RICHARD R. BEST
REGIONAL DIRECTOR
Sanjay Wadhwa
Gerald A. Gross
Paul G. Gizzi
James K. Hanson
Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
Brookfield Place
200 Vesey Street, Suite 400
New York, New York 10281-1022
212-336-0077 (Gizzi)
gizzip@sec.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **-against-** **J. JEREMY BARBERA, CARL SMITH, AND NANOBEAK BIOTECH INC.,** **Defendants.**	**COMPLAINT** **20-CV-10353** **JURY TRIAL DEMANDED**

Plaintiff Securities and Exchange Commission ("Commission"), for its Complaint against Defendants J. Jeremy Barbera ("Barbera"), Carl Smith ("Smith"), and Nanobeak Biotech Inc. ("Nanobeak") (collectively, "Defendants"), alleges as follows:

SUMMARY

1. Between at least December 2015 and December 2019 (the "Relevant Period"), Nanobeak and Barbera, Nanobeak's former CEO, solicited and sold Nanobeak securities using false and misleading statements. During this period, Nanobeak and Barbera sold securities to at least 37 investors, raising a net total of approximately $3.6 million.

2. Barbera lied to investors about Nanobeak's sole business prospect, claiming that Nanobeak, working in conjunction with scientists at the National Aeronautics and Space Administration ("NASA") and at a nationally recognized research university ("University A"), had developed a sensor device that used a breathalyzer test to detect cancer and drug use. In fact, Nanobeak never developed any such technology.

3. Barbera also made false and misleading statements to investors about: law enforcement agencies using the sensor device; the work that University A had conducted; the likelihood of a Nanobeak initial public offering ("IPO"); and the use of investor proceeds. While Nanobeak used some investor funds for corporate purposes, between 2016 and 2019, Barbera siphoned off at least $1.6 million, or nearly 45% of the funds raised, for his personal benefit.

4. In April 2019, Barbera was forced to resign as CEO by Nanobeak's board of directors. Thereafter, however, Barbera continued to serve as a board member and to be employed by Nanobeak. Barbera then enlisted Smith, a stock promoter, to help him continue to raise funds from investors ostensibly on behalf of Nanobeak. Smith falsely told investors that he was a Nanobeak employee, that all investor funds would only be used to benefit Nanobeak, and that he was not accepting compensation or taking commissions for the sales of stock. In fact, Smith was never a Nanobeak employee, and in 2019, he received at least $173,000 of funds purportedly raised for Nanobeak for his own personal benefit.

VIOLATIONS

5. By virtue of the foregoing conduct and as alleged further herein, Defendants have violated Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)], and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5]. In addition, Smith aided and abetted Barbera's

violations of Securities Act Section 17(a) [15 U.S.C. § 77q(a)], and Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

6. Unless Defendants are restrained and enjoined, they will engage in the acts, practices, transactions, and courses of business set forth in this Complaint or in acts, practices, transactions, and courses of business of similar type and object.

NATURE OF THE PROCEEDINGS AND RELIEF SOUGHT

7. The Commission brings this action pursuant to the authority conferred upon it by Securities Act Sections 20(b) and 20(d) [15 U.S.C. §§ 77t(b) and 77t(d)], and Exchange Act Section 21(d) [15 U.S.C. § 78u(d)].

8. The Commission seeks a final judgment: (a) permanently enjoining Defendants from violating the federal securities laws and rules this Complaint alleges they have violated; (b) ordering Defendants to disgorge all ill-gotten gains they received as a result of the violations alleged here and to pay prejudgment interest thereon; (c) ordering Defendants to pay civil money penalties pursuant to Securities Act Section 20(d) [15 U.S.C. § 77t(d)] and Exchange Act Section 21(d)(3) [15 U.S.C. § 78u(d)(3)]; and (d) ordering any other and further relief the Court may deem just and proper.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to Securities Act Section 22(a) [15 U.S.C. § 77v(a)] and Exchange Act Section 27 [15 U.S.C. § 78aa].

10. Defendants, directly and indirectly, have made use of the means or instrumentalities of interstate commerce or of the mails in connection with the transactions, acts, practices, and courses of business alleged herein.

11. Venue lies in this District under Securities Act Section 22(a) [15 U.S.C. § 77v(a)]

and Exchange Act Section 27 [15 U.S.C. § 78aa]. Defendants may be found in, are inhabitants of, or transact business in the Southern District of New York, and certain of the acts, practices, transactions, and courses of business alleged in this Complaint occurred within this District, including the offer and sale of Nanobeak securities to investors residing in this District.

DEFENDANTS

12. **Nanobeak** is a closely held corporation organized under the laws of Delaware with its principal place of business in New York, New York. Nanobeak was originally formed as a California corporation in 2009. Nanobeak was converted into a Delaware limited liability company in 2014, and later into a Delaware corporation under the name "Nanobeak, Inc." in 2015. In July 2019, Nanobeak's name was changed to "Nanobeak Biotech Inc."

13. **Barbera**, age 61, is a resident of New York, New York. Between 2009 and July 2019, Barbera was Nanobeak's CEO. In July 2014, the Commission charged Barbera with securities fraud in *SEC v. MSGI Technology Solutions, Inc. et al.*, No. 14-cv-5820 (S.D.N.Y.) (July 29, 2014) ("2014 Commission Action"), and on August 1, 2014, the court entered a final judgment on consent against him, enjoining him from future violations of Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.RF.R. § 240.10b-5], imposing a penny stock bar and an officer and director bar, and ordering him to pay a $100,000 civil penalty.

14. **Smith**, age 78, is a resident of Sarasota, Florida.

FACTS

I. BACKGROUND

15. In December 2013, NASA and Nanobeak entered into a licensing agreement to develop an application of a patented breath sensor device that had been invented by a NASA scientist. The technology behind the device was originally designed to be used to detect the

presence of diabetes by analyzing the user's breath. Nanobeak's license limited its development for use in cancer and narcotics detection. In March 2014, Nanobeak entered into a Space Act Agreement,[1] in which Nanobeak agreed to pay NASA's Ames Research Center ("ARC") in exchange for ARC scientists conducting research to determine the effectiveness of the sensor device for detection of acetone in human breath under various conditions.

16. In late 2013, shortly before signing the Space Act Agreement, Barbera met with "Individual A," the chief scientist for Exploration Technology at the ARC laboratory where the Nanobeak research was conducted. Barbera introduced himself to Individual A, telling him "we've got $1 million for NASA." Eventually, Barbera took a sensor device from ARC. According to Individual A, the sensor device did not actually detect cancer or narcotics but rather was a model of what the sensor was expected to look like.

17. Thereafter, Barbera caused Nanobeak to make initial payments to NASA under its Space Act Agreement. In total, since 2014, Nanobeak paid NASA approximately $340,000 for the initial work performed at ARC, but made no additional payments to further the research.

18. By late 2017, all work on the proposed technology had ceased at ARC because Nanobeak failed to fully fund the research.

19. University A had an agreement with Nanobeak pursuant to which Nanobeak paid University A approximately $1 million. In return, University A provided Nanobeak with some information about bio-markers, which may have been relevant to Nanobeak's sensor device, but University A's scientists did not perform any original research on the subject for Nanobeak.

[1] Under the National Aeronautics and Space Act [51 U.S.C. § 20113], NASA may enter into research and development agreements with private companies, which pay NASA scientists to do research.

II. BARBERA SOLICITED AND SOLD NANOBEAK SECURITIES

A. Barbera Successfully Solicited Investors While Serving as Nanobeak's CEO

20. Throughout the Relevant Period, Barbera solicited investors to purchase Nanobeak stock and promissory notes. To convince investors to invest, he made numerous false and misleading statements regarding Nanobeak, its sensor technology, its plans to conduct an IPO, and its use of investor proceeds.

21. Barbera used a similar sales pitch to investors when he solicited investors to purchase Nanobeak stock and promissory notes. He told several investors, including "Investor 1," "Investor 2," "Investor 3," and "Investor 4," that Nanobeak was working with scientists at NASA and at University A to develop a sensor device that could detect lung cancer and drug (marijuana or opioid) use, and that the sensor device was close to being or was fully functional.

22. For example, beginning in approximately December 2016, Barbera told Investor 1 that Nanobeak's technology was originally created by NASA to monitor the health of astronauts in space, and that research on the product was being conducted at University A and by a "team in California" (likely referring to ARC).

23. Barbera also showed at least two investors, Investor 2 and Investor 3, what purported to be a prototype of the sensor device. Barbera told these investors that the sensor device would be sold to police departments.

24. Barbera also told at least one investor, Investor 2, that Nanobeak had agreements with certain local sheriff's departments in Florida and Colorado, and that law enforcement was interested in purchasing Nanobeak's sensor technology for use in drug enforcement.

25. When soliciting investors, Barbera also showed at least one investor, Investor 2, projections for Nanobeak's revenues that predicted the company would make a profit in the near

future. Indeed, the projections showed Nanobeak earning cash after taxes of more than $20 million in 2019.

26. Barbera also told investors that, if Nanobeak could meet its short-term financing needs, Nanobeak would be able to achieve profitability. Based on this representation, Investor 1 gave Barbera $90,000, which was supposed to be used for Nanobeak's business expenses. In fact, as further alleged below, a portion of investors' funds were deposited in Nanobeak's bank account and used for Barbera's personal purposes.

27. In addition, Barbera told investors that Nanobeak was soliciting investments because it needed funds for the anticipated costs associated with the company's impending IPO. Barbera also told at least one investor, Investor 2, that the value of Nanobeak shares would increase dramatically when the IPO happened. Indeed, between 2016 and 2019, Barbera repeatedly told this investor that the product was being finalized and "things were about to happen." In 2019, Barbera told Investor 2 that the IPO would occur at the end of 2019 or early 2020.

28. In total, Barbera sold Nanobeak stock to 28 investors and Nanobeak promissory notes to nine investors. At least one investor purchased both promissory notes and Nanobeak stock.

29. The promissory notes offered investors up to a 100% return within one year with Nanobeak stock used as collateral. Other promissory notes promised to pay 10% interest for period ranging from six months to two years followed by repayment of principal. In addition, Barbera offered promissory note holders the chance to convert the dollar amount of the note to the equivalent in Nanobeak stock.

30. In total, between December 2015 and December 2019, Barbera and Nanobeak

sold approximately $3.6 million of Nanobeak securities to 37 investors.

B. Barbera Lied About His Role at Nanobeak, a Planned IPO, and the Status of the Sensor Development in Attempting to Solicit a Wealthy Investor

31. In late 2019, after Nanobeak had removed Barbera as CEO (but while he was still a member of the board of directors), Barbera and "Individual B," an individual who Barbera understood to be a wealthy investor, had a series of telephone calls concerning a potential investment by Individual B in Nanobeak.

32. During the telephone calls, Barbera falsely represented himself as Nanobeak's current CEO seeking investor funds for the company. In particular, Barbera said that Nanobeak was raising capital and planning an IPO. Barbera also falsely told Individual B that Nanobeak's sensor device development, being conducted at University A and ARC, was nearly complete.

33. For example, Barbera said that there was an ongoing clinical trial consisting of 450 people at University A for Stage 1 lung cancer, that the trials were already through 333 of the 450 patients, and that the clinical trial would be finished in six months. Barbera said that, in addition to the sensor device detecting cancer, Nanobeak would also test the device to detect for drug usage. Further, Barbera claimed that the "hardware" of the sensor remains the same and that only the "software" has to change in order to redeploy the sensor to test for different drugs or diseases. In an attempt to use high-pressure sales tactics to convince Individual B to invest, Barbera claimed that he had just signed a large investor in England and that Nanobeak hardly needed any more investor funds to complete its research.

34. Barbera made other false and misleading statements to Individual B, similar to the lies he told actual investors. In particular, he said that:

- Nanobeak's sensor device would be in the market "next year" (*i.e.*, 2020).
- Investor dollars would be used for clinical trials at University A and on developing the technology at NASA.
- Nanobeak was working toward an IPO "next year" and that they were talking to

banks, including a specific well-known, large commercial bank.

- Nanobeak had "agreements" with "Colorado," and "Florida" to market the sensor, the company was working on a similar agreement with the Los Angeles Police Department, and law enforcement planned to use the sensor for marijuana detection and breath analysis for the presence of THC, fentanyl, and heroin.

35. Barbera also misrepresented his professional experience, claiming to be an ex-NASA scientist. In fact, Barbera is not a trained scientist and he previously testified that he merely worked as a research assistant through a NASA affiliated program in New York.

36. In addition, when describing his background during these calls with Individual B, Barbera did not disclose the judgment against him in the 2014 Commission Action.

37. Finally, during his calls with Individual B, Barbera offered to send, and eventually sent, a video that purported to be a demonstration of the sensor device by a NASA scientist.

III. BARBERA'S STATEMENTS TO INVESTORS AND PROSPECTIVE INVESTORS WERE FALSE AND MISLEADING

38. Barbera's representations to investors and to Individual B were false and misleading. According to Individual A, Nanobeak's sensor device was not even close to commercialization. Also according to Individual A, it would have been impossible to use the original NASA diabetes sensor to detect other conditions because it would be "too complicated." According to Individual A and other ARC personnel, even the original intended use of the technology for diabetes testing was very far from completion, and no progress was made on the uses for which Nanobeak had its license: cancer detection and drug testing.

39. Further, as noted above, Nanobeak's agreement with NASA was limited to ARC scientists researching the sensor device's effectiveness in the detection of acetone in human breath. ARC scientists have confirmed that the device was very far from being commercially viable. Indeed, according to the inventor of the sensor device, it was only designed to be used to

diagnose diabetes, not cancer or drug use.

40. More importantly, by late 2017 – two years before his recorded conversations with Individual B – Barbera knew that his statements to investors were false because, by that time, all NASA research concerning the efficacy of the sensor device's detection of diabetes had ended with inconclusive results and there were no tests of its efficacy to test for cancer or drugs.

41. Barbera's statements to investors regarding Nanobeak's agreements with law enforcement agencies were similarly misleading. Nanobeak did not have any agreements to sell the sensor device to law enforcement agencies. Rather, the few agreements that existed with some local sheriff's departments were only that the offices agreed to accept free samples of the sensor to try out once it was functional and available. Moreover, unlike Barbera's statements to Individual B, Nanobeak had no agreements with the States of "Colorado" or "Florida," only the above-referenced agreements with some local sheriff's departments.

42. Barbera's statements to investors about research at University A were also false and misleading. Although Barbera paid University A to conduct some research, contrary to what he told Individual B, University A did not conduct clinical trials for Nanobeak that tested an actual device.

43. The purposed demonstration video that was made available to Individual B was also misleading. Indeed, according to Individual A, the movie was "shocking" in its deceptiveness because the sensor shown in the movie appeared to be simply the model NASA had given to Barbera and *not* a functional sensor. Moreover, the purported scientist appearing in the movie is not a NASA employee and had nothing to do with research on the sensor.

44. In addition, Barbera's statements to investors regarding Nanobeak's financial projections and IPO plans were misleading. According to Individual A, Barbera knew that

Nanobeak was not paying NASA for the research to be done, and therefore Barbera knew or should have known that Nanobeak could never meet the manufacturing deadlines he touted. And while Barbera told investors that a Nanobeak IPO would occur soon, Nanobeak never took any meaningful steps in furtherance of an IPO.

IV. BARBERA USED INVESTOR FUNDS FOR HIS PERSONAL BENEFIT

45. When investors purchased Nanobeak securities, the sale proceeds were sent to Nanobeak's bank account. Only a portion of investor funds, however, were used to pay for research projects.

46. Rather, Barbera used a significant portion of those funds for his personal benefit. Indeed, Barbera treated Nanobeak's bank account as his personal account. For example, Barbera used investor funds for himself, as follows:

- $37,000 in jewelry, clothing, food, gifts, beauty product purchases.
- $5,400 in spa and salon purchases.
- $5,160 in Amazon purchases.
- $4,400 in pet-related expenses.
- $14,482 for self-storage units.
- $7,000 in food purchases.
- Other amounts to pay personal utility bills and to make car payments

47. In addition, payments totaling approximately $477,000 were made from Nanobeak's bank account to Barbera's two ex-wives, his mother, and his daughters, which payments had no apparent business purpose.

V. SMITH PARTICIPATED IN BARBERA'S FRAUD

48. After being forced to step down as CEO in April 2019, Barbera continued to raise funds from investors by working with Smith, a stock promoter.

49. Between April and December 2019, Smith solicited investors, saying that he was a Nanobeak employee and was not being compensated for selling investments. Both of these

statements were false. Smith did not work for Nanobeak, and he retained a portion of investors' funds for himself.

50. Smith also repeated many of the same types of lies Barbera had made to investors. For example, in approximately September 2019, Smith, misrepresenting himself as a Nanobeak employee, told an existing investor, Investor 5, that Nanobeak had created a breathalyzer device that could detect cancer and drug use, had partnerships with NASA and University A, and had agreements with law enforcement agencies in several states to use the device.

51. Also in 2019, Smith and Barbera solicited Investor 4 to purchase Nanobeak stock. After learning about the 2014 Commission Action, Investor 4 asked Smith about it. Smith falsely assured Investor 4 that Barbera had done nothing wrong.

52. Smith also falsely assured investors that all of their money would go directly to Nanobeak and that he would not receive any compensation or commission. In fact, at least $173,000 of investor money was transferred to a bank account in the name of a company Smith controlled.

53. In addition, funds investors invested in Nanobeak through Smith were spent on payments to Barbera, food, plane tickets, legal fees, and cash withdrawals.

54. In total, Smith raised approximately $700,000 from investors in Nanobeak.

FIRST CLAIM FOR RELIEF
Violations of Securities Act Section 17(a)
(All Defendants)

55. The Commission re-alleges and incorporates by reference here the allegations in paragraphs 1 through 54.

56. Defendants, directly or indirectly, singly or in concert, in the offer or sale of securities and by the use of the means or instruments of transportation or communication in

interstate commerce or the mails, (1) knowingly or recklessly have employed one or more devices, schemes or artifices to defraud, (2) knowingly, recklessly, or negligently have obtained money or property by means of one or more untrue statements of a material fact or omissions of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and/or (3) knowingly, recklessly, or negligently have engaged in one or more transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon the purchaser.

57. By reason of the foregoing, Defendants, directly or indirectly, singly or in concert, have violated and, unless enjoined, will again violate Securities Act Section 17(a) [15 U.S.C. § 77q(a)].

SECOND CLAIM FOR RELIEF
Violations of Exchange Act Section 10(b) and Rule 10b-5 Thereunder
(All Defendants)

58. The Commission re-alleges and incorporates by reference here the allegations in paragraphs 1 through 54.

59. Defendants, directly or indirectly, singly or in concert, in connection with the purchase or sale of securities and by the use of means or instrumentalities of interstate commerce, or the mails, or the facilities of a national securities exchange, knowingly or recklessly have (i) employed one or more devices, schemes, or artifices to defraud, (ii) made one or more untrue statements of a material fact or omitted to state one or more material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and/or (iii) engaged in one or more acts, practices, or courses of business which operated or would operate as a fraud or deceit upon other persons.

60. By reason of the foregoing, Defendants, directly or indirectly, singly or in concert, have violated and, unless enjoined, will again violate Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

THIRD CLAIM FOR RELIEF
Aiding and Abetting Violations of Securities Act Section 17(a)
(Smith)

61. The Commission re-alleges and incorporates by reference here the allegations in paragraphs 1 through 54.

62. As alleged above, Barbera violated Securities Act Section 17(a) [15 U.S.C. § 77q(a)].

63. Smith knowingly or recklessly provided substantial assistance to Barbera with respect to Barbera's violations of Securities Act Section 17(a) [15 U.S.C. § 77q(a)].

64. By reason of the foregoing, Smith is liable pursuant to Securities Act Section 15(b) [15 U.S.C. § 77o(b)] for aiding and abetting Barbera's violations of Securities Act Section 17(a) [15 U.S.C. § 77q(a)] and, unless enjoined, Smith will again aid and abet these violations.

FOURTH CLAIM FOR RELIEF
Aiding and Abetting Violations of Exchange Act Section 10(b) and Rule 10b-5 Thereunder
(Smith)

65. The Commission re-alleges and incorporates by reference here the allegations in paragraphs 1 through 54.

66. As alleged above, Barbera violated Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

67. Smith knowingly or recklessly provided substantial assistance to Barbera with respect to Barbera's violations of Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

68. By reason of the foregoing, Smith is liable pursuant to Exchange Act Section

20(e) [15 U.S.C. § 78t(e)] for aiding and abetting Barbera's violations of Exchange Act Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5] and, unless enjoined, Smith will again aid and abet these violations.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that the Court enter a Final Judgment:

I.

Permanently enjoining Barbera, Smith, and Nanobeak and their agents, servants, employees and attorneys and all persons in active concert or participation with any of them from violating, directly or indirectly, Securities Act Section 17(a) [15 U.S.C. § 77q(a)(2)], Exchange Act Section 10(b) [15 U.S.C. § 78j(b)], and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5)];

II.

Ordering Defendants to disgorge all ill-gotten gains they received directly or indirectly, with pre-judgment interest thereon, as a result of the alleged violations;

III.

Ordering Defendants to pay civil monetary penalties under Securities Act Section 20(d) [15 U.S.C. § 77t(d)] and Exchange Act Section 21(d)(3) [15 U.S.C. § 78u(d)(3)]; and

IV.

Granting any other and further relief this Court may deem just and proper.

Dated: New York, New York
December 9, 2020

/s/ Richard R. Best

RICHARD R. BEST
REGIONAL DIRECTOR
Sanjay Wadhwa
Gerald A. Gross
Paul G. Gizzi
James K. Hanson
Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
Brookfield Place
200 Vesey Street, Suite 400
New York, New York 10281-1022
212-336-0077 (Gizzi)
gizzip@sec.gov