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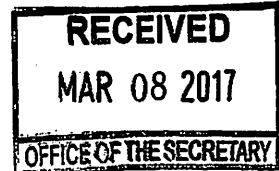

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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ADMINISTRATIVE PROCEEDING

File No. 3-17550

In the Matter of

TOD A. DITOMMASO, ESQ.,

Respondent.

DIVISION OF ENFORCEMENT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

PRELIMINARY STATEMENT

Respondent, Tod Anthony DiTommaso's Opposition to Motion for Summary Disposition ("Opp.") does not dispute: that he issued ten attorney opinion letters incorrectly opining that Fusion Pharm, Inc. ("FSPM") stock could legally be issued without restriction; that Microcap, Bayside, and Meadpoint were affiliates of FSPM due to the roles of William and/or Susan Sears in those entities; or that without DiTommaso's attorney opinion letters, the transfer agent would not have issued unrestricted shares and those shares would not have been sold into the market in violation of Section 5. *See* Opp. *passim* and Division of Enforcement's Motion for Summary Disposition ("MSD") at 1. DiTommaso's sole argument in opposition to the MSD is his claim that undisputed facts do not establish that he "was a substantial participant in the FSPM distribution" or "was a 'necessary participant' or a 'substantial factor' in the offering or selling of unregistered shares." Opp. 17. This defense, however, is based on the faulty legal premise that "Courts look at the knowledge/recklessness factor when determining whether one is a substantial participant in the wrongful sale of unregistered shares." Opp. 4. As discussed herein,

the authority DiTommaso cites for this proposition is inapposite. Section 5 imposes no requirement of scienter. Summary disposition is warranted.

Moreover, a finding against DiTommaso is important to the Securities and Exchange Commissions' mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. Opinion letters and the lawyers that sign them play a crucial gatekeeping role in the issuance of unrestricted securities. *See* December 16, 2016, Press Release No. 2016-265 (announcing settlements with "attorneys and a transfer agent supervisor who betrayed the trust that investors place in gatekeepers to protect them in this highly risky [microcap] market"). DiTommaso's relatively modest remuneration of between $1,300 and $1,750 (Answer ¶ 19) for his role in the illegal issuance of nearly three million shares of FSPM stock does not mean he did not violate the law. As the cases cited in the Division's MSD make clear, a lawyer that issues false opinion letters is a substantial factor in the unregistered sale of securities issued pursuant to such letters. It is important that attorneys understand this and not rely on others – particularly others like Jean-Pierre who have been banned from issuing opinion letters themselves – to do their work for them.

ARGUMENT

The Respondent Misstates the Applicable Law

The Respondent's Opposition incorrectly imports a scienter requirement into this Section 5 matter based on a misguided reading of Rule 10b-5 cases that are inapplicable because there is no Section 10(b) claim against DiTommaso. DiTommaso then compounds that error by invoking a reliance defense that is also not applicable in a Section 5 case. *See* Opposition at 3.

The law is clear that there is no requirement to show scienter in Section 5 cases. *SEC v. CMKM Diamonds Inc.*, 729 F.3d 1248, 1256 (9th Cir. 2013) ("reaffirm[ing] that scienter is not

an element of Section 5 liability"). "[Section 5] prohibits any person from 'directly or *indirectly*' engaging in the offer or sale of unregistered securities . . . ." *SEC v. Holschuh*, 694 F.2d 130, 140 (7th Cir. 1982) (emphasis in original). "Liability under Section 5 may be found for persons who are 'necessary participant[s]' or whose activities were a 'substantial factor' in the illicit sale." *BioElectronics,* Initial Decision Rel. No. 1089, at 39, 2016 WL 7228231, at *43 (December 13, 2016). Attorneys are often found liable under Section 5 without any finding of scienter. *See, e.g., SEC v. CMKM Diamonds, Inc.*, No. 2:08-v-0437-LRH-RJJ, 2011 WL 3047476, at *2 (D. Nev. July 25, 2011) (granting SEC's motion for summary judgment for primary Section 5 violations against attorney Brian Dvorak, who by signing opinion letter was both necessary participant and substantial factor), *aff'd on other grounds*, 729 F.3d 1248 (9th Cir. 2013).

Respondent's incorrect reading of the law begins with his citation to *In re Swine Flu Products Liab.,* 764 F.2d 637, 641 (D.C. Cir. 1989), for the proposition that "whether a party knew or should have known is a question of fact for the jury." *See* Opposition at 3.[1] But that products liability case has no bearing on a strict liability Section 5 unregistered securities offering proceeding. Respondent goes on to cite several Section 10(b) securities fraud cases and improperly imports the scienter requirement that is applicable to those claims into the Section 5 claims. *See* Opposition at 3-4.

First, *In re Homestore.com* is inapplicable because that was a Rule 10b-5 case and makes no reference to scienter being an element of a Section 5 claim. Next, the Respondent misinterprets *SEC v. Spongetech Delivery Sys., Inc.,* to support his claim that "[c]ourts look at

[1] While whether an individual is a "substantial factor" may be a jury question in some cases, in cases involving attorney opinion letters that facilitate the sale of unregistered securities, summary disposition is often warranted. *See* MSD at 13-14 (citing cases granting summary disposition).

the knowledge/recklessness factor when determining whether one is a substantial participant in the wrongful sale of unregistered shares." Opp. at 3-4. The *Spongetech* court, however, lists the elements of a Section 5 violation as: "(1) no registration statement was filed or in effect at the time of the sale; (2) the defendant, directly or indirectly, sold or offered to sell the securities; and (3) interstate means were used in connection with the offer or sale." *S.E.C. v. Spongetech Delivery Systems, Inc.*,No. 10–CV–2031 (DLI) (JMA), 2011 WL 887940, at *6 (E.D.N.Y. March 14, 2011). The court added that, "Liability under Section 5 extends beyond those who sell stock to all necessary participants in a sale of unregistered stock." *Id.* (internal quotation marks omitted). Nowhere in the court's discussion of Section 5 does it mention a scienter requirement. *See id.*

Rather, in *Spongetech*, the court held that it would not enjoin defendant Halperin, an attorney, from violating *Section 10(b),* stating: "A preliminary injunction against Halperin is not warranted here. The SEC has not demonstrated the requisite high degree of scienter, and it appears that Halperin did not instigate this fraud and only minimally participated in the overall scheme." *Spongetech,* 2011 WL 887940, at *14. The court went on to make clear that this holding was regarding 10(b), stating: "In sum, the court finds that the public interest will be served best if Halperin is allowed to continue in his profession without the stigma of a preliminary injunction *under the fraud statutes*." *Id.* at 15 (emphasis added).

Conversely, the *Spongetech* court held that defendant Pensely, another attorney, was liable for both Section 10(b) and Section 5 violations and stated,

> In sum, the SEC has made a substantial showing that Pensley likely violated Sections 10(b) and 17(a) by making material misrepresentations or omissions in the opinion letters with scienter in connection with the purchase or sale of securities. Moreover, the SEC has made a substantial showing that Pensley violated Section 5 because Spongetech, through RM Enterprises, issued

> unregistered stock for unrestricted sale and Pensley was a necessary participant and substantial factor in making the unregistered offerings.

Id. at 18. These quotations make clear that the *Spongetech* court's discussion of scienter is intended to be applied to Section 10(b), not to prove a Section 5 violation.

Mr. DiTommaso's Opposition includes the following quotation without citation: "the effect of an attorney's reliance on the truth of the information provided by the client where there was no reason to believe that such information was inaccurate, the information did not appear to be irregular on its face, and there were no known circumstances that would make reliance unwarranted." Opp. at 4. Wherever this quotation comes from, the argument that reliance on factual representations of the issuer shields Respondent from Section 5 liability is without basis. Each of the cases he has cited for this proposition is readily distinguishable. In *Schatz*, the court held that "lawyers do not vouch for the probity of their clients when they draft documents reflecting their clients' promises, statements, or warranties" in the context of Section 10b liability. *Schatz v. Rosenberg*, 943 F.2d 485, 495 (4th Cir. 1991). *Escott v. BarChris Const. Corp.,* involved a Section 11 claim for false statements in an issuer's prospectus where the court held that an underwriter had not satisfied the "due diligence" defense because the underwriter failed to reasonably investigate the prospectus data presented to them by a corporate issuer. *Escott v. BarChris Const. Corp.*, 283 F.Supp. 643, 697 (S.D.N.Y. 1968). Similarly, *Monroe v. Hudges*, is inapposite because it is a Section 11 case discussing the defenses that are applicable to accountants who follow GAAP. *Monroe v. Hudges*, 31 F.3d 772, 774 (9th Cir. 1994). *Wafra Leasing Corp. 1999-A-1 v. Prime Capital Corp.,* is a Rule 10b-5 case, as Respondent acknowledges. Opp. at 12. Respondent concludes his legal analysis with *Fortress Credit Corp. v. Dechert LLP* (Opposition at 12), an inapplicable New York State Court opinion in a case

alleging fraud, legal malpractice, and negligent misrepresentation. *Fortress Credit Corp. v. Dechert LLP*, 934 N.Y.S.2d 119, 121 (N.Y. App. Div. 2011).

CONCLUSION

In short, Respondent's attempt to incorporate a knowledge or recklessness standard into this Section 5 proceeding is wholly unsupported and should be rejected. Once that improper reading of the law is rejected, liability is clear and summary disposition should be granted because DiTommasso has not disputed any other element at issue.[2]

Respectfully submitted this 7th day of March, 2017.

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[2] Absent a requirement to show scienter, Respondent's claims of reliance and that the red flags he faced were irrelevant (Opp. at 5-17) have no bearing on his liability. DiTommaso's blatant disregard of numerous red flags will become relevant and be briefed during the remedies phase of this proceeding, if and when he is found liable for the underlying Section 5 violations.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Division of Enforcement's Reply In Support of Its Motion for Summary Disposition was served on the following on this 7th day of March, 2017, in the manner indicated below:

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(By Facsimile and original and three copies by UPS)

Hon. Judge Carol Fox Foelak
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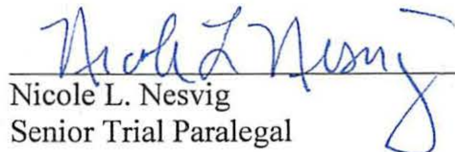

Nicole L. Nesvig
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