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C -95 20840

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

14 _____
15 SECURITIES AND EXCHANGE COMMISSION,
16

Plaintiff,

v.

18 NABEEH I. TOTAH,
19

Defendant.
20 _____

CIVIL ACTION NO. _____

COMPLAINT FOR
INJUNCTION AND
OTHER RELIEF

21 SUMMARY OF THE PROCEEDING

22 1. The Securities and Exchange Commission (the
23 "Commission") brings this insider trading action against Nabeeh
24 I. Totah ("Totah"), who, between January 9 and January 25, 1995,
25 while in possession of material nonpublic information concerning
26 a proposed tender offer for Affymax N.V. ("Affymax") by Glaxo plc
27

28 **COMPLAINT**

*ERIC
H. [unclear]
@ [unclear]
[unclear]*

1 ("Glaxo"), improperly purchased 120 call options for the
2 securities of Affymax, and knew of the purchase of 400 shares of
3 Affymax common stock through accounts in which he held a direct
4 or indirect beneficial interest. Totah sold his options on
5 January 26, 1995, following a public announcement of the proposed
6 tender offer for a profit of \$102,750, and shared in the
7 \$4,962.50 profit earned on the common stock sold the same day.

8 2. Defendant Totah has, accordingly, violated Sections
9 10(b) and 14(e) of the Securities Exchange Act of 1934 ("Exchange
10 Act") [15 U.S.C. §§ 78j(b) and 78n(e)] and Rules 10b-5 and 14e-3
11 thereunder [17 C.F.R. §§ 240.10b-5 and 240.14e-3].

12 3. The Commission brings this action pursuant to Sections
13 21(d) and 21(e) of the Exchange Act [15 U.S.C. §§ 78u(d) and
14 78u(e)], seeking an injunction, disgorgement, penalty and other
15 appropriate relief.

16 4. Unless enjoined, Totah may engage in the future in
17 similar, illegal acts and practices.

18 **JURISDICTION**

19 5. This Court has jurisdiction pursuant to Sections 21(e)
20 and 27 of the Exchange Act [15 U.S.C. §§ 78u(e) and 78aa].

21 **INTRADISTRICT ASSIGNMENT**

22 6. Defendant Totah has, directly or indirectly, used the
23 means or instrumentalities of interstate commerce, the mails and
24 the facilities of national securities exchanges, in connection
25 with the acts described herein, certain of which occurred within
26
27

1 the Northern District of California in Santa Clara County,
2 California.

3 **THE DEFENDANT**

4 7. Defendant Totah, age 60, is an engineer employed by a
5 defense contractor headquartered in California. Totah resides in
6 Cupertino, California.

7 **OTHER RELEVANT ENTITIES**

8 8. During the relevant period, Affymax was a biotechnology
9 company located in Palo Alto, California and incorporated in the
10 Netherlands. Until Glaxo completed its tender offer for Affymax
11 on or about March 1, 1995, Affymax's common stock was registered
12 with the Commission pursuant to Section 12(g) of the Exchange Act
13 and its shares were traded on the National Association of
14 Securities Dealers Automated Quotation System (NASDAQ). Options
15 on its common stock were traded on the Chicago Board Options
16 Exchange.

17 9. Glaxo plc is the world's largest pharmaceutical company
18 and is headquartered in Great Britain.

19 **FIRST CAUSE OF ACTION**

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

23 10. Paragraphs 1 through 9, above, are realleged and
24 incorporated herein by reference.

25 **The Merger Discussions**

26 11. In September 1994, Affymax officials contacted Glaxo to
27 solicit its interest in acquiring a controlling interest in

1 Affymax. On or about September 22, 1994, Affymax and Glaxo
2 signed a confidentiality agreement in connection with their
3 discussions.

4 12. In early December 1994, Glaxo notified Affymax of its
5 desire to negotiate the purchase of 100% of Affymax's shares.
6 During the last week of December 1994, Glaxo's attorneys
7 conducted formal due diligence meetings and document review at
8 Affymax's headquarters in Palo Alto, California.

9 13. On January 6 and January 7, 1995, Glaxo and Affymax
10 representatives met at Affymax to discuss the structure of the
11 proposed acquisition. On or about January 9, 1995, Glaxo advised
12 Affymax that it was considering a \$30.00 dollar per share tender
13 offer for Affymax, which would be a seventy-nine per cent premium
14 over Affymax's then-current share price of \$16 3/4.

15 14. On or about January 11, 1995, Affymax signed an
16 exclusivity agreement with Glaxo, agreeing to negotiate a
17 definitive acquisition agreement within the next two weeks.

18 15. On January 25, 1995, Affymax's board of directors met
19 to approve the Glaxo offer and on January 26, 1995, Affymax and
20 Glaxo jointly announced that Affymax's board of directors had
21 approved a \$30 per share tender offer by Glaxo for all of
22 Affymax's outstanding shares.

23 **Total's Purchases of Affymax Securities**

24 16. Prior to January 9, 1995, Totalah came into possession of
25 material nonpublic information concerning the proposed tender
26 offer as a result of an improper communication made to him.

1 Totalah was at least reckless in not knowing that such
2 communication was improper and in breach of a duty of trust and
3 confidence.

4 17. Between January 9 and January 24, 1995, a total of 400
5 shares of Affymax common stock were purchased, with Totalah's
6 knowledge, in accounts in which he held a direct or indirect
7 beneficial interest. Specifically, on January 9, 1995, 100
8 shares of Affymax common stock were purchased. On January 17,
9 1995, another 100 shares of Affymax common stock were purchased,
10 and on January 24, 1995, another 200 shares of Affymax common
11 stock were purchased.

12 18. Between January 16 and January 25, 1995, Totalah
13 purchased a total of 120 February 20 call option contracts for
14 Affymax common stock. Specifically, on January 16, 1995, Totalah
15 purchased 10 Affymax February 20 call option contracts. On
16 January 17, 1995, Totalah purchased another 40 Affymax February 20
17 call option contracts. On January 24, 1995, Totalah purchased 40
18 Affymax February 20 call option contracts, and on January 25,
19 1995, Totalah purchased an additional 30 February 20 call option
20 contracts for Affymax common stock.

21 19. On January 26, 1995, following the public announcement
22 of the tender offer, the 400 shares of Affymax common stock were
23 sold for a profit of \$4,962.50. Defendant Totalah shared in these
24 profits.

25 20. On the same day, Totalah sold his Affymax call options
26 for a profit of \$102,750.

1 21. By reason of the foregoing, defendant Totah violated
2 Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule
3 10b-5 thereunder [17 C.F.R. § 240.10b-5].

4 **SECOND CAUSE OF ACTION**

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

8 22. Paragraphs 1 through 21, above, are realleged and
9 incorporated herein by reference.

10 23. By January 9, 1995, Glaxo had taken substantial steps
11 to commence a tender offer for Affymax's common stock.

12 24. Defendant Totah purchased Affymax call options knowing
13 or having reason to know that the material information he
14 possessed about the proposed tender offer was nonpublic and was
15 acquired from an Affymax officer, director, partner, employee or
16 other person acting on behalf of Affymax.

17 25. By reason of the foregoing, defendant Totah violated
18 Section 14(e) of the Exchange Act [15 U.S.C. § 78n(e)] and Rule
19 14e-3 thereunder [17 C.F.R. § 240.14e-3].

20 **PRAYER FOR RELIEF**

21 WHEREFORE, plaintiff Commission respectfully requests that
22 this Court:

23 (a) enjoin Nabeeh I. Totah from violating Sections
24 10(b) and 14(e) of the Exchange Act [15 U.S.C. §§ 78j(b) and
25 78n(e)] and Rules 10b-5 and 14e-3 thereunder [17 C.F.R. §§
26 240.10b-5 and 240.14e-3];

1 (b) order Nabeeh I. Totah to disgorge profits of
2 \$107,712.50, plus prejudgment interest accruing from the date the
3 unlawful profits were realized;

4 (c) order defendant Nabeeh I. Totah to pay a civil
5 penalty pursuant to Section 21A(a) of the Exchange Act [15 U.S.C.
6 § 78u-1(a)]; and

7 (d) grant such other relief as this Court may deem
8 appropriate.

9
10 Respectfully submitted,

11
12 Dated: December 11, 1995

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