com, CEO Don Hackett and Vice Chairman John Zaccaro by former drkoop.com consultant Andy Agrawal.

Claiming lost share value of \$21 million plus \$9 million in damages, Agrawal says drkoop.com executives neglected to recognize 31,000 initial and 40,000 additional stock options they offered to Agrawal in June 1998 while he was consulting for the company, then called Empower Health Care Corp.

Over the past year, the company has undergone one initial public offering and various stock splits that have boosted Agrawal's original claim to 525,000 shares, says Don Taylor of Taylor & Dunham, which is representing Agrawal.

"Most startups have stock options; Andy was given stock options at a number that, with splits, is now 525,000," Taylor says. "The stock has traded at up to \$40. Forty times 525,000 is \$21 million. [And there's] a claim for punitive damages."

Koop's attorney, Kent Caperton of Winstead Sechrest & Minick, says his client will testify that he delegated resolution of the issue to the company's executives.

"The essence of his testimony is it's a management issue, not a board issue. He was not involved," Caperton says. "He lives in New Hampshire. He hires the CEO and entrusts the CEO to do the job. One of those jobs is dealing with personnel."

Executives of drkoop.com have denied all of Agrawal's claims in the case, which is set for trial Feb. 14.

The defendants filed a counterclaim, denying Agrawal any stock options and claiming he overcharged the company for consulting services he performed last fall.

Still at issue is whether Agrawal has a claim to the initial 31,000 stock options.

"Stock options have to be earned, and he never earned them," Caperton says. "He was not an employee; he was a consultant. Agrawal seems to think these are gifts given like manna falling out of heaven."

"When they're given to employees and consultants, they're given as incentives for keeping those people committed to the company and performing to high standards. They oftentimes have vesting periods in them. Agrawal, for many reasons, is not entitled to any stock."

But Agrawal claims the 31,000 stock options were part of a written consulting agreement for services between June and August 1998. Agrawal also served as drkoop.com's general counsel.

According to Agrawal's filing in the case, Hackett offered another 40,000 in stock options to Agrawal via email to lure the consultant into leaving Software Colony, a South Carolina firm founded by Agrawal, to become chief operating officer and executive vice president of drkoop.com.

Agrawal claims in his filing that after he left Software Colony he was promised a full-time position with drkoop.com.

The filings include a company organizational flow chart that lists Agrawal as executive vice president as well as his Empower Health business card. Court documents also name an attorney – Alan Schoenbaum of Akin, Gump, Strauss, Hauer & Feld – who performed services for drkoop.com and received 15,000 stock options.

Agrawal also claims the company entered into a second consulting agreement with him, which was never legally terminated. Caperton says drkoop.com ended the agreement days after it was created.

"You have qualified and unqualified options," says Lou Kokernac of Austin investment advisement firm Martin Capital Advisers. "Qualified are an incentive and have preferential tax options. They're restricted to employees. Non-qualified options can go to anyone, including consultants and lawyers. If a judge says a contract is valid, the options vested are owed to [the shareholder]."

Agrawal's options were part of a capitalization table compiled by the company listing shares authorized and issued in a company, Taylor says. Yet the pending case, not those shares, was the only Agrawal mention in drkoop.com's IPO filings with the Securities and Exchange Commission.

The company's COO is now Dennis Upah, and its chief financial officer is Susan Georgen-Saad. CEO Hackett owns 19 percent of the company, and Koop owns 7 percent. The company, which was ranked the No. 1 health Web site in September by PC Data magazine, received more awards than any other e-commerce healthcare site at the eHealthcare World Awards in New York earlier this month.

In the three months ended Sept. 30, drkoop.com posted \$2.9 million in revenue and reported a net loss of more than \$40 million for the three months ended June 30.

[Travis County District Court, Cause No. A 99CA-042-94]