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CV 12 - 1281

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

SHERIF MITYAS,

Defendant.

ECF CASE **AMON, CH.J.**

COMPLAINT

MANN, M.J.

Plaintiff Securities and Exchange Commission (“Commission”), for its Complaint against defendant Sherif Mityas (“Mityas” or “Defendant”), alleges as follows:

SUMMARY

1. This case involves insider trading by Mityas, a partner and vice-president at a global management consulting firm, who obtained material nonpublic information concerning the public company NBTY, Inc. (“NBTY”), and traded on the basis of that information.

2. On or around May 17, 2010, Mityas obtained material nonpublic information through his employment. Specifically, Mityas learned that The Carlyle Group (“Carlyle”), one of his consulting clients, was negotiating to acquire NBTY.

3. Mityas purchased shares of NBTY on the basis of this information, reaping profits of \$25,896 upon their subsequent sale following the public announcement of the acquisition. Mityas also instructed a relative to trade shares of NBTY around the announcement, and the trading by such relative resulted in additional profits of \$12,035.

NATURE OF THE PROCEEDINGS AND RELIEF SOUGHT

4. The Commission brings this action pursuant to the authority conferred upon it by Section 21(d) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78u(d)]. The Commission seeks a permanent injunction against the Defendant, enjoining him from engaging in the transactions, acts, practices, and courses of business alleged in this Complaint, disgorgement of ill-gotten gains from the unlawful insider trading activity set forth in this Complaint, together with prejudgment interest, and civil penalties pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1] and the Insider Trading and Securities Fraud Enforcement Act of 1988. The Commission also seeks an order barring Mityas from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 781] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)]. Finally, the Commission seeks any other relief the Court may deem appropriate pursuant to Section 21(d)(5) of the Exchange Act [15 U.S.C. § 78u(d)(5)].

JURISDICTION AND VENUE

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

6. Venue lies in this Court pursuant to Sections 21(d), 21A, and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u-1, and 78aa]. Certain of the acts, practices,

transactions, and courses of business alleged in this Complaint occurred within the Eastern District of New York. During the times relevant to this action, NBTY's headquarters were located in Ronkonkoma, New York.

DEFENDANT

7. **Mityas**, age 44, resides in Chicago, Illinois, and is a partner and vice-president at a global management consulting firm ("Consulting Firm A"). Mityas is a management consultant who primarily works with clients in the retail sector. Mityas has been employed at Consulting Firm A since at least 2001, although from June 2008 to January 2010, Mityas left the firm to serve as Chief Operating Officer (and later, Chief Executive Officer) of Movie Gallery, Inc., a public company whose shares were traded on the Nasdaq but which has since filed for bankruptcy. Mityas does not hold any securities licenses.

RELEVANT ENTITIES

8. **NBTY** is a manufacturer of vitamins and nutritional supplements that is headquartered in Ronkonkoma, New York. On July 15, 2010, NBTY and Carlyle announced that they had reached an agreement for Carlyle to purchase all of the shares of NBTY for \$55 per share. On October 1, 2010, Carlyle and NBTY completed the merger. Prior to the acquisition by Carlyle, NBTY's securities were registered with the Commission pursuant to Section 12(b) of the Exchange Act, and its common stock traded on the New York Stock Exchange

9. **Carlyle** is a private equity firm based in Washington, D.C. Carlyle originates, structures, and acts as an equity investor in management-led buyouts, strategic minority equity investments, equity private placements, and growth capital financings.

10. **Consulting Firm A** is a global private management consulting firm based in the United States that employs approximately 2,000 consultants worldwide and has offices in dozens of foreign countries. Consulting Firm A's Code of Business Conduct prohibits all employees and partners of the firm from misappropriating confidential information that employees learn through their employment and using such information for the employees' personal benefit.

FACTS

A. Carlyle's Confidential Merger Discussions with NBTY and Mityas's Receipt of Material Nonpublic Information

11. On or about April 22, 2010, a managing director at Carlyle contacted the President and CFO of NBTY to discuss Carlyle potentially acquiring NBTY.

12. On April 29, 2010, NBTY and Carlyle executed a non-disclosure agreement that barred Carlyle from disclosing "to any other person . . . the fact that investigations, discussions or negotiations are taking place concerning a possible transaction" between Carlyle and NBTY. This prohibition extended not only to Carlyle itself but to Carlyle's "representatives" – a term that was defined in the agreement to include, *inter alia*, consultants and financial advisors.

13. On May 11, 2010, Carlyle personnel met for several hours with NBTY's President and CFO, as well as with NBTY's CEO to discuss the potential acquisition.

14. On May 12, 2010, a principal at Carlyle called one of Mityas's partners at Consulting Firm A to inquire about the firm performing work for Carlyle in connection with the potential acquisition of an undisclosed company.

15. By at least May 13, 2010, that partner had contacted Mityas about Carlyle's potential engagement of Consulting Firm A.

16. On May 17, 2010, Mityas and two of his partners at Consulting Firm A participated in a conference call with Carlyle to discuss Consulting Firm A's qualifications for the consulting project. During this call, Mityas and his partners learned that Carlyle's acquisition target was NBTY.

17. On that same day, May 17, 2010, Mityas received an email from Carlyle regarding "Project Alphabet" (the codename Carlyle used for the acquisition). Attached to that email were NBTY's most recent 10-K and 10-Q filings. From May 17 through May 20, 2010 Mityas was involved in multiple discussions with Carlyle personnel concerning the scope of the work that his firm would perform for Carlyle in connection with its attempt to acquire NBTY.

18. On May 19, 2010, a Carlyle vice-president sent Mityas and two other partners at Consulting Firm A an email asking them to complete and sign a "joinder" to the confidentiality agreement that Carlyle had executed with NBTY on April 29.

19. The May 19, 2010, email attached a copy of the confidentiality agreement between Carlyle and NBTY, as well as the joinder form (which was a letter from Carlyle to Consulting Firm A, to be counter-signed by the consulting firm). The form specifically required Consulting Firm A to acknowledge that it would not disclose the existence of the negotiations between Carlyle and NBTY. The form also required Consulting Firm A to acknowledge that it was aware that federal securities laws prohibited any person who possessed material nonpublic information regarding a possible transaction involving NBTY to purchase or sell securities in reliance on that information (or to pass that information to others who might trade securities based on that information).

20. On May 20, 2010, one of Mityas's partners executed the joinder to the confidentiality agreement between NBTY and Carlyle on behalf of Consulting Firm A.

21. On May 21, 2010, NBTY management informed the company's board of directors of the approach by Carlyle. The board retained Bank of America Merrill Lynch as its financial advisor and authorized management and Bank of America Merrill Lynch to further explore the transaction with Carlyle and to contact a limited number of third parties to see if those parties would be interested in acquiring NBTY.

22. Over the next week, Mityas and other persons at Consulting Firm A began work on Carlyle's bid to acquire NBTY. Mityas was involved in the preparation and revision of a detailed engagement agreement that set forth the specific projects and analysis that Consulting Firm A would perform. Mityas also sent Carlyle detailed lists of documents and data that his firm would need to perform its work (and received several of those documents from Carlyle). On May 26, 2010, personnel from Consulting Firm A accompanied Carlyle on a tour of an NBTY manufacturing facility in Florida.

B. Purchases of NBTY Shares Based on Material Nonpublic Information

23. On May 22, 2010, Mityas initiated a transfer of \$50,000 from a joint bank account he shared with a relative ("Relative A") to a brokerage account that he jointly controlled with Relative A. Five days later, on May 27, 2010, Mityas transferred \$49,000 out of that brokerage account into another brokerage account that he controlled as custodian for another relative ("Relative B").

24. On that same day – May 27, 2010 – Mityas purchased 1,300 shares of NBTY in the custodial account he controlled. The per share price of the shares was \$34.04, which resulted in a total purchase price of \$44,252.

25. On July 7, 2010, based on instructions from Mityas, yet another relative of Mityas ("Relative C") purchased 440 shares of NBTY at \$34 per share. On July 14, 2010, Relative C purchased an additional 210 shares at \$37.50 per share.

**C. The Completion of Carlyle's Negotiations with NBTY and
Subsequent Sales of NBTY Shares**

26. Throughout June and early July of 2010, Carlyle continued to negotiate the terms of its acquisition of NBTY. During this time, Mityas and the team from Consulting Firm A continued to support Carlyle in the negotiations, performing additional site visits to NBTY manufacturing facilities and analyzing the company's manufacturing and retail store operations.

27. On July 2, 2010, Consulting Firm A presented Carlyle with its final engagement report. Revised versions of the report were sent to Carlyle on July 11 and July 13, 2010.

28. On July 14, 2010, the NBTY board determined that proceeding with the Carlyle offer would be in the best interests of the company.

29. At approximately 5 a.m. on July 15, 2010, Carlyle and NBTY executed the merger agreement. At 6:15 a.m., NBTY issued a press release announcing the execution of a definitive merger agreement with Carlyle, pursuant to which Carlyle would acquire all of the outstanding common shares of NBTY for \$55 per share in cash. That purchase price represented a premium of approximately 57% over NBTY's average closing share price during the 30 trading days ended July 14, 2010. After the announcement, the market price of NBTY's common stock increased from \$37.47 at market-close on July 14, 2010, to a closing price of \$53.74 on July 15, 2010.

30. At 9:34 am on July 15, 2010, just hours after Carlyle's purchase of NBTY

was announced, Mityas sold the 1,300 shares of NBTY that he had purchased on May 27, 2010, for the brokerage account Mityas controlled for Relative B, at a sale price of \$53.96 per share, thereby realizing profits of \$19.92 per share, or total profits of \$25,896.

31. Relative C held the shares purchased on July 7 and 14, 2010, through the completion of the merger, and sold all 650 NBTY shares on October 1, 2010, realizing profits of \$12,035.

CLAIM FOR RELIEF

CLAIM I

Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder

32. The Commission realleges and incorporates by reference paragraphs 1 through 31, as though fully set forth herein.

33. The information regarding Carlyle's negotiations with NBTY that Mityas obtained in the course of his consulting work was material and nonpublic. This information was considered confidential by Mityas's employer, Consulting Firm A, and its client, Carlyle, which was the source of the information, and Consulting Firm A had policies protecting its own and its clients' confidential information.

34. Mityas owed a fiduciary duty, or obligation arising from a similar relationship of trust and confidence, to both Consulting Firm A and to Carlyle to keep the information confidential and to abstain from purchasing or selling securities based on that information.

35. Mityas misappropriated the material nonpublic information regarding Carlyle's negotiations with NBTY by purchasing shares of NBTY while in possession of that information.

36. Mityas also tipped this material nonpublic information to Relative C with the expectation of receiving a benefit from doing so, and knew, recklessly disregarded, or should have known, that the information he conveyed was in breach of a fiduciary duty, or obligation arising from a similar relationship of trust and confidence.

37. Mityas is liable for Relative C's trading because he directly or indirectly caused Relative C to effectuate purchases of NBTY securities.

38. By virtue of the foregoing, defendant Mityas, in connection with the purchase or sale of securities, by the use of the means or instrumentalities of interstate commerce, or of the mails, or a facility of a national securities exchange, directly or indirectly: (i) employed devices, schemes or artifices to defraud; (ii) made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (iii) engaged in acts, practices or courses of business which operated or would have operated as a fraud or deceit upon persons.

39. By virtue of the foregoing, defendant Mityas, directly or indirectly, violated, and unless enjoined, will again violate, Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

RELIEF SOUGHT

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

I.

Permanently restraining and enjoining defendant Mityas from violating Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5];

II.

Ordering defendant Mityas to disgorge, with prejudgment interest, all ill-gotten gains received as a result of the conduct alleged in this Complaint, including all illicit trading profits, and all ill-gotten gains and illicit trading profits of Mityas's tippee;

III.

Ordering defendant Mityas to pay civil monetary penalties pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1];

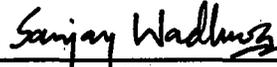
IV.

Barring defendant Mityas, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)], from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 781] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)]; and

V.

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

Dated: New York, New York
March 15, 2012



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and Associate Regional Director
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