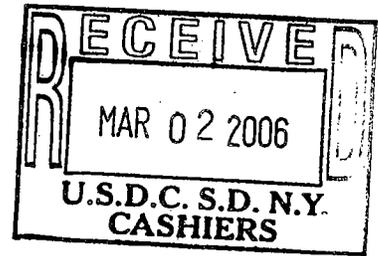


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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MITCHELL S. DRUCKER AND RONALD
DRUCKER,

Defendants,

WILLIAM V. MINERVA,

Relief Defendant.

JUDGE CASEY
06 Civ. CV 1644

COMPLAINT

COMPLAINT

Plaintiff Securities and Exchange Commission ("Commission") alleges the following against defendants Mitchell S. Drucker ("M. Drucker") and Ronald Drucker ("R. Drucker") (collectively, the "Defendants"), and William V. Minerva ("Minerva") ("Relief Defendant"):

SUMMARY

1. In October 2001, M. Drucker and his father, R. Drucker, engaged in unlawful insider trading by selling their holdings of NBTY, Inc. ("NBTY") stock one day before NBTY

made a negative earnings announcement. At the time, M. Drucker was NBTY's Associate General Counsel.

2. After the close of the market on Friday, October 19, 2001, NBTY publicly announced in a press release that its 2001 fourth quarter earnings per share ("EPS") would be about 50 percent lower than analysts' expectations ("Press Release"). Earlier that day, a research analyst from a prominent investment bank issued a note predicting that NBTY's 2001 fourth quarter EPS results would be below consensus estimates. After this note was released, NBTY's shares fell \$2.42, or about 20%, from \$12.31 to \$9.89. On the next trading day following the Press Release, the price of NBTY shares fell an additional \$2.69, or 27%, from \$9.89 to \$7.20.

3. On October 18, 2001, one day prior to NBTY's announcement about the EPS shortfall, M. Drucker placed orders to sell his entire holdings of NBTY stock, consisting of 25,700 shares.

4. At the time of his sales, M. Drucker was aware of material, non-public information concerning NBTY's 2001 fourth quarter EPS results.

5. At the same time he was selling his own shares, M. Drucker called his father, R. Drucker, and tipped him. Within minutes, R. Drucker also sold his entire holdings of NBTY stock, consisting of 10,000 shares, plus an additional 5,000 shares which R. Drucker had in his account for the benefit of his son.

6. At the same time he sold his own shares and tipped his father, M. Drucker also directed the sale of the entire NBTY holdings of his friend Minerva, which consisted of 1,575 shares.

7. By trading in advance of the Press Release and any other public announcement of NBTY's EPS shortfall, the defendants and relief defendant avoided total losses of almost \$200,000.

VIOLATIONS

8. The Defendants, directly or indirectly, have engaged, and, unless enjoined and restrained, will again engage, in transactions, acts, practices, and courses of business that constitute violations of 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 [17 C.F.R. § 240.10b-5] thereunder.

JURISDICTION AND VENUE

9. The Commission brings this action pursuant to its authority under Section 20(b) of the Securities Act [15 U.S.C. § 77t(b)] and Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)] to enjoin the Defendants from engaging in the transactions, acts, practices, and courses of business alleged in this Complaint, for disgorgement of their losses avoided and pre-judgment interest thereon, and for civil penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d) of the Exchange Act [U.S.C. § 78u(d)(3)]. The Commission also brings this action pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1] for civil penalties against the Defendants under the Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA"). In addition, the Commission seeks an order barring M. Drucker 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)], pursuant to Section 20(e) of the

Securities Act [15 U.S.C. § 77t(e)] and Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)], and for such other relief as the Court may deem appropriate.

10. In addition, the Commission is seeking, against the Relief Defendant, disgorgement of funds equal to his losses avoided and pre-judgment interest thereon.

11. The Defendants, directly or indirectly, singly or in concert, made use of the means or instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the transactions, acts, practices, and courses of business alleged herein. Certain of the alleged transactions, acts, practices, and courses of business occurred in the Southern District of New York. Specifically, during the time of the conduct at issue, shares of NBTY were traded on the NASDAQ, an electronic stock market located in the Southern District of New York. Accordingly, this Court has jurisdiction over this action, and venue is proper in this district, pursuant to Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)] and Sections 21(d), 21(e), 21A, and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), 78u-1, and 78aa].

THE DEFENDANTS

12. **M. Drucker**, age 36, is a resident of Miller Place, New York. M. Drucker was Associate General Counsel of NBTY from approximately January 2000 to April 2002. M. Drucker has been an attorney since 1994. Prior to joining NBTY, M. Drucker was an associate at Thatcher, Proffit & Wood, in New York. NBTY terminated M. Drucker's employment following an internal investigation of his sales of NBTY stock at issue in this Complaint.

13. **R. Drucker**, age 62 is a resident of Setauket, New York. He is M. Drucker's father.

RELIEF DEFENDANT

14. **Minerva**, age 37, is a resident of Nesconset, New York. Minerva is a friend of M. Drucker, who he has known since high school.

RELATED ENTITY

15. **NBTY**, a Delaware corporation with its principal offices in Bohemia, New York, manufactures, markets and retails nutritional supplements, including vitamins, minerals, herbs, and diet aids. NBTY's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and trades on the New York Stock Exchange, and traded on the NASDAQ during the period of the conduct at issue. NBTY reports its earnings on a fiscal year basis with a September 30 year-end.

FACTS

Background.

16. M. Drucker's duties as Associate General Counsel of NBTY included litigation, contracts, acquisitions and trademark issues. In addition, M. Drucker worked with NBTY's General Counsel and NBTY's Chief Financial Officer ("CFO"), in the preparation of company press releases.

17. At the time of the conduct at issue, M. Drucker had frequent contact with NBTY's CFO and General Counsel. M. Drucker was part of the "inner circle" of NBTY management. M. Drucker reported directly to the CFO and, with the General Counsel nearing retirement, the CFO dealt increasingly with M. Drucker. M. Drucker considered himself to be the CFO's "go to guy."

18. M. Drucker routinely received sensitive and confidential financial information about NBTY. M. Drucker owed a duty to keep confidential, and not use for personal gain, any material, non-public information concerning NBTY.

19. NBTY had an insider trading policy. Employees subject to the insider trading policy had to obtain approval from NBTY's CFO or General Counsel prior to trading in NBTY stock. Pursuant to that policy, NBTY prohibited trading by officers, directors, and legal staff after the close of a quarter's books and through the issuance of an earnings announcement, a period they referred to as a "blackout period." NBTY's General Counsel told M. Drucker about the insider trading policy when M. Drucker was hired at NBTY.

20. M. Drucker never sought, nor received, approval from NBTY's CFO or General Counsel before selling shares of NBTY on October 18, 2001, which was during a blackout period.

M. Drucker Learned That NBTY Would Miss Analysts' Consensus 2001 Fourth Quarter EPS Estimate.

21. On October 15, 2001, on a business trip in Colorado with a few NBTY employees, including M. Drucker, NBTY's CFO received financial information from NBTY's in-house accountants concerning NBTY's fiscal fourth quarter, which ended on September 30, 2001. These preliminary financial results revealed that NBTY's EPS for its 2001 fourth quarter would likely be between \$0.12 and \$0.14 per share, significantly below Wall Street analysts' consensus estimate of \$0.25 per share.

22. The following day, on October 16, 2001, M. Drucker accompanied the CFO, as well as a few other employees, on a private jet returning from Colorado. On that flight, the CFO worked on matters relating to NBTY's disappointing 2001 fourth quarter EPS results.

23. During the early part of the week of October 15, 2001, the CFO informed NBTY's General Counsel of the disappointing 2001 fourth quarter EPS results, and the General Counsel recommended that NBTY issue a press release.

24. Throughout the week of October 15, 2001, the CFO participated in several meetings and discussions concerning NBTY's 2001 fourth quarter EPS results.

25. During the week of October 15, 2001, after returning from Colorado with other NBTY executives, M. Drucker was working at NBTY's headquarters, with daily contact with the CFO.

26. On Wednesday, October 17, 2001, the CFO informed an investment banker from a prominent investment bank about NBTY's 2001 fourth quarter EPS results. The next day, the investment banker and a colleague conducted a conference call with the CFO. The investment banker strongly recommended that NBTY make a public announcement of its projected fourth quarter earnings earlier than NBTY normally would have made such an announcement.

27. On October 18, 2001, M. Drucker attended a meeting in the CFO's office with, among others, the CFO and General Counsel, where the attendees discussed NBTY's projected fourth quarter 2001 earnings, the fact that NBTY's EPS would be below analysts' estimates, and the likelihood and timing of an NBTY press release addressing the EPS.

On October 18, 2001, The Defendants Sold All Their Shares of NBTY Stock.

28. Beginning at approximately 3:11 p.m. on October 18, 2001, M. Drucker sold his entire holdings of NBTY stock. M. Drucker held a total of 25,700 shares of NBTY stock. Of that amount, he held 20,700 in his own account and 5,000 in an account held by his father, R. Drucker. M. Drucker sold all but 200 of the shares in his account within approximately the next 90 minutes, at an average price of \$12.63 per share. Although M. Drucker had placed the order

to sell the remaining 200 shares on October 18, the order was not filled until October 19, at an average price of \$12.39. In a telephone conversation in the afternoon of October 18, M. Drucker also directed R. Drucker to sell the 5,000 shares M. Drucker held in R. Drucker's account. These 5,000 shares were sold at an average price of \$12.45 per share.

29. At the time of his sales of NBTY stock, M. Drucker was aware of material non-public information concerning NBTY's fourth quarter EPS.

30. By trading in advance of the Press Release and any other public announcement of NBTY's EPS shortfall, M. Drucker avoided losses of at least \$138,174.

31. At approximately 3:14 p.m. on October 18, 2001, three minutes after M. Drucker began selling his NBTY stock, M. Drucker called R. Drucker. Over the next fifty minutes M. Drucker called R. Drucker four more times and R. Drucker called M. Drucker once.

32. During those phone calls, M. Drucker asked R. Drucker to sell the 5,000 shares M. Drucker held in R. Drucker's account, told R. Drucker that M. Drucker was immediately liquidating his entire holdings of NBTY stock, and communicated to R. Drucker, in words or in substance, material non-public financial information concerning NBTY's 2001 fourth quarter.

33. Within minutes of receiving M. Drucker's call, R. Drucker proceeded to sell M. Drucker's 5,000 shares of NBTY stock. Also, within minutes of receiving the first call from M. Drucker on October 18, R. Drucker proceeded to sell R. Drucker's entire holdings of NBTY stock, which consisted of 10,000 shares, at an average price of approximately \$12.31 per share.

34. By trading in advance of the Press Release and any other public announcement of NBTY's EPS shortfall, R. Drucker avoided losses of at least \$51,116.

35. Shortly after placing the orders to sell his own shares on October 18, 2001, M. Drucker logged onto Minerva's on-line brokerage account with the password Minerva had

previously provided to M. Drucker, and sold all 1,575 shares of NBTY stock that Minerva owned, at an average price of approximately \$12.25 per share.

36. By trading in advance of the Press Release and any other public announcement of NBTY's EPS shortfall, M. Drucker caused Minerva to avoid losses of at least \$7,953.

The Public Learned That NBTY's EPS is Below Analysts' Expectations.

37. During the early afternoon on Friday October 19, 2001, a research analyst from a prominent investment bank issued a note predicting that NBTY's fourth quarter EPS would be below analysts' consensus estimates. After this note was released, NBTY's shares fell \$2.42, from \$12.31 to \$9.89, or about 20%.

38. After the analyst issued the negative report, at approximately 7:00 pm, on Friday, October 19, 2001, NBTY issued the Press Release, in which it announced that it expected its 2001 fourth quarter earnings to be between \$0.12 and \$0.14 per share, which was approximately 50% below analysts' consensus estimate of \$0.25 per share.

39. M. Drucker, as well as others at NBTY, participated in drafting the Press Release.

40. On Monday, October 22, 2001, the next trading day following the issuance of the Press Release, the price of NBTY shares fell an additional 27%, or \$2.69, from \$9.89 to \$7.20.

The Defendants and Relief Defendant Repurchased Shares of NBTY.

41. On November 7 and November 8, 2001, after avoiding significant trading losses through their sales on October 18, 2001, M. Drucker and R. Drucker repurchased almost the same amount of shares of NBTY stock as they had previously sold. M. Drucker purchased 25,000 shares and R. Drucker purchased 6,000 shares of NBTY stock. About two weeks later, Minerva purchased 500 shares of NBTY stock. The Defendants and Relief Defendant purchased these shares of NBTY stock at prices ranging from approximately \$8.83 to \$9.50 per share.

M. Drucker Failed to Disclose His Trading To NBTY's Senior Management.

42. The NASD began an investigation of trading of NBTY stock shortly after the issuance of the Press Release. Despite his close working relationship with senior management and the timing of his trading, M. Drucker did not disclose to or otherwise inform anyone at NBTY that he traded shares of NBTY stock prior to the NASD investigation, when his name appeared on a list of certain persons who traded NBTY stock prior to the issuance of the Press Release. Even then, M. Drucker did not disclose the full extent of his trading to NBTY's senior management.

43. NBTY retained a law firm to conduct an internal investigation concerning trading in NBTY shares prior to the issuance of the Press Release. At the conclusion of NBTY's internal investigation, NBTY terminated M. Drucker's employment because of his sales of NBTY stock on October 18, 2001.

FIRST CLAIM FOR RELIEF

**Violations of Section 17(a) of the Securities Act, and
Section 10(b) of the Exchange Act, and Rule 10b-5 Thereunder
(Antifraud Provisions - against all Defendants)**

44. The Commission repeats and realleges the allegations contained in paragraphs 1 through 43 by reference as if fully set forth herein.

45. Defendants, directly or indirectly, singly and in concert, knowingly, or recklessly, by the use of the means or instruments of transportation or communication in, and the means or instrumentalities of, interstate commerce, or by the use of the mails, in the offer or sale, and in connection with the purchase or sale, of securities, have (a) employed devices, schemes or artifices to defraud; (b) obtained money or property by means of, or otherwise made untrue statements of material fact, or omitted to state material facts necessary to make the statements, in

the light of the circumstances under which they were made, not misleading; and (c) engaged in transactions, acts, practices, and courses of business which operated or would operate as a fraud or deceit upon purchasers of NBTY securities and upon other persons, as more fully described above.

46. As part and in furtherance of his violative conduct, M. Drucker, knowingly or recklessly, for his direct or indirect benefit, in breach of a fiduciary duty to NBTY's shareholders, or other similar duty arising out of a relationship of trust and confidence with NBTY, sold shares of NBTY stock while he was aware of material non-public information concerning NBTY's 2001 fourth quarter EPS results.

47. In addition, as part, and in furtherance, of his violative conduct, M. Drucker knowingly or recklessly, for his direct or indirect benefit, in breach of a fiduciary duty to NBTY's shareholders, or other similar duty arising out of a relationship of trust and confidence with NBTY, tipped his father, R. Drucker, by telling him that M. Drucker was immediately liquidating his entire holdings of NBTY stock, and by conveying, in words or in substance, material non-public information about NBTY's negative financial information.

48. R. Drucker knew, or acted with reckless disregard of the fact, that: (a) M. Drucker was aware of material, non-public financial information concerning NBTY's 2001 fourth quarter; (b) M. Drucker told R. Drucker that M. Drucker was selling, or attempting to sell, all of M. Drucker's NBTY stock; (c) M. Drucker had communicated to R. Drucker, in words or in substance, material non-public information concerning NBTY's negative financial information; and (d) M. Drucker's conveyance of this material non-public information to R. Drucker constituted a breach of fiduciary duty, or other similar duty arising out of a relationship of trust and confidence with NBTY, that M. Drucker owed to NBTY.

49. Defendants illicitly avoided losses by selling shares of NBTY stock.

50. By reason of the foregoing, the Defendants, directly or indirectly, singly or in concert, have violated and, unless permanently enjoined, would again violate Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] and Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder.

SECOND CLAIM FOR RELIEF

Unjust Enrichment (Against Minerva)

51. The Commission realleges and incorporates paragraphs 1 through 50 by reference as if fully set forth herein.

52. M. Drucker sold Minerva's NBTY stock while aware of material non-public information. As a result, Minerva avoided losses, and thus was unjustly enriched, under circumstances in which it is not just, equitable, or conscionable for Minerva to be so enriched.

RELIEF SOUGHT

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

I.

Permanently enjoining the Defendants, and their agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, and each of them, from violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] and Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder;

II.

Ordering each defendant to disgorge his losses avoided from trading in shares of NBTY stock as set forth in paragraphs 1 through 50 herein, and to pay prejudgment interest thereon;

III.

Ordering each defendant to pay civil money penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Sections 21(d) and 21A of the Exchange Act [15 U.S.C. § 78u(d)(3) and § 78u-1];

IV.

Ordering that M. Drucker be barred from acting as an officer or director of a public company pursuant to Section 20(e) of the Securities Act [15 U.S.C. § 77t(e)] and Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)]; and

V.

Ordering that Minerva disgorge funds equal to the amount by which he was unjustly enriched, together with prejudgment interest thereon; and

VI.

Granting such other and further relief as the Court shall deem just and proper.

Dated: New York, New York
March 2, 2006

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