INITIAL DECISION RELEASE NO. 1142
ADMINISTRATIVE PROCEEDING
FILE NO. 3-17550

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	
	:	INITIAL DECISION
TOD A. DITOMMASO, ESQ.	:	June 13, 2017

APPEARANCES: Stephen C. McKenna and Kimberly S. Greer for the Division of Enforcement, Securities and Exchange Commission

Respondent Tod A. DiTommaso, Esq., *pro se*

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision orders Respondent Tod A. DiTommaso, Esq., to pay disgorgement of $1,475 and a civil penalty of $1,475.

I. INTRODUCTION

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on September 16, 2016, pursuant to Section 8A of the Securities Act of 1933 (Securities Act). On March 21, 2017, the undersigned concluded that, as alleged in the OIP, DiTommaso violated Sections 5(a) and 5(c) of the Securities Act through his issuance of ten attorney opinion letters in 2012 and 2013 concerning the safe harbor of Securities Act Rule 144 for transactions in the stock of Fusion Pharm, Inc. (FSPM). *Tod A. DiTommaso, Esq.*, Admin. Proc. Rulings Release No. 4698, 2017 SEC LEXIS 848 (A.L.J. Mar. 21, 2017) (Summary Disposition Order). Securities Act Sections 5(a) and 5(c) prohibit unregistered offers and sales by "any person, directly or indirectly"; DiTommaso violated those sections "indirectly." *Id.*, at *12. On May 10, 2017, the undersigned held a hearing on the issue of sanctions. The Division of Enforcement called DiTommaso as a witness, and he testified in his own behalf. There were no other witnesses. Fifty-eight exhibits offered by the Division and twenty-three exhibits offered by DiTommaso were admitted into evidence.[1]

[1] Citations to the transcript will be noted as "Tr. __." Citations to exhibits offered by the Division and Respondent will be noted as "Div. Ex. __" and "Resp. Ex. __," respectively. The Division's exhibits are designated 1 through 58, and Respondent's exhibits are designated A through W.

The findings and conclusions in this Initial Decision are based on the record and public official records of which official notice has been taken, pursuant to 17 C.F.R. § 201.323. Preponderance of the evidence was applied as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 96-104 (1981). The parties specified that their April 26, 2017, prehearing briefs would constitute their proposed findings and conclusions and supporting reasons; they otherwise waived any post-hearing filings to which they are entitled under the Administrative Procedure Act, 5 U.S.C. § 557(c). All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision were considered and rejected.

II. FINDINGS OF FACT

A. FSPM Stock and DiTommaso's Opinion Letters – Background Facts

The following background facts were found in the Summary Disposition Order:

FSPM is a Nevada corporation with its principal offices in Denver, Colorado. Its business focuses on the development, production, and sale of refurbished shipping containers used primarily to grow cannabis. FSPM has never registered an offering of securities under the Securities Act or a class of securities under the Securities Exchange Act of 1934. As of April 4, 2011, FSPM's stock was quoted on OTC Link (previously "Pink Sheets") operated by OTC Markets Group Inc. under the symbol FSPM. OTC's website currently displays a Caveat Emptor/Grey Market warning, illustrated with a skull and crossbones, for FSPM common stock. During the relevant period, Scott M. Dittman, a founder, was FSPM's CEO, president, and director.

Microcap Management LLC, Bayside Realty Holdings LLC, and Meadpoint Venture Partners, LLC – Nevada limited liability companies – were original securities holders or subsequent transferees of the blocks of securities in the transactions that were the subject of DiTommaso's opinion letters. William Sears, who had been convicted of securities fraud in 2007, operated the entities, and Dittman was also part owner of Meadpoint. Sears is Dittman's brother-in-law. Sears and Dittman operated FSPM as business partners and held themselves out as such to numerous individuals and investors. Sears was a *de facto* officer of FSPM. At the time he issued the opinion letters, DiTommaso was unaware of the relationship among Sears, Dittman, FSPM, and the three entities.

Sears and Dittman sold unregistered FSPM shares into the market through Microcap, Bayside, and Meadpoint, using various financial maneuvers and concealing their associations with the entities that made them affiliates of FSPM; these dealings include the transactions for which DiTommaso issued opinion letters. DiTommaso does not assert that any of these transactions involving affiliates actually qualified for a Rule 144 exemption, and there is nothing in his filings to support such an assertion.

DiTommaso is an attorney licensed in California. He issued ten attorney opinion letters relating to ten transactions in FSPM stock. He was paid a total of $1,475 for the ten letters.

Each opinion letter was directed to FSPM's transfer agent, Pacific Stock Transfer, and opined that a stock certificate could be issued without a restrictive legend in that the applicable one-year holding period had passed as the entity involved, Microcap, Bayside, or Meadpoint, was not an affiliate. The opinion letters enabled the removal of restrictive legends, which allowed the stock to

be sold by the three affiliated entities and by investors who purchased from Bayside. Account statements or confirmations of each entity show that the shares were sold into the market within a short time. There were no Form 144 filings by any of the three entities.

DiTommaso's involvement with the opinion letters was as follows: A friend introduced DiTommaso to attorney Guy Jean-Pierre, who explained that he was in-house lawyer for various entities and would like an outside counsel to prepare attorney opinion letters concerning the companies; DiTommaso agreed to provide the letters at a discounted price in exchange for Jean-Pierre's "ghostwriting" them. OTC had banned Jean-Pierre from rendering legal opinions and listed him on its Prohibited Attorney List as of April 21, 2010. DiTommaso was unaware of this or any other enforcement actions against Jean-Pierre until 2014, when the Division contacted him.[2] In July 2011, Jean-Pierre contacted DiTommaso about issuing opinion letters concerning FSPM, and from July 2012 to August 2013, DiTommaso issued the letters that are the subject of this proceeding. Jean-Pierre "ghostwrote" each letter and forwarded supporting documentation, such as certificates of officers of FSPM and the original securities holders that explicitly stated warranties and representations as to the non-affiliate status of the concerned parties. DiTommaso reviewed the supporting documentation to verify the predicate facts for establishing the Rule 144 safe harbor.

B. DiTommaso's Actions and State of Mind

At the hearing, with the benefit of hindsight, DiTommaso testified that, had he looked at all the documents for all the transactions together, there were "red flags all over the place," and he "would never ever have issued any opinion letters without making sure they are not affiliates." Tr. 50. However, he looked at each transaction in isolation. Tr. 38-39, 51.

Documents available to DiTommaso before he issued the opinion letters contained indications that the entities might be affiliates of FSPM. Prior to issuing any letters, DiTommaso met with Dittman in July 2011; the email string that Jean-Pierre forwarded to DiTommaso regarding the logistics of the meeting included emails from William Sears from the email address "wsears@fusionpharminc.com." Div. Ex. 45; *see also* Div. Ex. 46 (June 11, 2012, email from Jean-Pierre to DiTommaso forwarded email from FSPM's accountant that was cc'ed to Sears at the "fusionpharminc" email address). However, as DiTommaso pointed out, these indications were in the middle of the email strings and were not in the body of the communications that he read. Tr. 33.

[2] On April 16, 2015, the United States District Court for the Southern District of New York ordered a penny stock bar against Jean-Pierre; disgorgement of $62,000 plus prejudgment interest from May 1, 2011, of $8,053.10; and a civil penalty of $1,425,000. *SEC v. Jean-Pierre*, No. 12-cv-8886 (S.D.N.Y. Apr. 16, 2015), ECF No. 21. Based on that case, he was suspended temporarily (to become permanent after thirty days absent a petition to lift the suspension) from appearing or practicing before the Commission pursuant to 17 C.F.R. § 201.102(e)(3). *Guy M. Jean-Pierre, Esq.*, Exchange Act Release No. 74999, 2015 LEXIS 2062 (May 20, 2015). (Those two documents are Division Exhibits 42 and 43, respectively.) He was also suspended (permanently) from appearing or practicing before the Commission pursuant to 17 C.F.R. § 201.102(e)(2), based on his Florida disbarment. *Guy M. Jean-Pierre, Esq.*, Exchange Act Release No. 75000, 2015 LEXIS 2064 (May 20, 2015). Jean-Pierre has been charged with violating 18 U.S.C. § 1956 by conducting financial transactions in the proceeds of unlawful activity of securities fraud and wire fraud. *United States v. Jean-Pierre*, No. 17-cr-8 (D. Colo. Jan. 11, 2017), ECF No. 3. Those charges are pending.

William Sears signed documents on behalf of Microcap and Meadpoint. *See, e.g.*, Div. Exs. 4, 32-34. FSPM stock certificates that Jean-Pierre sent to DiTommaso in connection with opinion letters were signed by Sandra Sears, President. Div. Exs. 49-51. DiTommaso did not ascertain her relationship, if any, to William Sears, and thus did not learn that she is his mother, as he now knows. Tr. 45-48. Sandra Sears also signed a document as managing member of Bayside. Div. Ex. 53; Resp. Ex. F; *see* Tr. 48-50.

DiTommaso no longer issues Rule 144 opinion letters and will not issue them in the future. Tr. 10-12. The risk in doing so is great in light of the strict liability aspect of Securities Act Sections 5(a) and 5(c). Tr. 11-12. He testified, "I would never want to do them ever again. That is all." Tr. 12.

C. Ability to Pay

DiTommaso asserts an inability to pay disgorgement, interest, or penalties. Respondent Exhibit W, received under seal, which is Commission Form D-A (17 C.F.R. § 209.1), and confidential testimony taken pursuant to a protective order show liabilities greatly in excess of assets, limited expenses, and a limited, irregular income. The liabilities include a substantial amount of federal taxes owed. This showing has been taken into account in determining sanctions, pursuant to 17 C.F.R. § 201.630[3] and Securities Act Section 8A(g)(3).[4]

III. SANCTIONS

The Division requests disgorgement plus prejudgment interest and a second-tier civil money penalty.[5] As discussed below, DiTommaso will be ordered to disgorge $1,475 and to pay a civil money penalty of $1,475.

A. Disgorgement

Section 8A(e) of the Securities Act authorizes disgorgement of ill-gotten gains from DiTommaso. Disgorgement of ill-gotten gains is "an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." *Montford & Co. v. SEC*, 793 F.3d 76, 84 (D.C. Cir. 2015) (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)). "Thus, 'disgorgement need only be a reasonable approximation of profits causally connected to the violation.'" *Id*. (quoting *First City Fin. Corp.*, 890 F.2d at 1231); *see SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1192 n.6 (9th Cir. 1998) (holding

[3] "[T]he [Administrative Law Judge] may, in . . . her discretion, consider evidence concerning ability to pay in determining whether disgorgement, interest or a penalty is in the public interest." 17 C.F.R. § 201.630(a).

[4] Evidence concerning ability to pay may include "the collectability of a penalty" and "any other claims of the United States or third parties upon the assets of the respondent." 15 U.S.C. § 77h-1(g)(3).

[5] The OIP also authorizes a cease-and-desist order. OIP at 7. However, the Division did not request that sanction.

disgorgement amount only needs to be a reasonable approximation of ill-gotten gains); *Laurie Jones Canady*, Exchange Act Release No. 41250, 1999 SEC LEXIS 669, at *38 n.35 (Apr. 5, 1999) (quoting *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996)), *pet. denied*, 230 F.3d 362 (D.C. Cir. 2000). It returns the violator to where he would have been absent the violative activity. DiTommaso received $1,475 in payments for issuing the ten opinion letters. Thus, $1,475 is subject to disgorgement. In light of DiTommaso's financial situation, prejudgment interest will not be ordered. *See* 17 C.F.R. §§ 201.600, .630(a).

B. Civil Money Penalty

Securities Act Section 8A(g) authorizes the Commission to impose civil money penalties against a person who is violating or has violated, or was the cause of the violation of, any provision of the Securities Act, where such penalties are in the public interest. 15 U.S.C. § 77h-1(g).

Penalties in addition to disgorgement are in the public interest. A first-tier penalty, rather than a second-tier penalty, is appropriate because DiTommaso's violative acts did not involve a reckless disregard of a regulatory requirement.[6] 15 U.S.C. § 77h-1(g)(2)(A), ((B). DiTommaso has, in effect, acknowledged negligence, but the record does not show recklessness. While scienter is not an element of a violation of Securities Act Sections 5(a) and 5(c), which are strict liability provisions, the standard of recklessness is well-developed in securities law. Often cited is *SEC v. Steadman*, 967 F.2d. 636, 641-42 (D.C. Cir. 1992), in which the court held that recklessness satisfied the scienter element of the antifraud provisions of the securities laws defining it as "not merely a heightened from of ordinary negligence," but an "extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." The Commission has adopted this definition of recklessness in defining improper professional conduct of accounts in 17 C.F.R. § 201.102(e) even though such professional standards are not fraud based, for the purpose of consistency in the federal securities laws. Amendment to Rule 102(e) of the Commission's Rules of Practice, 63 Fed. Reg. 57164, 57167 (Oct. 26, 1998).

Sears' "fusionpharminc" email address on the cc line in the middle of an email string received a year before the first opinion letter does not make the entities' status as affiliates so obvious that DiTommaso must have been aware of it a year later. His failure to investigate the possible relationship between Sandra and William Sears may have been negligent but his failure to investigate does not mean the relationship was so obvious that he must have been aware of it. The Division did not otherwise present evidence to establish the standard of ordinary care to be followed by an attorney in issuing a Rule 144 opinion letter. Under Securities Act Section 8A, for each violative act or omission during 2012 and 2013, the maximum first-tier penalty for each violation for a natural person is $7,500. 15 U.S.C. § 77h-1(g)(2)(A); Adjustments to Civil Monetary Penalty Amounts, 82 Fed. Reg. 5367, 5371 (Jan. 18, 2017) (to be codified at 17 C.F.R. § 201.1001 tbl.I). The provisions, like most civil penalty statutes, leave the precise unit of violation undefined. *See* Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1440-41 (1979).

[6] Third-tier penalties are not appropriate because the record in this proceeding does not show substantial gain to DiTommaso or substantial loss or risk of loss to others. 15 U.S.C. § 77h-1(g)(2)(C).

DiTommaso's violative acts in issuing the ten opinion letters in 2012 and 2013 will be considered as one course of action and a first-tier civil penalty of $1,475, consistent with the total payments he received for the letters and taking account of his financial situation, will be ordered. Combined with the disgorgement ordered, this penalty is in the public interest. These sanctions are also sufficient to serve as deterrence from committing the violations proven in this proceeding.

IV. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on May 26, 2017.

V. ORDER

IT IS ORDERED that Securities and Exchange Commission's Office of the Secretary maintain under seal: (1) Respondent Exhibit W, Tod A. DiTommaso's Form D-A and supporting documents; and (2) pages 55 and 56 of the hearing transcript.[7]

IT IS FURTHER ORDERED that, pursuant to Section 8A(e) of the Securities Act, Tod A. DiTommaso disgorge $1,475.

IT IS FURTHER ORDERED that, pursuant to Section 8A(g) of the Securities Act, Tod A. DiTommaso pay a civil money penalty of $1,475.

Payment of disgorgement and civil penalties shall be made no later than twenty-one days following the day this Initial Decision becomes final, unless the Commission directs otherwise. Payment shall be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) by certified check, United States postal money order, bank cashier's check, or bank money order, payable to the Securities and Exchange Commission.

Any payment by certified check, United States postal money order, bank cashier's check, or bank money order shall include a cover letter identifying the Respondent and Administrative Proceeding No. 3-17550, and shall be delivered to: Enterprise Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Bld., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

[7] Although the record in a public hearing is presumed to be public, the harm resulting from disclosure of an individual's financial situation outweighs the benefits. *See* 17 C.F.R. § 201.322(b). Disclosure of financial information concerning an individual is presumed harmful. It is specifically limited in various statutes, for example, Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and the Privacy Act, 5 U.S.C. § 552a. There is no benefit from disclosure in this case.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Carol Fox Foelak
Administrative Law Judge