UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. ANTHONY K. WELCH, Defendant.	CIVIL ACTION No. 1:12-cv-3034-SCJ

O R D E R

This matter is before the Court on Plaintiff's motion for default judgment [Doc. No. 15].

I. PROCEDURAL BACKGROUND

This action by the Securities and Exchange Commission, alleging violations of the antifraud provisions of § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act") was filed on August 30, 2012. Thereafter, the SEC attempted to locate and serve Defendant [Doc. No. 5-1]. Despite its diligent efforts, the SEC was unable to personally serve Defendant [Doc. No. 7-1], and it moved for permission to serve Defendant by publication. The SEC's request was granted, and Defendant was served by publication [Doc. No. 13]. Upon Defendant's failure to file a timely answer, the SEC moved for clerks' entry of default on May 14, 2013.

Default was entered against Defendant on May 15, 2013, and the SEC moved for the entry of default judgment.

II. LEGAL STANDARD

"The entry of a default judgment is appropriate '[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise.'" *Mitchell v. Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1316 (11th Cir. 2002) (alteration in original) (quoting Fed. R. Civ. P. 55(a)). The Court is cognizant, however, that default judgment is considered a "drastic remedy," which should be used only in exceptional circumstances. *Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir. 1985). Although generally disfavored, a default judgment is "appropriate when the adversary process has been halted because of an unresponsive party." *Flynn v. Angelucci Bros. & Sons, Inc.*, 448 F. Supp. 2d 193, 195 (D.D.C. 2006) (internal quotation marks omitted).

A party's failure to plead or defend "do[es] not automatically entitle the [opposing party] to a default judgment in the requested (or any) amount." *SE Property Holdings, LLC, v. Welsh*, No. 12-0717-WS-B, 2013 WL 608176, at *2 (S.D. Ala. Feb. 19, 2013). That is because "[a] default is not an absolute confession by the

defendant of his liability and of the plaintiff's rights to recover, but is instead merely an admission of the facts cited in the Complaint, which by themselves may or may not be sufficient to establish a defendant's liability." *Id.* (internal quotation marks omitted). *See also* Fed. R. Civ. P. 8(b)(6) ("An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied."). Where a defendant fails to deny the facts as alleged in the complaint, the allegations are deemed admitted and there is "no further burden upon [the] [p]laintiff to prove its case factually." *Stewart v. Regent Assent Mgmt. Solutions, Inc.*, No. 1:10-CV-2552-CC-JFk, 2011 WL 1766018, at *1 (N.D. Ga. May 4, 2011) (quoting *Burlington Northern R.R. Co. v. Huddleston*, 94 F.3d 1413, 1415 (10th Cir. 1996)).

III. DEFENDANT'S LIABILITY

Having considered the above-detailed standard, the Court concludes that default judgment is warranted in this instance. Service was perfected upon Defendant through publication. Defendant failed to appear and file an answer or otherwise defend this action. Accordingly, the entry of default was appropriate. The complaint alleges sufficient facts—accepted as true for Defendant's failure to

deny them—to establish that Defendant is liable for the violations alleged and to warrant the entry of default judgment against him.

Specifically, the complaint alleges facts establishing that (1) Defendant was the chairman and chief executive officer of eHydrogen Solutions, Inc. ("eHydrogen") and ChromoCure, Inc. ("ChromoCure") for the period at issue; (2) eHydrogen and ChromoCure had little to no revenue or business operations; (3) Defendant launched an internet-based promotional campaign for eHydrogen and ChromoCure, which involved the issuance of numerous press releases publicizing nonexistent acquisitions and technological advancements as well as false corporate valuations; and (4) the price of eHydrogen and ChromoCure stock price increased dramatically (600% and 300%, respectively) at points throughout the promotional campaign, and the stock volume for both companies spiked during the campaign.

Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), proscribes individuals from employing "any manipulative or deceptive device or contrivance" through any instrumentalities of interstate commerce in connection with the purchase or sale of securities. The corresponding regulation, 17 C.F.R. § 240.10-b(5), prohibits the making of false statements of material facts in connection with a securities transaction by the means of interstate commerce. Here, based on the admitted facts

and the reasonable inferences drawn therefrom, it is apparent that Defendant had sole control over the substance of the publicity campaign, that the assertions regarding eHydrogen and ChromoCure were material, that there was no reasonable basis for the assertions made, and the assertions were made in connection with the purchase or sale of securities. Accordingly, a violation of § 10(b) and of Rule 10b-5 is established.

Alternatively, Defendant is liable for aiding and abetting eHydrogen and ChromoCure in violating § 10(b) and Rule 10b-5. As the individual responsible for the campaign, which published materially false information, Defendant provided substantial assistance to the two companies at issue in their violation of the Act. As the chairman and chief executive officer of eHydrogen and ChromoCure, Defendant knew or should have known that the statements made were baseless. Accordingly, it is established that Defendant acted with the requisite scienter and provided substantial assistance to eHydrogen and ChromoCure in their violations of § 10(b) and Rule 10b-5.

Defendant is liable as the person controlling eHydrogen and ChromoCure. Defendant was the chairman and chief executive officer of both companies, and he

controlled the publicity campaign. Thus, Defendant had control over and knowledge of the false press releases.

IV. RELIEF SOUGHT

The SEC requests that in view of the violations established the Court enter a permanent injunction, require disgorgement, award prejudgment interest on any disgorged amount, levy a civil penalty, and enter an officer and director bar and a penny stock bar.

A. PERMANENT INJUNCTION

With regard to a permanent injunction, the SEC seeks to enjoin Defendant and all those in concert with him from violating § 10(b) of the Act and Rule 10-b5. The SEC notes that it is mindful of *S.E.C. v. Goble*, 682 F.3d 934 (11th Cir. 2012), which notes that a general restraint against violating § 10(b) and Rule 10b-5 may run afoul of the specificity requirement demanded by Rule 65(d) of the Federal Rules of Civil Procedure. In view of *Goble*, the SEC has proposed "a narrower, hybrid antifraud injunction." [Doc. No. 15-1, 21]. A review of the proposed injunction, however, shows that it offers little more in terms of specificity of the acts enjoined than the language of Rule 10b-5 itself. "A broad, but properly drafted injunction, which largely uses the statutory or regulatory language may satisfy the specificity

requirement of Rule 65(d) so long as it clearly lets the defendant know what he is ordered to do or not do." *Goble*, 682 F.3d at 952. However, "a bare command to comply with § 10(b)" may run afoul of Rule 65(d) considering that

> if an injunction simply used the language of § 10(b) of the Exchange Act or Rule 10b-5, a defendant reading the injunction would have little guidance on how to conform his conduct to the terms of the injunction. Indeed, that defendant would need to review hundreds of pages of the Federal Reporters, law reviews, and treatises before he could begin to grasp the conduct proscribed by § 10(b) and in turn the injunction. What's more, the judicial gloss on § 10(b) is not fixed. . . . This ever-changing judicial landscape would further complicate a defendant's efforts to comply with an injunction that recited the language of § 10(b).

Id. at 951. Here, the proposed injunction faithfully tracks the language of Rule 10b-5 in that it enjoins Defendant from making untrue statements of material facts or from omitting material facts in connection with the purchase or sale of securities. The only addition being that Defendant would also be enjoined from violating Rule 10-b5 through the means of a press release or statement issued by a publicly held company. The inclusion of this nuance does little to inform Defendant of the specific type of conduct that would result in his violating § 10(b) and Rule 10b-5. Because the proposed injunction fails to provide the level of specificity necessary to place Defendant on notice of the enjoined acts, the SEC's request for the entry of the permanent injunction is DENIED.

B. DISGORGEMENT OF PROFITS

With regard to the SEC's request for disgorgement and prejudgment interest on the amount disgorged, the Court concludes that such relief is appropriate to the extent it can be shown that Defendant profited from the fraud outlined in the SEC's complaint. But because the SEC has no evidence at this time that Defendant did profit from the fraud, disgorgement is not ordered against him.

C. CIVIL PENALTY

Considering that Defendant's violation of § 10(b) and Rule 10b-5 involved fraud and created a significant risk of substantial losses to other persons, Defendant is ordered to pay a civil penalty in the amount of $ 60,000 pursuant to Sections 21(d)(3) and 21A of the Exchange Act, 15 U.S.C. 78u(d)(3) and 78u-1. Defendant shall make this payment within ten business days after entry of this Default Judgment. Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order

payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Anthony K. Welch as a defendant in this action; and specifying that payment is made pursuant to this Default Judgment. Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action at the following address:

Edward G. Sullivan, Esq.,
Securities and Exchange Commission,
950 East Paces Ferry Road, NE, Suite 900,
Atlanta, GA 30326.

By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant. The Commission shall send the funds paid pursuant to this Default Judgment to the United States Treasury. Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

D. PENNY STOCK BAR

Pursuant to both Section 603 of the Sarbanes-Oxley Act of 2002 (which amended Section 21(d) of the Exchange Act) and to the inherent equitable powers of this Court, Defendant is permanently barred from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock. A penny stock is any equity security that has a price of less than five dollars, except as provided in Rule 3a51-1 under the Exchange Act, 17 C.F.R. 240.3a51-1.

E. OFFICER AND DIRECTOR BAR

Defendant, pursuant to Section 21(d)(2) of the Exchange Act, 15 U.S.C. 78u(d)(2), is also permanently prohibited from acting as an officer or director of any issuer that has a class of securities registered with the Commission pursuant to Section 12 of the Exchange Act, 15 U.S.C. 78l, or that is required to file reports with the Commission pursuant to Section 15(d) of the Exchange Act, 15 U.S.C. 78o(d).

V. CONCLUSION

For the above-stated reasons, Plaintiff's motion for default judgment [Doc. No. 15] is **GRANTED**. The Clerk is **DIRECTED** to enter judgment against

Defendant in the sum of $60,000. Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961. Furthermore, Defendant is permanently **BARRED** from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock and is also permanently **PROHIBITED** from acting as an officer or director of any issuer that has a class of securities registered with the Commission pursuant to Section 12 of the Exchange Act, 15 U.S.C. 78l, or that is required to file reports with the Commission pursuant to Section 15(d) of the Exchange Act, 15 U.S.C. 78o(d).

IT IS SO ORDERED, this 21st day of November, 2013.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE