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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Securities and Exchange Commission)	
)	No. CV 08-353-PHX-MHM
Plaintiff)	
)	
v.)	CORRECTED AND
)	
Mario A. Pino)	SUPERSEDING DEFAULT
)	
Defendant.)	JUDGMENT AS TO
)	
)	MARIO A. PINO
_____)	

This Corrected and Superseding Default Judgment Against Mario Pino corrects and supersedes the Order of Default Judgment Against Mario A. Pino entered September 24, 2008.

The Securities and Exchange Commission filed a Complaint on February 25, 2008. Defendant Mario A. Pino has failed to respond to the Complaint. Default pursuant to Federal Rule of Civil Procedure 55(a) was entered on April 16, 2008 against Pino. The Plaintiff has moved for default judgment, which the Court, in its discretion has determined should enter.

“Entry of default judgment is governed by FRCP 55 and is left to the trial court’s sound discretion.” Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). After entry of default by the Clerk of the Court pursuant to FRCP 55(a), the Court may grant default judgment pursuant to FRCP 55(b)(2). See Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir. 1986) (discussing the sequential two-step process under FRCP 55). Factors that a district court may consider in

1 exercising its discretion include the following:

2
3 (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's
4 substantive claim, (3) the sufficiency of the complaint, (4) the sum of
5 money at stake in the action; (5) the possibility of a dispute concerning
6 material facts; (6) whether the default was due to excusable neglect, and
7 (7) the strong policy underlying the Federal Rules of Civil Procedure
8 favoring decisions on the merits.

9 Id., 782 F.2d at 1471-72. After default has been entered by the Clerk of the Court, the factual
10 allegations of the complaint are taken as true, except for those allegations relating to damages.
11 See TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). "A party seeking
12 default judgment must state a claim upon which it may recover." Philip Morris USA, 219
13 F.R.D. 494, 501 (C.D.Cal. 2003). Furthermore, a plaintiff must prove all damages sought in
14 the complaint. See Philip Morris USA, 219 F.R.D. at 498; see also Fed.R.Civ.P. 55(b)(2) ("In
15 determining damages, a court can rely on the declarations submitted by the plaintiff."). After
16 considering the facts presented in this case, the Court finds that Plaintiff has satisfied the Eitel
17 factors such that default judgment is appropriate.

18 With respect to the Eitel factors, under the first factor, the SEC will be prejudiced if it is
19 unable to enforce securities laws merely because someone like Pino refuses to defend an action.
20 Furthermore, the SEC asks for an injunction after being presented with evidence that the
21 Defendant "may be embarking upon similar activities in California." (Memorandum in Support
22 of Motion for Default Judgment, Dkt.# 8, p.8). As to the second factor, the Complaint sets forth
23 with great specificity the nature of the allegations leveled against Defendant. Similarly, the
24 third factor has been met, because the Complaint is sufficient, both legally and factually. As to
25 the fourth factor, the SEC has submitted a declaration setting forth the amount gained by Pino
26 through his alleged scheme. (Memorandum in Support of Motion for Default Judgment Exhibit
27 1, Declaration of Nancy Gegenheimer). That amount is additionally supported by Exhibit A to
28 the same Memorandum, which shows the number of stock transactions that have resulted in
Pino's gain. Lastly, the SEC submitted a supplemental exhibit attaching a chart showing the

1 calculation of the pre-judgment interest. (Supplemental Exhibit in Support of Motion for Default
2 Judgment Exhibit A, Dkt.# 13). As to the fifth factor, the possibility of dispute concerning
3 material facts seems remote given the strength of the government's case and the detailed nature
4 of the Complaint and supporting documents. As to the sixth factor, Pino's default was not
5 excusable. He was served with the summons and complaint while incarcerated, and now that he
6 is out Pino has, according to the SEC, been using a lawyer to transact business.

7 The SEC further contends that Pino has actual knowledge of this action, has access to counsel,
8 and does not have an otherwise valid excuse for failing to defend. (Memorandum in Support of
9 Motion for Default Judgment, Dkt.# 8, p. 9). As to the final factor, despite the strong policy
10 underlying the Fed. R. Civ. P. favoring decisions on the merits, Pino's failure to respond
11 while having actual knowledge of the proceedings strongly indicates that the allegations
12 contained in the government's complaint are true. Furthermore, Pino's refusal to
13 acknowledge this action renders adjudication on the merits before this Court impracticable.

14 **Accordingly,**

15 **I.**

16 **IT IS HEREBY ORDERED** that Defendant is permanently restrained and enjoined
17 from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the
18 "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R.
19 § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or
20 of any facility of any national securities exchange, in connection with the purchase or sale of
21 any security:

- 22 (a) to employ any device, scheme, or artifice to defraud;
- 23 (b) to make any untrue statement of a material fact or to omit to state a material fact
24 necessary in order to make the statements made, in the light of the circumstances
25 under which they were made, not misleading; or
- 26 (c) to engage in any act, practice, or course of business which operates or would
27 operate as a fraud or deceit upon any person.
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II.

IT IS FURTHER ORDERED that Defendant is permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the “Securities Act”) [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

- (a) to employ any device, scheme, or artifice to defraud;
- (b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

III.

IT IS FURTHER ORDERED that Defendant is permanently restrained and enjoined from violating Section 5 of the Securities Act [15 U.S.C. § 77e] by, directly or indirectly, in the absence of any applicable exemption:

- (a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;
- (b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or
- (c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the

1 use or medium of any prospectus or otherwise any security, unless a registration
2 statement has been filed with the Commission as to such security, or while the
3 registration statement is the subject of a refusal order or stop order or (prior to
4 the effective date of the registration statement) any public proceeding or
5 examination under Section 8 of the Securities Act [15 U.S.C. § 77h].
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8 **IV.**

9 **IT IS FURTHER ORDERED** that, pursuant to Section 20(e) of the Securities Act [15
10 U.S.C. § 77t(e)] and Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)], Defendant
11 is prohibited from acting as an officer or director of any issuer that has a class of securities
12 registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to
13 file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].
14

15 **V.**

16 **IT IS FURTHER ORDERED** that Defendant is permanently barred from participating
17 in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer
18 for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any
19 penny stock. A penny stock is any equity security that has a price of less than five dollars,
20 except as provided in Rule 3a51-1 under the Exchange Act [17 C.F.R. 240.3a51-1].

21 **VI.**

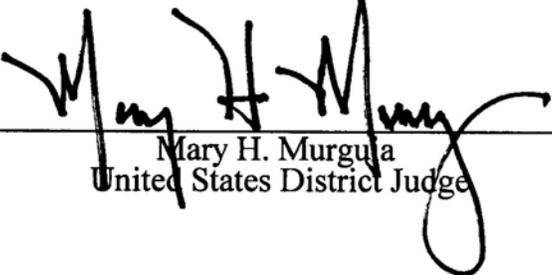
22 **IT IS FURTHER ORDERED** that Defendant is liable for disgorgement of \$259,811,
23 representing ill-gotten profits gained as a result of the conduct alleged in the Complaint,
24 together with prejudgment interest thereon in the amount of **\$66,945.80**, and a civil penalty of
25 \$100,000 pursuant to Section 20(d) of the Securities Act and Section 21(d) of the Exchange
26 Act. Defendant shall satisfy this obligation by paying **\$426,756.80** within ten (10) business
27 days after entry of this Default Judgment by certified check, bank cashier's check, or United
28 States postal money order payable to the Securities and Exchange Commission. The payment

1 shall be delivered or mailed to the Office of Financial Management, Securities and Exchange
2 Commission, Operations Center, 6432 General Green Way, Mail Stop 0-3, Alexandria,
3 Virginia 22312, and shall be accompanied by a letter identifying Mario A. Pino as a defendant
4 in this action; setting forth the title and civil action number of this action and the name of this
5 Court; and specifying that payment is made pursuant to this Default Judgment. Defendant shall
6 pay post-judgment interest on any delinquent amounts pursuant to 28 USC § 1961. The SEC
7 shall remit the funds paid pursuant to this paragraph to the United States Treasury.

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9 **VII.**

10 **IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this matter for
11 the purposes of enforcing the terms of this Default Judgment.

12 DATED this 3rd day of October, 2008.

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17 Mary H. Murgula
18 United States District Judge
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