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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

**UNITED STATES SECURITIES AND  
EXCHANGE COMMISSION,**

**Plaintiff,**

**v.**

**YANG XIE,**

**Defendant.**

Civil Action No.

**COMPLAINT**

Plaintiff United States Securities and Exchange Commission (the "Commission"), 100 F Street, N.E., Washington, DC, 20549, for its Complaint against Defendant Yang Xie, 280 Wukang Road, 4-201, Shanghai, China, for insider trading, alleges as follows:

**SUMMARY**

1. On November 20, 2014, Defendant Yang Xie, then an employee of Merck & Co., Inc. ("Merck"), was sent an email with attached documents from an attorney in Merck's Office of General Counsel. One of the attachments contained "privileged and confidential" information that "Merck and Cubist Pharmaceuticals, Inc. ("Cubist") are in discussions regarding a contemplated

strategic transaction” that “is likely to be considered material to Cubist.” The email attachment further advised that, pursuant to Merck’s corporate insider trading policy, “[y]ou may not purchase, sell or otherwise engage in any trading of Cubist’s stock until a full trading day has elapsed after a public announcement of the Transaction.”

2. Within approximately 14 minutes after being sent the email, Xie purchased 80 shares of Cubist stock in his personal brokerage account at a price of \$73.39 per share.

3. On December 8, 2014, Merck publicly announced its intention to acquire Cubist for \$102 per share in cash (39% premium to Xie’s purchase price) via a tender offer, which was completed on January 21, 2015.

4. Xie sold his Cubist stock on January 21, 2015, for a profit of approximately \$2,287.

### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over this matter pursuant to Sections 21(d), 21A and 27 of the Exchange Act [*15 U.S.C. §§ 78u(d), 78u-1 and 78aa*]. The Defendant, directly or indirectly, made use of the means or instrumentalities of interstate commerce or the mails in connection with the conduct alleged herein.

6. Venue in this judicial district is proper pursuant to Section 27 of the Exchange Act [*15 U.S.C. § 78aa*] because certain of the acts, transactions, practices, and courses of business constituting the violations alleged herein occurred within this judicial district in that: Xie was a resident of Bridgewater, New Jersey during the period at issue; Xie worked for Merck from an office within New Jersey during the period at issue; and Xie placed his order to buy the securities at issue via a device connected to the Internet while located in his office at Merck within New Jersey.

### **DEFENDANT**

7. Yang Xie (Xie), age 38, is a citizen of China who resided in Bridgewater, New Jersey under a U.S. work visa from approximately December 2010 to May 2016.

8. During this period, and until approximately October 2016, Xie worked for a subsidiary of Merck. Xie held the title of Director of Global Health Outcomes Research at Merck's Center for Observational and Real World Evidence, a unit within Merck's Research & Development division that did observational research and comparative effectiveness research to assess the value of medical interventions relative to alternatives in "real world" settings.

#### **OTHER RELEVANT ENTITIES**

9. Merck, a New Jersey corporation, is a global health care company headquartered in Kenilworth, N.J. Merck's common stock is registered with the Commission and Merck files periodic reports with the Commission. Merck's stock is traded on the New York Stock Exchange.

10. Cubist Pharmaceuticals, Inc. (Cubist), until approximately January 2015, was a Delaware corporation in the pharmaceuticals industry headquartered in Lexington, MA. Cubist's stock was registered with the Commission and Cubist filed periodic reports with the Commission. Cubist's stock was quoted on the NASDAQ Global Select Market. On January 21, 2015, Merck completed a successful tender offer for all the outstanding shares of Cubist's stock and acquired Cubist through a merger of Merck's wholly owned subsidiary with and into Cubist.

#### **FACTS**

11. As an expert in health outcomes research, part of Xie's job at Merck was to assess the value and cost effectiveness of drugs Merck was marketing, developing, or that Merck was considering acquiring. Xie specialized in evaluating antibacterial and antifungal drugs for treatment of certain infectious diseases. Xie often contributed his health outcomes research to colleagues at Merck who advised the company on new product launches and proposed acquisitions.

12. Prior to 2015, one of Merck's main competitors developing infectious disease drugs was the pharmaceutical company Cubist.

13. In 2014, Merck considered acquiring Cubist. To ensure confidentiality of the deliberations, Merck's contemplated acquisition of Cubist was given the internal code name "Project Pablo." In early to mid-2014, Xie analyzed information that was marked "confidential" about Cubist's products from a health outcomes perspective.

14. On July 2, 2014, the Project Pablo team ultimately concluded their review of Cubist by "recommending at this time not to pursue this acquisition."

15. At or around September and October, 2014, Merck decided nonetheless to pursue an acquisition of Cubist. At about the same time, Merck retained legal counsel and an investment banking firm for the purpose of pursuing the acquisition of Cubist.

16. On approximately October 7, Merck's CEO approached Cubist's CEO to broach the idea of Merck acquiring Cubist. Confidential negotiations began shortly thereafter, and Merck changed the internal code name for the acquisition from "Project Pablo" to "Project Diego."

17. On approximately November 10, Merck's CEO informed Cubist's CEO that Merck was prepared to make a non-binding, all-cash tender offer to acquire all outstanding Cubist stock for \$102 per share, a significant premium to the price of Cubist's stock at that time quoted on the NASDAQ.

**Insider Trading in Connection with Merck's Tender Offer for Cubist**

18. At approximately 4:04 p.m. on November 20, 2014, an attorney in Merck's Office of General Counsel sent a group email message to approximately 60 Merck employees, including Xie, with the subject line "PROJECT DIEGO (f/k/a PABLO)." The email included two attachments, one of which was entitled "Diego No Trading Memo."

19. The "Diego No Trading Memo" attachment specifically warned:

Merck and Cubist Pharmaceuticals, Inc. ("Cubist") are in discussions regarding a contemplated strategic transaction (the "Transaction"). The Transaction is likely to be considered material to Cubist. As such, we would like to remind you of the insider trading and

confidentiality obligations that apply to you with respect to the Transaction.

You may not purchase, sell or otherwise engage in any trading of Cubist's stock until a full trading day has elapsed after a public announcement of the Transaction.... Please see Merck's Corporate Policy #30 on Insider Trading for additional information.

This matter remains extremely confidential. We ask that you continue to restrict information about the potential Cubist Transaction to only those who have an absolute need to know as Merck has certain confidentiality obligations to Cubist.....

20. The body of the email asked recipients to "read the attached memorandum regarding Project Diego (f/k/a Pablo)" and to respond acknowledging that they have read and understood the memo. The body of the email also asked the recipients to identify other people not already included on the distribution "who are aware of the deal."

21. Xie replied to the email six minutes later, at approximately 4:10 p.m., acknowledging his receipt of the email. Xie's reply stated in full: "I am on your distribution list so I got the email, but I'm not on the list in your word document. I don't know if should be on your list or not as this is my first time hearing about Project DIEGO. But judging from the other people on the list I might be. Can you check and let me know? Thanks!"

22. Approximately eight minutes later, at 4:18 p.m., Xie placed an order to buy 80 shares of Cubist stock. His order was filled almost immediately at a cost of \$73.39 per share.

23. At approximately 7:00 a.m. on December 8, 2014, 19 days after Xie bought Cubist stock, Merck and Cubist made their first public announcements of the deal. According to the announcement, Merck and Cubist entered into a definitive agreement under which Merck would engage in a tender offer to acquire Cubist for \$102 per share in cash, representing a premium of \$28.61 (39%) to Xie's cost basis in Cubist stock.

24. On January 21, 2015, Merck announced the successful completion of the tender offer at a purchase price of \$102.

25. Xie sold his 80 shares of Cubist stock on January 21 at \$101.98, for proceeds, excluding commissions, of \$8,158.40. Thus, Xie realized profits of \$2,287.20.

26. During the Commission staff's investigation, Xie denied learning about Merck's proposed acquisition of Cubist until the night before it was publicly announced.

### **FIRST CLAIM FOR RELIEF**

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

27. Paragraphs 1 through 26 are re-alleged and incorporated by reference.

28. As an express condition of his employment, Defendant Xie owed a fiduciary or similar duty of trust and confidence to Merck and its shareholders, including the duty to keep nonpublic information obtained in the course of his employment confidential and to not use such information for his personal benefit.

29. Xie acted at least recklessly in failing to know that the email he was sent on November 20, 2014, contained information concerning Merck's tender offer to acquire Cubist that was confidential and that he was not permitted to trade Cubist securities until after this information was disclosed publicly.

30. By reason of the conduct described above, Defendant Yang Xie, acting at least recklessly, by use of the means or instrumentalities of interstate commerce or of the mails, in connection with the purchase or sale of securities, directly or indirectly:

(a) employed devices, schemes or artifices to defraud; and/or

(b) engaged in acts, practices, or courses of business which operate or would operate as a fraud or deceit upon any persons, including purchases or sellers of the Cubist's securities.

### **SECOND CLAIM FOR RELIEF**

#### **Violations of Section 14(e) of the Exchange Act and Rule 14e-3 Thereunder**

31. Paragraphs 1 through 30 are re-alleged and incorporated by reference.

32. By November 20, 2014, the date of Xie's purchase of Cubist securities alleged herein, substantial steps had been taken to commence Merck's tender offer to acquire Cubist, including: both companies hiring legal counsel and investment banking advisors, negotiations between senior officers of Merck and Cubist, and the companies reaching a tentative agreement about the terms of a tender offer.

33. On November 20, 2014, Defendant Xie purchased the securities to be sought by the tender offer while in possession of material information relating to such tender offer, which he at least had reason to know was nonpublic information, and which he at least had reason to know had been acquired from a representative acting on behalf of Merck, the offering company.

**PRAYER FOR RELIEF**

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

- A. Permanently enjoining Defendant Xie 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] and Securities Act Section 17(a) [15 U.S.C. § 77q(a)];
- B. Permanently enjoining Defendant Xie from violating Section 14(e) of the Exchange Act [15 U.S.C. § 78n(e)] and Rule 14e-3 thereunder [17 C.F.R. § 240.14e-3];
- C. Ordering Defendant Xie defendant to disgorge, with prejudgment interest, all illicit trading profits or other ill-gotten gains received by any person or entity, as a result of the actions alleged herein;
- D. Ordering the Defendant to pay civil money penalties pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1]; and
- E. Granting such other and further relief as the Court deems just and appropriate.

Dated: February 27, 2018

Respectfully submitted,

/s/ Stephan J. Schlegelmilch  
Stephan J. Schlegelmilch (D.C. Bar No. 983874)  
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**LOCAL RULE 11.2 CERTIFICATION**

Pursuant to Local Rule 11.2, I certify that the matter in controversy alleged in the foregoing Complaint is not the subject of any other action pending in any court, or of any pending arbitration or administrative proceeding.

/s/ Stephan J. Schlegelmilch

Stephan J. Schlegelmilch (D.C. Bar No. 983874)

*Counsel for Plaintiff*

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Washington, DC 20549

**DESIGNATION OF AGENT FOR SERVICE**

Pursuant to Local Rule 101.10, because the Securities and Exchange Commission (the “Commission”) does not have an office in this district, the United States Attorney for the District of New Jersey is hereby designated as eligible as an alternative to the Commission to receive service of all notices or papers in the above captioned action. Therefore, service upon the United States or its authorized designee, David E. Dauenheimer, Deputy Chief, Civil Division, United States Attorney’s Office for the District of New Jersey, 970 Broad Street, Suite 700, Newark, NJ 07102 shall constitute service upon the Commission for purposes of this action.

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