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8
9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11
12 SECURITIES AND EXCHANGE
COMMISSION,
13
14 Plaintiff,
15
16 vs.
DEREK COHEN, MICHAEL
17 FLEISCHLI and ROBERT HERMAN,
Defendants.

Case No: '14CV1189 JAH NLS
COMPLAINT

18
19
20 Plaintiff Securities and Exchange Commission (“SEC”) alleges:

21 **JURISDICTION AND VENUE**

22 1. The Court has jurisdiction over this action pursuant to Sections 21(d)(1),
23 21(d)(3)(A), 21(e) and 27(a) of the Securities Exchange Act of 1934 (“Exchange
24 Act”), 15 U.S.C. §§ 78u(d)(1), 78u(d)(3)(A), 78u(e) & 78aa(a).

25 2. Venue is proper in this district pursuant to Section 27(a) of the Exchange
26 Act, 15 U.S.C. § 78aa(a), because certain of the transactions, acts, practices and
27 courses of conduct constituting violations of the federal securities laws occurred
28 within this district.

1 **SUMMARY**

2 3. This is an insider trading case involving three former salesmen at
3 Qualcomm Incorporated (“Qualcomm”). Through their work at Qualcomm, the
4 Defendants Derek Cohen, Michael Fleischli, and Robert Herman learned that
5 Qualcomm planned to announce that it was going to acquire Atheros
6 Communications, Inc. (“Atheros”). Armed with this information, they bought
7 Atheros stock and options on January 4, 2011. Just hours after they made their
8 purchases, a news article announced Qualcomm’s acquisition of Atheros (the
9 “Atheros Acquisition”). The next day, January 5th, Qualcomm issued its own news
10 release announcing the acquisition.

11 4. News of the Atheros Acquisition caused Atheros’ stock price to increase
12 from \$37.02 on January 3 to \$44.64 per share on January 5. This was a 20.3% two-
13 day increase in the stock price, and its trading volume increased from 1.2 million
14 shares on January 3 to 70 million shares on January 5.

15 5. The three Defendants made quick profits when they sold their Atheros
16 securities after news of the Atheros Acquisition became public. Cohen made
17 \$200,000; Fleischli made \$3,000; and Herman made \$30,000.

18 6. By engaging in this conduct, Defendants Cohen, Fleischli, and Herman
19 each violated the antifraud provisions of Section 10(b) of the Exchange Act,
20 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. The SEC
21 seeks permanent injunctions prohibiting future violations, disgorgement of ill-gotten
22 gains together with prejudgment interest thereon, and civil penalties under
23 Section 21A of the Exchange Act (the Insider Trading and Securities Fraud
24 Enforcement Act of 1988).

25 **THE DEFENDANTS**

26 7. **Derek Montague Cohen**, age 52, resides in San Diego, California.
27 During the relevant period, Cohen was a Qualcomm employee. He worked in the
28 Qualcomm sales department as a Sales Director reporting to the head of North

1 American Sales. He worked at Qualcomm from 1995 to September 2013, when he
2 was terminated for violations of the company's insider trading policy.

3 8. **Michael Edward Fleischli**, age 43, resides in Newport Beach,
4 California. During the relevant period, Fleischli was a Qualcomm employee. He
5 worked in the Qualcomm sales department as a Regional Sales Manager reporting to
6 the head of North American Sales. He worked at Qualcomm from 2007 to
7 September 2013, when he was terminated for violations of the company's insider
8 trading policy.

9 9. **Robert William Herman**, age 52, resides in San Diego, California.
10 During the relevant period, Herman was a Qualcomm employee. He worked in the
11 Qualcomm sales department as a Sales Director reporting to the head of North
12 American Sales. He worked at Qualcomm from 2007 to September 2013, when he
13 was terminated for violations of the company's insider trading policy.

14 **THE ALLEGATIONS**

15 **A. Qualcomm and Atheros**

16 10. Qualcomm is a Delaware corporation headquartered in San Diego,
17 California. It sells wireless communication products and services and also licenses
18 related intellectual property. Qualcomm's common stock trades on the NASDAQ
19 Global Select Market under the symbol "QCOM" and is registered with the SEC
20 pursuant to Section 12(b) of the Exchange Act.

21 11. Atheros is a Delaware corporation headquartered in San Jose, California.
22 Atheros' common stock traded on the Nasdaq Global Select Market under the symbol
23 "ATHR" and was registered with the SEC pursuant to Section 12(b) of the Exchange
24 Act until Atheros was acquired by Qualcomm in an acquisition announced on
25 January 5 and completed on May 24, 2011.

26 **B. Qualcomm Had Clear Insider Trading Policies**

27 12. Qualcomm had an insider trading policy which clearly explained that it
28 would be illegal for employees to trade securities when they possessed material non-

1 public information. Qualcomm employees regularly acknowledged receiving the
2 company's code of business conduct which included the insider trading policy.

3 13. Cohen, Fleischli, and Herman all acknowledged receipt of the
4 Qualcomm insider trading policy.

5 14. The Qualcomm insider trading policy included the following description
6 of when information has become public: "Information is considered to be available
7 to the public only when it has been released to the public through appropriate
8 channels, e.g., by means of a press release, or a statement from one of the company's
9 senior officers, and enough time has elapsed to permit the investment market to
10 absorb and evaluate the information." This insider trading policy also listed
11 examples of material information, including "potential acquisitions or sales of
12 significant businesses or significant partnering agreements." Finally, the Qualcomm
13 insider trading policy included the following warning: "Those of us who possess
14 material nonpublic information have a legal obligation not to use such information for
15 personal gain. Under the law, if you, during the course of your work, obtain material
16 nonpublic information which could affect the price of a company's stock, you can be
17 considered an 'insider.' This means that you would be subject to legal actions, both
18 civil and criminal should you buy or sell that company's stock on the basis of such
19 material nonpublic information. . . . The use of material nonpublic information to
20 gain personal benefit is as illegal with respect to a few shares of stock as it is with
21 respect to a large number of shares."

22 15. During the relevant period, Cohen, Fleischli, and Herman were
23 employed in the Qualcomm North American Sales Group in San Diego, California
24 with about a dozen other salesmen. Qualcomm regularly provided confidential
25 business information to its sales team. Salesmen were required to keep the
26 information confidential and to use the information only for the purpose of
27 Qualcomm's business. Qualcomm provided confidential business information to its
28 sales team through company e-mail messages and "Monday Meetings" led by the

1 head of the North American Sales Group.

2 **C. Defendants Learned Material Non-Public Information about the Atheros**
3 **Acquisition**

4 16. Qualcomm's planned acquisition of Atheros was non-public and
5 Qualcomm took steps to keep this information confidential. For example, Qualcomm
6 and Atheros executed confidentiality agreements and used a code name to refer
7 internally to the planned acquisition.

8 17. On Thursday, December 30, 2010, Cohen, Fleischli, and Herman learned
9 through an e-mail from a sales director in their sales group that Qualcomm would be
10 making an important announcement during the Consumer Electronics Show the
11 following week. The sales director reminded the Defendants about this with another
12 e-mail on Monday, January 3, 2011.

13 18. Also on January 3, 2011, the head of North American Sales at
14 Qualcomm e-mailed his staff about the planned announcement, stating: "To reiterate
15 the importance of this timeline I've been informed this letter will coincide with a
16 major announcement from the company. Steve Mollenkopf will be co-signing the
17 letter." At the time of this e-mail, Mollenkopf was Qualcomm's Executive Vice
18 President. Qualcomm has since promoted him to Chief Executive Officer. Having a
19 high-level executive sign the letter showed that it was an important announcement.
20 Therefore, this e-mail message emphasized the importance and urgency of
21 Qualcomm's upcoming announcement.

22 19. Cohen, Fleischli, and Herman each received the December 30 and
23 January 3 e-mails.

24 20. On January 3, 2011, the head of North American Sales at Qualcomm
25 held a sales team meeting at Qualcomm's San Diego office during which he
26 discussed Qualcomm's upcoming major announcement. He mentioned the target
27 company name "Atheros" in the meeting. He also provided sufficiently detailed
28 information about the target company such that attendees who did not hear the target

1 name could figure out that the acquisition target was Atheros. Finally, he reminded
2 the attendees that the information relating to the acquisition was confidential.

3 21. Both Cohen and Fleischli attended this January 3 meeting.

4 **D. Cohen, Fleischli, and Herman Traded in Atheros Securities While in**
5 **Possession of Material Non-Public Information**

6 22. Cohen, Fleischli, and Herman had never traded in Atheros securities
7 before January 4, 2011. All three of them, however, purchased Atheros securities on
8 January 4, 2011 after exchanging a series of suspiciously-timed phone calls before
9 their trades. Specifically, Fleischli traded first; then, Fleischli called Cohen, who then
10 traded; and finally, Cohen then called Herman, and then Herman traded.

11 23. Cohen, Fleischli, and Herman traded in Atheros securities while in
12 possession of, and on the basis of, material non-public information provided by
13 Qualcomm. Specifically, they knew, and traded on the basis of, non-public
14 information regarding the Atheros Acquisition.

15 **1. Cohen Engaged in Insider Trading**

16 24. On January 4, 2011, Cohen engaged in insider trading when he executed
17 multiple purchases of Atheros stock and two different types of Atheros options.
18 Cohen made his trades with multiple limit orders.

19 25. Cohen made the following trades in Atheros securities:

Description of Trade	Date of Purchase	Amount of Purchase	Date of Sale	Proceeds from Sale	Profit
Bought Atheros 20,400 shares common stock	1/4/2011 9:30 a.m. - 12:09 p.m.	\$826,702	1/5/2011	\$909,407	\$82,705
Bought Atheros 300 February call options	1/4/2011 9:24 a.m.	\$28,177	1/6/2011 1/7/2011 1/12/2011	\$135,937	\$107,760

Description of Trade	Date of Purchase	Amount of Purchase	Date of Sale	Proceeds from Sale	Profit
Bought Atheros 75 June call options	1/4/2011 11:30 - 11:36 a.m.	\$21,789	1/12/2011	\$36,699	\$14,910
TOTAL		\$876,668		\$1,082,043	\$205,375

26. Cohen also traded in Qualcomm securities. On January 4, 2011, Cohen purchased 2,000 shares of Qualcomm stock for about \$100,800 to cover a short position he had taken in September 2010.

2. Fleischli Engaged in Insider Trading

27. On January 4, 2011, Fleischli engaged in insider trading when he purchased Atheros securities.

28. Fleischli made the following trades in Atheros securities:

Description of Trade	Date of Purchase	Amount of Purchase	Date of Sale	Proceeds from Sale	Profit
Bought Atheros 500 shares common stock	1/4/2011 6:59 a.m.	\$18,779	1/4/2011 12:13 p.m.	\$21,786	\$3,007

3. Herman Engaged in Insider Trading

29. On January 4, 2011, Herman engaged in insider trading when he purchased Atheros securities. Herman purchased Atheros stock with a limit order of \$37.17 per share using margin in his securities brokerage account.

30. Herman made the following trades in Atheros securities:

Description of Trade	Date of Purchase	Amount of Purchase	Date of Sale	Proceeds from Sale	Profit
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1	Bought Atheros	1/4/2011	\$148,670	1/4/2011	\$177,988	\$29,318
2	4,000 shares	11:21 to		12:43 p.m.		
3	common stock	11:59 a.m.				

4

5 **E. Announcement of the Atheros Acquisition**

6 31. The first public information about Qualcomm's planned acquisition of
7 Atheros happened on Tuesday, January 4, 2011 at exactly 12 Noon (PST) when the
8 *New York Times* published a news article online in its "Dealbook" section entitled
9 "Qualcomm is Said to be Set to Buy Atheros for \$3.5 Billion." This *New York Times*
10 article stated the deal could be "as soon as Wednesday." The article explained that
11 the deal was for \$45 per share, which represented "a roughly 22 percent premium to
12 where Atheros' stock traded midday on Tuesday." The article emphasized that "a
13 purchase of Atheros would be Qualcomm's largest acquisition ever." After this
14 article was published, Atheros' stock price and stock trading volume increased on
15 January 4.

16 32. The official announcement of the acquisition came on January 5, 2011 at
17 4:30 a.m. (PST) when Qualcomm and Atheros issued a joint news release entitled
18 "Qualcomm to Acquire Atheros, Leader in Connectivity & Networking Solutions."
19 The companies announced that they had "entered into a definitive agreement whereby
20 Qualcomm intends to acquire Atheros, a leader in innovative technologies for
21 wireless and wired local area connectivity in the computing, networking and
22 consumer electronics industry. The acquisition is intended to help accelerate the
23 expansion of Qualcomm's technologies and platforms to new businesses beyond
24 cellular and provide access to significant new growth opportunities." The
25 announcement confirmed the acquisition price of \$45 per share. After this news
26 release, Atheros' stock price and stock trading volume increased again on January 5.

27 33. After news of the Atheros Acquisition was publicly released on
28 January 4 and 5, 2011, Atheros' stock price increased materially from \$37.02 to

1 \$44.64 per share, a \$7.62 per share increase, or 20.3%. Its stock trading volume
2 increased materially from 1,223,933 shares to 70,214,919 shares.

3 **F. Defendants Quickly Profited from Their Insider Trading**

4 34. Cohen sold his Atheros securities shortly after it was publicly reported
5 that Qualcomm would acquire Atheros. He made a profit of about \$200,000.

6 35. Fleischli sold his Atheros securities shortly after the Atheros Acquisition
7 was announced publicly. He made a profit of about \$3,000.

8 36. Herman sold his Atheros securities shortly after it was publicly
9 announced that Atheros would be acquired by Qualcomm. He made a profit of about
10 \$30,000.

11 **G. Cohen and Herman Misled Qualcomm about Their Insider Trading**

12 37. Qualcomm conducted an internal investigation regarding trading in
13 connection with the announcement of the Atheros Acquisition.

14 38. Cohen gave Qualcomm inconsistent explanations of his trading. In July
15 2011, Cohen told Qualcomm in its internal investigation that he did not know about
16 the acquisition before his Atheros trades. He said that he learned about the
17 acquisition because there had been a press leak about the acquisition and that he
18 traded after the leak. In a subsequent interview, Cohen added a new explanation,
19 emphasizing that he purchased Atheros securities on January 4 after seeing an
20 increase in its trading volume on January 3.

21 39. In July 2011, Herman told Qualcomm in the internal investigation the
22 same story as Cohen – that he learned about the Atheros Acquisition because it had
23 been leaked the day before Qualcomm’s announcement.

24 40. The story told by both Cohen and Herman that they first heard about the
25 acquisition through the news media was misleading because the *New York Times*
26 published the article about Qualcomm’s planned acquisition of Atheros at noon on
27 January 4 (PST), after the insider trading by Cohen and Herman.

28

1 **FIRST CLAIM FOR RELIEF**

2 **Fraud In Connection With The Purchase Or Sale Of Securities**
3 **Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder**
4 **(against Defendants Cohen, Fleischli, and Herman)**

5 41. The SEC realleges and incorporates by reference paragraphs 1
6 through 40 above.

7 42. Defendants, by engaging in the conduct described above, directly or
8 indirectly, in connection with the purchase or sale of a security, by the use of means
9 or instrumentalities of interstate commerce, of the mails, or of the facilities of a
10 national securities exchange, with scienter:

- 11 a. employed devices, schemes, or artifices to defraud;
- 12 b. made untrue statements of a material fact or omitted to state a
13 material fact necessary in order to make the statements made, in
14 light of the circumstances under which they were made, not
15 misleading; or
- 16 c. engaged in acts, practices, or courses of business which operated
17 or would operate as a fraud or deceit upon other persons.

18 43. By engaging in the conduct described above, the Defendants violated,
19 and unless restrained and enjoined will continue to violate, Section 10(b) of the
20 Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, the SEC respectfully requests that the Court:

23 **I.**

24 Issue findings of fact and conclusions of law that each Defendant committed
25 the alleged violations.

1 **II.**

2 Issue judgments, in a form consistent with Fed. R. Civ. P. 65(d), permanently
3 enjoining each Defendant and his agents, servants, employees and attorneys, and
4 those persons in active concert or participation with any of them, who receive actual
5 notice of the judgment by personal service or otherwise, from violating Section 10(b)
6 of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R.
7 § 240.10b-5.

8 **III.**

9 Order each Defendant to disgorge all ill-gotten gains from his illegal conduct,
10 together with prejudgment interest thereon.

11 **IV.**

12 Order each Defendant to pay civil penalties under Section 21A of the Exchange
13 Act (the Insider Trading and Securities Fraud Enforcement Act of 1988).

14 **V.**

15 Retain jurisdiction of this action in accordance with the principles of equity and
16 the Federal Rules of Civil Procedure in order to implement and carry out the terms of
17 all orders and decrees that may be entered, or to entertain any suitable application or
18 motion for additional relief within the jurisdiction of this Court.

19 **VI.**

20 Grant such other and further relief as this Court may determine to be just and
21 necessary.

22 Dated: May 12, 2014

23 *s/ John W. Berry*

24 _____
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