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10 SECURITIES AND EXCHANGE COMMISSION

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION
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16 SECURITIES AND EXCHANGE COMMISSION, Case No. CV-15-
17 Plaintiff, COMPLAINT
18 v.
19 JOHN MCENERY III, JOHN MCENERY IV and
MICHAEL RAWITSER,
20 Defendants.
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23 Plaintiff Securities and Exchange Commission (“Commission”) alleges:

24 **SUMMARY OF THE ACTION**

25 1. This action concerns illegal insider trading and tipping by defendant John McEnergy III
26 (“McEnergy III”) in the securities of the formerly-public biotechnology company Clariant, Inc.
27 (“Clariant”) in advance of its acquisition through a tender offer by GE Healthcare. Before the deal
28 was announced to the public, McEnergy III learned of the potential acquisition from a close friend who

1 worked at Clariant. McEnergy III misappropriated the information, which had been conveyed to him
2 in confidence, by purchasing 15,000 shares of Clariant stock in early October 2010.

3 2. In addition to his own trading, McEnergy III recommended to family and friends that
4 they buy Clariant stock. In the days leading up to the announcement of the acquisition, McEnergy III's
5 son, John McEnergy IV ("McEnergy IV"), and longtime friend, Michael Rawitser ("Rawitser"),
6 purchased Clariant shares based on confidential information about the Clariant acquisition that they
7 learned from McEnergy III. McEnergy IV and Rawitser knew or were reckless in not knowing that the
8 information McEnergy III shared with them came from a Clariant insider and that McEnergy III had
9 received or misappropriated the confidential information in breach of a duty.

10 3. On October 22, 2010, Clariant and GE Healthcare jointly announced that GE
11 Healthcare planned to acquire Clariant for \$5 per share in a tender offer. On the day of the
12 announcement, the closing price of Clariant stock rose by 33%. McEnergy III, McEnergy IV and
13 Rawitser profited a total of more than \$50,000 on their trades. Two other family members of
14 McEnergy III purchased Clariant shares based on his recommendation, realizing additional combined
15 profits of \$11,904.

16 4. McEnergy III, McEnergy IV and Rawitser knowingly or recklessly engaged in the
17 conduct described in this Complaint, violating Sections 10(b) and 14(e) of the Securities Exchange
18 Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b) and 78n(e)] and Rules 10b-5 and 14e-3
19 thereunder [17 C.F.R. §§ 240.10b-5 and 240.14e-3].

20 **JURISDICTION AND VENUE**

21 5. The Commission brings this action pursuant to Sections 21(d), 21(e) and 21A of the
22 Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78u-1].

23 6. This Court has jurisdiction over this action pursuant to Sections 21(e), 21A and 27 of
24 the Exchange Act [15 U.S.C. §§ 78u(e), 78u-1 and 78aa].

25 7. Defendants, directly or indirectly, made use of the means or instrumentalities of
26 interstate commerce, or of the mails, or of the facilities of a national securities exchange in
27 connection with the transactions, acts, practices and courses of business alleged herein.
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1 8. Venue in this District is proper pursuant to Section 27 of the Exchange Act [15 U.S.C.
2 § 78aa] because a substantial part of the acts and transactions constituting the violations alleged in
3 this Complaint occurred within the Northern District of California, and because at least one
4 Defendant resides or transacts business in the District.

5 **INTRADISTRICT ASSIGNMENT**

6 9. This action is appropriate for assignment to the San Jose Division, pursuant to Civil
7 Local Rule 3-2(e), because a substantial part of the events alleged herein occurred in Santa Clara
8 County.

9 **DEFENDANTS**

10 10. McEnergy III, age 73, resides in Capitola, California, and lived in Santa Cruz,
11 California during the events alleged herein. He is a partner in his family business, the Farmers Union
12 Partnership (“Farmers Union”) in San Jose, California.

13 11. McEnergy IV, age 50, resides in San Jose, California. He is employed by Farmers
14 Union.

15 12. Rawitser, age 74, resides in Paso Robles, California. He owns the Mike Rawitser Golf
16 Shop in San Jose, California. McEnergy III has an ownership stake in one of Rawitser’s golf
17 businesses.

18 **OTHER RELEVANT ENTITIES**

19 13. Clariant was a Delaware corporation headquartered in Aliso Viejo, California. Until
20 2005, Clariant was known as ChromaVision Medical Systems, Inc. Clariant announced its
21 acquisition by GE Healthcare through a merger and tender offer on October 22, 2010. Before the
22 acquisition, Clariant’s common shares were registered pursuant to Section 12(b) of the Exchange Act
23 and traded on the NASDAQ Stock Market (ticker: CLRT). Clariant provided molecular diagnostics
24 to assess and characterize cancer.

25 14. GE Healthcare is a unit of General Electric Company (“GE”) with headquarters in the
26 United Kingdom. GE’s common shares are registered under Section 12(b) of the Exchange Act and
27 trade on the New York Stock Exchange (ticker: GE). GE Healthcare provides diagnostic, information
28 and life science technologies.

FACTUAL ALLEGATIONS**A. The Clariant Acquisition**

15. In May 2010, Clariant and GE Healthcare began discussing GE Healthcare's potential acquisition of Clariant through a tender offer. By June 2010, the two companies entered into a confidentiality agreement to further discuss the transaction and representatives from the two companies met at Clariant's facilities.

16. These discussions progressed and by September 26, 2010, GE Healthcare informed Clariant that it would be willing to offer \$5.00 per share to purchase the company, conditioned on Clariant entering into exclusive negotiations with GE Healthcare. Clariant's Board of Directors authorized management to enter into exclusive negotiations with GE Healthcare and between October 8 and October 21, 2010 representatives of Clariant and GE Healthcare negotiated the terms of the merger agreement. Prior to the opening of the securities markets on October 22, 2010, Clariant and GE Healthcare announced the planned acquisition.

17. McEnergy III's close friend was a Senior Director at Clariant in 2010 (the "Clariant Insider"). During the period of approximately early September to early October 2010, the Clariant Insider learned from colleagues at Clariant that GE Healthcare planned to acquire Clariant. She also joined the Clariant due diligence team to help prepare the company for the public announcement of the impending merger.

18. McEnergy III and the Clariant Insider had dated on and off since the early 1990s, and she had lived with McEnergy III for several years in his Santa Cruz, California home. The Clariant Insider and McEnergy III had a history of sharing confidences. In September and October 2010, she confided in McEnergy III and shared nonpublic information regarding the planned Clariant acquisition. Given their history, pattern and practice of sharing confidences, the Clariant Insider expected McEnergy III to keep the information regarding the merger confidential.

B. McEnergy III's Illegal Trading

19. On October 5, 2010, after he received the information from the Clariant Insider, McEnergy III purchased 5,000 shares of Clariant stock at a cost of \$17,607.

1 20. On October 12, 2010, McEnery III purchased an additional 10,000 shares of Clariant
2 stock at a cost of \$35,259.

3 21. On October 21, 2010, the day before the public announcement of the merger between
4 Clariant and GE Healthcare, the price of Clariant stock closed at \$3.74 per share. The next day, after
5 the two companies announced the merger and tender offer, the price of Clariant stock closed at \$4.98
6 per share, an increase of 33%.

7 22. As a result of the increase in the price of Clariant stock after the announcement of the
8 merger, McEnery III realized ill-gotten gains of \$20,578.

9 **C. McEnery III Recommended Friends and Family Members Buy Clariant Stock**

10 23. In the days and weeks after he learned of the planned Clariant acquisition, McEnery III
11 tipped his son, McEnery IV, and longtime friend, Rawitser, with material nonpublic information
12 regarding the planned acquisition of Clariant and advised them to buy Clariant stock before the deal
13 was announced to the public.

14 24. McEnery III told Rawitser to buy Clariant shares immediately because the pending
15 acquisition announcement would drive the share price up soon. Rawitser knew or was reckless in not
16 knowing that McEnery III provided nonpublic information about Clariant in breach of a duty of trust
17 and confidence. On October 13, Rawitser purchased 20,000 shares of Clariant at a cost of \$71,705.

18 25. In the same time period, McEnery III and McEnery IV began emailing each other
19 regarding Clariant.

20 26. On October 18, 2010, McEnery IV wrote to his father “OK, put purchase order in for
21 1500 shares at Market opening tomorrow at 6:30 am. Hope they hold off on the news until tomorrow
22 or I’m screwed:).”

23 27. On October 19, 2010, McEnery IV purchased 1,530 shares of Clariant in an existing
24 brokerage account at a cost of \$5,706. That same day, McEnery IV opened a new brokerage account
25 and on October 21 bought an additional 1,323 shares of Clariant at a cost of \$4,997. McEnery IV
26 knew or was reckless in not knowing that his father provided nonpublic information about Clariant in
27 breach of a duty of trust and confidence.

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1 28. Later on Tuesday, October 19, 2010, McEnergy IV wrote to his father: “No
2 announcement today. Stock went up a few cents.” His father wrote back: “Thursday!” McEnergy IV
3 wrote back: “Sweet.”

4 29. After the merger was publicly announced, McEnergy IV sold all of his Clariant stock on
5 October 25, 2010 realizing ill-gotten gains of \$3,288. Rawitser tendered all of his Clariant shares on
6 December 20, 2010 realizing ill-gotten gains of \$28,386.

7 30. Also, in the days and weeks after he learned of the planned Clariant acquisition,
8 McEnergy III recommended to other family members that they should buy Clariant stock.

9 31. On October 2, 2010, based on McEnergy III’s recommendation, a close family member
10 of McEnergy III purchased 6,256 shares of Clariant at a cost of \$21,747. On October 17 and 19, 2010,
11 also based on McEnergy III’s recommendation, another family member of McEnergy III purchased
12 2,000 shares of Clariant at a cost of \$7,280.

13 32. The first family member sold all of his Clariant stock on October 27 realizing a profit
14 of \$9,344. The second family member sold all of his Clariant stock on November 1 and 2 realizing a
15 profit of \$2,560.

16 **D. McEnergy III, McEnergy IV and Rawitser Violated the Federal Securities Laws**

17 33. McEnergy III and the Clariant Insider had a history of sharing confidences with one
18 another and trusted that the other would keep those confidences. Given their history, pattern and
19 practice of sharing confidences, the Clariant Insider expected McEnergy III to keep the information
20 regarding the Clariant acquisition confidential.

21 34. By virtue of their close relationship, McEnergy III owed the Clariant Insider a duty of
22 trust and confidence and breached that duty by misappropriating the information about the Clariant
23 acquisition to unlawfully enrich himself and others.

24 35. In violation of the duty owed to the Clariant Insider, McEnergy III knowingly and/or
25 recklessly traded on the basis of that information. McEnergy III also knowingly and/or recklessly
26 tipped material nonpublic information to McEnergy IV and Rawitser, and recommended that two other
27 family members purchase Clariant stock.

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1 36. McEnergy III knew or recklessly disregarded that the information he misappropriated
2 from the Clariant Insider was nonpublic and material for trading purposes. Moreover, a reasonable
3 investor would have viewed this information as being important to his or her investment decision and
4 significantly altering the mix of information available to the public.

5 37. McEnergy III tipped McEnergy IV and Rawitser with material nonpublic information,
6 and recommended that the other family members purchase Clariant stock, knowing that the traders
7 would trade, or being recklessly indifferent as to whether they would trade.

8 38. McEnergy IV and Rawitser each traded based on the information that McEnergy III
9 provided knowing or recklessly disregarding that the information was material and nonpublic, and
10 had been disclosed to them by McEnergy III in breach of a duty of trust or confidence.

11 39. Unless enjoined, McEnergy III, McEnergy IV and Rawitser will continue to violate
12 Sections 10(b) and 14(e) of the Exchange Act and Rules 10b-5 and 14e-3 thereunder.

13 **FIRST CLAIM FOR RELIEF**

14 **Violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)]**
15 **and Rule 10b-5 [17 C.F.R. § 240.10b-5] Thereunder**

16 40. The Commission realleges and incorporates by reference paragraphs 1 through 39, as
17 though fully set forth herein.

18 41. Defendants, with scienter, directly or indirectly:

- 19 a. employed devices, schemes, or artifices to defraud;
- 20 b. made untrue statements of material facts or omitted to state material facts
21 necessary in order to make the statements made, in the light of the
22 circumstances under which they were made, not misleading; and
- 23 c. engaged in acts, practices, or courses of business which operated or would
24 operate as a fraud or deceit upon other persons, including purchasers and
25 sellers of securities;

26 in connection with the purchase or sale of securities, by the use of means or instrumentalities of
27 interstate commerce, of the mails, or the facilities of a national securities exchange.

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1 42. By reason of the foregoing, Defendants violated, and unless restrained and enjoined
2 will continue to violate, Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5
3 thereunder [17 C.F.R. § 240.10b-5].

4 **SECOND CLAIM FOR RELIEF**

5 **Violations of Section 14(e) of the Exchange Act [15 U.S.C. § 78n(e)]**
6 **and Rule 14e-3 [17 C.F.R. § 240.14e-3] Thereunder**

7 43. Paragraphs 1 through 42 are re-alleged and incorporated herein by reference.

8 44. After GE Healthcare had taken a substantial step or steps to commence or had
9 commenced a tender offer, Defendants:

- 10 a. Purchased or sold or caused to be purchased or sold the securities to be sought
11 by the tender offer while in possession of material information relating to such
12 tender offer,
13 b. which information they knew or had reason to know was nonpublic, and
14 c. which they knew or had reason to know had been acquired directly or
15 indirectly from the offering company, the issuing company, or any officer,
16 director, partner or employee acting on behalf of the offering or issuing
17 companies.

18 45. By reason of the foregoing, Defendants violated, and unless restrained and enjoined
19 will continue to violate, Section 14(e) of the Exchange Act [15 U.S.C. § 78n(e)] and Rule 14e-3 [17
20 C.F.R. § 240.14e-3] thereunder.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, the Commission respectfully requests that this Court:

23 **I.**

24 Permanently enjoin Defendants, and their officers, agents, servants, employees, and attorneys,
25 and those persons in active concert or participation with them who receive actual notice of the
26 injunction by personal service or otherwise, and each of them, from directly or indirectly violating
27 Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5]
28 thereunder;

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II.

Permanently enjoin Defendants from directly or indirectly violating Section 14(e) of the Exchange Act [15 U.S.C. § 78n(e)] and Rule 14e-3 [17 C.F.R. § 240.14e-3] thereunder;

III.

Order Defendants to disgorge, with prejudgment interest, all illicit trading profits, other ill-gotten gains received, and/or losses avoided as a result of the conduct alleged in the Complaint, including, as to each Defendant, their own illicit trading profits, other ill-gotten gains, and/or losses avoided, and the illicit trading profits, other ill-gotten gains, and/or losses avoided of their direct and downstream tippees;

IV.

Order Defendants to pay civil penalties pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1]; and

V.

Grant such other relief as this Court may deem just and appropriate.

Respectfully submitted,

Dated: September 9, 2015

/s/ Elena Ro
Jina Choi
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Elena Ro
Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION