

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
ENTERED

SEP 11 2002

Michael N. Milby, Clerk of Court

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

Civil Action No. H-02-0636

MARK E. RICE d/b/a/ PRIMEX CAPITAL, and

STATUS WINES OF TUSCANY, INC.
f/k/a PORTALZONE.COM, INC.

Defendants,

APPLEGATE SENTRY, S.A., and

PRIMEX (USA), INC.

Relief Defendants.

FINAL JUDGMENT BY DEFAULT
AGAINST MARK E. RICE

The Securities and Exchange Commission filed a motion pursuant to Fed. R. Civ. P. 55(b)(2), requesting entry of a final judgment by default against Defendant Mark E. Rice ordering him to pay disgorgement, prejudgment and post judgment interest, and civil penalties. In ruling on this motion, the Court has considered the SEC's motion and the Affidavit of Michael R. Macphail attached as support to that motion.

On March 7, 2002, this Court entered a permanent injunction against Rice, based on his consent, which enjoined him from violating the anti-fraud, securities registration, and manipulation provisions of the federal securities laws contained at 15 U.S.C. §§ 77e(a), 77e(c), 77q(a), 78j(b) and 17 C.F.R. §§ 240.10b-5, and 242.101. The injunction provided that this Court retained jurisdiction to determine whether disgorgement, pre-judgment interest, and civil

38

penalties should be entered against Rice based on his violations of the provisions listed above.

Although Rice waived service of the summons and First Amended Complaint pursuant to Fed. R. Civ. P. 4(d) on March 7, 2002, Rice failed to file an answer or other responsive pleading on or before May 4, 2002 denying the allegations of the SEC's complaint. Rice has filed no responsive pleading to date and is currently in default.

The court has determined pursuant to F.R.C.P. 55(b)(2) that a hearing to determine the amount of disgorgement, prejudgment interest and civil penalties is not necessary, because the amounts can be determined based on the affidavit submitted by the SEC. See *Flaks v. Koegel*, 504 F.2d 702, 707 (2d Cir. 1974) (hearing not required where damages are "susceptible of mathematical computation"); *U.S. v. Raleigh Restaurant*, 398 F. Supp. 496, 498 (E.D.N.Y. 1975) (default judgment based on "affidavit ... evidencing a final accounting of the amount due ... for the approval of this court. Such amount, when approved, shall constitute the total indebtedness due from defendant ... for federal tax liabilities").

Because the defendant is in default, the Court considers the factual allegations of the Commission's complaint, except those relating to the amount of damages, as true. *Beck v. Atlantic Contracting Co., Inc.*, 157 F.R.D. 61, 64 (D. Kan. 1994), citing 10 Wright, Miller & Kane, *Federal Practice and Procedure* § 2688, at 444 (2d ed. 1983); *Comdyne I, Inc. v. Corbin*, 908 F.2d 1142, 1149 (3rd Cir. 1990).

The Court finds it has jurisdiction over the subject matter of this action pursuant to Section 22(a) of the Securities Act, 15 U.S.C. § 77v, and Sections 21(e) and 27 of the Exchange Act, 15 U.S.C. §§ 78u(e) and 78aa, and personal jurisdiction over the defendant Rice because he resides in this district and certain act which form the basis for the SEC's claims against the defendant occurred within the Southern District of Texas.

The Court finds that the Commission is not required to serve the Second Amended Complaint upon Rice because the Second Amended Complaint does not contain new or additional claims for relief against him. See Fed. R. Civ. P. 5(a).

The Court finds that Rice obtained illegal profits of \$89,528 from his personal trading of the securities of four public companies while he was engaged in fraudulent and manipulative activities in connection with the sales of the securities of those companies. The Court finds that Rice also controlled and directed the trading activities of the two relief defendants. Rice obtained illegal profits of \$759,174 for Primex, and illegal profits of \$51,665 for Applegate through stock sales by these companies, during the time period when Rice was manipulating the price of those securities by distributing false information about the companies over the Internet.

The Court finds that it is appropriate to order Rice to disgorge his personal trading profits of \$89,528. Disgorgement is an appropriate equitable remedy granted to the district court by Section 22(a) of the Securities Act, 15 U.S.C. § 77v(a), and Section 27 of the Exchange Act, 15 U.S.C. § 78aa. See e.g., *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103 (2d Cir. 1972).

The Court also finds that it is appropriate to order Rice to be jointly and severally liable with Primex to disgorge illegal trading profits of \$759,174, and to be jointly and severally liable with Applegate to disgorge illegal trading profits of \$51,665. When defendants act collectively, joint and several liability is appropriate. See Section 20(a) of the Exchange Act, 15 U.S.C. § 78t; see also *Hateley v. SEC*, 8 F.3d 653, 656 (9th Cir. 1993) (joint and several liability assessed against defendants acting collectively or against defendants who were controlling or controlled persons). The facts of this case are distinguishable from *SEC v. Cross Financial Services, Inc.*, 908 F. Supp. 718 (C.D. Cal. 1995), in which the court refused to apply joint and several liability

between defendants and a relief defendant. In *Cross Financial*, there was no collective activity by the defendants and relief defendant, which is present in the instant case. In this case, Rice made the decisions and directed the sales of stock for the accounts of the relief defendants. Rice used the relief defendants to hide his trading activities and his control of the proceeds from the stock sales. This element of control was not present in the *Cross Financial* case. Additionally, the plaintiff's request will not make the relief defendants jointly responsible for Rice's illegal acts or the profits from his personal trading, however, it will make Rice responsible to disgorge all of the illegal gains he obtained as a result of this fraud and manipulation of the securities of four public companies.

The Court finds it appropriate to order Rice to pay prejudgment interest upon the illegal profits from his personal trading and to be jointly and severally liable for the prejudgment interest upon the illegal profits obtained by the relief defendants through trading that he directed. The Court finds it appropriate to calculate the amount of prejudgment interest using the IRS underpayment rates contained in 26 C.R.F. § 301.6621-1. *See e.g., SEC v. Stephenson*, 732 F. Supp. 438, 439 (S.D.N.Y. 1990); *SEC v. Tome*, 638 F. Supp. 638, 639 (S.D.N.Y. 1986), *aff'd*, 833 F.2d 1086 (2d Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988); *SEC v. Drexel Burnham Lambert, Inc.* 837 F. Supp. 587, 612 n. 8 (S.D.N.Y. 1993), *aff'd*, 16 F.3d 520 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 724 (1995).

The Court finds it is appropriate pursuant to Section 20(d)(2)(C) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3), as amended, to order Rice to pay \$440,000 in civil penalties consisting of four penalties of \$110,000 each, which are based on Rice's violations related to each of the four companies whose stock he manipulated by distributing false and misleading information and engaging in manipulative

trading practices. These provisions authorize the Court to order civil penalties of \$110,000 per violation where the defendant's violation involves fraud or manipulation coupled with proof of substantial losses. The Court finds that Rice's violations involved fraud and manipulation, which resulted in substantial losses of \$900,367, the amount by which Rice, Primex and Applegate profited while engaged in fraudulent misrepresentations to investors who purchased these securities from an artificially inflated market created by the defendant.

Now therefore,

I.

IT IS ORDERED that:

A. Defendant Mark E. Rice shall disgorge \$89,528 of his personal trading profits plus prejudgment interest of ~~\$19,215.85 plus additional prejudgment interest of~~ \$ 20,252.98; and

B. Within fourteen days of entry of this Order, Defendant Rice shall make payment of \$89,528 of disgorgement and prejudgment interest of \$ 20,252.98 in the form of a United States postal money order, certified check, bank cashier's check or bank money order payable to the Securities and Exchange Commission and hand-delivered or mailed to the Office of the Comptroller, U.S. Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312. The payment shall be submitted with a cover letter that identifies Mark E. Rice as defendant in this case, lists the caption and case number of this action, and the name of this Court. Defendant Rice shall send a copy of the cover letter and payment to Leslie Hendrickson Hughes, Trial Counsel, Securities and Exchange Commission, Denver Regional Office, 1801 California Street, Suite 1500, Denver, Colorado 80202-2656.

II.

IT IS FURTHER ORDERED that:

A. Defendant Mark E. Rice and Primex (USA), Inc. jointly and severally pay disgorgement of \$759,174, which is Primex's illegal trading profits, plus prejudgment interest in the amount of \$ 152,597.53; and

B. Within fourteen days of entry of this Order, Defendant Rice and relief defendant Primex (USA) Inc. shall make payment of \$759,174, of disgorgement and prejudgment interest of \$ 152,597.53 in the form of a United States postal money order, certified check, bank cashier's check or bank money order payable to the Securities and Exchange Commission and hand-delivered or mailed to the Office of the Comptroller, U.S. Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312. The payment shall be submitted with a cover letter that identifies Mark E. Rice and Primex (USA) Inc. as parties in this case, lists the caption and case number of this action, and the name of this Court. Defendant Rice shall send a copy of the cover letter and payment to Leslie Hendrickson Hughes, Trial Counsel, Securities and Exchange Commission, Denver Regional Office, 1801 California Street, Suite 1500, Denver, Colorado 80202-2656.

III.

IT IS FURTHER ORDERED that:

A. Defendant Mark E. Rice and relief defendant Applegate Sentry, S.A. jointly and severally pay disgorgement of \$51,665, which represents Applegate's illegal trading profits, and prejudgment interest of \$ 11,904.73; and

B. Within fourteen days of entry of this Order, Defendant Rice and relief defendant Applegate Sentry, S.A. shall make payment of \$51,665 of disgorgement and prejudgment interest

of \$ 11,904.73 in the form of a United States postal money order, certified check, bank cashier's check or bank money order payable to the Securities and Exchange Commission and hand-delivered or mailed to the Office of the Comptroller, U.S. Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312. The payment shall be submitted with a cover letter that identifies Mark E. Rice and Applegate Sentry S.A. as parties in this case, lists the caption and case number of this action, and the name of this Court. Defendant Rice shall send a copy of the cover letter and payment to Leslie Hendrickson Hughes, Trial Counsel, Securities and Exchange Commission, Denver Regional Office, 1801 California Street, Suite 1500, Denver, Colorado 80202-2656.

IV.

IT IS ORDERED that four civil penalties in the amount of \$110,000 each, for a total amount of \$440,000, shall be imposed upon Defendant Mark E. Rice, pursuant to Section 20(d) of the Securities Act, 15 U.S.C. 77t(d), and Section 21 of the Exchange Act, 15 USC 78u]. Within fourteen days of entry of this Order, Defendant Rice shall make payment of \$440,000 in the form of a United States postal money order, certified check, bank cashier's check or bank money order payable to the Securities and Exchange Commission and hand-delivered or mailed to the Office of the Comptroller, U.S. Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312. The payment shall be submitted with a cover letter that identifies Mark E. Rice as defendant in this case, lists the caption and case number of this action, and the name of this Court. Defendant Rice shall send a copy of the cover letter and payment to Leslie Hendrickson Hughes, Trial Counsel, Securities and Exchange Commission, Denver Regional Office, 1801 California Street, Suite 1500, Denver, Colorado 80202-2656.

VI.

IT IS FURTHER ORDERED that Mark E. Rice shall pay post judgment interest pursuant to 28 U.S.C. § 1961, which shall accrue on the disgorgement amount, the prejudgment interest amount, and the civil penalties from the date of entry of this judgment until Rice shall pay the full amount listed above.

VII.

IT IS FURTHER ORDERED, that this Court shall retain jurisdiction over this action for all purposes, including implementation and enforcement of this judgment. There being no just reason for delay, the Clerk of the Court is hereby directed to enter this Final Judgment By Default Against Mark E. Rice pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, forthwith.

Entered this 18th day of August, 2002.



VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

The Clerk of the Court is directed to send copies of this order to:

Leslie Hendrickson Hughes, Esq.
Securities and Exchange Commission
1801 California Street, Suite 1500,
Denver, CO 80202- 2656

Mark E. Rice
142 N. Keswick Ct.
Sugar Land, TX 77478

Status Wines of Tuscany, Inc.
f/k/a Portalzone.com, Inc.
c/o Elections Division
Office of the Secretary of State of Nevada
101 N. Carson Street, Suite 3
Carson City, NV 89701-4786

Primex (USA), Inc.
c/o Elections Division
Office of the Secretary of State of Nevada
101 N. Carson Street, Suite 3
Carson City, NV 89701-4786

Applegate Sentry, S.A.
Attn: Gaye Knowles
Management International Building
East Bay Street
P.O. Box N8198
Nassau, Bahamas