



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
BYRON ROGERS FEDERAL OFFICE BUILDING  
1961 STOUT STREET, SUITE 1700  
DENVER, CO 80294-1961

August 7, 2020

**VIA EMAIL-ALJ@SEC.GOV**

Hon. Judge James E. Grimes  
100 F Street, N.E.  
Mail Stop 2557  
Washington, D.C. 20549

Re: *In the Matter of William J. Sears*, Administrative Proceeding File No. 3-17547

Dear Judge Grimes:

In response to the July 29, 2020, Order Extending Briefing Schedule and Requesting Supplemental Briefing, the Division of Enforcement (“Division”) submits this letter supplementing its pending motion for summary disposition (“MSD”) against respondent William J. Sears. In *Liu v. SEC*, the Supreme Court affirmed a district court’s authority to order disgorgement “that does not exceed a wrongdoer’s net profits and is awarded for victims.” 140 S. Ct. 1936, 1940 (2020). The Division is reducing its requested disgorgement in its motion for summary disposition to comply with the holding of *Liu*, as set forth below.

**Background**

This matter concerns William J. Sears who, along with Scott Dittman and entities they controlled, illegally raised approximately \$12.2 million through the offer and sale of unregistered securities in another entity they controlled, Fusion Pharm Inc. See September 16, 2016 Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order and Notice of Hearing (“OIP”) at 2; Declaration of Kimberly Greer (“Greer Decl.”) at ¶ 2, attached.

Sears was also charged by the United States Attorney’s Office for the District of Colorado in a criminal complaint alleging essentially the same conduct as in the OIP. See *United States v. William Sears and Scott Matthew Dittman*, 16-CR-301-WJM (D. Colo.) (the “Criminal Case”). In the Criminal Case, Respondent agreed to plead guilty to conspiracy [18 U.S.C. § 371]

to commit securities, wire, and mail fraud. *See* OIP at 6, ¶ 22.<sup>1</sup> Respondent also agreed to plead guilty to filing a false federal individual income tax return. *Id.*

On May 22, 2020, the Division filed its MSD against Respondent Sears. In its MSD, the Division noted that the Federal District Court in the Criminal Case entered judgment against Sears finding that he wrongfully obtained \$10,810,916.90 in FSPM stock sales proceeds, personally or through accounts he controlled. MSD at 21. Because the \$10,810,916.90 in criminal forfeiture and criminal judgment ordered against Sears in the criminal action is “a reasonable approximation of profits causally connected to the violation,” the Division argued that Sears should be ordered to disgorge that amount, but that disgorgement in this matter should be deemed satisfied by forfeiture and payment of the money judgment in the criminal case. *Id.*

### **The Division is Reducing its Disgorgement Request to \$9,762,000.**

The Commission has statutory authority to order disgorgement here under Section 8A(e) of the Securities Act and Section 21C(e) of the Exchange Act. In *Liu*, the Court stated that the “equitable nature of the profits remedy generally requires the SEC to return a defendant’s gains to wronged investors for their benefit,” *Liu*, 140 S.Ct. at 1948; that joint and several liability for disgorgement must comport with equitable principles, *id.* at 1949; and that disgorgement must be limited to a defendant’s net profits, excluding legitimate expenses. *Id.* at 1950. The revised requested disgorgement in this case satisfies these criteria.

First, the requested disgorgement consists of Sears’ net profits—specifically, the amounts received from fraudulent stock sales less amounts that were returned to FSPM and Sears’ co-conspirator Dittman. The Greer Decl. sets forth that Sears received approximately \$12.2 million in proceeds from the fraudulent stock sales. Greer Decl. at ¶ 2; OIP at 2. In calculating the revised disgorgement amount, the Division is subtracting from that amount \$1.3 million that was returned to FSPM and payments of \$450,000 and \$688,000 made to Dittman, for a revised disgorgement request of \$9,762,000. Greer Decl. at ¶¶ 3, 4.<sup>2</sup>

Second, any disgorgement ordered in this case would be consistent with equitable principles and for the benefit of wronged investors. Ordinarily, the Commission would seek and collect disgorgement in order to distribute the funds to those individuals that lost money investing in the FSPM fraud. The Division is instead requesting to deem disgorgement satisfied by the judgment ordered against Sears in the Criminal Case because the money that would ordinarily be used to pay the disgorgement award has been seized by the criminal authorities. On these facts and circumstances, deeming the disgorgement satisfied is consistent with the

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<sup>1</sup> In his prior Offer of Settlement in this matter, Sears agreed the findings of the OIP shall be accepted as and deemed true by the hearing officer. *See* Offer of Settlement of William J. Sears dated August 18, 2016.

<sup>2</sup> *Liu* did not overturn precedent holding that the amount of disgorgement ordered should “be a reasonable approximation of profits causally connected to the violation.” *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996) (quoting *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995)). Those cases further make clear that “any risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created that uncertainty.” *First Jersey*, 101 F.3d at 1475 (quoting *Patel*, 61 F.3d at 140) (alteration in the original)

equitable principle that a wrongdoer should not be required to give up his unjust gains twice. *See SEC v. Palmisano*, 135 F.3d 860, 863 (2d Cir. 1998) (“Defendant is only required to give back the proceeds of his securities fraud once.”); *Thomas Lee Hazen*, 6 Law Sec. Reg. § 16.18 (2020) (a disgorgement order is an abuse of discretion where the “ill-gotten profits had already been returned”) (citing *Hateley v. SEC*, 8 F.3d 653, 655-656 (9th Cir. 1993)); *see also United States v. Ursery*, 518 U.S. 267, 284 (1996) (“Forfeitures ... require disgorgement of the fruits of illegal conduct.”). The Commission’s practice of deeming the disgorgement satisfied by the criminal forfeiture is consistent with the principle reflected in *Palmisano* and ensures that disgorgement does not become a “punitive sanction[.]” *Liu*, 140 S. Ct. at 1940. In addition, it is the Division’s understanding that the forfeiture award in the Criminal Case will be at least partly used to compensate victims. The DOJ has launched a webpage for victims of the fraud through which it anticipates allowing victims to petition for a return of funds from the money they seized from Sears, currently approximately \$9 million. *See Greer Decl.* at ¶ 5.

Third, the Division’s MSD does not seek to hold Sears jointly and severally liable with any other participant in the alleged fraudulent scheme, so *Liu*’s limitations on joint and several liability are not implicated. In fact, the Division is offsetting from the amount Sears misappropriated the \$450,000 and \$688,000 he paid to his co-conspirator Dittman.

Finally, the *Liu* Court remanded for additional findings on business expenses. In the present case, Sears’ disgorgement is calculated on the basis of the ill-gotten gains he received, less monies returned to FSPM and Dittman. Other than these, the Division is not aware of any other business expenses that might appropriately be offset under *Liu*.

For the reasons set forth above and in the Division’s MSD, the Division respectfully requests that the Administrative Law Judge (i) order Sears to pay disgorgement of \$9,762,000, but deem disgorgement waived and forego prejudgment interest in view of the forfeiture ordered in the Criminal Case, and (ii) not impose a penalty in view of Sears’ 96-month prison sentence.



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**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-17547**

<p><b>In the Matter of</b></p> <p style="text-align:center"><b>WILLIAM J. SEARS,</b></p> <p><b>Respondent.</b></p>
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**DECLARATION OF KIMBERLY S. GREER IN SUPPORT OF DIVISION OF ENFORCEMENT'S SUPPLEMENTAL LETTER SUPPORTING MOTION FOR SUMMARY DISPOSITION**

I, Kimberly S. Greer, under penalty of perjury, affirm as follows:

1. I am over the age of eighteen years. I am a Senior Counsel employed by the U.S. Securities and Exchange Commission, Division of Enforcement. I have personal knowledge of the facts set forth in this declaration and if called to testify, could testify thereto.

2. As part of my duties as an investigative attorney in the Division of Enforcement, I supervised an analysis of the sales of Fusion Pharm, Inc. ("FSPM") stock. Through analysis of brokerage, transfer agent records, we determined that William J. Sears, through Microcap Management LLC, Bayside Realty Holdings LLC, and Meadpoint Venture Partners, LLC, all entities owned and controlled by Sears, received proceeds from the unregistered sales of FSPM securities of approximately \$12.2 million.

3. The analysis also showed that proceeds from these sales of FSPM stock were round-tripped back to FSPM, and reported as revenue, in an amount of approximately \$1.3 million.

4. The analysis further showed that Scott Dittman received approximately \$450,000 in salary and other payments from FSPM and the Sears' entities. In addition, Dittman received \$688,000 of funds traced back to Sears' FSPM stock sales.

5. Relating to the criminal case filed by the United States Attorney's Office for the District of Colorado, *United States v. William Sears and Scott Matthew Dittman*, 16-CR-301-WJM (D. Colo.), the United States Attorney's Office launched a web page for victims of the fraud. See <https://www.justice.gov/usao-co/pr/colorado-us-attorneys-office-launches-web-page-victims-fusionpharm>. In Case Information posted on that page for FSPM investors, the United States Attorney's Office stated:

In addition, the United States has currently seized approximately \$9 million, which it alleges is traceable to the criminal conduct set forth in the information. The United States anticipates the majority of these funds will be criminally forfeited. However, the United States does not anticipate obtaining a restitution order. Accordingly, at the appropriate time, victims of the alleged criminal conduct will be able to petition the Attorney General to recover a portion of their losses from these forfeited funds.

6. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: Littleton, Colorado  
August 7, 2020

*Kimberly S. Greer*  
Kimberly S. Greer

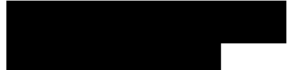

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the **DECLARATION OF KIMBERLY S. GREER IN SUPPORT OF DIVISION OF ENFORCEMENT'S SUPPLEMENTAL LETTER SUPPORTING MOTION FOR SUMMARY DISPOTION** was served on the following on this 7<sup>th</sup> day of August, 2020, in the manner indicated below:

Vanessa A. Countryman, Secretary  
100 F Street, N.E.  
Mail Stop 1090  
Washington, D.C. 20549  
(By Email: [apfilings@sec.gov](mailto:apfilings@sec.gov))

Hon. Judge James E. Grimes  
100 F Street, N.E.  
Mail Stop 2557  
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(By Email)

William J. Sears

  
Federal Correctional Institution  Florence, CO 81226  
(By USPS)

s/ Nicole L. Nesvig  
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Nicole L. Nesvig  
Senior Trial Paralegal