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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4698/March 21, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-17550

In the Matter of :
:
TOD A. DITOMMASO, ESQ. : ORDER

This Order grants the Division of Enforcement's February 1, 2017, Motion for Summary Disposition. It concludes that, as alleged in the Order Instituting Proceedings (OIP), Respondent Tod A. DiTommaso, Esq., violated Sections 5(a) and 5(c) of the Securities Act of 1933 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). The issue of sanctions, if any, remains.

Background

The Securities and Exchange Commission instituted this proceeding with an OIP on September 16, 2016, pursuant to Section 8A of the Securities Act. The hearing, expected to last one or two days, was set to commence on May 10, 2017.

The Division filed its Motion for Summary Disposition, pursuant to 17 C.F.R. § 201.250(c) (Rule 250(c)), in accordance with leave granted. *See Tod A. DiTommaso, Esq*., Admin. Proc. Rulings Release No. 4446, 2016 SEC LEXIS 4607 (A.L.J. Dec. 14, 2016). The responsive pleadings are: Respondent DiTommaso's February 21, 2017, Opposition; and the Division's March 7, 2017, Reply. Rule 250(c) authorizes summary disposition based on "undisputed pleaded facts, declarations, affidavits, deposition transcripts, documentary evidence or facts officially noticed pursuant to 17 C.F.R. § 201.323." *See* Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50212, 50224 & n.115 (citing n.112) (July 29, 2016) ("[Rule 250(c)] is analogous to Federal Rule of Civil Procedure 56."). For the purpose of this order, any facts in DiTommaso's pleadings have been taken as true.

Rule 144

Sections 5(a) and 5(c) of the Securities Act prohibit, respectively, the direct or indirect sale and the direct or indirect offer for sale of securities through jurisdictional means unless a registration statement has been filed. A showing of scienter is not required. *See SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044, 1047 (2d Cir. 1976). Section 5 is a strict liability statute. *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1257 (9th Cir. 2013). The purpose of the registration

requirement, and the Securities Act as a whole, is to "protect investors by promoting full disclosure of information thought necessary to informed investment decisions." *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953).

Securities Act Section 4(1) exempts from the registration requirements "transactions by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(1). The intent of Section 4(1) is "to exempt routine trading transactions between members of the investing public and not distributions by issuers or the acts of others who engage in steps necessary to those distributions." *Owen V. Kane*, Securities Exchange Act of 1934 Release No. 23827, 1986 SEC LEXIS 326, at *5 (Nov. 20, 1986), *aff'd*, 842 F.2d 194 (8th Cir. 1988). Securities Act Section 2(11) defines "underwriter," and 17 C.F.R. 230.144 (Rule 144) elucidates this for Sections 2(11) and 4(1), noting:

> If any person sells a . . . security to another person, the sale must be registered unless an exemption can be found for the transaction. . . . Section 4(a)(1) . . . provides [an] exemption for a transaction 'by a person other than an issuer, underwriter, or dealer.' . . . "[U]nderwriter" is broadly defined in Section 2(a)(11). . . . Rule 144 creates a safe harbor from the Section 2(a)(11) definition of "underwriter."

Rule 144, Preliminary Note. As applicable here, "An *affiliate* of an issuer is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, such issuer" and "*restricted securities*" are "[s]ecurities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering." Rule 144(a)(1), (3)(i). Further, as applicable here, "a minimum of one year must elapse between the later of the date of the acquisition of the securities from the issuer, or from an affiliate of the issuer, and any resale of such securities." Rule 144(d)(1)(ii). Pursuant to 17 C.F.R. § 239.144, any person who intends to sell securities in reliance on Rule 144 must file a Form 144 with the Commission.

Once a *prima facie* case of an unregistered offer or sale is established, the burden shifts to the respondent or defendant to prove the availability of any exemptions. *See Ralston Purina*, 346 U.S. at 126. Exemptions from registration are affirmative defenses that must be proved by the person claiming the exemptions. *See Swenson v. Engelstad*, 626 F.2d 421, 425 (5th Cir. 1980) (collecting cases); *Lively v. Hirschfeld*, 440 F.2d 631, 632 (10th Cir. 1971) (collecting cases). Claims of exemption from the registration provisions of the Securities Act are construed narrowly against the claimant. *See SEC v. Murphy*, 626 F.2d 633, 641 (9th Cir. 1980) (citing *SEC v. Blazon Corp.*, 609 F.2d 960, 968 (9th Cir. 1979)); *Quinn & Co. v. SEC*, 452 F.2d 943, 946 (10th Cir. 1971) (citing *United States v. Custer Channel Wing Corp.*, 376 F.2d 675, 678 (4th Cir. 1967)).

That unregistered offers and sales of FSPM stock occurred is essentially undisputed, as is the fact that the transactions in reality involved affiliates. DiTommaso's opposition focuses on his state of mind and the circumstances of his issuing the opinion letters, including documentation he reviewed regarding the affiliate status of parties to the transactions. In essence, he argues that he was not a substantial factor in the violations.

Findings of Fact

FSPM is a Nevada corporation with its principal offices in Denver, Colorado. Answer at 2-3. Its business focuses on the development, production, and sale of refurbished shipping containers

used primarily to grow cannabis. Answer at 3. FSPM has never registered an offering of securities under the Securities Act or a class of securities under the Securities Exchange Act of 1934. *Id.*[1] 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. *Id.* FSPM is currently listed as a Caveat Emptor/Grey Market OTC stock. *Id.*[2] During the relevant period, Scott M. Dittman, a founder, was FSPM's CEO, president, and director. *Id.*; Motion for Summary Disposition, Ex. 3 ¶¶ 4,7.

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. Answer at 3-4, 24; Opp. Decl. ¶ 14. William Sears, who had been convicted of securities fraud in 2007, operated the entities, and Dittman was also part owner of Meadpoint. Motion for Summary Disposition, Ex. 3 ¶¶ 1, 19, 21-22. Sears is Dittman's brother-in-law. *Id.* ¶ 2. Sears and Dittman operated FSPM as business partners and held themselves out as such to numerous individuals and investors. *Id.* ¶ 9. Sears was a *de facto* officer of FSPM. *Id.* ¶¶ 11-12. At the time he issued the opinion letters, DiTommaso was unaware of the relationship among Sears, Dittman, FSPM, and the three entities. Answer, *passim*; Opp. Decl. ¶¶ 6, 16.

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. Motion for Summary Disposition, Ex. 3 ¶¶ 23-36. 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. Answer at 2. He issued ten attorney opinion letters relating to ten transactions in FSPM stock. Motion for Summary Disposition, Exs. 5, 10, 18, 19, 20, 21, 22, 25, 29, 35. He affirms that he issued nine of the letters and states that "it appears likely" that he prepared the tenth, dated August 13, 2013, but that he cannot locate any records concerning it. Answer at 10-11; Opp. Decl. ¶¶ 8-14; Opp. at 10. He was paid a total of $1,300 for the nine letters and $175 for the tenth. Answer at 8; Motion for Summary Disposition, Ex. 30 (invoice for the August 13, 2013, letter).

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. Motion for Summary Disposition, Exs. 5, 10, 18, 19, 20, 21, 22, 25, 29, 35. The opinion

[1] The Commission's public official records contained in EDGAR, of which official notice pursuant to 17 C.F.R. § 201.323, also show no such filings. *See* https://www.sec.gov/cgi-bin/browse-edgar?company=Fusion+Pharm&owner=exclude&action=getcompany (last visited March 17, 2017).

[2] OTC's website displays a Caveat Emptor/Grey Market warning, illustrated with a skull and crossbones, for FSPM common stock, of which which official notice pursuant to 17 C.F.R. § 201.323 is taken. *See* https://www.otcmarkets.com/stock/FSPM/quote (last visited March 17, 2017).

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. *Id*., Exs. 6, 11, 31. There were no Form 144 filings by any of the three entities. *Id*., Exs. 7, 12, 27.

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. Opp. Decl. ¶¶ 2, 4-5. OTC had banned Jean-Pierre from rendering legal opinions and listed him on its Prohibited Attorney List as of April 21, 2010. Motion for Summary Disposition at 2, Ex. 40.[3] DiTommaso was unaware of this or any other enforcement actions against Jean-Pierre until 2014, when the Division contacted him.[4] Opp. Decl. ¶ 3. 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. *Id*. ¶¶ 6-7. 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. *Id*. ¶¶ 9-11. DiTommaso reviewed the supporting documentation to verify the predicate facts for establishing the Rule 144 safe harbor. *Id*. ¶ 12.

Conclusions of Law

Securities Act Sections 5(a) and 5(c) prohibit unregistered offers and sales by "any person, directly or indirectly." DiTommaso violated those sections "indirectly." As described above and not disputed by DiTommaso, unregistered offers and sales of FSPM securities by affiliates after a short holding period occurred in violation of Securities Act Sections 5(a) and 5(c) stock. DiTommaso's argument as to his state of mind – essentially that he was deceived by FSPM insiders – bears on potential sanctions but does not in itself relieve him from liability since those provisions are strict liability provisions. As the result of DiTommaso's opinion letters, the transfer agent issued stock certificates without a restrictive legend, enabling the offer and sale into the market of

[3] OTC's Prohibited Attorney List, of which official notice pursuant to 17 C.F.R. § 201.323 is taken, is available at: https://www.otcmarkets.com/research/prohibited-attorney (last visited March 17, 2014). Jean-Pierre appears on the list. *Id*.

[4] 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 Exhibits 42 and 43, respectively, to the Motion for Summary Disposition. 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).

what were actually restricted securities. Thus, he was a necessary participant and substantial factor in the violative unregistered offers and sales. DiTommaso was clearly a necessary participant; without his opinion letters, the restrictive legend would not have been removed, and the shares could not have been sold into the market. DiTommaso argues that he was not a "substantial factor," pointing to *CMKM Diamonds* in support, but this citation is inapposite to his argument. In stating that "the substantial factor test requires more than a finding of 'but for' causation," the court gave as an example of a participant who was not a substantial factor in the violation a printer who prepared key documents. *CMKM Diamonds*, 729 F.3d at 1255. By contrast with such logistical or clerical activities, DiTommaso prepared letters giving a legal opinion in his capacity as a licensed attorney. *See, e.g., SEC v. Blackburn,* No. 15-cv-2451, U.S. Dist. LEXIS 178325, at *12-13 (E.D. La. Sept. 11, 2015) (explaining, in denying defendant's motion to dismiss, that attorney "was a substantial factor because the writing of opinion letters justifying the removal of restrictive legends is not a de minimis act.")

In light of the above, a hearing is unnecessary as to the charge that DiTommaso violated Securities Act Sections 5(a) and 5(c), as it is concluded herein that he violated those sections. However, material questions of fact remain as to sanctions, if any. For example, the OIP authorizes the imposition of a civil penalty pursuant to Securities Action Section 8A(g). That section authorizes three tiers of penalties, and the second and third tiers require a violation that "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." Securities Act Section 8A(g)(2)(B), (C). If the Division intends to ask for a civil penalty, it will be necessary to adduce evidence related to scienter. While the OIP also authorizes disgorgement pursuant to Securities Act Section 8A(e), any disgorgement would be limited to the $1,475 in fees that DiTommaso received for his role in the violation. The parties may wish to discuss a settlement as to possible sanctions.

Protective Order

Exhibits 36 and 37 to the Motion for Summary Disposition, which are account statements of non-party individuals, will be subject to a protective order pursuant to 17 C.F.R. § 201.322(b). Although the record in a public hearing is presumed to be public, the harm resulting from disclosure of Exhibits 36 and 37 outweighs the benefits. *See* 17 C.F.R. § 201.322(b). Disclosure of financial information concerning an individual is presumed harmful and 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.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge