IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. PIRANHA, INC., RICHARD S. BERGER, and EDWARD W. SAMPLE, Defendants; and LINDA A. SHAUGHNESSY, Defendant Solely for the Purpose of Equitable Relief.	**COMPLAINT** **CIVIL NO.:** **3:04-CV-1829-N**

Plaintiff Securities and Exchange Commission alleges:

SUMMARY

1. This case concerns market manipulation and accounting fraud schemes involving the securities of Piranha, Inc. ("Piranha"), a developmental-stage technology company formerly traded on the OTC Bulletin Board. The schemes were orchestrated by Richard S. Berger, Piranha's largest shareholder and CFO, with the assistance of Edward W. Sample, Piranha's CEO.

2. From February 2000 through January 2001, Piranha issued numerous misleading press releases which presented the company as a promising software technology company with the potential for substantial earnings when, in truth, the company never developed a commercially marketable product and generated only *de minimis* revenue.

3. From June 2000 through May 2001, Piranha also filed false reports with the Commission that materially overstated the value of the company's principal asset, a mathematical algorithm from which the company intended to develop its various software products, and failed to disclose and improperly accounted for $675,000 that Berger misappropriated from the company.

4. Berger and his nominee, Linda A Shaughnessy, profited from the scheme by selling more than $1.5 million of Piranha shares into an artificially inflated market.

5. In the interest of protecting the public against market manipulation and the reporting of false and misleading financial information by public companies, the Commission brings this action against Piranha, Berger, and Sample, seeking: (1) permanent injunctions and civil penalties against each defendant; (2) officer-and-director bars against Berger and Sample; and (3) disgorgement against Berger and Shaughnessy.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to Section 22(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77v(a)] and Section 27 of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78aa].

7. Defendants have, directly and indirectly, made use of the means or instrumentalities of interstate commerce and/or the mails in connection with the transactions described in this Complaint.

8. Venue lies in this Court pursuant to 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] because Piranha is headquartered in Richardson, Texas, and certain of the acts and transactions described herein took place in Richardson.

DEFENDANTS

9. **Piranha** is a Delaware corporation located in Richardson, Texas, whose common stock is registered with the Commission under Section 12(g) of the Exchange Act. From January of 2000 through at least May 2001, Piranha's common stock was traded on the OTC Bulletin Board under the symbol BYTE. Piranha has not filed a periodic report with the Commission since filing its Form 10-QSB for the first quarter of 2001, on May 31, 2001.

10. **Berger,** age 70, is a Chicago, Illinois, resident. During the scheme described herein, he was Piranha's CFO, a director and its largest shareholder.

11. **Sample**, age 53, is a Plano, Texas, resident and the former CEO and chairman of Piranha.

RELIEF DEFENDANT

12. **Shaughnessy**, age 58, resides in Chicago, Illinois, and is Berger's wife. Acting at the direction of Berger, during a time in which Piranha's share price was inflated by the fraudulent conduct described herein, Shaughnessy sold $392,380 of Piranha shares that she obtained from Berger for no consideration.

FACTS

Background

13. Piranha was formed in December of 1999 as a result of a merger between a private technology company affiliated with Sample and a dormant public shell company controlled by Berger. Simultaneous with its formation and name change to Piranha, Sample became CEO of the company while Berger became the CFO and its largest shareholder. Shortly after its formation, Piranha acquired all of the capital stock

of an unrelated privately held company whose principal asset was a data-compression algorithm that Piranha subsequently used as the principal basis for its software applications.

14. Piranha's acquisition of the private company was valued at $10,788,125 based on Piranha's assumption of $100,000 in liabilities and its issuance of 3,490,000 restricted shares, valued at the then market price of $3 per share, to the shareholders of the private company.

15. Piranha's business plan was to use the algorithm to develop software for data compression, streaming video, and Internet-website graphics. To that end, the company employed approximately 15 software engineers and organized a small marketing and sales force to sell and license its anticipated software applications. At one time, the company had approximately 60 employees and three offices nationwide.

16. The company worked for more than a year to develop three software products based on the algorithm: Piranha Net—a web based product designed to allow commercial web sites to download at faster speeds than conventional technology; Piranha Byte—a streaming data compression product that allows for faster downloads of large files from a server to a workstation; and Piranha Stream—a browser based video product that, working in conjunction with existing streaming media players, would allow faster and better streaming video over the Internet. Despite more than a year of product development, none of these products became commercially viable.

False and Misleading Press Releases

17. Notwithstanding Piranha's failure to develop a commercially viable product, the company's press releases distorted its progress in developing software

products using the algorithm and its purported prominence within the data-compression and software industries. During the relevant period, Sample drafted or caused to be drafted all of Piranha's press releases before their issuance and posting on the company's website. Berger reviewed and approved each press release before publication.

18. In its first press release issued on February 25, 2000, Piranha claimed that its proposed suite of software products was "fully operational and portable to the Apple and Microsoft operating systems." In truth, the company had not yet developed the algorithm into a viable product.

19. In its February 28, 2000 press release announcing the hiring of fifteen scientists to work on developing software, the company claimed "we are finalizing three exciting Piranha products for a late March launch date." The products included a streaming-video product called "Webstream." In truth, work had merely just started on developing these products, and the claim of a March release date was without any reasonable basis.

20. On March 27, 2000, in a press release announcing the "completion" of Webstream, the company claimed that it had "received advanced requests to encode a variety of content." But Webstream was not complete and the "advanced requests" were from companies who merely had agreed to test the product—not actual sales of the product or encoding services.

21. On March 30, 2000, a Piranha press release claimed that "[w]e are fortunate, indeed, to have spirit among all of our employees that propelled the Company to reach its goals in an unbelievably short period of time, and to maintain the integrity of

our products at the highest levels attainable." Piranha, while its shares were traded on the OTC Bulletin Board, further said that its progress in developing products allowed it to "take steps to file an application with the Nasdaq for listing on the National Market System." The release misleadingly omitted that the company had yet to create any commercially viable product.

22. While the company did file an application for its shares to be quoted on the Nasdaq SmallCap Market, in October of 2000 the application was withdrawn by counsel for Piranha after Nasdaq questioned the valuation of Piranha's primary asset and its ability to meet listing requirements. No corrective release announcing the withdrawal of the application was ever issued.

23. Starting in July of 2000, the general theme of Piranha's press releases transitioned from product development to the company's earnings potential. In an apparent attempt to stop what was now a declining share price, Piranha issued a series of press releases misrepresenting Piranha's financial prospects.

24. On July 12, 2000, Piranha announced a distributorship arrangement with an Australian company to market software products in Australia. Piranha touted that it would receive an initial payment of $1 million as consideration for the agreement to market its yet-to-be-developed products. Piranha further claimed that the Australian deal would lead to over "$50 million or more [in gross sales] over the next few years." In truth, the agreement was never consummated; Piranha did not receive $1 million and no relationship developed with the Australian distributor leading to any sales.

25. On October 4, 2000, Piranha announced that its new Internet-website graphics product was "running ahead of projected revenues and [that Piranha] looked

forward to a rewarding fourth quarter." In truth, Piranha realized only *de minimis* revenue from a website-graphics product. In fact, it never developed a functional website graphics product.

26. On December 11, 2000, a company press release claimed that "increased sales of core Piranha products and services will allow Piranha to achieve its objective of a cash-flow positive operation for the first quarter of 2001." And on January 29, 2001, Piranha projected "[w]e have high hopes of far exceeding our already-positive cash flow projections by the end of the first quarter." In truth, when both statements were made, Piranha was in desperate financial condition—not cash-flow positive; Piranha's private-placement funding had dried-up; and there were insufficient funds to cover rent and payroll.

27. On January 15, 2001, at the same time the company publicly touted achieving its objective of positive cash-flow, Sample wrote an e-mail to Berger describing Piranha's severe financial problems and emphasizing the need to raise more funds from investors. As if to portend Piranha's ultimate demise, Sample signed the e-mail "$5M or Bust!"

Market Impact

28. The market was extraordinarily receptive to Piranha's false and misleading promotional rhetoric. While initially trading at $3 per share in January 2000, the stock price sky-rocketed at the time of the false and misleading press releases, hitting an intra-day high of $65 per share on March 6, 2000. During the same period, the average daily trading volume increased from 25,370 to 116,600 shares, an increase of more than 400%. Despite having no viable products and only *de minimis* revenue, Piranha

shares traded between $7.12 and $14 on average daily volume of approximately 30,440 shares as late as September of 2000.

Berger and Shaughnessy's Stock Sales

29. From March 16, 2000, until May 18, 2000, Berger sold 43,225 shares of Piranha stock for proceeds of $1,122,551. Similarly, from March 20, 2000, until November 9, 2000, and acting at the direction of Berger, Shaughnessy sold 35,900 shares for proceeds of $392,380. The shares sold by Shaughnessy were "gifts" from Berger for which she paid no consideration.

Failure to Keep Books and Records and Lack of Internal Controls

30. Throughout Piranha's existence, Piranha failed to keep appropriate financial books and records and lacked adequate internal financial controls. Other than Berger, only a part-time accountant had access to Piranha's accounting books and records. Quarterly, Berger provided the accountant Piranha's check register to create drafts of quarterly financial statements. Any additional information needed to determine, among other things, the proper classification of expenses for the preparation of company financial statements flowed directly from Berger.

31. Berger also approved company expenses and personally deposited funds from all company sales of stock. A third-party vendor who handled payroll and employee benefits, also obtained all necessary information from Berger.

Berger's Misappropriation of Piranha Funds

32. Piranha's lack of internal controls led to abuse. In May and June of 2000, Berger issued two company checks payable to an escrow company for a total amount of $675,000. The checks were applied toward the purchase of Berger and Shaughnessy's

personal residence. The funds represented approximately 20% of Piranha's current assets.

33. Berger falsely advised Piranha's accountant that the checks had been issued in connection with a secret merger deal. He also falsely claimed that because the merger deal had not closed, the escrow agent was still holding the funds.

34. Ultimately, in December of 2001, Berger repaid $200,000 to the company. The balance of $475,000 remains unpaid.

35. The financial statements in Piranha's Forms 10-QSB for the second and third quarters of 2000—which were filed with the Commission and signed by Berger—both failed to properly account for the misappropriated funds and failed to disclose that Berger, a principal officer, had misappropriated funds.

The Improper Valuation of the Algorithm

36. Against internal company sales projections of $5.6 million, during fiscal year 2000, Piranha's algorithm generated only $78,000 in actual software sales. Most problematic was that its algorithm-based software did not work.

37. Despite problems with Piranha's products and the lack of sales, the company valued the algorithm at the original $10.6 million cost in its 2000 Form 10-KSB that was signed by both Sample and Berger. The same valuation was recorded in the company's March 31, 2001 Form 10-QSB signed by Sample.

38. By relying on the original cost basis, without considering the company's failure to develop a viable product, Piranha failed to comply with Generally Accepted Accounting Principles ("GAAP").

39. Intangible assets acquired from other entities can be recorded at cost

when acquired. Once booked at cost, however, GAAP requires an entity to review intangible assets whenever events or changes in circumstances indicate that the carrying amount of the asset may not be recoverable. Statement of Financial Accounting Standards 121 lists examples of events or changes in circumstances that require this analysis, including: 1) a significant change in the extent or manner in which an asset is used; 2) a significant adverse change in the business climate; and 3) a current period operating or cash flow loss combined with a history of operating or cash flow loss.

40. In preparing Piranha's Commission filings, Berger and Sample failed to consider the non-existent operating history of algorithm-based products; the changing applications of the algorithm when initial products did not work; competitive pressures of the software industry; and critically, that Piranha missed its sales projections by over 98%. By failing to comply with GAAP, Piranha materially overstated the value of the algorithm asset—continuing to carry the asset at its original valuation of $10.6 million, even though it was impaired. Thus, the financial statements in Piranha's 2000 Form 10-KSB and first quarter 2001 Form 10-QSB were materially misleading.

CLAIMS

FIRST CLAIM

Violations of Section 17(a) of the Securities Act

(Against Berger)

41. Paragraphs 1 through 40 are realleged and incorporated by reference.

42. Berger, directly or indirectly, singly or in concert with others, in the offer or sale of securities of Piranha, by use of the means and instruments of transportation and communication in interstate commerce and by use of the mails, has (a) employed devices, schemes or artifices to defraud, (b) obtained money or property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading and (c) engaged in transactions, practices or courses of business which operated or would operate as a fraud or deceit, upon a purchaser.

43. Berger acted knowingly or recklessly with respect to the activities alleged in this Claim.

44. Berger was also negligent with respect to the activities alleged in this Claim.

45. By reason of the foregoing, Berger violated and, unless enjoined, will continue to violate Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)].

SECOND CLAIM

Violations of Section 10(b) of the Exchange Act and Rule 10b-5

(Against Piranha, Berger, and Sample)

46. Paragraphs 1 through 40 are realleged and incorporated by reference.

47. Piranha, Berger, and Sample, directly or indirectly, singly or in concert with others, in connection with the purchase or sale of securities of Piranha, by use of the means and instrumentalities of interstate commerce and by use of the mails (a) employed manipulative and deceptive devices, contrivances, schemes and artifices to defraud, (b) made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading and (c) engaged in acts, practices and courses of business which operate as a fraud and deceit upon purchasers, prospective purchasers and other persons.

48. Piranha, Berger, and Sample, acted knowingly or recklessly with respect to the activities alleged in this Claim.

49. By reason of the foregoing, Piranha, Berger, and Sample, unless enjoined, will continue to 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].

THIRD CLAIM

Violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 Thereunder

(Against Piranha)

50. Paragraphs 1 through 40 are realleged and incorporated by reference.

51. Piranha, in the manner set forth above, failed to file with the Commission, in accordance with rules and regulations the Commission has prescribed, information and documents required by the Commission to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to Section 12 of the Exchange Act and annual reports and quarterly reports as the Commission has prescribed, and to include in such reports all material information as necessary to make the required statements, in light of the circumstances, not misleading.

52. By reason of the foregoing, Piranha violated Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20, 13a-1 and 13a-13 thereunder. [17 C.F.R. §§ 240.12b-20, 240.13a-1 and 240.13a-13].

FOURTH CLAIM

Aiding and Abetting Piranha's Violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 Thereunder

(Against Berger and Sample)

53. Paragraphs 1 through 40 are realleged and incorporated by reference.

54. Based on the conduct alleged herein, Piranha violated Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20, 13a-1 and 13a-13 thereunder. [17 C.F.R. §§ 240.12b-20, 240.13a-1 and 240.13a-13].

55. Berger and Sample, acting alone or in concert with others, in the manner set forth above, knowingly provided substantial assistance to Piranha, as an issuer of a security registered pursuant to Section 12 of the Exchange Act, in its failing to file with the Commission, in accordance with rules and regulations the Commission has prescribed, information and documents required by the Commission to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to Section 12 of the Exchange Act and annual reports and quarterly reports as the Commission has prescribed.

56. By reason of the foregoing, Berger and Sample aided and abetted Piranha's violations of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20, 13a-1 and 13a-13 thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-1 and 240.13a-13].

FIFTH CLAIM

Violations of Section 13(b)(2) of the Exchange Act

(Against Piranha)

57. Paragraphs 1 through 40 are realleged and incorporated by reference.

58. Piranha, having a class of securities registered pursuant to Section 12 of the Exchange Act, in the manner set forth above, failed to: (a) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of its assets; and (b) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary to permit preparation of

financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements and to maintain accountability for assets; and (iii) access to assets is permitted only in accordance with management's general or specific authorization; and the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

59. By reason of the foregoing, Piranha violated Section 13(b)(2) of the Exchange Act [15 U.S.C. § 78(m)(b)(2)].

SIXTH CLAIM

Aiding and Abetting Piranha's Violations of Section 13(b)(2) of the Exchange Act

(Against Berger and Sample)

60. Paragraphs 1 through 40 are realleged and incorporated by reference.

61. Based on the conduct alleged herein, Piranha violated Section 13(b)(2) of the Exchange Act [15 U.S.C. § 78(m)(b)(2)].

62. Berger and Sample, acting alone or in concert with others, in the manner set forth above, knowingly provided substantial assistance to Piranha in its failure to: (a) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of its assets; and (b) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements and to maintain

accountability for assets; and (iii) access to assets is permitted only in accordance with management's general or specific authorization; and the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

63. By reason of the foregoing, Berger and Sample aided and abetted Piranha's violations of Section 13(b)(2) of the Exchange Act [15 U.S.C. § 78(m)(b)(2)].

SEVENTH CLAIM

Violations of Section 13(b)(5) of the Exchange Act and Rule 13b2-1 Thereunder

(Against Berger and Sample)

64. Paragraphs 1 through 40 are realleged and incorporated by reference.

65. Berger and Sample knowingly circumvented Piranha's system of internal accounting controls and knowingly falsified books, records, or accounts described in Section 13(b)(2) of the Exchange Act.

66. By reason of the foregoing, Berger and Sample violated, and unless enjoined, will continue to violate Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)] and Rule 13b2-1 [17 C.F.R. § 240.13b2-1].

EIGHTH CLAIM

Violations of Exchange Act Rule 13b2-2

(Against Berger)

67. Paragraphs 1 through 40 are realleged and incorporated by reference.

68. Exchange Act Rule 13b2-2 prohibits officers and directors of an issuer from directly or indirectly making or causing to be made a materially false or misleading statement or omitting to state, or causing another person to omit to state, any material

fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading to an accountant in connection with any audit or examination of the issuer's required financial statements or the preparation of any document or report filed with the Commission.

69. By reason of the foregoing, Berger violated, and unless enjoined, will continue to violate Rule 13b2-2 [17 C.F.R. § 240.13b2-2].

NINTH CLAIM

Claim Against the Relief Defendant
As Custodian of Proceeds of Unlawful Activities

(Against Shaughnessy)

70. Paragraphs 1 through 40 are realleged and incorporated by reference.

71. In the manner set forth above, relief defendant Shaughnessy received funds and property, which are the proceeds, or are traceable to the proceeds, of the unlawful activities of defendants.

72. Shaughnessy has obtained the funds and property alleged above under circumstances in which it is not just, equitable or conscionable for her to retain the funds and property. As a consequence, relief defendant Shaughnessy has been unjustly enriched.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that the Court:

I.

Find that defendants committed the alleged violations.

II.

Permanently restrain and enjoin Piranha, Berger, and Sample from violating, or aiding and abetting, directly or indirectly, the provisions of law and rules alleged in this Complaint.

III.

Order that Piranha, Berger, and Shaughnessy disgorge all ill-gotten gains, including pre-judgment interest, resulting from their participation in the alleged conduct.

IV.

Order Piranha, Berger, and Sample to pay civil penalties pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)] and Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] in an amount to be determined by the Court.

V.

Enter an order barring Berger and Sample from acting as an officer or director of any issuer required to file reports pursuant to Sections 12(b), 12(g) or 15(d) of the Exchange Act, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)].

VI.

Grant such other relief as this Court may deem just or appropriate.

Respectfully submitted,

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