

JUDGE KEENAN

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

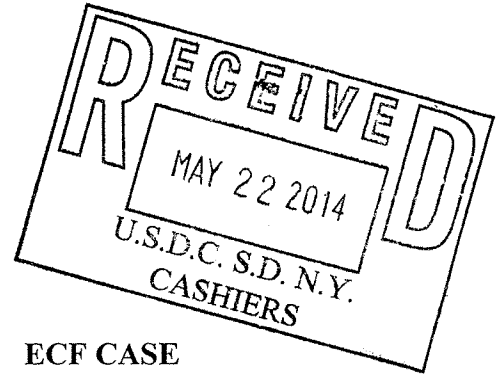
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

GLENN COHEN,  
CRAIG COHEN,  
MARC I. COHEN,  
STEVEN A. COHEN, and  
LAURIE G. TOPAL,

Defendants.



ECF CASE

COMPLAINT AND  
JURY DEMAND

Plaintiff Securities and Exchange Commission ("Commission"), for its Complaint against defendants Glenn Cohen ("Glenn"), Craig Cohen ("Craig"), Marc Cohen ("Marc"), Steven Cohen ("Steven"), and Laurie Topal ("Topal"), alleges as follows:

**SUMMARY**

1. This case involves insider trading by three relatives and one friend of Glenn Cohen, a former member of the board of directors of NBTY, Inc.
2. On or around May 21, 2010, Glenn obtained material nonpublic information about NBTY while attending a meeting of the company's board of directors.

Specifically, Glenn learned that The Carlyle Group (“Carlyle”), a leveraged buyout firm, was negotiating to acquire NBTY.

3. Within three trading days of Glenn learning of the negotiations between NBTY and Carlyle, his three brothers – as well as the girlfriend of one of those brothers – purchased shares of NBTY on the basis of this information, reaping profits totaling approximately \$175,000 upon their subsequent sale following the public announcement of the acquisition.

#### **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 defendants, enjoining them 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 defendant Glenn 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]. Two of the defendants reside and work in the Southern District of New York, and certain of the acts, practices, transactions, and courses of business alleged in this Complaint occurred within the Southern District of New York.

## DEFENDANTS

7. **Glenn**, age 54, resides in Woodbury, New York, and co-owns a landscaping business in Bellmore, New York with his brother Craig. Glenn served on the board of directors of NBTY from 1988 until Carlyle's acquisition of the company was finalized in October 2010. During the relevant period, Glenn received \$70,000 in annual cash compensation for his service on NBTY's board as well as stock options grants. In 2000, Glenn was named as a defendant in a putative class action complaint in the Eastern District of New York which alleged that he, along with other members of NBTY's board, had engaged in insider trading by selling company shares while aware of material misstatements contained in the company's financial reports. The class action complaint was dismissed in 2002.

8. **Craig**, age 53, resides in Melville, New York and co-owns a landscaping business in Bellmore, New York with his brother Glenn.

9. **Marc**, age 59, resides in Mamaroneck, New York where he is the owner of a liquor store and where he shares a home with Topal.

10. **Steven**, age 57, resides in North Woodmere, New York and is the owner of cabinetry business in Valley Stream, New York.

11. **Topal**, age 60, shares a home in Mamaroneck, New York with Marc. Topal is employed as a property manager for Phoenix Capital Partners, a real estate development company based in Purchase, New York.

### **RELEVANT ENTITIES**

12. **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.

13. **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.

### **FACTS**

#### **A. NBTY's Insider Trading Policies**

14. In May 2002, NBTY announced its official policy regarding insider trading. The policy applied to all "accounting, administrative, supervisory and management" employees as well as to the board of directors. The policy prohibited covered employees and directors who are aware of material nonpublic information relating to the Company from buying or selling NBTY securities (except pursuant to a

pre-approved Rule 10b5-1 plan). The policy also prohibited the passing of material nonpublic information to “others outside the Company, including family and friends.”

15. The policy defined “material information” as “any information that a reasonable investor would consider important in making a decision to buy, hold, or sell securities. Any information that could be expected to affect the Company’s stock price, whether it is positive or negative, should be considered material.” The policy provided examples of material information, which included information regarding “[a] pending or proposed merger, acquisition or tender offer.”

16. As a member of the NBTY board, Glenn signed a certification acknowledging that he had read and understood the company’s insider trading policy and would “continue to comply with the Statement of Policy for as long as I am subject to the Policy.”

**B. Carlyle’s Non-Public Merger Discussions with NBTY and Glenn’s Receipt of Material Non-Public Information**

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

18. On May 11, 2010, Carlyle personnel met for several hours with Executive A, NBTY’s President and CFO, as well as with Executive B, NBTY’s CEO, to discuss the potential acquisition.

19. On the morning of May 21, 2010, Glenn attended a regularly scheduled board meeting of NBTY at the company’s offices. During the meeting, NBTY management informed the board of directors of the approach by Carlyle. The board decided to retain Bank of America Merrill Lynch (“BofA”) as its financial advisor and authorized management and BofA 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.

20. During the meeting, Executive B stressed maintaining the confidentiality of the discussions with Carlyle, and the board specifically determined that in order to maintain confidentiality, none of the interested parties (including Carlyle) would be permitted to discuss the transaction with any potential source of debt financing for the deal. The May 21 board meeting ended at approximately 11:30 a.m.

21. On the afternoon of June 4, 2010, Glenn attended a telephonic board meeting to discuss the status of negotiations with Carlyle and other potential bidders. During that meeting, the board authorized BofA to provide additional financial information to all potential bidders and to request that written indications of interest be submitted by June 14, 2010. Glenn called in to this meeting from his cell phone and, based on his phone records, remained on the call for 19 minutes.

22. On June 16, 2010, Glenn attended another telephonic board meeting to discuss the merger negotiations. At this meeting, the board authorized BofA to permit bidders to contact sources of debt financing. Glenn called into the meeting at 10:58 a.m. and remained on the call until 12:55 p.m.

23. On June 18, 2010, Glenn placed a 15-minute call to the same teleconferencing access number that he used to attend the previous telephonic board meetings (although this conference call does not appear to have been an official board meeting).

24. Glenn attended additional telephonic board meetings on June 24, July 6, July 12, and July 14, 2010.

25. On the evening of July 14, the Wall Street Journal reported that Carlyle and another firm were negotiating to purchase NBTY. On the morning of July 15, 2010, NBTY issued a press release announcing that it had entered into an agreement to sell the company to Carlyle at \$55 per share – a 47 percent premium over the previous day’s closing price.

**C. Purchases of NBTY Shares Based on Material Nonpublic Information**

26. The May 21, 2010 NBTY board meeting occurred on a Friday. On that afternoon and over the next several days, Glenn Cohen’s cell phone placed numerous calls to a cell phone registered to his brother Craig. Glenn’s cell phone also had multiple calls with Marc’s cell phone, and there was at least one call between the landline at Glenn Cohen’s home and a land line at Steven’s home. There were also calls between Marc and Craig, and Marc and Steven.

27. On the morning of May 24, 2010, Steven’s cell phone called Glenn’s cell phone twice and then Glenn’s cell phone placed a 64-second call to Steven’s cell phone at 9:45 a.m. Three minutes later, a landline telephone associated Steven’s business called the Jericho, New York office of Morgan Stanley Smith Barney (“MSSB”), where Steven and his wife have multiple brokerage accounts. Over the next 26 minutes, there were two calls from MSSB’s office to Steven’s cell phone; the calls lasted a total of approximately 11 minutes.

28. During the May 24 calls with MSSB, Steven informed his financial advisor that he wanted to sell shares of a mutual fund he owned and purchase 2,300 shares of NBTY. The purchase of NBTY – at an average price of \$33.56 per share or \$77,196 in total – was executed at 10:19 a.m. and represented the largest purchase he had

made in his MSSB accounts since they had been opened in 2006. This May 24, 2010 purchase was the first time Steven had traded NBTY since 2001. After the purchase, Steven's position in NBTY represented 15 percent of his portfolio at MSSB.

29. On the afternoon of May 24, 2010, Steven's cell phone placed a 2 minute and 43 second call to Marc's cell phone at 12:14 p.m.; immediately after that call, Marc's cell phone placed call lasting approximately 3 minutes to Topal's cell phone. At 3:12 p.m., there was second call, lasting approximately 4 minutes, from Steven's cell phone to Marc's cell phone, followed at 3:48 p.m. by a call, lasting approximately 1 minute, from Marc's cell phone to a phone associated with the landscaping business owned by Craig and Glenn.

30. Approximately 40 minutes later, at 4:24 p.m., Topal called her broker at Merrill Lynch and placed an order to purchase 1,000 shares of NBTY. The order was filled at market open the next morning, May 25, at an average price of \$32.37. This purchase was the only unsolicited trade that Topal made in her Merrill Lynch accounts for all of 2010.

31. At 10:04 a.m. on May 25, Marc purchased 1,000 shares of NBTY in his account at Janney Montgomery Scott at an average price of \$32.57 per share. The purchase, which was partially funded by the redemption of \$17,000 of principal-protected notes issued by Citigroup Global Markets, was Marc's only purchase in his brokerage accounts for all of 2010.

32. At 10:45 a.m. on the morning of May 26, 2010, Craig called his financial advisor at MSSB's Jericho, New York office. Ten minutes later, two purchases of 600 shares and 1,650 shares of NBTY were executed in two of Craig's accounts at MSSB.



The purchase – at an average price of \$33.33 or \$74,992 in total – was funded by the sale of shares of Home Depot, Inc., and was Craig’s only purchase of NBTY since at least 2005. After the purchase, Craig’s NBTY position represented 12 percent of his portfolio at MSSB.

33. At 1:07 p.m. on June 16, 2010, approximately 12 minutes after the end of Glenn’s participation in that day’s telephonic board meeting, Glenn’s cell phone placed a 57-second call to Steven’s cell phone. (The call appears to have been prompted by a voice-mail message that Steven left for Glenn during the board meeting.) Glenn’s cell phone also had multiple calls with Craig’s cell phone that afternoon.

34. At 9:30 a.m. on June 17, 2010, Glenn’s cell phone placed a 1 minute and 48 second call to Craig’s cell phone. Approximately 35 minutes later, Craig called MSSB’s Jericho, New York office and placed an order to purchase 1,450 shares of NBTY. The purchase was funded by the sale of shares of IBM. After this purchase, Craig’s position in NBTY represented 20 percent of his portfolio at MSSB.

35. On the morning of June 20, 2010 (a Sunday), Glenn’s cell phone placed three brief calls in to Steven, Marc and Craig in succession.

36. At 11:51 a.m. on June 21, 2010, Steven called his financial advisor at MSSB and indicated that he wanted to add to his NBTY position and fund the purchase with the sale of mutual fund shares. Later that day, MSSB executed a sale of \$26,000 in mutual fund shares in Steven’s account. Three days later, on June 24, 2010, Steven called MSSB again and instructed his financial advisor to purchase 700 additional shares of NBTY.

37. 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.

38. On July 15, 2010, after the announcement of the agreement with Carlyle, Craig, Marc, Steven and Topal all placed sell orders with respect to their NBTY shares. The sales netted profits of approximately \$72,000 for Craig; \$21,000 for Marc; \$60,000 for Steven; and \$21,000 for Topal.

**D. Glenn Cohen Violated His Duty to NBTY and Communicated Material Non-Public Information to His Brothers and Topal Who Then Purchased NBTY Shares**

39. The information regarding Carlyle's negotiations with NBTY that defendant Glenn obtained in the course of his service on NBTY's board of directors was confidential. This information was considered confidential by NBTY, which had policies protecting its confidential information.

40. Defendant Glenn owed a fiduciary duty, or obligation arising from a similar relationship of trust and confidence, to NBTY to keep the information confidential, to abstain from purchasing or selling securities based on that information, and to abstain from passing material nonpublic information to others outside the Company, including family and friends.

41. Defendant Glenn violated the fiduciary duty he owed to NBTY by willfully or recklessly tipping and conveying, in words or in substance, during the telephone calls described in paragraphs 26 through 30 and 33 through 35 above and during other means of communications among the defendants, material nonpublic information regarding Carlyle's negotiations with NBTY to defendants Craig, Marc, Steven and/or Topal with the expectation of receiving a benefit from doing so.

42. Defendants Craig, Marc, Steven and/or Topal owed a fiduciary duty, or obligation arising from a similar relationship of trust and confidence, to Glenn and/or to each other, to: (i) maintain the confidentiality of material nonpublic information regarding NBTY provided to them, directly or indirectly, by Glenn; (ii) to abstain from purchasing or selling securities based on that material nonpublic information; and (iii) to abstain from passing that material nonpublic information to others, including family and friends.

43. Defendants Craig, Marc, Steven and Topal each knew, recklessly disregarded, or should have known, that the material nonpublic information concerning NBTY that each received from Glenn and/or from any of the other defendants was disclosed or misappropriated in breach of a fiduciary duty, or similar relationship of trust and confidence.

44. At the time defendants Craig, Marc, Steven and Topal purchased, or directed the purchase of, NBTY securities, as alleged above, they were in possession of material, nonpublic information about the contemplated acquisition of NBTY.

45. Defendants Craig, Marc, Steven and Topal: (i) knew, recklessly disregarded, or should have known that their trading was in breach of a fiduciary duty, or

obligation arising from a similar relationship of trust and confidence, owed to the shareholders of NBTY, or to the source from whom they received the material, nonpublic information; and/or (b) knew, recklessly disregarded, or should have known, that the material, nonpublic information about the contemplated acquisition that had been conveyed to them was disclosed or misappropriated in breach of a fiduciary duty, or similar relationship of trust and confidence.

46. Any and all material, nonpublic information that the defendants Craig, Marc, Steven and Topal received concerning the contemplated acquisition of NBTY, as set forth above, was disclosed to them by a person or persons who tipped such information with the expectation of receiving a benefit.

#### **CLAIM FOR RELIEF**

##### **Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder Against All Defendants (Antifraud Provisions –against all Defendants)**

47. The Commission realleges and incorporates by reference paragraphs 1 through 46, as though fully set forth herein.

48. By virtue of the foregoing, all of the defendants, singly or in concert with others, 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: (a) employed devices, schemes or artifices to defraud; (b) made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) engaged in acts, practices or courses of business which operated or would have operated as a fraud or deceit upon persons.

49. By virtue of the foregoing, the defendants, and each of them, 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 defendants Glenn, Craig, Marc, Steven and Topal 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 defendants Glenn, Craig, Marc, Steven and Topal 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 their respective tippees;

**III.**

Ordering defendants Glenn, Craig, Marc, Steven and Topal to pay civil monetary penalties pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1];

**IV.**

Barring defendant Glenn, 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.

**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, the Commission demands trial by jury in this action of all issues so triable.

Dated: New York, New York  
May 22, 2014



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