Initial Decision Release No. 1405
Administrative Proceeding
File No. 3-17547

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

In the Matter of **William J. Sears**	**Initial Decision** November 9, 2020

Appearances: Stephen C. McKenna, Polly Atkinson, and Kim Greer for the Division of Enforcement, Securities and Exchange Commission

William J. Sears, *pro se*

Before: James E. Grimes, Administrative Law Judge

This is a partially settled proceeding against Respondent William J. Sears. The Securities and Exchange Commission found that he violated Section 5(a) and (c) of the Securities Act of 1933 and the antifraud provisions of Securities Act Section 17(a), Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5. The Commission also found that Sears aided and abetted and caused an entity's violation of these provisions. Under the settlement, Sears cannot argue that he did not commit these violations and has agreed to a cease-and-desist order and penny-stock and officer-and-director bars. The only remaining issues are whether I should order Sears to pay a civil monetary penalty and disgorgement, and if so, in what amounts. At the Division of Enforcement's request, I order no civil monetary penalty and order that Sears's disgorgement obligation is satisfied by the judgment in a related criminal case.

Procedural Background

The Securities and Exchange Commission initiated this partially settled proceeding in September 2016, when it issued an order instituting proceedings (OIP) under Section 8A of the Securities Act and Sections 15(b) and 21C of the

Exchange Act.[1] The Commission instituted this proceeding, based on Sears's offer of settlement, to determine whether he should be ordered to pay disgorgement and a civil monetary penalty.

The OIP directs that a public hearing take place after "the entry of a final judgment against the last remaining defendant(s)" in a related criminal action.[2] It also instructs that I may decide this proceeding based on "affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence."[3] In March 2020, the Division reported that the district court entered final judgment in the related criminal action in February 2020.[4] I held a telephonic prehearing conference in April 2020. After the conference, I set a motions schedule, which I twice extended after the Division reported delays in its efforts to disclose its investigative file to Sears and after questions arose about whether Sears had been served with orders I had issued.[5]

After the Division moved for summary disposition, I asked it to submit supplemental briefing discussing how the intervening decision in *Liu v. SEC* would affect its request for disgorgement.[6] The Division filed a supplemental letter but Sears did not respond to the Division's motion or its supplemental letter. The Division's motion is supported by three exhibits: Sears's plea agreement (Exhibit A), the district court's amended forfeiture order (Exhibit B), and the district court's judgment (Exhibit C).[7]

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1 OIP at 1; *see* 15 U.S.C. §§ 77h-1, 78*o*(b), 78u-3.

2 OIP at 7.

3 *Id.*

4 *See Fusion Pharm, Inc.*, Admin. Proc. Rulings Release No. 6747, 2020 SEC LEXIS 858, at *1 (ALJ Mar. 27, 2020).

5 *William J. Sears*, Admin. Proc. Rulings Release No. 6781, 2020 SEC LEXIS 3198 (ALJ July 29, 2020); *William J. Sears*, Admin. Proc. Rulings Release No. 6761, 2020 SEC LEXIS 1450 (ALJ May 27, 2020); *Fusion Pharm, Inc.*, Admin. Proc. Rulings Release No. 6757, 2020 SEC LEXIS 1237, at *4 (ALJ May 1, 2020).

6 *Sears*, 2020 SEC LEXIS 3198, at *1–2; *see Liu v. SEC*, 140 S. Ct. 1936 (2020).

7 I refer to these documents by name rather than their designation as exhibits. Sears's plea agreement includes as separate, additional exhibits, the criminal information charging Sears and his codefendant Scott M. Dittman (Plea Agreement Exhibit A) and the United States Attorney's office's plea

Findings of Fact

The OIP requires me to accept its factual findings as true.[8] I therefore base the following findings of fact and conclusions on the OIP's binding factual findings and on the entire remaining record, including matters subject to official notice.[9] Outside the binding factual findings in the OIP, I have applied preponderance of the evidence as the standard of proof.[10] I reject all arguments inconsistent with this decision.

Sears was convicted in 2007 of securities fraud and of conspiracy to commit securities fraud and commercial bribery.[11] After being convicted, he engaged in a "stock public relations and promotional business through Microcap Management, LLC," which was a Nevada company that he formed.[12] Sears used his home address as Microcap's primary business address.[13] During this time, Sears also formed Bayside Realty Holdings LLC, which used Sears's mother's home address as its business address.[14]

In 2010, Sears's brother-in-law, Scott M. Dittman, decided to develop a business selling refurbished shipping containers, called PharmPods, for use in growing cannabis.[15] Dittman persuaded Sears to help develop and promote the business.[16]

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agreement letter, describing the terms of Sears's plea (Plea Agreement Exhibit B). In this initial decision, I also refer to these documents by name rather than Plea Agreement Exhibit A or B.

8 OIP at 6–7.

9 *See* 17 C.F.R. § 201.323.

10 *See John Francis D'Acquisto*, Investment Advisers Act of 1940 Release No. 1696, 1998 WL 34300389, at *2 (Jan. 21, 1998).

11 Plea Agreement at 13.

12 *Id.*

13 OIP at 2.

14 *Id.*; Plea Agreement at 13.

15 Plea Agreement at 13; OIP at 3.

16 Plea Agreement at 13.

As part of their plan, Sears and Dittman took over an existing company and changed its name in 2011 to Fusion Pharm, Inc.[17] Fusion Pharm's offices were in Denver.[18] The company was supposedly involved in developing and selling PharmPods.[19] Fusion Pharm's stock was quoted on OTC Link from 2011 until 2014, when the Commission suspended trading in its stock for 10 days.[20] Fusion Pharm never registered a securities offering under the Securities Act or a class of securities under the Exchange Act.[21]

Although Dittman and Sears listed Dittman as Fusion Pharm's CEO, Sears acted as an undisclosed executive officer.[22] Sears worked at Fusion Pharm from its inception, appeared on non-public company documents as an officer, drew a salary, and handled daily responsibilities typically assigned to an officer.[23]

As it turned out, Fusion Pharm had almost no revenue.[24] From 2011 through 2013, it was mostly funded through illegal securities sales.[25] Fusion Pharm's initial funding came from the sale of stock that Sears received in Microcap's name.[26] This stock came from Fusion Pharm's predecessor entity

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17 *Id.* at 14–15; OIP at 3.

18 OIP at 3.

19 *Id.*

20 *Id.*; *see Fusion Pharm, Inc.*, Exchange Act Release No. 72177, 2014 SEC LEXIS 1676 (May 16, 2014).

21 OIP at 3. Section 5 of the Securities Act makes it unlawful to use means of interstate commerce to sell or to offer to sell or buy unregistered securities. 15 U.S.C. § 77e(a), (c). Section 12 of the Exchange Act imposes certain requirement on brokers, dealers, and issuers as to the registration of securities transacted on exchanges or through interstate commerce. 15 U.S.C. § 78*l*(a), (g)(1).

22 OIP at 3; Plea Agreement at 17–18.

23 Plea Agreement at 17–18.

24 OIP at 3.

25 *Id.*

26 *Id.*

and as part of the transition to Fusion Pharm.[27] To hide what they were doing, Sears and Dittman made it appear that Sears had loaned money to Fusion Pharm through Bayside and Meadpoint Venture Partners, LLC, another entity Sears formed and owned.[28] And after Sears and Dittman depleted these funds, Sears converted the fake debts to Bayside and Meadpoint into unrestricted Fusion Pharm shares.[29] He then caused Bayside and Meadpoint to illegally sell those shares into the market.[30]

In 2011 and 2012, Sears and Dittman through Microcap sold around 735,000 shares of unregistered Fusion Pharm stock.[31] To facilitate these sales, Dittman and Sears falsely told brokers and Fusion Pharm's transfer agent that Sears was unaffiliated with Fusion Pharm, and therefore Microcap was unaffiliated with Fusion Pharm.[32] These sales accounted for nearly all the funds deposited in Fusion Pharm's bank account during 2011 and 2012.[33]

In 2012, Sears and Dittman prepared fraudulent *non-convertible* promissory notes and credit lines between Fusion Pharm and Bayside and between Fusion Pharm and Meadpoint.[34] They backdated the Bayside non-convertible note and credit line agreement to May 2, 2011, and backdated the Meadpoint non-convertible promissory note and credit line agreement to June 15, 2011.[35]

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27 *Id.*

28 *Id.* Meadpoint claimed to be the exclusive distributor of Fusion Pharm's PharmPods. OIP at 3. Meadpoint's primary business address was a Fusion Pharm warehouse in Denver. *Id.* at 2; *see* Plea Agreement at 23. Sears purported to be Meadpoint's "Managing Member." OIP at 3. Dittman was a Meadpoint shareholder and employee. *Id.* at 3; Plea Agreement at 23.

29 OIP at 3.

30 *Id.*

31 *Id.* at 4.

32 *Id.*

33 *Id.*

34 *Id.* at 4; Plea Agreement at 22–23.

35 OIP at 4; Plea Agreement at 24–25.

In late 2012, Sears and Dittman re-drafted the Bayside and Meadpoint notes as fraudulent *convertible* notes.[36] They changed the notes from non-convertible to convertible so they could obtain more unrestricted Fusion Pharm stock to sell illegally, and thus to fund Fusion Pharm.[37] They backdated the Bayside note to May 2, 2011, and the Meadpoint note to December 8, 2011.[38]

Sears and Dittman next caused Bayside, using its convertible note, to convert debt into 140,000 Fusion Pharm common shares, which they sold into the market.[39] To facilitate these sales, Sears and Dittman falsely told brokers and a transfer agent that Bayside was unaffiliated with Fusion Pharm.[40] Sears and Dittman caused Bayside to sell the remainder of its note to an investment group for $250,000.[41] Based on more false statements from Dittman and Sears, the group sold some shares before the expiration of the one-year holding period in Securities Act Rule 144.[42] Sears and Dittman funneled to Fusion Pharm Bayside's proceeds from its Fusion Pharm stock sales and the payment from the investment group.[43] Fusion Pharm used the proceeds to partly fund its 2013 operations.[44]

During and after this time, Sears and Dittman used the Meadpoint convertible note to convert debt into 4.245 million Fusion Pharm common shares, of which they sold 3.2 million shares into the market.[45] To facilitate the sales, Sears and Dittman told brokers and a transfer agent that Meadpoint was unaffiliated with Fusion Pharm.[46] Later, Sears and Dittman caused Meadpoint to convert more fake debt into 1.5 million Fusion Pharm shares,

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36 OIP at 4; Plea Agreement at 25.

37 OIP at 4; Plea Agreement at 25–26.

38 OIP at 4; Plea Agreement at 25.

39 OIP at 5; Plea Agreement at 26.

40 OIP at 5; Plea Agreement at 26.

41 OIP at 5; Plea Agreement at 27.

42 OIP at 5; *see generally* 17 C.F.R. § 230.144.

43 OIP at 5.

44 *Id.* at 5.

45 OIP at 5; Plea Agreement at 28.

46 OIP at 5; Plea Agreement at 28.

which they sold to three investors.[47] The investors received unrestricted shares based on Dittman's and Sears's false statements that Meadpoint was unaffiliated with Fusion Pharm.[48] As with Bayside's sales, these Meadpoint sales funded Fusion Pharm's 2013 operations.[49] In 2014, Meadpoint's proceeds from its note with Fusion Pharm amounted to $9.9 million.[50] Criminal authorities seized about $8.7 million of this amount in May 2014.[51]

While engineering the transactions described above, Dittman and Sears caused Fusion Pharm to report false revenues and issue false press releases about PharmPods.[52] In 2011, Fusion Pharm reported about $225,000 in invented "licensing revenue."[53] In 2012, Fusion Pharm claimed over $800,000 in revenue based largely on a license agreement with VertiFresh, LLC, another Sears-controlled entity.[54] But Sears did not disclose that because he controlled VertiFresh, the license agreement was a one-party transaction.[55] And Fusion Pharm reported that VertiFresh and Meadpoint, both controlled by Sears, had committed to ordering over $3 million in PharmPods over the next three years.[56] These and other misrepresentations continued in 2013.[57]

When Sears and Dittman, acting through Fusion Pharm, reported selling PharmPods to Meadpoint and VertiFresh, they did not disclose that these transactions, and the Bayside and Meadpoint notes, were related-party

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47 OIP at 5; Plea Agreement at 29.

48 OIP at 5; Plea Agreement at 29.

49 OIP at 5; Plea Agreement at 29.

50 OIP at 5; Plea Agreement at 29.

51 OIP at 5; Plea Agreement at 29.

52 Plea Agreement at 32–36.

53 *Id.* at 32.

54 *Id.* at 34; *see id.* at 22–23 (explaining that Sears owned VertiFresh, which shared the same address and employees as Fusion Pharm and Meadpoint).

55 *Id.* at 34.

56 *Id.* at 35.

57 *Id.* at 34–36.

transactions.[58] To the contrary, in various disclosures in 2011 and 2012, Fusion Pharm falsely stated that it had not engaged in any related-party transactions.[59] None of Fusion Pharm's other quarterly reports or its 2013 annual report disclosed related-party transactions.[60] Sears's false statements and material omissions affected Fusion Pharm's stock price and volume, which helped Sears sell Fusion Pharm stock into the market.[61]

From April 2011 through May 2014, Sears acted through Microcap, Bayside, and Meadpoint to illegally sell over $12.2 million in restricted Fusion Pharm stock.[62] Sears transferred nearly of the proceeds from these sales to an account he controlled.[63]

In 2016, the government charged Sears in a two-count criminal information with (1) conspiracy to defraud the Commission, commit securities fraud, sell unregistered securities, commit mail fraud, and commit wire fraud, all in violation of 18 U.S.C. § 371; and (2) filing a false tax return, in violation of 26 U.S.C. § 7206(1).[64] The information sought forfeiture of assets, including a money judgment, derived from gross proceeds traceable to Sears's conspiracy offense.[65] Sears entered into a written plea agreement in September 2016, in which he agreed to plead guilty and consented to forfeiture of property, including a money judgment in excess of $12 million.[66] The United States District Court for the District of Colorado imposed judgment against Sears in January 2020, sentenced him to 96 months' imprisonment, and ordered him to pay $2,433,818 in restitution.[67]

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58 OIP at 5; *see id.* at 3–4.

59 *Id.* at 5–6; Plea Agreement at 33, 34 n.32.

60 OIP at 6; *see* Plea Agreement at 36–37.

61 OIP at 3–5.

62 *Id.* at 4; Plea Agreement at 29–30.

63 Plea Agreement at 30.

64 Criminal Information at 1–19.

65 *Id.* at 19–20.

66 Plea Agreement at 1–2.

67 Criminal Judgment at 1–2, 6.

The court also entered an amended preliminary order of forfeiture in which it held that Sears "obtained $10,810,916.90 of the 12,204,172.00 in Fusion Pharm, Inc. stock sales proceeds, personally, or through accounts he controlled."[68] In the final order of forfeiture, the court ordered Sears to pay $2,433,818.00 in restitution to the Internal Revenue Service, entered a personal money judgment against him in the amount of $1,914,049.49, and ordered forfeiture of identified property totaling $6,463,049.42.[69] The court of appeals dismissed Sears's appeal in August 2020.[70]

Discussion and Conclusions of Law

As noted, the OIP instructs that I may decide this partly settled proceeding "on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence." And because the factual findings in the partially settled OIP are binding, there is no genuine issue with regard to any material fact.[71] In other words, an in-person hearing is not required. Given this fact and the remaining issues to be decided, the proceeding is ripe for summary disposition.

Monetary penalties

The Commission directed me to "determine what, if any, … civil penalties pursuant to Section 8A(g) of the Securities Act and Section 21B(a) of the Exchange Act against Respondent are in the public interest."[72] To impose civil monetary penalties under these provisions, an administrative law judge is generally required to find that a violation of the securities laws occurred and that penalties are in the public interest.[73] There is no need to conduct that analysis in this case, however, because the Division argues that I should impose no penalty at all. Absent notice to Sears, I am not inclined to impose

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68 Amended Preliminary Order of Forfeiture at 2; *see* Final Order of Forfeiture at 2, *United States v. Sears*, No. 1:16-cr-301 (D. Colo. April 24, 2020), ECF No. 236.

69 Final Order of Forfeiture at 2–3; *see* Criminal Judgment at 6–7.

70 *United States v. Sears*, 822 F. App'x 818, 821 (10th Cir. 2020).

71 *See* 17 C.F.R. § 201.250(c).

72 OIP at 6; *see* 15 U.S.C. §§ 77h-1(g), 78u-2(a).

73 *See* 15 U.S.C. §§ 77h-1(g)(1), 78u-2(a)(1) & (2).

more than the Division asks for. Because it has asked that I impose no penalty, I grant the Division's request.

Disgorgement

Section 8A(e) of the Securities Act and Section 21C(e) of the Exchange Act permit the Commission to order disgorgement in this proceeding.[74] Disgorgement operates to "deprive[] wrongdoers of their net profits from unlawful activity."[75] To carry its burden to show disgorgement is warranted, the Division need only reasonably approximate the net profits causally connected to a respondent's violation.[76] The burden then shifts to the respondent to show that the Division's estimate is not a reasonable approximation.[77] It is not enough for a respondent to show uncertainty in

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[74] OIP at 6; *see* 15 U.S.C. §§ 77h-1(e), 78u-3(e); *see John Thomas Capital Mgmt. Grp.*, Securities Act Release No. 10834, 2020 WL 5291417, at *18 (Sept. 4, 2020). The Commission could also order disgorgement under Exchange Act Section 21B(e), 15 U.S.C. § 78u-2(e), but it chose not to authorize disgorgement under that provision in this proceeding. *See* OIP at 6.

[75] *Liu v. SEC*, 140 S. Ct. 1936, 1942–44 (2020); *John Thomas*, 2020 WL 5291417, at *18. The Supreme Court's recent decision in *Liu* dealt with a district court's statutory authority in Commission-instituted actions to award "equitable relief," which the Court held encompassed the authority to order disgorgement. 140 S. Ct. at 1940, 1942, 1944–50; *see* 15 U.S.C. § 78u(d)(5). The Commission's authority to order disgorgement in administrative proceedings, however, is explicitly provided by statute. *See, e.g.*, 15 U.S.C. §§ 77h-1(e), 78u-3(e); *see also Liu*, 140 S. Ct. at 1946–47 (stating that because federal agencies lack "inherent equitable powers," "it makes sense that Congress would expressly name the equitable powers it grants to an agency for use in administrative proceedings" and that "'statutory reference[s]' to a remedy grounded in equity 'must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes'" (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211 n.1 (2002)) (alteration in original)). The Commission, nonetheless, recently applied *Liu* in the administrative context. *See John Thomas*, 2020 WL 5291417, at *18 nn.92, 98. And the Division, which has adjusted its disgorgement calculation based on *Liu*, has at least implicitly accepted that *Liu* applies in this proceeding. *See* Letter from Stephen C. McKenna (Aug. 7, 2020). So I take no position on whether *Liu* applies in administrative proceedings and instead proceed on the assumption that it does.

[76] *John Thomas*, 2020 WL 5291417, at *18.

[77] *Id.*; *see SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989).

arriving at an exact figure; the respondent, as the party "'whose illegal conduct created that uncertainty,'" bears "the burden of uncertainty."[78]

In *Liu*, the Supreme Court set forth principles that define disgorgement as an equitable, profits-based remedy.[79] After reviewing equity jurisprudence, the Court explained that: (1) the proceeds obtained from the wrongdoer generally should be awarded to those victims harmed by the misconduct; (2) although an adjudicator generally cannot impose joint-and-several liability to pay disgorgement, it may do so if wrongdoers have "engaged in concerted wrongdoing"; and (3) unless a respondent's entire enterprise is illegitimate, an adjudicator "must deduct legitimate expenses" when calculating disgorgement.[80]

Noting that the district court held that Sears wrongfully obtained $10,810,916.90 in Fusion Pharm stock sales proceeds, the Division first argued that I should order Sears to disgorge that amount.[81] It also proposed that Sears's obligation to pay disgorgement "should be deemed satisfied by forfeiture and payment of the money judgment in the criminal case."[82]

Because the Supreme Court issued *Liu* after the Division filed its motion, I asked the Division to supplement its motion and discuss how *Liu* affects the

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78 *John Thomas*, 2020 WL 5291417, at *18 (quoting *First City*, 890 F.2d at 1232); *see id.* at *18 n.95 (citing Restatement (Third) of Restitution § 51(5)(c)–(d) & cmt. I, for the proposition "that if the claimant submits a reasonable approximation of the gain the 'defendant is then free … to introduce evidence tending to show that the true extent of unjust enrichment is something less,' and that any 'uncertainty in calculating net profit is assigned to the defendant' since 'the uncertainty arises from the defendant's wrong'").

79 *See* 140 S. Ct. at 1942–46; *see also id.* at 1947 ("Congress' own use of the term 'disgorgement' in assorted statutes did not expand the contours of that term beyond a defendant's net profits—a limit established by longstanding principles of equity.").

80 *Id.* at 1942–50. The Court based the first point on both established practices in equity courts and on the text of 15 U.S.C. § 78u(d)(5), which restricts equitable relief to that which "may be appropriate or necessary for the benefit of investors." *Id.* at 1944, 1947–49.

81 Mot. at 21.

82 *Id.*

Division's disgorgement calculation.[83] The Division responded that the disgorgement figure should be adjusted to $9,762,000.[84]

To get to this figure, the Division starts with the $12.2 million Sears obtained from sales of unregistered Fusion Pharm securities, and subtracts $1.3 million that was returned to Fusion Pharm, and two payments to Dittman of $450,000 and $688,000.[85] The Division argues that the new figure represents Sears's net profits; it is what Sears received minus money returned to Fusion Pharm and payments to Dittman.[86] The Division also asserts that its request accords with equitable principles in that I should consider Sears's obligation to pay disgorgement satisfied by his criminal judgment.[87] The Division adds that it "understand[s] that the forfeiture award in the Criminal Case will be *at least partly* used to compensate victims."[88] The Division also notes that subtracting funds paid to Dittman avoids joint-and-several liability.[89] Finally, it says it is unaware of other business expenses to which Sears could point to offset his disgorgement liability.[90]

On its face, the Division's calculation is reasonable. First, Sears agreed that as a result of his conspiracy offense, he received about $12.2 million.[91] Second, he has not disputed that because Fusion Pharm never registered an offering of its securities, all of his sales of those securities through the entities he controlled were illegitimate. Indeed, Sears did not respond to the Division's supplemental letter or its motion. Third, subtracting funds returned to Fusion Pharm and payments to Dittman adheres to *Liu*. Finally, the Division proposes that I consider Sears's obligation to pay disgorgement satisfied or "waived" by

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83 *Sears*, 2020 SEC LEXIS 3198, at *1–2.

84 Letter from McKenna at 2.

85 *Id.*

86 *Id.*

87 *Id.* at 2–3.

88 *Id.* at 3 (emphasis added).

89 *Id.*

90 *Id.*

91 Plea Agreement at 2.

any amount paid as part of his criminal judgment, thus obviating any concern that he will face double counting.[92]

The Division has proposed a reasonable approximation that represents the net proceeds of Sears's securities violations. Sears has not disputed the Division's proposal, and nothing suggests that the Division's figure should be offset by legitimate business expenses. Because I grant the Division's request that disgorgement be deemed satisfied by the criminal judgment (in other words, Sears is not obliged to pay any disgorgement to the Commission),[93] it is a moot issue whether, consistent with equitable principles, any disgorgement ordered in this case would be awarded to investors harmed by Sears's misconduct.[94]

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[92] Courts before and after *Liu* have deemed a defendant's disgorgement obligation satisfied by a parallel criminal restitution order. *See SEC v. Catledge*, No. 2:12-cv-887, 2020 WL 3621311, at *3 (D. Nev. July 2, 2020); *SEC v. Apostelos*, No. 1:15-cv-699, 2019 WL 3944755, at *14 (S.D. Ohio Aug. 21, 2019).

[93] If the Division had not requested that the entire disgorgement amount be satisfied by the criminal judgment, there would have been a gap of $3,818,719.09 between the Division's reasonable approximation of Sears's net profits and the total amount of monetary sanctions resulting from Sears's securities-related count of conviction. The latter totals only $5,943,280.91—that is, the $1,914,049.49 personal money judgment plus the $6,463,019.42 forfeited less the $2,433,818 of forfeiture proceeds used to pay restitution to the Internal Revenue Service as a result of Sears's non-securities-related conviction. Criminal Judgment at 6–7; Amended Preliminary Order of Forfeiture at 2–4; Final Order of Forfeiture at 2–3.

[94] If Sears were obliged to pay disgorgement in this case, I note that there were victims of his fraud and nothing suggests that this is a case where "the wrongdoer's profits cannot practically be disbursed to the victims." *Liu*, 140 S. Ct. at 1948–49. Consistent with equitable principles and under Subpart F of the Commission's Rules of Practice, the Commission or an administrative law judge has the authority to order that funds recovered by way of disgorgement and prejudgment interest be placed in a disgorgement fund for the benefit of investors harmed by a respondent's violations. But because I am deeming disgorgement satisfied by the criminal judgment, I do not include this directive in the order.

Order

The Division of Enforcement's motion for summary disposition is GRANTED.

Under Section 8A(e) of the Securities Act of 1933 and Section 21C(e) of the Securities Exchange Act of 1934, I ORDER William J. Sears to pay disgorgement in the amount of $9,762,000. However, I GRANT the Division's request that payment of such disgorgement is deemed satisfied by the order of forfeiture and money judgment against Sears in *United States v. William Sears*, No. 1:16-cr-301 (D. Colo.).

Under Section 8A(g) of the Securities Act of 1933 and Section 21B(a) of the Securities Exchange Act of 1934, I GRANT the Division's request and ORDER no civil penalty be imposed against William J. Sears.

This initial decision will become effective in accordance with and subject to the provisions of Rule 360.[95] Under that rule, a party may petition for review of this initial decision within 21 days after service of the initial decision. Under Rule of Practice 111, a party may also move to correct a manifest error of fact within ten days of the initial decision.[96] If a party files a motion to correct a manifest error of fact, then a party will have 21 days from the date of the order resolving that motion to petition for review.

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 petitions for review or moves 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 will not become final as to that party.

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James E. Grimes
Administrative Law Judge

Served by email on the Division of Enforcement.

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[95] *See* 17 C.F.R. § 201.360.

[96] *See* 17 C.F.R. § 201.111.