IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 16-cr-00301-WJM

UNITED STATES OF AMERICA,

Plaintiff,

v.

2. SCOTT M. DITTMAN

Defendant.

GOVERNMENT'S MOTION FOR LEAVE TO FILE REDACTED PLEA AGREEMENT AS TO DEFENDANT DITTMAN

The UNITED STATES OF AMERICA, by and through its undersigned counsel, respectfully moves to file as an unrestricted document, a redacted version of the Plea Agreement for Defendant Scott M. Dittman, in the form annexed hereto as Exhibit A.

As grounds for the motion, the government states as follows:

1. On January 31, 2017, this Court conducted a change of plea hearing with respect to defendant Dittman, at which time defendant Dittman tendered a guilty plea to Count 1 of the Information filed in this case pursuant to a written plea agreement between Dittman and the government. This Court accepted defendant Dittman's guilty plea, adjudged him guilty of the offense set forth in the Information and set sentencing with respect to his case. Consistent with defendant Sears' plea agreement, the Court filed defendant Dittman's plea agreement with the government filed under restriction at Level 2. (DE 72-73).[1] However, the Court permitted defendant Sears and the government leave to submit to the Court a proposed redacted plea

[1] "DE" refers to the docket entries in this case.

agreement that would be available to the public through viewing on the Court's PACER system. The government moved to do so, tendering a proposed redacted plea agreement, and the Court granted this motion and caused the redacted version of defendant Sears' plea agreement to be filed as an unrestricted document (DE 51-56).

2. The government, by this motion, seeks to follow the same course here with respect to defendant Dittman's plea agreement. Exhibit A to this motion is a redacted version of the Dittman plea agreement, which makes the same redactions to the Dittman plea agreement as were made to the Sears plea agreement that was filed as an unrestricted document.

3. The government is filing, in further support of this motion and the proposed redactions, a memorandum identifying for the Court the passages of the Dittman plea agreement which the government proposes to be redacted from the publicly filed version of the plea agreement.

WHEREFORE, the Government prays that the Court authorize the filing of a redacted version of the Plea Agreement of Defendant Dittman in the form annexed hereto as Exhibit A.

Respectfully submitted this 1st day of May, 2017.

Respectfully submitted,

ROBERT C. TROYER
Acting United States Attorney

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 2017, I electronically filed the foregoing **GOVERNMENT'S UNOPPOSED MOTION FOR LEAVE TO FILE REDACTED PLEA AGREEMENT AS TO DEFENDANT DITTMAN** with the Clerk of the Court using the CM/ECF which will send notification of such filing to counsel at the following e-mail addresses:

Marci Gilligan LaBranche
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s/ Andrea K. Hough
ANDREA K. HOUGH
U.S. Attorney's Office

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Criminal Case No. 16-cr-00301-WJM

UNITED STATES OF AMERICA,

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2. SCOTT M. DITTMAN,

Defendant.

PLEA AGREEMENT AND STATEMENT OF FACTS RELEVANT TO SENTENCING

The United States of America (the government), by and through Kenneth M. Harmon and Tonya S. Andrews, Assistant United States Attorneys for the District of Colorado, and Scott M. Mascianica, Special Assistant United States Attorney for the District of Colorado, and the defendant, Scott M. Dittman, personally and by his counsel, William L. Taylor, Esq., submit the following Plea Agreement and Statement of Facts Relevant to Sentencing pursuant to D.C.COLO.LCrR 11.1.

I. PLEA AGREEMENT

A. The defendant agrees to plead guilty to Count 1 of a two-count information in this case, in the form annexed hereto as Exhibit A (hereinafter, the "Contemplated Information"), charging him, in Count 1, with conspiring with William J. Sears, named as a co-defendant, and with others to defraud the United States and one of its agencies, the U.S. Securities and Exchange Commission ("SEC"), and to commit specified offenses against the United States, in violation of Title 18, United States Code, Section 371.

COURT EXHIBIT 1

EXHIBIT A

B.1. The defendant agrees to forfeit, his interest to the extent he has any, to the United States immediately and voluntarily any and all assets and property, or portions thereof, subject to forfeiture, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), that may constitute or is derived from proceeds of his commission of or involvement or participation in the charged conspiracy and its object offenses, including, but not limited to, the following:

(a) A money judgment not exceeding approximately $12,204,172, corresponding to the total amount obtained as a result of the Count One;

(b) The following particular assets, derived from the sale of Fusion Pharm common stock, and constituting direct and indirect proceeds of the Count One:

(1) $27,066.23 Seized From Wells Fargo Bank Account No. 6020559917, Held In The Name Of Meadpoint Venture Partners;

(2) $9,455.56 Seized From Wells Fargo Bank Account No. 7784731577, Held In The Name Of Sandra L. Sears;

(3) $8,462,621.25 Seized From Moors And Cabot Trust Account No. 4597-6546, Held In The Name Of Sandra Lee Sears, Tr, Sandra Lee Sears Ttee, less approximately $2,472,945 to be applied to Mr. Sears' restitution;

(4) $20,820.37 Seized From Wells Fargo Bank Account No. 5181260307, Held In The Name Of Fusionpharm, Inc.;

(5) $212,273.92 Seized From Wells Fargo Bank Account No. 8141061286, Held In The Name Of Fusionpharm, Inc.,

(6) $250,000.00 Held In Lieu Of Earnest Money Held On Deposit For The Purchase Of 4200 Monaco Street, Denver, Colorado; And

(7) The Real Property Located At 194 Basket Road, Oley, Pennsylvania.

B.2. The defendant has no cognizable right, claim, or interest in assets described in subparagraphs (b)(1), (2), (3), or (6) listed above.

B.3. The defendant further agrees to forfeit, as substitute assets, any monetary value he realizes in the future from his interest in FusionPharm, Inc. ("FusionPharm").

B.4 The United States agrees to accept payment of $688,000.00 in lieu of forfeiture of

the real property located at 194 Basket Road, Oley, Pennsylvania no later than six months from the date of sentencing.

B.5. The United States agrees the funds obtained from the forfeiture of any assets, direct or substitute, shall be applied to the forfeiture money judgment identified in subparagraph (a). In addition, the seized funds applied to any restitution obligation of co-defendant Sears would also be credited to the forfeiture money judgment.

B.6. The defendant agrees and consents to the forfeiture of these assets pursuant to any federal criminal, civil, and/or administrative forfeiture action. The forfeiture money judgment entered against the defendant would be joint and several with co-defendant Sears' forfeiture money judgment. The parties further agree that the forfeiture money judgment shall remain in full force and effect for 2 years from the date of sentencing.

B.7. The defendant further agrees, at the government's election, to divest whatever beneficial ownership interest he has in shares of common and preferred stock of FusionPharm.

C. The parties agree that, although restitution would otherwise be mandatory with respect to Count 1 of the Contemplated Information, they will take the position that restitution should not be ordered by the Court, pursuant to 18 U.S.C. § 3663A(c)(3), because the number of identifiable victims is so large as to make restitution impracticable and, alternatively, restitution would involve determination of complex issues of fact that would complicate or prolong the sentencing process to a degree that the need for restitution would be outweighed by the burden on the sentencing process. The parties acknowledge and agree, however, that, while court ordered restitution will not be sought with respect to Count 1 of the Contemplated Information, the assets and funds which are to be forfeited pursuant to the terms of this plea agreement may be made available to eligible victims pursuant to administrative proceeding before the U.S. Department of

Justice.

D.1. [redacted]

[redacted]

D.2. [redacted]

[redacted]

D.3. The defendant [redacted] agrees to cooperate fully with the Law Enforcement Agencies in the identification, recovery and repatriation of assets that are subject to, or are otherwise available for, forfeiture pursuant to his plea obligations with respect to forfeiture, as set forth in paragraph B above. Such cooperation shall include, but not necessarily be limited to, (a) submitting to debriefings concerning the identification, recovery and repatriation of potentially forfeitable assets; (b) producing documents, records and other evidence, as requested by the Law Enforcement Agencies, relevant to these subjects; (c) executing documents required by financial institutions and custodians who may have custody or control of potentially forfeitable assets in order to permit access to records concerning such assets and in order to facilitate the recovery and repatriation of such assets; (d) providing truthful testimony concerning these subjects, whether in the form of testimony or through affidavit or declaration; and (e) appearing at judicial or administrative hearings and proceedings as may be necessary for these purposes.

D.4. The defendant also agrees to cooperate fully with the IRS in the ascertainment and payment of his correct tax liabilities for the calendar years 2011 through 2014 inclusive, among other ways, by preparing and filing returns or amended returns, as necessary, for those years for himself individually as well as for entities through which he conducted business during those years and on whose behalf he should have filed tax returns. The defendant further agrees to file truthful

and accurate income tax returns which are or may become due by law during any period of supervised release or probation imposed by the Court.

E. The Office of the United States Attorney for the District of Colorado agrees that – contingent upon the defendant's entry of a guilty plea and sentencing on the Contemplated Information and the defendant's fulfillment of his other plea obligations -- it will not further prosecute the defendant for the conduct set forth in the Contemplated Information or any other criminal conduct known to Office of the United States Attorney for the District of Colorado as of the date of this plea agreement.

F.1. The parties acknowledge that, pursuant to *United States v. Booker*, 543 U.S. 220 (2005), the Court, while not bound by them, is required to consider the United States Sentencing Guidelines and determine the defendant's applicable sentencing guideline range, in deciding the sentence in this case.

F.2. The parties agree to take the respective positions ascribed to them regarding the sentencing factors set forth in Part VI herein (the parties' Advisory Guideline Computation and 3553 Advisement), which positions, the parties agree, would result in an advisory sentencing guideline range that would exceed the statutory maximum imprisonment term of five years for the defendant's offense of conviction set forth in Count 1 of the Contemplated Information. The parties agree that, as a consequence, under these circumstances, should these positions be accepted by the Court, the effective advisory sentencing guideline range applicable to the defendant would be five years' imprisonment or 60 months. *See* U.S.S.G. §§ 5G1.1-5G1.2 & comments.

F.3. [redacted]

[redacted]

F.4. [redacted]

[redacted]

F.5. [redacted]

[redacted]

[redacted]

F.6. [redacted] The defendant further acknowledges that the government will not be advocating, at the time of sentencing, a sentence on his behalf lower than 24 months' imprisonment.

F.7. The defendant is free, at the time of sentencing, to advocate for any lawful sentence in this case and to make to the Court any arguments in support of thereof, provided, however, that that sentence *include a term of imprisonment not less than 24 months in duration* and any supporting arguments are consistent with the positions he is obligated to take under the plea agreement with respect to the calculation of his advisory sentencing guideline range and are not factually inconsistent with his entry of a guilty plea and admission of guilt or with the body of body of stipulated facts set forth in Part V herein (the parties' Stipulation of Facts).

G.1. The defendant agrees that, as a condition of supervised release or probation, he will not be involved in any capacity in the securities industry on behalf of another individual or an entity not solely owned and controlled by him. The defendant further agrees that, as a condition of supervised release or probation, he will not act as an officer or director of a company whose securities are publicly traded or otherwise act as a control person of such a company and that he will not directly or indirectly participate in the issuance, purchase, offer, or sale of any security in an unregistered offering by any issuer of securities.

G.2. The defendant further agrees that, as a condition of supervised release or probation, he will not act as a fiduciary or be employed in a fiduciary position and that he will not otherwise be engaged in any other employment or occupation involving his solicitation of funds for investment or his custody or control of investor funds.

G.3. The defendant further agrees that any conditions of supervised release or probation should include the special conditions that (a) his employment be approved in advance by his supervising probation officer; (b) that he provide his supervising probation officer access to any financial records requested by such officer and otherwise be subject to financial monitoring by such officer; (c) that he shall not register any business entities without prior disclosure to his supervising probation officer; and (d) that he shall not conduct any financial transactions through accounts of any business entities or individuals not made known to and approved by his supervising probation officer.

H. The defendant is aware that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. Understanding this and in exchange for the concessions made by the government in this agreement, the defendant knowingly and voluntarily waives the right to appeal any matter in connection with this prosecution, conviction, or sentence unless the sentence exceeds 60 months, that is, the combined the statutory maximum penalties for imprisonment for the offenses of conviction, with the sentences run consecutive to one another. The defendant also agrees to waive his right to challenge this prosecution, conviction, or sentence and/or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255, except that such waiver provision will not prevent him from seeking relief otherwise available if: (1) there is an explicitly retroactive change in the applicable guidelines or sentencing statute, (2) there is a claim that he was denied the effective assistance of counsel, or (3)

there is a claim of prosecutorial misconduct. Additionally, if the government appeals the sentence imposed by the Court, the defendant is released from these waiver provisions.

I. The parties agree and acknowledge that the government's obligations under this plea agreement are expressly contingent on the defendant's performance of his obligations under the plea agreement. The parties further agree and acknowledge, in particular, that should the defendant breach this agreement [redacted] the government is entitled, at its election, to be relieved of its obligations under this plea agreement and may elect to abrogate the agreement and prosecute the defendant to the full extent permitted under law.

J. The parties understand, acknowledge, and agree that the sentencing recommendations of the parties under this plea agreement are made pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure and are not binding on the Court.

II. THE ELEMENTS OF THE OFFENSE

The defendant understands that, in order to be convicted of the offense of conspiracy to defraud the United States and one of its agencies, and to commit offenses against the United States, as charged in Count 1 of the Contemplated Information, the government, at trial, would have to prove the following essential elements beyond a reasonable doubt:

1. The defendant agreed with at least one other person to violate the law;
2. One of the conspirators engaged in at least one overt act furthering the conspiracy's objective;

3. The defendant knew the essential objective of the conspiracy:

4. The defendant knowingly and voluntarily participated; and

5. There was interdependence among the members of the conspiracy; that is, the members, in some way or manner, intended to act together for their shared mutual benefit within the scope of the conspiracy charged.[1]

III. STATUTORY PENALTIES

The maximum statutory penalty for the offenses set in Count 1 of the Contemplated Information is: not more than five (5) years imprisonment; not more than a $250,000 fine, or both; not more than three (3) years supervised release; a $100 special assessment fee; plus, restitution.

A violation of the conditions of probation or supervised release may result in a separate prison sentence and additional supervision.

IV. COLLATERAL CONSEQUENCES

The conviction may cause the loss of civil rights, including but not limited to the rights to possess firearms, vote, hold elected office, and sit on a jury.

V. STIPULATION OF FACTUAL BASIS AND FACTS RELEVANT TO SENTENCING

The parties agree that there is a factual basis for the guilty pleas that the defendant will tender pursuant to this plea agreement. That basis is set forth below. Because the Court must, as part of its sentencing methodology, compute the advisory guideline range for the offenses of conviction, consider relevant conduct, and consider the other factors set forth in 18 U.S.C. §3553, additional facts may be included below which are pertinent to those considerations and computations. To the extent the parties disagree about the facts set forth below, the stipulation of

[1] Tenth Circuit Pattern Jury Instruction 2.19 (2011).

facts identifies which facts are known to be in dispute at the time of the execution of the plea agreement.

This stipulation of facts does not preclude either party from hereafter presenting the Court with additional facts which do not contradict facts to which the parties have stipulated and which are relevant to the Court's guideline computations, to other 18 U.S.C. §3553 factors, or to the Court's overall sentencing decision.

The parties agree that the date on which relevant conduct began is in or about November 2010 and continued until on or about July 18, 2014 (the "Relevant Period").

Except as noted,[2] the parties agree that the government's evidence would establish the following:

The Defendant and Co-Defendant Sears Start FusionPharm

1. Co-defendant William J. Sears ("Sears"), a resident of Thornton, Colorado, had previously been primarily involved in the business of providing public relations and promotional services to microcap companies that sought to have their stocks publicly traded in various non-exchange, over-the-counter markets. In 2007, co-defendant Sears was convicted in the Southern District of New York of one count of conspiring to commit securities fraud and commercial bribery and one count of securities fraud (Case No. 04-cr-556-swk). Thereafter, co-defendant Sears primarily conducted his stock public relations and promotional business through Microcap

[2] The defendant maintains that he did not enter the conspiracy charged in Count 1 of the Contemplated Information until on or about June 6, 2012 (*see* ¶¶ 24-28, *infra*), but acknowledges that he was complicit as a co-conspirator thereafter and legally accountable for the acts of the conspiracy under various theories of co-conspirator liability, without the defenses of advice of counsel or good faith. The defendant reserves the right to offer evidence concerning advice he received from counsel, his resulting *mens rea*, good faith, state of mind, awareness, motivations and intentions with respect to other acts and conduct described below and to provide evidence putting such acts and conduct in context. With this general caveat, the defendant does not dispute that the government's evidence would otherwise establish the underlying facts set forth in this section of the Plea Agreement and that there is an independent basis in fact for his guilty plea and that he is guilty, in fact, of the offense set forth in Count 1, namely a violation of Title 18, Section 371.

Management, LLC ("Microcap"), a Nevada limited liability company that he formed. He also conducted some of his business affairs through a second Nevada limited liability company, Bayside Realty Holdings, LLC ("Bayside"), which he formed and operated in the name of a blood relative family member (hereinafter, "Family Member A").

2. Defendant Scott M. Dittman ("Dittman"), a resident of Elizabeth, Colorado and later Boyertown, Pennsylvania, had worked for Arthur Andersen & Co. from October 1991 until April 1995, where he primarily worked in the Enterprise small business consulting group doing mainly audit and process consulting to include audits of financial statements. The defendant quit working for Arthur Andersen and went into real estate development and construction in 1995. He became a Certified Public Accountant in 1995. His license with the State of California expired in April 1997. The defendant and co-defendant Sears are brothers-in-law; co-defendant Sears is married to the defendant's sister.

3. In or about 2010, the defendant conceived of a business to develop, manufacture and sell steel shipping containers refurbished for use as hydroponic growing pods ("PharmPods,") for indoor plant cultivation, primarily cannabis. He undertook to collaborate with co-defendant Sears to develop this business and, in particular, enlisted co-defendant Sears to assist in promoting the business, marketing its products and finding investment capital for it. The business was conducted through FusionPharm, Inc. ("FusionPharm"), with its principal place of business at first in Denver, Colorado and later in Commerce City, Colorado.

4. In November 2010, in furtherance of these efforts, co-defendant Sears and the CEO for a company named Baby Bee Bright Corporation ("Baby Bee Bright") began discussions about co-defendant Sears and the defendant taking over Baby Bee Bright. The purpose of the takeover was for the defendant and co-defendant Sears to transform Baby Bee Bright, a company whose

stock was already quoted on OTC Link, operated by OTC Markets Group, Inc. ("OTC Link"), into FusionPharm, Inc.[3] On November 8, 2010, Baby Bee Bright's CEO and co-defendant Sears exchanged emails about the Baby Bee Bright CEO transferring his convertible preferred shares in Baby Bee Bright to co-defendant Sears and the defendant. The owner of the preferred shares could convert the shares to common stock at a rate of 100 common stock shares for every preferred share. On approximately March 1, 2011, co-defendant Sears and the Baby Bee Bright CEO ultimately agreed that the defendant and co-defendant Sears would receive 99% of the company's convertible preferred shares at no cost while the Baby Bee Bright CEO retained 1% as his compensation for the transaction On November 15, 2010, Baby Bee Bright's shareholders executed a written consent acknowledging, among other things: (a) the resignation of Baby Bee Bright's CEO; and (b) the appointment of the defendant and, at co-defendant Sears' direction, Family Member A as directors. Family Member A was appointed to act as director, in part to avoid disclosure of co-defendant Sears' involvement and his prior conviction for securities fraud.[4]

5. Prior to November, 2010, the defendant had been aware that co-defendant Sears had a prior felony conviction. Co-defendant Sears and the defendant discussed co-defendant Sears' prior felony conviction with a transactional and securities lawyer (hereinafter "Counsel A") and were advised by that lawyer that co-defendant Sears' felony conviction would have to be disclosed to the market if co-defendant Sears was given an officer or director title in the company and, over the course of time, they were further advised by Counsel A that co-defendant Sears'

[3] At the time, the common stock of Baby Bee Bright, like the common stock of many publicly traded microcap companies, was not traded on a registered national securities exchange but rather directly between two parties, typically securities broker-dealers, using inter-dealer quotation services offered through internet platforms such as OTC Link.

[4] The parties acknowledge that the defendant and co-defendant Sears' acquisition of these pre-existing shares through the reverse merger with Baby Bee Bright was not the product of wrongdoing.

formal involvement with FusionPharm would need to be limited in various ways to avoid running afoul of the federal securities laws or triggering disclosure obligations under the federal securities laws.[5]

6. On January 25, 2011, as part of the plan to turn over control of Baby Bee Bright to co-defendant Sears and the defendant, the Baby Bee Bright CEO transferred 1.3 million of the existing 1.5 million Baby Bee Bright preferred shares to a single person LLC owned and controlled by the defendant. On March 16, 2011, the Baby Bee Bright CEO then transferred 185,000 Baby Bee Bright preferred shares to Microcap, an entity controlled by co-defendant Sears. As arranged with co-defendant Sears, the Baby Bee Bright CEO retained 15,000 preferred shares as his compensation for the transaction.

7. On March 25, 2011, the defendant and co-defendant Sears filed a notification of name change with the Financial Industry Regulatory Authority ("FINRA") to change Baby Bee Bright's name and stock symbol to FusionPharm's name and stock symbol. After FINRA approved this form, all Baby Bee Bright shares were converted to FusionPharm shares. The FINRA notification form was signed by the defendant in his capacity as President of FusionPharm and identified co-defendant Sears as the company's "Administrative Officer." Family Member A was listed as treasurer and secretary of former Baby Bee Bright and the newly formed FusionPharm.

8. Around this time, co-defendant Sears and the defendant enlisted the services of an associate of co-defendant Sears ("Co-Conspirator A") to assist in preparing materials for

[5] The defendant would also offer evidence that he and co-defendant Sears also consulted with a cannabis licensing lawyer (hereinafter "Counsel B") who advised that co-defendant Sears' felony conviction made co-defendant Sears being an officer or director in FusionPharm problematic from a state cannabis licensure standpoint to the extent that FusionPharm's business model contemplated selling pods to, among others, licensed legal marijuana cultivators.

FusionPharm. The defendant and co-defendant Sears requested that Co-Conspirator A prepare, among other things, FusionPharm business plans including financial projections for the company. For example, on March 10, 2011, co-defendant Sears emailed Co-Conspirator A and cc'd the defendant, asking Co-Conspirator A to "please start communicating with regard to putting a business/plan/powerpoint/offering documents together." About a month later, on April 5, 2011, the defendant emailed Co-Conspirator A with specific financial projections to assist in the preparation of FusionPharm's business plan. The projections included PharmPod sales estimates for the company for the upcoming fiscal years that forecasted the number of pods that were expected to be sold in each of these years, as follows with the translated corresponding sales revenue figures at an average price of $32,500 per pod: (a) Fiscal Year ("FY") 2011: 30 pods ($975,000); (b) FY 2012: 60 pods ($1,950,000); and (c) FY 2013: 100 pods ($3,250,000).

9. The defendant and co-defendant Sears operated FusionPharm as business partners, and held themselves out as such to numerous individuals and investors. On April 21, 2011, the defendant sent an email to numerous individuals notifying them that he "recently partnered with [co-defendant Sears] and [we] have acquired and moved [our] operations into a publicly traded company: FusionPharm." The defendant would identify co-defendant Sears as his "partner" in FusionPharm to numerous individuals through in-person communications and emails. In short, during the Relevant Period, co-defendant Sears and the defendant worked in tandem regarding the critical decisions concerning FusionPharm's management and operations, and co-defendant Sears was primarily responsible for FusionPharm's capital formation and investor relations. At no point, however, was co-defendant Sears included on any FusionPharm disclosures to the investing public as having any involvement with FusionPharm.

10. Following the conversion of shares and name change to FusionPharm, the defendant and co-defendant Sears, initially with the assistance of Co-Conspirator A, undertook thereafter regularly to post certain prescribed written disclosures for FusionPharm on the OTC Link internet platform. These submissions typically included financial statements, together with financial statement notes, and quarterly and annual reports, which reports included information, among other things, about the officers, directors, and control persons and significant beneficial owners of the company's stock.[6] Throughout the Relevant Period, no mention was made in any of FusionPharm's financial statements, notes, or quarterly and annual reports, that co-defendant Sears or any of the entities through which he conducted business was an affiliate of, or related party to FusionPharm.

Co-Defendant Sears Served as *de facto* Officer for FusionPharm

11. Even though co-defendant Sears was never identified in FusionPharm's financial and other disclosures as having a formal role with the company, he was integral to the company's operations. As FusionPharm began its actual operations in the Spring of 2011, co-defendant Sears was identified in some of FusionPharm's documents as being an officer of the company; he was alternatively classified as the company's "Vice President" "Director of Financial Operations" and/or "Investor Relations Director" in other documents.

[6] Reporting on the OTC Link platform was voluntary on the part of the companies whose stock was listed for trading but the degree and nature of the disclosures provided by the companies determined the "market tier" in which the company would be classified by the internet platform. Higher level tiers required more comprehensive disclosures. Companies that provided limited or no information were placed in market tiers that OTC Link reserved for stock issuers that prospective investors were advised to approach with caution. OTC Link provided written guidelines for the type of information contemplated in these quarterly and annual reports. The disclosures made by companies whose securities were listed on the OTC Link platform were readily accessible to the investing public and were widely disseminated through financial media outlets.

12. In addition to being identified on initial company documents as an officer, from the time of FusionPharm's organization as a company in Spring 2011 until late 2013 (when FusionPharm hired a contractor to serve as part-time Chief Financial Officer), co-defendant Sears handled many day-to-day responsibilities typically reserved in other companies for a chief financial officer. For example, co-defendant Sears: (a) managed incoming investor checks and paperwork; (b) served as FusionPharm's primary contact with the company's transfer agent[7] in connection with FusionPharm common stock transactions; (c) signed payroll checks for FusionPharm employees from FusionPharm account(s) for six months when the defendant did not have access to FusionPharm's bank accounts; (d) made pitches to a number of investors on FusionPharm's behalf; (e) at times aided in drafted, revised, and posted FusionPharm press releases; and (f) drafted certain FusionPharm corporate documents, such as written board of director consent for co-defendant Sears and others to convert their preferred FusionPharm shares for sale. Co-defendant Sears also had and used a FusionPharm email address and, from at least November 2011 to January 2012, received a salary from FusionPharm.

Co-Defendant Sears Sold FusionPharm Stock Through Microcap for the Benefit of Co-Defendant Sears, the Defendant and FusionPharm

13. Federal securities laws require that every offer or sale of a security by a company such as FusionPharm needs to be registered with the Securities and Exchange Commission ("SEC") or exempt from registration. FusionPharm was not registered with the SEC. Accordingly, throughout the Relevant Period, any lawful issuance of securities, including convertible notes, preferred and common stock, would have needed to be exempt from registration. Further, any of these exempt offerings would have required that the shares associated with the

[7] A transfer agent is assigned by a publicly traded company to keep track of the individuals and entities that own the companies' stocks and bonds.

issuance be "restricted," or limited in the manner and amount in which they could be sold after issuance. For example, restricted securities would have needed to be held by the owner for a certain amount of time (the "holding period") before they could be freely transferrable to a third party. Additionally, shares held by individuals or entities that could direct or control the direction of a company's management or policies - classified as "affiliates" - were subject to additional regulations under federal securities laws, such as limitations on how many shares they can sell during a given time period.[8]

14. The defendant and co-defendant Sears knew that unrestricted or "free trading" shares of FusionPharm could be sold into the market or to be used as negotiating tools. Unrestricted shares would be more marketable to investors as they could immediately sell the shares without having to satisfy any holding period. As such, co-defendant Sears used the preferred shares acquired by Microcap to fund FusionPharm's operations and to financially support themselves.[9] Because co-defendant Sears was a *de facto* affiliate throughout the Relevant Period, sales of his preferred shares were accomplished while avoiding registration with the SEC and in violation of the otherwise applicable restriction requirement on newly issued shares.

15. The securities transactions were realized in stages. Co-defendant Sears initially converted 1,450 preferred shares to 145,000 free-trading shares of FusionPharm common stock on April 15, 2011. He then caused Microcap to transfer the remaining preferred shares (183,550 preferred shares) to a company owned by an immediate family member (identified herein as "Family Member B"), although co-defendant Sears continued to beneficially own the stock.

[8] One can be an affiliate either directly or indirectly through one or more intermediaries.

[9] The defendant benefited from some of the sales of co-defendant Sears' preferred shares in that (1) his FusionPharm salary was sometimes traceable to proceeds of these sales, (2) some capital loans by the defendant to FusionPharm were repaid by FusionPharm with proceeds traceable to these sales, (3) FusionPharm's operations were financed by round-tripped proceeds from many of these sales; and (4) he received compensation from Meadpoint in 2012 traceable to proceeds of these sales.

Thus, co-defendant Sears was able to avoid being disclosed in FusionPharm's financial disclosure documents as a 10% shareholder of the company's preferred stock, and an affiliate of FusionPharm based on his stock ownership. After using Family Member B's company to convert small tranches of FusionPharm preferred shares to common stock, co-defendant Sears caused the remaining 178,760 preferred shares to be transferred to another family member (hereinafter, "Family Member C") on July 29, 2011.[10] Similarly, co-defendant Sears then used Family Member C as a proxy for his stock ownership, instructing him to transfer as needed small tranches of preferred shares to Microcap (or other entities controlled by co-defendant Sears), which co-defendant Sears, in turn, caused to be converted into common stock and sold into the market. The defendant knew about this arrangement. Co-defendant Sears did this in order to conceal his true share ownership, as he continued to beneficially own these shares throughout the Relevant Period.[11]

16. All told, between April 28, 2011 and December 10, 2012, co-defendant Sears, in consultation with the defendant, converted 14,270 of the 185,000 preferred shares into 1,427,000 shares of FusionPharm common stock. Co-defendant Sears sold 675,000 shares of these shares into the secondary market through Microcap, netting approximately $1.6 million in proceeds. Co-defendant Sears and the defendant agreed that co-defendant Sears would use some of the remaining 752,000 FusionPharm common stock shares as part of their efforts to raise funds for the company's

[10] Both Family Members B and C were also relatives of the defendant.

[11] The defendant contends that this family member, Family Member C, was the true owner of these shares but acknowledges that co-defendant Sears had substantial influence with this family member as to the use and disposition of these share holdings.

operations and to finance construction of pods. Some investors were told that such shares would be unrestricted and thus could be immediately traded. [12]

17. Since FusionPharm's transfer agent was the gatekeeper responsible for determining whether shares would be restricted, Microcap's sale of these unregistered shares was based on false statements by the defendant and co-defendant Sears about co-defendant Sears' affiliation with, and his ability to control certain aspects of, FusionPharm. For example, the defendant signed and submitted a FusionPharm Officer's Certificate attesting to, among other things, that co-defendant Sears and, derivatively, Microcap, were not affiliates of FusionPharm. Similarly, co-defendant Sears submitted documents on Microcap's behalf to the transfer agent that claimed he had no power to direct or cause the direction of FusionPharm's operations, even though co-defendant Sears handled many responsibilities typically reserved in other companies for an officer or director. (*See* ¶¶ 11-12 above). Co-defendant Sears and the defendant did not accurately describe co-defendant Sears' role with FusionPharm in their efforts to have the transfer agent remove the restricted legend on the stock certificates in order to be able to sell the shares as free trading.

18. The defendant also misrepresented facts about co-defendant Sears' stock ownership and transactions to FINRA. In October 2011, FINRA investigated Microcap's significant sales of FusionPharm stock. During that investigation, the defendant represented to FINRA that co-defendant Sears was only a "part time salesman" at FusionPharm and that the defendant was

[12] For example, on May 12, 2011, the defendant emailed co-defendant Sears with various proposals to a prospective investor, including "[w]e will throw you 1 million shares of free trading paper, in 100,000 share tranches (so they are immediately liquid) while we draw down the line ($100k for 100,000 shares)." Eight days later, on May 20, 2011, co-defendant Sears emailed a potential financier and cc'd the defendant. In the email, co-defendant Sears claimed that "instead of doing the whole wait for a registration statement thing, we have gone to some shareholders and have been able to put together enough stock to do a transaction with free trading paper." The "shareholders" referenced in co-defendant Sears' email referred to his own company, Microcap.

unaware that co-defendant Sears owned any FusionPharm stock and, therefore, was unaware he was selling FusionPharm stock.[13] In a later interview, on November 3, 2011, the defendant indicated to FINRA staff that co-defendant Sears "no longer owns Microcap Management" and that co-defendant Sears owned no "FusionPharm stock." But only weeks earlier, on September 6, 2011 and September 13, 2011, the defendant and co-defendant Sears emailed each other details about Microcap's trading. On one occasion, the defendant even requested that co-defendant Sears transfer $3,000 from "this week's take" (in reference to Microcap's trading) to another family member's account.

Co-Defendant Sears and the Defendant Use Affiliated Entities to Increase Access to Free-Trading Shares

19. The defendant and co-defendant Sears used entities owned by co-defendant Sears to increase their access to FusionPharm stock. Two of these entities, Microcap and Bayside, were, as discussed above, entities that co-defendant Sears had previously used in connection with earlier business affairs. Two new entities, VertiFresh, LLC ("VertiFresh") and Meadpoint Venture Partners ("Meadpoint"), were formed in connection with efforts to sell FusionPharm's PharmPods and license its business methods and technology. Meadpoint was additionally used, in part to secure additional FusionPharm stock. (The four entities are hereafter collectively referred to as the "Facilitating Entities".)

20. In addition to co-defendant Sears' control over these entities, the Facilitating Entities shared other connections to FusionPharm. Among other things, Meadpoint's and VertiFresh's principal places of business were 4360 Vine Street in Denver, CO – the same address

[13] The defendant contends that co-defendant Sears actually was a "part-time salesman" during the 4th quarter of 2011, the brief period during which co-defendant Sears actually was a W-2 employee of FusionPharm and, as indicated above (*see* FN. 2), is prepared to offer evidence concerning his knowledge and beliefs regarding these factual representations, and his state of mind at the time that the statements were made, at the time of sentencing.

as FusionPharm for most of the Relevant Period. VertiFresh and Meadpoint also shared the same workspace and employees with FusionPharm. And the Facilitating Entities paid over $40,000 for shipping containers (the raw materials for PharmPods) that went to FusionPharm.

21. The defendant was also affiliated with, and acted on behalf of, VertiFresh and Meadpoint. Regarding VertiFresh, materials sent to potential VertiFresh investors identified the defendant as a Director of the company. The defendant edited and reviewed these materials before they were sent to potential investors. The defendant also made a presentation on VertiFresh's behalf with co-defendant Sears to the Denver Office of Economic Development JumpStart BizPlan Awards contest in 2012. The PowerPoint presentation the defendant and co-defendant Sears used at the presentation identified the defendant as VertiFresh's Director. Moreover, some company organization documents reflected that the defendant was the CEO and Chairman of Board for VF Management, Inc., VertiFresh's sole managing member.

22. Regarding Meadpoint, a draft of the company's shareholder agreement, never executed, identified the defendant as a 50% owner of the company.[14] The defendant also received tens of thousands of dollars in purported compensation as a 1099 worker of the company, and drafted investor materials on Meadpoint's behalf. The defendant later identified himself on an application to the Colorado Medical Marijuana Enforcement Division as a "consultant" to Meadpoint. At no point did FusionPharm disclose to investors that the defendant had any affiliations with VertiFresh or Meadpoint.

23. As a named officer of FusionPharm, the defendant's ownership share and transactions in FusionPharm stock were disclosed on FusionPharm's financial disclosures filed on, and made available to investors via, OTC Link. However, by facilitating the sale of FusionPharm

[14] The draft Meadpoint Shareholder Agreement was sent in an email from co-defendant Sears to the defendant on November 14, 2011. The defendant contends he never owned any interest in Meadpoint.

shares through Microcap, Bayside, and Meadpoint, the defendant's, along with co-defendant Sears' involvement and interest in those stock transactions remained undisclosed to investors.

24. Co-Conspirator A prepared two separate notes in June 2012 (one for Bayside and one for Meadpoint) for *non-convertible* lines of credit. On June 4, 2012, Co-Conspirator A emailed co-defendant Sears a draft Bayside non-convertible promissory note and credit line agreement, writing that he (Co-Conspirator A) would also draft drawdown requests to match the dates and amounts of previously made deposits into FusionPharm's accounts. Between June 5, 2012 and June 6, 2012, Co-Conspirator A drafted six drawdown requests totaling $177,000 and sent the requests to co-defendant Sears. The final non-convertible note and credit line agreement ("Bayside Non-Convertible Note") was then signed on June 6, 2012 with a purported $275,000 line of credit. However, the Bayside Non-Convertible Note signatures (the defendant on behalf of FusionPharm and Family Member A on behalf of Bayside, acting as co-defendant Sears' surrogate) were backdated to May 2, 2011.

25. To justify the "drawdowns," co-defendant Sears attached deposit slips for nine previous bank deposits totaling approximately $171,000. In reality, all but one of the various deposits listed as purported drawdowns actually came from Microcap, and the funds are traceable to Microcap sales of FusionPharm stock. The defendant signed these drawdown requests on June 6, 2012; the dates on the requests, however, were earlier in time and matched when funds actually had been disbursed to FusionPharm.

26. Following a similar pattern, on June 19, 2012, Co-Conspirator A emailed co-defendant Sears a draft of the Meadpoint non-convertible promissory note and credit line agreement for signature, with a credit limit of $200,000 ("Meadpoint Non-Convertible Note"). As with the Bayside Non-Convertible Note, the defendant signed the Meadpoint Non-Convertible

Note on or about June 19, 2012, when the Note bore a date of June 15, 2011. Co-defendant Sears signed on Meadpoint's behalf and also backdated his signature. FusionPharm attached deposit slips for $88,000 of deposits, although again the money actually came from Microcap stock sales. Once again, the defendant signed drawdown requests that bore earlier dates to match the dates on which funds actually had been disbursed to FusionPharm.

27. Five months later, on November 26, 2012, Co-Conspirator A emailed co-defendant Sears new drafts of the Bayside and Meadpoint notes now documented as *convertible* notes, writing "[t]he Notes work with the existing drawdown requests." (hereinafter referred to as the "Meadpoint Convertible Note" and "Bayside Convertible Note" respectively). The Bayside Convertible Note, signed by the defendant on FusionPharm's behalf on or about November 26, 2012 but bearing a date of May 2, 2011, was a 10% Convertible Promissory Note and Line of Credit Agreement in the amount of $275,000 with a conversion rate of $0.01/share. Similarly, the Meadpoint Convertible Note was also signed by the defendant on FusionPharm's behalf on or about November 26, 2012 but bore a date of June 15, 2011, and was a 10% Convertible Promissory Note in the amount of $275,000 with a conversion rate of $0.01/share.[15]

28. The notes were changed because co-defendant Sears wanted to sell the notes to potential buyers whom he had identified. By changing the non-convertible notes to convertible ones, co-defendant Sears and the defendant could present the notes to FusionPharm's transfer agent for conversion of the debt into FusionPharm common stock. Additionally, by backdating the notes, the defendant and co-defendant Sears were able to mislead the transfer agent into believing that: (1) all debt obligations reflected in the backdated notes were intended to be convertible at the time that FusionPharm incurred the debts; (2) the debt obligations always had

[15] The date (changed to December 8, 2011) and amount ($275,000 to $88,000) of the Meadpoint Convertible Note would be further revised at later dates.

been convertible; (3) the backdated notes constituted contemporaneously created written evidence of the debt obligations reflected therein; and (4) consequently that the applicable holding period required by the federal securities laws had been satisfied.

Co-Defendant Sears and the Defendant Convert Notes into Free Trading FusionPharm Shares and Raise Millions

29. After the defendant signed the backdated Bayside Convertible Note, co-defendant Sears immediately converted debt into FusionPharm shares. On December 6, 2012, Bayside submitted a Notice of Conversion to FusionPharm to convert $1.400 of the debt into 140,000 FusionPharm common shares. The package that co-defendant Sears submitted to the transfer agent contained several false documents, including: (1) the backdated Bayside convertible note and drawdown requests/deposit detailed above; (2) a letter from Bayside attesting that Bayside was not an affiliate (signed by Family Member A); (3) a separate Statement of Non-Affiliate from Bayside (signed again by Family Member A); and (4) a FusionPharm Officer's Certificate, Written Consent, and letter signed by the defendant stating that Bayside (and derivatively co-defendant Sears) were not affiliates and that Bayside Convertible Note was a valid obligation of the company as opposed to round-tripped[16] stock sale proceeds (*see* ¶¶ 25-26 above).[17]

30. Contrary to these representations, Bayside was an affiliate due to co-defendant Sears' control of Bayside and FusionPharm. (*See* ¶¶ 8-10; 19 above). In addition to the impact

[16] "Round tripping" occurs when a company provides an individual or entity with access to the company's stock with the understanding that a portion of the proceeds derived from the sale of such stock will be returned to the company. The practice is not unlawful *per se*. However, such "round tripping" may run afoul of the federal securities laws if the stock proceeds that are generated from securities transactions that involve unregistered securities that are not deemed lawfully exempt from registration. The "round tripping" may, under certain circumstances, also be required to be disclosed under the federal securities law or accounting principles.

[17] The government believes that its evidence would establish that the defendant and co-defendant Sears also created the misimpression that co-defendant Sears had no affiliation with Bayside. On December 17, 2012, co-defendant Sears emailed the FusionPharm transfer agent claiming that Bayside was a "family member['s] company" and that he would be the "point person" for the transaction. The defendant was cc'd on the email and followed up by writing the transfer agent to "[p]roceed with haste as directed" by "Mr. Sears."

the Bayside Convertible Note had on co-defendant Sears' ability to receive unrestricted shares, co-defendant Sears' affiliate status also meant that Bayside needed to abide by the volume restrictions mandated by federal securities laws. (*See* ¶ 11 above). Specifically, Bayside could not sell more than 1% of the FusionPharm's common stock shares during a three-month period. Between February and April 2013, FusionPharm had, at most, 5,201,650 common stock shares outstanding, meaning Bayside could only sell 52,016 shares during this period and still comply with the federal securities laws.[18] However, co-defendant Sears sold all 140,000 of Bayside's shares during this period, thus violating the volume restrictions.

31. On February 5, 2013, co-defendant Sears sold the remainder of the Bayside Convertible Note to an investment group. Co-defendant Sears received $250,000 from the investment group in consideration for the remaining debt that FusionPharm purportedly owed Bayside under the backdated note.[19] In order to ensure that the five investors in the investment group immediately received unrestricted shares, the defendant and co-defendant Sears again made statements to the transfer agent concerning ownership of Bayside that masked co-defendant Sears' *de facto* control of Bayside.

32. Once co-defendant Sears sold the remainder of the Bayside debt, co-defendant Sears and the defendant turned to utilizing the Meadpoint Convertible Note. Between March 2013 and April 2014, co-defendant Sears, though Meadpoint, converted $42,450 of purported debt into 4.245 million FusionPharm common shares. Co-defendant Sears, with the defendant's

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18 Notably, for most of this period, FusionPharm had approximately 3 million shares of common stock outstanding, meaning that for most of the period Bayside could not have sold more than 30,016 shares of FusionPharm common stock. Given that the three-month window can be calculated using different dates, the actual figure that Bayside could have sold during the February-April 2013 window is almost assuredly less than 52,016 for most of the period. Either way, Bayside violated the volume restrictions.

19 The defendant notes that co-defendant Sears accepted a conversion rate of $.40 per share for this transaction, amended from the original rate of $.01 per share. The defendant further contends that the Bayside note was a valid debt of FusionPharm.

knowledge, sold approximately 3.2 million of those shares in the market. Meadpoint still holds the remainder of those shares.

33. The Meadpoint conversions were documented similarly to the Bayside conversion. The packages that co-defendant Sears submitted to the transfer agent included similar false documents, including: (1) the backdated Meadpoint Convertible Note and deposit details listed above; (2) a letter from Meadpoint attesting that it was not an affiliate (signed by co-defendant Sears); (3) a separate Statement of Non-Affiliate from Meadpoint (signed by co-defendant Sears); (4) a FusionPharm Officer's Certificate, Written Consent, and letter (all signed by the defendant) stating that Meadpoint (and derivatively co-defendant Sears) were not affiliates and that the Meadpoint Convertible Note was a valid obligation of the company. As with the Bayside converted shares, the backdated nature of the Meadpoint Convertible Note misled the transfer agent into believing the holding period had been satisfied as to all debt obligations reflected in the Note.

34. FusionPharm's transfer agent emailed the defendant in February 2014 in response to one of the Meadpoint conversion requests. The transfer agent employee wrote that he had concerns about the conversion because co-defendant Sears requested the conversion on Meadpoint's behalf, and the transfer agent had co-defendant Sears listed as an Administrative Officer of FusionPharm (*see* ¶ 5 above). The defendant falsely responded to the transfer agent that co-defendant Sears had never been employed by FusionPharm (when, in truth and in fact, he had been employed directly by FusionPharm for 3 months in 2011 expressly as a named employee and thereafter continued to work at FusionPharm during the Relevant Period) and was not an affiliate. (*See* ¶¶ 5, 8-10 above). Meadpoint was, however, an affiliate based on co-defendant Sears' control of both FusionPharm and Meadpoint.

35. As with the Bayside Convertible Note, co-defendant Sears and the defendant also used the Meadpoint Convertible Note to obtain cash from outside investors. Rather than selling debt, however, co-defendant Sears converted $15,000 of debt under the Meadpoint Convertible Note into 1.5 million shares of FusionPharm common stock. Co-defendant Sears, with some assistance from the defendant, then sold the 1.5 million shares to three investors in August 2013 for $184,831. These three investors received unrestricted shares based on the defendant's and co-defendant Sears' false representations to FusionPharm's transfer agent (*see* ¶¶ 31-36 above).

36. Meadpoint received $273,210 in proceeds from the sale of stock derived from the Meadpoint Convertible Note, and an additional $184,831 from the three investors detailed in ¶ 36 above, for a total of $458,041. This amount constituted the primary source of the funds that Meadpoint paid to FusionPharm that year—again reflecting that stock sale proceeds were used by Meadpoint finance the construction of pods in 2013. *See also* ¶ 54 below for other proceeds that passed through the Meadpoint account.

37. In 2014, after the passage of Amendment 64 in Colorado, legalizing recreational usage of marijuana, FusionPharm's share price and trading volume spiked.[20] From January through May, 2014, Meadpoint received $9.9 million in proceeds from the sale of stock derived from the Meadpoint Convertible Note. While some of this amount was transferred to FusionPharm in 2014, the majority – approximately $8.7 million - was seized by the government in May 2014.

38. In total, from approximately April 28, 2011 through May 8, 2014, co-defendant Sears, in consultation with the defendant, sold more than 4 million shares of FusionPharm stock

[20] The average price of FusionPharm shares from May 2011 through December 2013 was $1.46; the average share price from January 2014 until the SEC suspended trading on May 16, 1014 was $4.28. Average trading volume during the two periods was 20,773, and 781,800 respectively.

through the Facilitating Entities and acquired more than $12.2 million in stock sale proceeds: $2.2 million prior to the passage of Amendment 64; $9.9 million in the months immediately following the passage of Amendment 64. Co-defendant Sears transferred the overwhelming majority of these funds (more than $8.4 million) to a brokerage account he controlled in the name of Family Member A. Although the proceeds were held in an account controlled by co-defendant Sears, the defendant and co-defendant Sears periodically communicated about the funds and jointly benefitted from the proceeds. For example, on September 6, 2011, the defendant asked co-defendant Sears in an email, "what do *we* have in microcap now?" In addition, on May 15, 2014, the defendant sent an email to a contact in the real estate industry specifically referencing the funds held in the brokerage account, writing "*We* have proof of funds for upward approx. $8 million today (liquid) and have access to more. *We* would like to write contracts on as many properties as is possible/feasible/reasonable..."[21]

39. Co-defendant Sears and the defendant also used significant portions of the stock sale proceeds for their own personal benefit. For example: (a) $688,000 was used to purchase the defendant's home in Pennsylvania (a loan, per the defendant[22]); (b) co-defendant Sears paid off his home in Denver and a condo in Westminster, CO; (c) co-defendant Sears purchased expensive watches; and (d) the defendant and co-defendant Sears used $250.000 as a down payment on a Denver warehouse as part of another planned business venture.

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21 Dittman contends that the email on May 15, 2014, was taken out of context, in that it related to a new real estate business not described here. Sears's contribution to the real estate business was to be the working capital referenced here.

22 The defendant maintains that this was a loan. The Government maintains that the loan was never documented and the defendant has not made any payments on the purported loan. The only evidence of the loan were the statements of the defendant and co-defendant Sears.

FusionPharm Falsely Reports Proceeds from Stock Sales as Revenue, and Fails to Disclose Co-Defendant Sears and Facilitating Entities as Affiliated and Related Parties

40. In addition to the funds the defendant and co-defendant Sears used for their own personal benefit, they also round-tripped over a million dollars of stock sale proceeds back to FusionPharm, most of which was booked as company revenue. and the rest as loans. In this manner, the defendant and co-defendant Sears consistently transferred a portion of a given week's trading proceeds to FusionPharm. On certain occasions. they even used a formulaic breakdown for the proceeds. For example, on July 2, 2012, co-defendant Sears emailed the defendant with specific figures from the prior week's trading whereby after deducting certain funds for commissions to stock promoters and co-defendant Sears' cut, the net was to be sent to FusionPharm.

41. The defendant and co-defendant Sears used the stock sale proceeds transferred to FusionPharm to sustain FusionPharm's business. Much of the funds were portrayed as involving transactions with Meadpoint and VertiFresh. As their business operations got underway, the defendant and co-defendant Sears had agreed to form entities to act as intermediaries with respect to FusionPharm's ultimate customers, one entity devoted to customers whose intended use of the PharmPods was in connection with the cannabis cultivation and the other with respect to a business devoted to using the PharmPods for growing non-cannabis produce (primarily, lettuce). Meadpoint was formed for the former purpose and held out as FusionPharm's 'exclusive distributor' of PharmPods. VertiFresh was formed ostensibly for the latter purpose and, as the defendant and co-defendant Sears started growing lettuce in PharmPods that they kept at FusionPharm's business premises, they began to market sale of this produce to local restaurants and retailers under the name "VertiFresh." As indicated above, the affairs and operation of all three

entities – FusionPharm, Meadpoint and VertiFresh – were comingled and all three entities were jointly operated, as a matter of fact, by co-defendant Sears and the defendant in concert.

42. As they sought to develop their business and find and sell PharmPods to cannabis growers and lettuce to ultimate customers, co-defendant Sears and the defendant undertook to use the FusionPharm stock sales proceeds being generated by co-defendant Sears through the various Facilitating Entities as a basis to claim revenues for FusionPharm. The defendant booked money being received by FusionPharm from the stock sales proceeds as FusionPharm revenue and the two, together, used Meadpoint and/or VertiFresh to construct revenue generating transactions prior to the actual sale and distribution of the PharmPods to the end-users.

FusionPharm's Overstated 2011 Revenues

43. FusionPharm's financial disclosures were made available to investors via OTC Link. FusionPharm's Annual Information and Disclosure Statement, financial statements, and notes to the financial statements for the period ended December 31, 2011, signed by the defendant ("FusionPharm's 2011 Annual Report"), was posted on OTC Link on March 31, 2012. The defendant was primarily responsible for preparing FusionPharm's 2011 Annual Report, although he consulted with other individuals regarding the content, including co-defendant Sears.[23]

44. In the FusionPharm 2011 Annual Report, FusionPharm claimed $256,895 in revenue for the fiscal year. FusionPharm's accounting records reflected $226,895 in "licensing revenue" from Meadpoint in 2011, purportedly related to Meadpoint's role as FusionPharm's exclusive distributor of cannabis PharmPods. However, FusionPharm's accounting records, bank accounts and general ledger reveal that the overwhelming majority of funds that went into

[23] The defendant contends that he relied on Co-Conspirator A to prepare the 2011 Annual Report but acknowledges that he reviewed and approved the contents of this report before it was uploaded to the OTC Link website. As indicated above (FN. 2), the defendant reserves the right to address, at sentencing, his knowledge and beliefs concerning this report at the time of its submission.

FusionPharm's bank accounts in 2011 came from Microcap stock sales. The defendant caused FusionPharm to book the majority of the stock sale proceeds from Microcap as revenue months in advance of securing signed contracts from actual PharmPod customers by Meadpoint.[24] The remainder of the these transfers served as the purported basis for the Meadpoint and Bayside Convertible Notes (*see* ¶¶ 23-27 above).

45. At no point in FusionPharm's 2011 Annual Report did FusionPharm disclose co-defendant Sears' role with both Meadpoint and FusionPharm, or the defendant's affiliation with Meadpoint. (*See* ¶¶ 8-10, 21 above). Additionally, contrary to its representations, FusionPharm failed to identify its transactions with Meadpoint or co-defendant Sears as: (a) material transactions with any director or executive officer (even though co-defendant Sears satisfied this by his *de facto* role as FusionPharm's chief financial officer); (b) transactions by any person beneficially owning shares carrying more than 5% of voting rights (which co-defendant Sears did via his preferred share ownership); or (c) transactions with any member of the immediate family (including in-laws) of any director or executive officer (which co-defendant Sears satisfied as the defendant's brother-in-law).[25]

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[24] Records reflect that in 2011, several PharmPods were intended to be leased to a Denver medical marijuana grower via Meadpoint. However, the actual transaction between Meadpoint and the grower, which ended up being a sale and not a leasing agreement, between Meadpoint and the marijuana grower did not occur until early 2012. Likewise, the payment and delivery of these PharmPods did not occur until 2012. According to FusionPharm's 2011 Annual Report, FusionPharm "records revenue when all of the following have occurred: (1) persuasive evidence of an arrangement exists, (2) product delivery has occurred, (3) the sales price to the customer is fixed or determinable, and (4) collectability is reasonably assured." The defendant contends that the sale on which revenue was recognized for 2011 was to Meadpoint. In 2011, the Government contends that none of these requirements were met with respect to the transaction at issue. The defendant contends that as the sale on which revenue was recognized in 2011 was to Meadpoint, all of these requirements were met, while conceding that disclosures concerning related party transactions that may have been required as to this transaction under GAAP given Meadpoint's *de facto* status may not have been met.

[25] As discussed above (FN 6), OTC Link published guidelines for its issuers to use in connection with its voluntary disclosures. These guidelines included disclosures of the identities of officers, directors and control persons (defined to be beneficial owners of more than 5% of any class of the issuer's equity securities); and the identities of beneficial owners of more than 10% of any class of the issuer's equity securities. The OTC Link

FusionPharm's Overstated & Fictitious 2012 Revenues

46. FusionPharm's Annual Information and Disclosure Statement, financial statements, and notes to the financial statements for the period ended December 31, 2012, signed by the defendant ("FusionPharm's 2012 Annual Report"), were posted on OTC Link on March 6, 2013. The defendant was primarily responsible for preparing FusionPharm's 2012 Annual Report, although he consulted with other individuals regarding the content, including co-defendant Sears[26].

47. In its 2012 Annual Report, FusionPharm claimed $808,398 in revenue. FusionPharm stated that $750,000 of this revenue resulted from a license agreement with VertiFresh.[27] As detailed above, co-defendant Sears and the defendant owned and/or controlled both entities (a fact never disclosed to investors), meaning the transaction was essentially one party transacting with itself. (*See* ¶¶ 8-10, 20 above).[28] During the Relevant Period, VertiFresh only generated nominal revenue from lettuce sales.

48. More than a year after the filing, FusionPharm voluntarily restated its 2012 financial statements and represented that $500,000 of the $750,000 revenue related to the

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published guidelines also called for the provision of financial statements prepared in accordance with GAAP, which would have required disclosure of related party transactions.

[26] The defendant contends that co-defendant Sears did not provide substantive comments or feedback on FusionPharm's financial statements. The Government contends that there are numerous emails where the defendant requested that co-defendant Sears review the company's financial statements.

[27] A comparison of FusionPharm's quarterly financial disclosures demonstrates similar misrepresentations. FusionPharm's first quarter financial disclosures (filed on June 12, 2012) claimed $71,800 in revenue. Yet, FusionPharm's second quarter financial disclosures (filed on August 14, 2012) claimed $750,000 in revenue, all from the purported VertiFresh agreement meaning FusionPharm's claimed Q1 revenue disappeared without any disclosure to investors. In fact, FusionPharm's non-VertiFresh revenue for all of 2012 was $58,398, more than $10,000 less than purported Q1 revenue.

[28] Consistent with FusionPharm's 2011 Annual Report, FusionPharm's 2012 Annual Report failed to disclose co-defendant Sears' role with FSPM FusionPharm or the defendant's affiliation with and/or control of VertiFresh.

VertiFresh license agreement should not have been recognized. FusionPharm maintained, however, that the other $250,000 was legitimate revenue. This was also materially overstated. Even if VertiFresh was a separate entity and even if it received anything of value in connection with the agreement, VertiFresh transferred only $147,475 into FusionPharm's bank account in 2012, not $250,000.00 as it agreed to do in 2012. As in 2011, *all* of these funds can be traced directly back to Microcap's stock sale proceeds.[29] Once again, FusionPharm booked proceeds from FusionPharm stock sales by Facilitating Entities as FusionPharm revenue.

49. The 2012 Annual Report went on to claim that Meadpoint and VertiFresh had committed to placing orders for more than $3 million worth of PharmPods over the next three years.[30]

FusionPharm's Overstated 2013 Revenue

50. FusionPharm's Annual Information and Disclosure Statement, financial statements, and notes to the financial statements for the period ended December 31, 2013, signed by the defendant ("FusionPharm's 2013 Annual Report"), were posted on OTC Link on April 15, 2014. The defendant was primarily responsible for preparing FusionPharm's 2013 Annual Report, although he consulted with other individuals regarding the content, including co-defendant Sears.

51. FusionPharm claimed $594,397 in revenue for 2013. As they did in 2011 and 2012, co-defendant Sears and the defendant used significant portions of stock sale proceeds back

[29] The other amounts that flowed into FusionPharm's bank account in 2012 were actually from Bayside, Microcap, and Meadpoint. Once again, all of these transfers are traceable to FusionPharm stock sales.

[30] The defendant asserts he terminated the agreement in 2014 for failure to meet performance goals.

to funds revenue transactions between FusionPharm and Facilitating Entities.[31] For example, between February 6, 2013 and February 8, 2013, co-defendant Sears transferred $235,000 from Bayside bank accounts to Meadpoint, all of which were provided by investors in connection with the sale of the Bayside note. (*See* ¶ 30 above). During the same time period, Meadpoint transferred at least $170,000 of these funds to FusionPharm. According to FusionPharm's general ledger, these transfers were booked as revenues.[32] Co-defendant Sears and the defendant did something similar with stock sale proceeds funneled through a company they both owned (10mm Holdings). According to FusionPharm's general ledger, at least $50,000 in March 2013 checks from 10mm Holdings were also booked as revenues.[33]

52. The defendant and co-defendant Sears also transformed investments from direct investors directly into purported FusionPharm revenue by passing the money through accounts in the name of the Facilitating Entities. For example, on August 5, 2013, the defendant sent a potential investor an email with a proposed investment deal. The defendant offered the investor an opportunity to purchase $50,000 worth of preferred shares in FusionPharm and purchase $50,000 of Meadpoint's Convertible Note. With regard to the proposed purchase of the Meadpoint Convertible Note, the defendant claimed that "Meadpoint would use its $50,000 to purchase the 2 containers referenced above..." meaning that investor's funds would flow through Meadpoint to be booked as revenues by FusionPharm. The defendant summarized the proposed

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31 Although Meadpoint did transfer over $728,000 into FusionPharm's bank account in 2013, over $550,000 of that were proceeds traceable to stock sales. As in 2011, the defendant and co-defendant Sears had third party customers in mind when they built these pods. However, most of these pods were not transferred to third-parties until after 2013. Based upon the government's bank record analysis, FusionPharm received a maximum of $194,000 from third-party customers in 2013.

32 The defendant believes the evidence would show the revenue booked corresponded to revenues from lease and sales revenue to Meadpoint for pods which were eventually sold to Groundswell. The Government contends the sale to Groundswell did not occur until 2014.

33 Notably, the notations on these checks were for "Convertible Promissory Note."

$100,000 investment by claiming "[t]hus. all funds would end up in FusionPharm, $50,000 as an investment and $50,000 as sales revenue for the 2 containers." The investor ultimately invested $100,000 and, as proposed, $50,000 of this investment was used for two PharmPods that were placed in FusionPharm's sales center and booked as part of FusionPharm's revenue for 2013.

53. Furthermore, the defendant reiterated the misrepresentation set forth in the 2012 Annual Report that Meadpoint and VertiFresh were independent entities that promised to purchase dozens of PharmPods in the future. For example, on February 18, 2013, the defendant drafted an email for Co-Conspirator A to send to prospective investors that stated, among other things: (a) Meadpoint is FusionPharm's exclusive distributor with minimum purchase requirements of 50 PharmPods/year; and (b) VertiFresh is a Denver licensee that paid $250,000 in 2012 for a license and 4 PharmPods, and was expected to purchase another 6 PharmPods in 2013.[34] However, the defendant did not disclose the relationships that he and co-defendant Sears had with and in Meadpoint and VertiFresh in that email. Co-Conspirator A ultimately sent the email to prospective investors.

The Origins of the Criminal Investigation

54. The foregoing matters became the focus of a federal criminal investigation in the District of Colorado that, in turn, arose from a referral in December 2013 from the SEC's Regional Office in Denver, Colorado, after the agency received a complaint from a former FusionPharm worker, alleging that FusionPharm was engaged in fraud. The agency commenced its own parallel civil investigation.

55. Following the referral, from on or about March 28, 2014 through on or about July 18, 2014, the FBI conducted an undercover operation as part of the investigation into FusionPharm.

[34] Co-defendant Sears was not on the email exchanges between the defendant and the investor, and the defendant and co-conspirator A, which are referenced in ¶¶ 52 and 53.

During this time, the defendant met with an undercover FBI agent posing as a potential FusionPharm investor on four separate occasions. Co-defendant Sears also met with the undercover agent on one occasion. Over the course of these undercover encounters, co-defendant Sears and the defendant variously acknowledged co-defendant Sears' control of Meadpoint and VertiFresh. Co-defendant Sears also candidly discussed his involvement in FusionPharm, at one point remarking to the FBI undercover agent that, when it came to FusionPharm, he was the "hand up Mona Lisa's skirt." In a final meeting with the FBI undercover agent, the defendant at one point acknowledged that co-defendant Sears could not be in the company (FusionPharm) because of his prior felony conviction in New York

56. As a result of its preliminary investigative findings, the SEC suspended trading in FusionPharm's stock on May 16, 2014. The same day, the FBI and IRS-CID executed a federal search warrant on FusionPharm's principal place of business. The FBI seized 24 items of evidence including six computers and one tablet. The FBI also executed seizure warrants on four bank accounts and one brokerage account containing proceeds from the sale of FusionPharm stock.

Government's Financial Analysis and Ill-Gotten Gain Calculations

57. The government analyzed bank and brokerage accounts in the name of the Defendants, FusionPharm, Family Member and the Facilitating Entities, along with various documents provided by FusionPharm's transfer agent to determine the amount of funds obtained by the Defendants. The ill-gotten gains by the Defendants total approximately $12.2 million based on the proceeds of the unregistered sales of FusionPharm common stock. The parties recognize, however, that as much as $9.9 million was generated immediately following the effective date of Amendment 64. The government also identified the following:

a. The government seized approximately $269,616 from various bank accounts, all traceable to FusionPharm stock sales. Additionally, the government seized approximately $8,462,621 in a brokerage account in the name of Family Member A.

b. Since the original execution of the search and seizure warrants, on November 30, 2015, the government seized $311,865.38 in relation to the sale of co-defendant Sears' home. Additionally, on January 13, 2016, the government seized an additional $85,859.00 in relation to the sale of FusionPharm's warehouse located at 4360 Vine Street in Denver, Colorado. These seizures were pursuant to a consent agreement signed by co-defendant Sears on November 25, 2015.

c. Proceeds from the sales of FusionPharm stock were transferred to FusionPharm, and reported as revenue, in an amount of approximately $1.3 million.

d. Meadpoint still holds approximately 1,072,270 FusionPharm common shares.

e. Between 2011 and 2014, the defendant received approximately $330,000 in salary and other payments from FusionPharm and the Facilitating Entities. In addition, on May 15, 2014, co-defendant Sears transferred to the defendant $688,000, which he used to purchase a house in Pennsylvania; these funds are traced back to FusionPharm stock sales.

VI. ADVISORY GUIDELINE COMPUTATION AND 3553 ADVISEMENT

The parties understand that the imposition of a sentence in this matter is governed by 18 U.S.C. §3553. In determining the particular sentence to be imposed, the Court is required to consider seven factors. One of those factors is the sentencing range computed by the Court under advisory guidelines issued by the United States Sentencing Commission. In order to aid the Court in this regard, the parties set forth below their estimate of the advisory guideline range called for by the United States Sentencing Guidelines. To the extent that the parties disagree about the guideline computations, the recitation below identifies the matters which are in dispute.

A. The base guideline is U.S.S.G. Section 2X1.1(a), which adopts the base offense level from the guideline for the substantive offenses which are the objects of the conspiracy, plus any adjustments from such guideline for intended offense conduct that can be established with reasonable certainty. The base guideline for the substantive offenses which are the objects of the conspiracy set forth in Count 1 of the Contemplated Information is U.S.S.G. Section 2B1.1

B. The Base Offense Level for these object offenses under Section 2B1.1 is offense level **6**, because 18 U.S.C. § 371 carries a maximum term of imprisonment that is less than twenty years.

C. Specific Offense Characteristic 2B1.1(b)(1), applies in this case because there was a loss resulting from the offense conduct. The parties agree, however, that such loss reasonably cannot be determined and that the gain that resulted from the offense conduct should instead be used as an alternative measure of loss for the purpose of determining this offense characteristic. *See* U.S.S.G. Section 2B1.1, comment. (n.3(B)). The parties further agree that the gain that resulted from the offense conduct corresponds to the total in proceeds realized from the sale of FusionPharm common stock and debt securities convertible into common stock through Microcap, Bayside, and Meadpoint, which is approximately $12,204,172, greater than $9,500,000 but not more than $25,000,000, which would increase the offense score **20 levels**, pursuant to U.S.S.G. Section 2B1.1(b)(1)(K).

D. Specific Offense Characteristic 2B1.1(b)(2)(A) applies because the offense conduct involved 10 or more victims, and was committed through mass marketing, increasing the Offense Level by **2 Levels**.

E. Specific Offense Characteristic 2B1.1(b)(10)(C) applies because the offense conduct involved sophisticated means and the defendant intentionally engaged in or caused the

conduct constituting the sophisticated means, warranting an additional **2 Level** increase in the defendant's Offense Level score, pursuant to this provision.

F. Specific Offense Characteristic 2B1.1(b)(16)(A) applies, increasing the offense score another **4 levels**, because the offense conduct involved a violation of securities law and, at the time of offense, the defendant was an officer and director of a publicly traded company.

G. The government's position is that the defendant's Offense Level score should be increased **3 additional levels**, pursuant to U.S.S.G. § 3B1.1(a), because the defendant acted as a manager or supervisor of criminal activity that involved five or more participants or was otherwise extensive.

H. The parties believe that there are no other victim-related, role-in-offense, obstruction adjustments which apply with respect to the offense conduct associated with this count of conviction. U.S.S.G. Parts 3A-3C.

I. The Total Offense Level for the conspiracy offense of conviction would accordingly be Level **37**.

J. The defendant is eligible to receive a **3-level** offense level reduction for acceptance of responsibility, pursuant to U.S.S.G. §3E1.1 based on his timely notification of his intention to resolve this case by guilty plea. The resulting offense level, based on the government's current calculations, would therefore be **Level 34**.

K. The parties understand that the defendant's criminal history computation is tentative. The criminal history category is determined by the Court. Facts currently known to the parties regarding the criminal history indicate that the defendant has no prior convictions or sentences which would be considered within the applicable period for calculating a criminal history category. Based on the parties' current information, if no other information were

discovered, the defendant's criminal history category would be **Category I**.

L. Assuming the (tentative) criminal history facts of (P) above, the career offender/criminal livelihood/armed career criminal adjustments would not apply.

M. The guideline range resulting from the estimated offense level of (J) above, and the (tentative) criminal history category of (K) above, would be **151-188** months without regard to the statutory maximum imprisonment terms for Count 1 of the Contemplated Information. With the criminal history category undetermined at this time, an estimated offense level 34 above could conceivably result in a range from 151 months (bottom of Category I), to 327 months (top of Category VI). Because the statutory maximum sentence is deemed to be the guideline sentence as well where the otherwise applicable sentencing guideline range would exceed the statutory maximum sentence, U.S.S.G. § 5G1.1(a), the guideline sentence in this case effectively would be **60 months**, the maximum statutorily authorized imprisonment term assuming the statutory maximum terms of imprisonment for Count 1 of the Contemplated Information.

N. Pursuant to guideline §5E1.2, assuming the government's estimated offense level of (O) above, the fine range for the offenses of conviction would be $35,000 to $350,000, plus applicable interest and penalties.

O. Pursuant to guideline §5D1.2, if the Court imposes the term of supervised release, that term shall be at least three years but not more than five years.

P. Restitution is either mandatory under U.S.S.G. §5E1.1(a)(1) or otherwise contemplated under U.S.S.G. §5E1.1(a)(2). The Court may determine not to order restitution or to limit restitution where, *inter alia*, the Court determines that complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims through the criminal process (U.S.S.G. §5E1.1(b)). The

parties agree that restitution should not be imposed with respect to the conspiracy count of conviction and offense conduct.

3553 Advisement.

The parties understand that although the Court will consider the parties' estimate, the Court must make its own determination of the guideline range. In doing so, the Court is not bound by the position of any party.

Except as otherwise provided for by the parties in their plea agreement (Part I herein), no estimate by the parties regarding the guideline range precludes either party from asking the Court, within the overall context of the guidelines, to depart from that range at sentencing if that party believes that a departure is specifically authorized by the guidelines or that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the United States Sentencing Commission in formulating the advisory guidelines. Similarly, except as otherwise provided for by the parties in their plea agreement (Part I herein), no estimate by the parties regarding the guideline range precludes either party from asking the Court to vary entirely from the advisory guidelines and to impose a non-guideline sentence based on other 18 U.S.C. §3553 factors.

The parties understand that the Court is free, upon consideration and proper application of all 18 U.S.C. § 3553 factors, to impose that reasonable sentence which it deems appropriate in the exercise of its discretion and that such sentence may be less than that called for by the advisory guidelines (in length or form), within the advisory guideline range, or above the advisory guideline range up to and including imprisonment for the statutory maximum term, regardless of any computation or position of any party on any 18 U.S.C. §3553 factor.

VII. ENTIRE AGREEMENT

This document states the parties' entire agreement. There are no other promises, agreements (or "side agreements"), terms, conditions, understandings, or assurances, express or implied. In entering this agreement, neither the government nor the defendant has relied, or is relying, on any terms, promises, conditions, or assurances not expressly stated in this agreement.[55]

Date: _____

Scott M. Dittman
Defendant

Date: 9/23/16

William L. Taylor, Esq.
Attorney for Defendant Dittman

Date: 9/22/16

Kenneth M. Harmon
Assistant U.S. Attorney

Date: 9/23/2016

Tonya S. Andrews
Assistant U.S. Attorney

Date: _____

Scott M. Mascianica
Special Assistant U.S. Attorney

55 This plea agreement expressly supersedes, and renders inoperative, the plea terms letter agreement letter, dated May 25, 2016, previously executed by counsel for the parties, a copy of which letter is annexed hereto as Exhibit B.

VII. ENTIRE AGREEMENT

This document states the parties' entire agreement. There are no other promises, agreements (or "side agreements"), terms, conditions, understandings, or assurances, express or implied. In entering this agreement, neither the government nor the defendant has relied, or is relying, on any terms, promises, conditions, or assurances not expressly stated in this agreement.[35]

Date: 9/23/16

Scott M. Dittman
Defendant

Date: _____

William L. Taylor, Esq.
Attorney for Defendant Dittman

Date: 9/22/16

Kenneth M. Harmon
Assistant U.S. Attorney

Date: _____

Tonya S. Andrews
Assistant U.S. Attorney

Date: _____

Scott M. Maseianica
Special Assistant U.S. Attorney

[35] This plea agreement expressly supersedes, and renders inoperative, the [illegible] dated May 25, 2016, previously executed by counsel for the parties, a copy of which

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No.

UNITED STATES OF AMERICA

Plaintiff,

v.

1. WILLIAM J. SEARS, and
2. SCOTT M. DITTMAN,

Defendants.

INFORMATION
18 U.S.C. §371
26 U.S.C. §7206(1)

The Acting United States Attorney charges that:

COUNT 1

1. Beginning as early as in or about March 25, 2011 and continuing at least through in or about May 15, 2014, the exact dates being unknown, in the State and District of Colorado, and elsewhere, the defendants,

WILLIAM J. SEARS, and
SCOTT M. DITTMAN,

did knowingly and willfully conspire, combine and agree with each other, and with other persons both known and unknown,

(a) to defraud the United States and one of its agencies, the United States Securities and Exchange Commission ("SEC"), by impeding, impairing, defeating and obstructing the lawful

EXHIBIT A

governmental functions of the SEC; and

(b) to commit the following offenses against the United States:

(i) securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff(a), and Title 17, Code of Federal Regulations, Section 240.10b-5 [Rule 10b-5];

(ii) willful violations of Section 5 of the Securities Act of 1933, Title 15, United States Code, Sections 77e(a) and 78ff(a);

(iii) mail fraud, in violation of Title 18, United States Code, Section 1341; and

(iv) wire fraud, in violation of Title 18, United States Code, Section 1343.

Background

At all times material to this Information:

2. Defendant WILLIAM J. SEARS was a resident of Thornton, Colorado whose principal occupation over the years was providing public relations and promotional services to companies with low or minimal capitalization (hereinafter, "microcap companies") that sought to have their stocks publicly traded in various non-exchange, over-the-counter markets. In 2007, defendant Sears was convicted in the Southern District of New York of one count of conspiring to commit federal securities fraud and commercial bribery and one count of federal securities fraud (Case No. 04-cr-556-swk).

3. Microcap Management LLC ("Microcap") was a Nevada limited liability company formed by defendant SEARS, with its primary business address in Colorado. Defendant SEARS was, among other things, the beneficial owner and manager of Microcap and controlled Microcap. SEARS primarily conducted his stock public relations and promotional business through Microcap over the years.

4. Bayside Realty Holdings, LLC ("Bayside") was another Nevada limited liability company formed, controlled and operated by defendant SEARS, in fact, but which was held out to be managed and owned by a blood relative family member (hereinafter, "Family Member A") residing in North Carolina.

5. Defendant SCOTT M. DITTMAN was a resident of Elizabeth, Colorado and later Boyertown, Pennsylvania. From October 1991 until April 1995, DITTMAN practiced as an accountant and for two years, from 1995 to 1997, had been a certified public accountant licensed in the State of California. Thereafter, defendant DITTMAN was principally self-employed in various businesses, including real estate development, construction and, beginning in or about 2010, medical marijuana. Defendants DITTMAN and SEARS were brothers-in-law, SEARS being married to DITTMAN's sister.

6. FusionPharm, Inc. ("FusionPharm") was a Nevada corporation with its principal place of business at first in Denver, Colorado and later in Commerce City, Colorado. FusionPharm's principal business was the development, manufacture and sale of steel shipping containers retrofitted and refurbished for use as hydroponic growing pods, branded as "PharmPods," for indoor plant cultivation, primarily cannabis. Defendant DITTMAN was the founder, chief executive officer and sole director of FusionPharm but, in fact, operated FusionPharm, and pursued and developed its business, together and in concert with defendant SEARS, and the two defendants together beneficially held and controlled the majority of the shares of FusionPharm's common and preferred stock, which was convertible into the company's common stock. FusionPharm's common stock was publicly traded in the over-the-counter markets, primarily through transactions involving networks of securities broker-dealers.

7. Meadpoint Venture Partners, LLC ("Meadpoint") was a Nevada limited liability company formed by defendant SEARS and was held out to be FusionPharm's exclusive distributor of PharmPods, marketing, in particular, to customers interested in using the pods for cannabis cultivation. Meadpoint shared FusionPharm's business addresses, shared employees with FusionPharm and was operated out of the same premises as used for FusionPharm. Defendant SEARS was identified as Meadpoint's managing member, and Meadpoint was operated by both defendants together in conjunction with the operations of FusionPharm.

8. VertiFresh, LLC ("VertiFresh") was a Delaware limited liability company jointly owned and controlled together by defendants SEARS and DITTMAN. Vertifresh was held out to be a licensee of FusionPharm's technology and growing methods whose principal business purportedly involved using FusionPharm PharmPods to grow non-cannabis produce (primarily, lettuce) for sale to restaurants and retail food outlets. Vertifresh shared FusionPharm's business addresses, shared employees with FusionPharm and was operated out of the same premises as used for FusionPharm.

9. OTC Link was an electronic inter-dealer stock quotation system that published stock quotes and other stock transaction information posted by securities broker-dealers and was typically used by broker-dealers to display quotes and make markets in securities of publicly traded microcap companies whose securities were traded in the over-the-counter markets. Such companies did not have to meet any requirements in order to have their stocks quoted on the OTC Link system, and any reporting or disclosure by companies whose stocks were quoted on the system was voluntary. However, the OTC Link system organized and classified the securities of the companies quoted on its system into several distinct marketplaces or "market

tiers," depending, in large part, on the nature, quality and extensiveness of the corporate and financial disclosures a company provided to OTC Link. The "market tiers" were designed to provide investors some indication as to the quality and level of information about the companies on the OTC Link system, and companies that provided limited or no information were placed in market tiers reserved for stock issuers that prospective investors were advised to consider with caution. The type of information that participating companies were encouraged to provide to OTC Link typically included quarterly and annual financial statements and quarterly and annual reports, in a prescribed format, providing disclosure, among other things, about the officers, directors, control persons and significant beneficial owners of the company's stock. These quarterly and annual submissions were uploaded to OTC Link's website, where they were readily accessible to the investing public and subject to wide dissemination through financial media outlets.

10. FusionPharm's common stock was quoted on the OTC Link under the stock symbol "FSPM" and, using this system, securities broker-dealers made a market in and facilitated public, over-the-counter trading in its stock. FusionPharm undertook to, and regularly did, upload to the OTC Link's website, and thereby made available to the investing public, quarterly and annual financial statements and reports providing information about its performance, its financial condition and the identities of its officers, control persons and significant stockholders.

11. The SEC was an independent agency of the executive branch of the United States Government whose duties included regulating and monitoring the trading of securities and the

reporting of financial and other information by publicly-held corporations within the United States.

12. Under the federal securities laws, the securities of companies traded in United States could not be bought and sold in public transactions unless first registered with the SEC or considered exempt from registration pursuant to one of several defined statutory or regulatory provisions. Such registration typically involved providing to the SEC and making available to the investing public certain specified information about the company, its financial situation, its operations and its principals and officers, in a prescribed form filed with the SEC which typically included a prospectus made available to potential investors. Securities that were unregistered, and not otherwise exempt from registration, were considered restricted securities that were not eligible for lawful public re-sale, and the certificates evidencing these securities typically bore a legend providing notice of this status.

13. One of the exemptions from registration recognized under the federal securities laws generally allowed holders of unregistered securities, not already unrestricted at the time of receipt, to resell them in public transactions, without limitation, after having held the securities for a specified period. This holding period, in the case of companies such as FusionPharm, was one year. Holders of unregistered, restricted securities who were deemed to be "affiliates" could resell these securities in public transactions after meeting the specified holding period, but only if they met certain additional regulatory requirements, and only then in limited numbers of shares over specified periods of time (*i.e.*, in public sales subject to "volume restrictions"). An "affiliate," for the purpose of this regulatory exemption from registration, was considered to be someone who directly, or indirectly through one or more intermediaries, controlled, or was

controlled by, or was under common control with the issuing company. Such "control" was defined to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract, or otherwise."

14. Both non-affiliate and affiliate holders of unregistered securities, upon satisfying their respective requirements for the regulatory exemption from registration, would typically have had to have the stock transfer agent for the issuing company remove the restrictive legends on the certificates of their securities, before the securities could be eligible for resale in a public transaction. To accomplish this, the holders would have had to have secured the consent of the issuing company and would have had to have provided documentation to the stock transfer agent demonstrating that the requirements for exemption from registration had been met.

15. None of FusionPharm's securities were registered with the SEC, and the only way that its securities could be traded over-the-counter or in other public transactions were through transactions involving securities that qualified for exemption from registration with the SEC.

Manner and Means of the Conspiracy

16. It was part of the manner and means of carrying out the conspiracy that:

A. Defendant SEARS would cause shares of preferred stock of FusionPharm held in the name of Microcap to be converted into shares of FusionPharm common stock and deposited into brokerage accounts established in the name of Microcap. Defendant SEARS would induce brokers overseeing these accounts to consider and treat these common shares as unrestricted securities that could be immediately sold in the public securities markets by falsely representing to them that neither he nor Microcap was an affiliate of FusionPharm or a control

person of the company. Defendant DITTMAN facilitated the deposit of these shares, and their treatment as unrestricted securities, by executing FusionPharm officer certificates and other documentation affirming that Microcap was not an affiliate of FusionPharm.

B. Defendant SEARS would then cause the remainder of these preferred shares to be transferred from Microcap's name into the names of family members or entities held in the name of family members, in order to make it appear that neither he nor Microcap had shareholdings in FusionPharm in such amounts as to deem either SEARS or Microcap to be affiliates or control persons under the federal securities laws or to trigger their disclosure as significant shareholders under the reporting guidelines established by OTC Link. Defendant SEARS would thereafter cause portions of the FusionPharm preferred shares that had been transferred into the names of these family members and entities, in turn, to be converted into additional common shares of FusionPharm that could be publicly sold later on or that he and DITTMAN could later use to raise funds for the company in private sales to select FusionPharm investors.

C. Defendant SEARS, working in coordination with another individual, would thereafter cause the FusionPharm common shares that had been deposited into the Microcap brokerage accounts to be sold in the public securities markets and, in consultation with defendant DITTMAN, would deposit significant portions of the proceeds of these FusionPharm stock sales into operating bank accounts of FusionPharm – both directly and through a series of transactions involving Bayside, Meadpoint or Vertifresh – so that the money could then be used to capitalize and operate the company, as well as be used for the defendants' own financial support.

17. As a further part of the manner and means of carrying out the conspiracy, in order to generate and make available for themselves additional FusionPharm common stock that could immediately be sold, without limitation, into the public securities markets, the defendants did and caused the following to be done:

A. Over the course of June 2012 through in or about December 2012, the defendants, working together with another individual (identified hereinafter as, "Co-Conspirator A"), fabricated promissory notes and incorporated credit line agreements, in order to falsely portray some of the money that had previously been deposited into FusionPharm's bank accounts from the Microcap FusionPharm stock sales as loans from Bayside and Meadpoint that had been extended to FusionPharm over a year before.

B. The defendants and Co-Conspirator A further fabricated documentation making it appear that FusionPharm had drawn down on the supposed credit lines established with Bayside and Meadpoint by specified amounts, and they assembled bank records to offer substantiation for these supposed earlier credit line draw downs.

C. The defendants and Co-Conspirator A, in the final iterations of these fabricated promissory notes and supporting documents, made it appear that the supposed debt evidenced by these notes could be converted in whole or in pieces, at the election of the noteholders, into shares of FusionPharm common stock at a specified conversion rate of one FusionPharm share for every penny of debt supposedly still owed on the notes by FusionPharm.

D. Defendant DITTMAN, on behalf of FusionPharm, and defendant SEARS, on behalf of Meadpoint and acting for Family Member A on behalf of Bayside, executed the back-dated promissory notes and documents.

E. Defendants SEARS and DITTMAN then generated packets of documents that SEARS caused to be presented to FusionPharm's stock transfer agent, over a series of months, in order to effectuate the conversion of portions of the supposed debt held by Bayside and Meadpoint into shares of FusionPharm common stock. The packets typically included the following:

- convertible promissory notes that he and defendant DITTMAN had backdated;
- the backdated draw down requests that DITTMAN had signed on behalf of FusionPharm;
- copies of bank account statements showing deposits to FusionPharm's accounts corresponding to the draw down requests;
- letters from Bayside and Meadpoint (depending on the entity exercising the conversion), for signature by Family Member A for Bayside and SEARS for Meadpoint, falsely representing that the entities were not affiliates of FusionPharm;
- additional statements of non-affiliation for Bayside and Meadpoint (again depending on the entity exercising the conversion), reiterating that neither entity was a FusionPharm affiliate and additionally representing that neither Family Member A, in the case of Bayside, and SEARS, in the case of Meadpoint, was an officer, director, control person or holder of more than ten percent of the securities of FusionPharm;
- a FusionPharm officer's certificate, signed by DITTMAN, representing that neither Bayside nor Meadpoint (depending on the entity making the conversion) were affiliates of FusionPharm and were outsiders to the company and management, with no other method of control over the company, and that the convertible promissory notes that were the vehicles for the conversion were valid obligations of the company;
- additional letters signed by DITTTMAN reiterating that Bayside and Meadpoint were not affiliates of the company; and
- attorney opinion letters opining that the common shares to be issued to Bayside and Meadpoint met the federal securities exemption from registration and could be issued as unrestricted shares without the need for a restrictive legend.

18. It was a further part of the manner and means of carrying out the conspiracy that defendant SEARS thereafter caused a substantial portion of the common shares issued to

Bayside and Meadpoint as a result of these supposed debt conversions to be deposited into brokerage accounts set up in the names of Bayside and Meadpoint and then caused these shares to be sold in the public securities markets.

19. It was a further part of the manner and means of carrying out the conspiracy that defendant SEARS, in consultation with defendant DITTMAN, would arrange for a substantial portion of the proceeds realized from the stock and debt sales resulting from the supposed FusionPharm debt to Bayside and Meadpoint to be deposited either directly or indirectly into FusionPharm's operating bank accounts so that these funds could also be used to further capitalize and support the operations of the company and to provide for both defendants' financial support.

20. As a part of the manner and means for carrying out the conspiracy, defendant DITTMAN, in consultation and in coordination with defendant SEARS and others, caused FusionPharm to treat and account for some of the funds received back to FusionPharm from the Microcap, Meadpoint and Bayside sales of FusionPharm stock as payments to FusionPharm for or relating to sales of its PharmPods, which sales DITTMAN then caused FusionPharm to book in its accounting records as licensing revenues realized by the company. The stock proceed deposits were claimed, in particular, to be payments by Meadpoint, acting in its supposed capacity as FusionPharm's purported exclusive PharmPod distributor, for PharmPods that were being manufactured for and sold to FusionPharm customers in arms-length transactions but that had not yet been delivered to those customers or purported Meadpoint payments in anticipation of sales of PharmPods that DITTMAN and SEARS were still negotiating with prospective FusionPharm customers.

21. As a further part of the manner and means for carrying out the conspiracy, defendant DITTMAN, in consultation and in coordination with defendant SEARS and others, also sought to use purported dealings with Vertifresh as a basis to claim and book additional revenues for FusionPharm. DITTMAN and SEARS caused contracts and related documentation to be drafted that purportedly depicted a licensing agreement between FusionPharm and Vertifresh, pursuant to which Vertifresh agreed to pay $750,000 to FusionPharm over the course of three years in exchange for the purchase of a series of PharmPods and the right to use FusionPharm's growing methods and technology to cultivate and sell non-cannabis produce in three distinct geographic regions. Based on this purported agreement, DITTMAN then caused FusionPharm to book the entire licensing agreement amount as FusionPharm revenues in a single year, 2012.

22. It was part of the manner and means of carrying out the conspiracy that defendant DITTMAN, with defendant SEARS' assistance, would then cause these purported transactions with Meadpoint and Vertifresh and the purported revenues associated with them to be publicly disseminated, among other ways, through press releases disseminated in the financial media and through interviews by DITTMAN made available to the public.

23. It was a further part of the manner and means of carrying out the conspiracy that defendants DITTMAN and SEARS would cause these transactions and revenue figures to be reported in quarterly and annual financial statements uploaded to, and made available to the investing public on, OTC Link's website. DITTMAN, working in concert with SEARS, would cause the financial statements notes and the quarterly and annual reports to omit facts revealing that Meadpoint, Vertifresh and FusionPharm were all under the common control of the

defendants and the revenues generated as a result of these transactions were between related parties. DITTMAN, in concert with SEARS, would further cause FusionPharm to affirmatively represent in these reports that there were, in fact, no related party transactions with immediate family members and significant beneficial owners of FusionPharm stock and would cause these reports to conceal completely SEARS' involvement in the company and his beneficial ownership of its stock.

Overt Acts

24. In furtherance of the conspiracy and to effect the objects thereof, one or more overt acts were carried out by at least one co-conspirator in the State and District of Colorado and elsewhere, which overt acts included the following:

A. On or about March 25, 2011, defendants SEARS and DITTMAN caused an Issuer Company-Related Action Notification form to be filed with the Financial Industry Regulatory Authority ("FINRA") providing notice of a name change to, and stock symbol change with respect to, FusionPharm, identifying himself and Family Member A as the sole officers and directors of the company, and representing, among other things, that none of the company's officers, directors or parties related to the company were the subjects of pending, adjudicated or settled civil or criminal action related to fraud or securities violations.

B. On or about April 11, 2011, defendant SEARS sent a letter to a representative of FusionPharm's stock transfer agent in Las Vegas, Nevada surrendering a stock certificate evidencing the ownership of 185,0000 FusionPharm preferred shares and requesting that a portion of the shares evidenced by this certificate be converted into 80,000 shares of FusionPharm common stock in the name of a limited liability company in Orlando, Florida and

65,000 shares of FusionPharm common stock in the name of Microcap and that the balance of the remaining preferred shares, 183,550, be transferred to a company in Thornton, Colorado.

C. On or about April 21, 2011, defendant DITTMAN sent an email to a number of people, bearing the subject "Fusion Pharm," announcing that he had recently "partnered with [his] brother-in-law William Sears" and that "we have acquired and moved our operations into a publicly traded company: Fusion Pharm, Inc."

D. On or about May 2, 2011, defendant SEARS sent a letter to an employee at Oppenheimer, & Co., Inc., directing that 65,000 shares of FusionPharm common stock be deposited into the brokerage account of Microcap Management and representing that Microcap Management was neither a control person nor an affiliate of FusionPharm.

E. On or about June 20, 2011, defendant SEARS sent an email to defendant DITTMAN, bearing the subject "Stock," advising, in part, that the "cert [was] for 182,050," that "the deal will be structured whereas we can have some free anyway," and that it was "just something we need."

F. On or about June 23, 2011, defendant DITTMAN sent an email to defendant SEARS asking whether "$3k from this weeks [sic] take" could be wired to a family member's account.

G. On or about September 6, 2011, defendant DITTMAN sent defendant SEARS an email asking, "What do we have in microcap now?"

H. On or about September 13, 2011, defendant SEARS forwarded defendant DITTMAN an exchange of emails between SEARS and a representative of a brokerage firm addressing SEARS' inquiry about the net amount in Microcap's brokerage account.

I. On or about October 6, 2011, defendant DITTMAN had a telephone conversation with a FINRA investigator during which he described defendant SEARS as a part-time salesman for FusionPharm and stated that he was unaware that SEARS owned or was selling FusionPharm stock.

J. On or about November 3, 2011, defendant DITTMAN had another telephone conversation with the same FINRA investigator during which he stated that defendant SEARS no longer owned Microcap or any FusionPharm stock.

K. On or about March 31, 2012, a document entitled "FusionPharm, Inc. Annual Information and Disclosure Statement," for the period ended December 31, 2011, was uploaded to a public website maintained by OTC Link.

L. On or about June 4, 2012, defendant SEARS forwarded an email from Co-Conspirator A transmitting as an attachment a draft promissory note and credit line agreement for Bayside and stating that Co-Conspirator A would draft "the drawdown requests to match the dates and amounts of the deposits."

M. On or about June 6, 2012, Co-Conspirator A sent defendant SEARS an email, bearing the subject "Bayside Loan Documents, transmitting, as a series of attachments, proposed loan drawdown requests and draft promissory notes and credit line agreements, and stating, "Bill, Let's get these signed up. Meadpoint's to follow in a separate email."

N. On or about June 6, 2012, Co-Conspirator A sent defendant SEARS a subsequent email, bearing the subject "MeadPoint Loan Documents," transmitting, as a series of attachments, proposed loan drawdown requests and draft promissory notes and credit line agreements.

O. On or about July 12, 2012, defendant SEARS sent defendant DITTMAN an email, bearing the subject "Cash," stating, in part, "This week will be a gross total of $25,118," and setting forth a "net to FP" of $12,558, after certain enumerated dollar amount offsets to identified individuals.

P. On or about November 26, 2012, a press release entitled, "FusionPharm Signs Licensing Agreement for Flowering Containers," was disseminated via PR Newswire, announcing the signing of a licensing agreement with Meadpoint to market PharmPods and relating that an initial order of 9 PharmPods had already been received from Meadpoint "with minimum purchase quantities of 50 containers in both 2013 and 2014."

Q. On or about November 26, 2012, Co-Conspirator A sent an email to defendant SEARS attaching drafts of convertible promissory notes for Bayside and Meadpoint and advising that the "Notes work with the existing draw down requests."

R. On or about December 12, 2012, defendant SEARS sent an email to a representative of FusionPharm's stock transfer agent transmitting a convertible promissory note in favor of Bayside, notifying the transfer agent that "Bayside has chosen to exercise its option to convert into shares [sic]," and that "Bayside [was] a family members [sic] company and I am assisting them [sic] as I am familiar with all parties."

S. On or about December 27, 2012, Co-Conspirator A sent defendant DITTMAN an email stating, "We are in need of a letter which confirms the end of the drawdowns under the Bayside promissory note," and advising that Co-Conspirator A had drafted such a letter for DITTMAN's signature.

T. On or about January 7, 2013, defendant SEARS sent an email to a representative of FusionPharm's stock transfer agent, with subject identified as "Bayside Note FSPM," transmitting an attorney's opinion letter, FusionPharm bank account statements "which reflect funding" and a "[c]losing letter that closed the note."

U. On or about January 30, 2013, defendant SEARS sent an email to Co-Conspirator A and defendant DITTMAN attaching drafts of a licensing agreement between Vertifresh and FusionPharm and advising, "This is the one we should work thru [sic]."

V. On or about March 6, 2013, a document entitled "FusionPharm, Inc. Annual Information and Disclosure Statement," for the period ended December 31, 2012, was uploaded to a public website maintained by OTC Link.

W. On or about March 27, 2013, defendant DITTMAN conducted a recorded interview with a representative of an internet-based financial public relations service for Small Cap Voice.Com, Inc., as self-styled financial communications and investor relations service for "small cap" companies, during which he stated that FusionPharm did "a little over $800,000 in revenue" for 2012 and that he expected FusionPharm to double its results for 2013.

X. On or about April 11, 2013, defendant SEARS sent an email to a representative of FusionPharm's stock transfer agent, with subject identified as "Meadpoint Venture Partners FSPM," stating that he was attaching a series of documents, including "a notice to convert," the "[o]riginal note," a "letter of opinion," and a "Non Affiliate declaration," and transmitting scanned versions of the described documents.

Y. On or about August 5, 2013, defendant DITTMAN set an email to an individual considering making an investment in FusionPharm proposing, in part, that some of the funds for

the contemplated investment involve the individual's purchase of "part of the existing note payable from FusionPharm to Meadpoint Venture Partners."

Z. On or about February 18, 2014, defendant DITTMAN sent the following email message to a representative of FusionPharm's stock transfer agent, in reply to that representative's observation that defendant SEARS had been listed as an "Administrative Officer" of FusionPharm "which would make him an affiliate:"

> ... Not sure why you would have Mr. Sears as an administrative officer of the Company, he has never been employed by the Company and is not an affiliate. ...

AA. On or about April 15, 2014, a document identified as FusionPharm's "Financial Statements for the Periods Ended December 31, 3013 [sic] and December 31, 2012 (Restated)", consisting of financial statements and financial statement notes for the periods ended December 31, 2012 and December 31, 2013, was uploaded to a public website maintained by OTC Link.

BB. On or about May 15, 2014, defendant SEARS forwarded to defendant DITTMAN an email from a representative of an investment firm, bearing the subject "RE: Todays Wires," acknowledging receipt of requests to send three wire transfers from a trust account established in the name of Family Member A.

In violation of Title 18, United States Code, Section 371.

COUNT 2

25. On or about January 7, 2013, in the State and District of Colorado, the defendant,

WILLIAM J. SEARS,

then a resident of Thornton, Colorado, did willfully make and subscribe a U.S Income Tax Return for Single and Joint Filers With No Dependents, Form 1040EZ, for the year 2011, which

was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said return he did not believe to be true and correct as to every material matter, in that the said return reported for the year total adjusted gross income of $7,500 (Form 1040EZ, line 4), whereas, as the defendant then and there well knew and believed, his adjusted gross income was significantly higher than what was actually reported.

In violation of Title 26, United States Code, Section 7206(1).

FORFEITURE ALLEGATION

26. The allegations contained in Count One of this Information are hereby re-alleged and incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

27. Upon conviction of the violation alleged in Count One of this Information involving the conspiracy to commit of violations of Title 18, United States Code, Section 1343, Title 18, United States Code, Section 1341, Title 15, United States Code, Sections 78j(b) and 78ff(a), all in violation of Title 18, United States Code, Section 371, the defendants,

WILLIAM J. SEARS, and
SCOTT M. DITTMAN,

shall forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461(c) any and all of the defendant's right, title and interest in all property constituting and derived from any proceeds the defendant obtained directly and indirectly as a result of such offense, including, but not limited to:

a. $27,066.23 Seized From Wells Fargo Bank Account No. 6020559917, Held In The Name of Meadpoint Venture Partners;

b. $9,455.56 Seized From Wells Fargo Bank Account No. 7784731577, Held In The Name of Sandra L. Sears;

c. $8,462,621.25 Seized From Moors And Cabot Trust Account No. 4597-6546, Held In The Name of Sandra Lee Sears, Tr, Sandra Lee Sears Ttee;

d. $20,820.37 Seized From Wells Fargo Bank Account No. 5181260307, Held In The Name of FusionPharm, Inc.;

e. $212,273.92 Seized From Wells Fargo Bank Account No 8141061286, Held In The Name of FusionPharm, Inc.;

f. $250,000.00 Held In Lieu Of Earnest Money Held On Deposit For The purchase of 4200 Monaco Street, Denver, Colorado;

g. 194 BASKET ROAD, OLEY, PENNSYLVANIA; and

h. A money judgment in the amount of proceeds obtained by the conspiracy and by the defendants, for which the defendants are joint and severally liable, less the amount recovered from directly forfeitable assets.

i. If any of the property described above, as a result of any act or omission of the defendant:

a) cannot be located upon the exercise of due diligence;
b) has been transferred or sold to, or deposited with, a third party;
c) has been placed beyond the jurisdiction of the Court;
d) has been substantially diminished in value; or
e) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as

incorporated by Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of said defendant up to the value of the forfeitable property.

ROBERT C. TROYER
ACTING UNITED STATES ATTORNEY

By: s/Tonya S. Andrews
Tonya S. Andrews
Assistant United States Attorney

s/Scott Mascianica
Scott Mascianica
Special Assistant U.S. Attorney

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U.S. DEPARTMENT OF JUSTICE

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May 25, 2016

VIA E-MAIL TRANSMISSION

William L. Taylor, Esq.
wtaylor@sideman.com
Sideman & Bancroft LLP
1999 Broadway, Suite 4300
Denver, CO 80202-5731

Re: Scott M. Dittman

Dear Mr. Taylor:

I write to set forth the essential terms by which we propose to address through a negotiated guilty plea the criminal liability of you client, Scott M. Dittman, in relation to matters currently under a federal criminal investigation being conducted under the auspices of a federal grand jury in the District of Colorado, which matters arise from and relate to the operations of Fusion Pharm, Inc., a public company whose common stock has been traded on the OTC Markets Group under the ticker symbol "FSPM." The particular matters under investigation and the federal criminal offenses under consideration with respect to your client are described and outlined in my September 23, 2015 letter to you setting forth terms under which this office was prepared to take a proffer of information from your client, by way of interview, which letter is incorporated by reference herein and a copy of which is attached hereto as Attachment A (hereinafter, the "September 23, 2015 proffer letter").

This document does not itself constitute a plea agreement and is being provided in furtherance of plea discussion and pursuant to Rule 11(f) of the Federal Rules of Criminal Procedure. This pre-indictment resolution is subject to, and contingent upon, a pre-indictment resolution of the matters concerning this federal criminal investigation being reached with William J. Sears and his counsel.

Upon acceptance of this proposed pre-indictment resolution, as signified through your and your client's execution of this letter in the signature blocks below and upon Mr. Sears' acceptance of the terms of his proposed pre-indictment resolution, as signified in the same manner with respect to him, these essential terms will be embodied in a formal proposed plea agreement conforming, in form, to the Court's requirements for plea agreements in this District.

EXHIBIT B

1. The Offenses of Conviction & Asset Forfeiture.

Mr. Dittman would agree to waive prosecution by indictment and would agree to plead guilty to one count of conspiring with Mr. Sears and others (a) to defraud the U.S. Securities and Exchange Commission ("SEC") and (b) to commit various offenses against the United States, including wire fraud, in violation of Title 18, United States Code, Section 1343; mail fraud, in violation of Title 18, United States Code, Section 1341; securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff(a), and Title 17 Code of Federal Regulations, Section 240.10b-5; and willful violation of Section 5 of the Securities Act of 1933, Title 15, United States Code, Sections 77e(a) and 78ff(a); said conspiracy being in violation of Title 18, United States Code, Section 371. The conspiracy count would be set forth in a contemplated information that would also charge Mr. Sears as a defendant in the conspiracy count and would separately charge Sears in an additional count with filing a false federal individual income tax return for calendar year 2011, in violation of Title 26, United States Code, Section 7206(1).

The contemplated information would also contain an asset forfeiture notice provision setting forth the government's intent to seek forfeiture of any and all of Mr. Dittman' right, title and interest in all property constituting and derived from any proceeds obtained directly and indirectly by Mr. Dittman' as a result of the commission of the charged conspiracy and its object offenses, or substitute assets for such property.

As part of our negotiated resolution, Mr. Dittman would agree that he will agree to forfeiture of his interest in all property that may constitute or is derived from proceeds of his commission of or involvement or participation in the charged conspiracy and its objet offenses, including, but not limited to, the following:

(a) A money judgment not exceeding approximately $12,204,172, corresponding to the total amount currently believed to have been obtained as a result of the charged conduct from the sale of Fusion Pharm common stock or debt securities convertible into Fusion Pharm common stock;

(b) The following particular assets, derived from the sale of Fusion Pharm common stock, and constituting direct and indirect proceeds of the charged conduct:

(1) $27,066.23 Seized From Wells Fargo Bank Account No. 6020559917, Held In The Name Of Meadpoint Venture Partners;

(2) $9,455.56 Seized From Wells Fargo Bank Account No. 7784731577, Held In The Name Of Sandra L. Dittman;

(3) $8,462,621.25 Seized From Moors And Cabot Trust Account No. 4597-6546, Held In The Name Of Sandra Lee Dittman, Tr, Sandra Lee Dittman Ttee,

less approximately $2,472,945 to be applied to Mr. Sears' restitution;

(4) $20,820.37 Seized From Wells Fargo Bank Account No. 5181260307, Held In The Name Of Fusionpharm, Inc.;

(5) $212,273.92 Seized From Wells Fargo Bank Account No. 8141061286, Held In The Name Of Fusionpharm, Inc.,

(6) $250,000.00 Held In Lieu Of Earnest Money Held On Deposit For The Purchase Of 4200 Monaco Street, Denver, Colorado; And

(7) The Real Property Located At 194 Basket Road, Oley, Pennsylvania.

The funds obtained from the forfeiture of the assets identified in subparagraph (b) would be applied to the forfeiture money judgment identified in subparagraph (a). In addition, the seized funds applied to any restitution obligation would also be credited to the forfeiture money judgment.

Mr. Dittman would further agree to divest whatever beneficial ownership interest he has in shares of common and preferred stock of Fusion Pharm.

Mr. Dittman would further agree to forfeit, as substitute asset, any monetary value he realizes in the future from his interest in Fusion Pharm.

The parties would agree that Mr. Dittman's liability for forfeiture would be joint and several with Mr. Sears' forfeiture liability in connection with the pre-indictment resolution of his case. The parties further agree that the forfeiture money judgment shall be enforceable as to Mr. Dittman for 2 years after the date of sentencing.

2. Restitution.

The parties would agree that, although restitution would otherwise be mandatory with respect to the conspiracy offense of conviction, they will take the position that restitution should not be ordered by the Court, pursuant to 18 U.S.C. § 3663A(c)(3), because either the number of identifiable victims is so large as to make restitution impracticable or, alternatively, restitution would involve determination of complex issues of fact that would complicate or prolong the sentencing process to a degree that the need for restitution would be outweighed by the burden on the sentencing process. Accordingly, while forfeited funds may be administratively available to eligible victims by the Department of Justice, no court ordered restitution entered would be sought with respect to Mr. Dittman.

William L. Taylor, Esq.
wtaylor@sideman.com

3. [redacted]

Mr. Dittman would [redacted] agree to cooperate fully with the Office of the United States Attorney for the District of Colorado and law enforcement and regulatory authorities designated by it, in the identification, recovery and repatriation of assets that are subject to, or are otherwise available for, forfeiture pursuant to his plea obligations with respect to forfeiture, as outlined above. Such cooperation would include, but not necessarily be limited to, (a) submitting to debriefings concerning the identification, recovery and repatriation of potentially forfeitable assets; (b) producing documents, records and other evidence, as requested by this office or its designees, relevant to these subjects; (c) executing documents required by financial institutions

and custodians who may have custody or control of potentially forfeitable assets in order to permit access to records concerning such assets and in order to facilitate the recovery and repatriation of such assets; (d) providing truthful testimony concerning these subjects, whether in the form of testimony or through affidavit or declaration; (e) preparing and executing sworn financial statements; and (f) appearing at judicial or administrative hearings and proceedings as may be necessary for these purposes.

Mr. Dittman would also agree to cooperate fully with the Internal Revenue Service in the ascertainment and payment of his correct tax liabilities for the calendar years 2011 through 2014 inclusive, among other ways, by preparing and filing returns or amended returns, as necessary, for those years for himself individually as well as for entities through which he conducted business during those years and on whose behalf he should have filed tax returns. Mr. Dittman would further agree to file truthful and accurate income tax returns which are or may become due by law during any period of supervised release or probation imposed by the Court.

4. No Further Prosecution.

The Office of the United States Attorney for the District of Colorado would further agree that – contingent upon the fulfillment of Mr. Dittman's plea obligations and Mr. Dittman's entry of guilty pleas and sentencing on the counts of conviction – it will not further prosecute Mr. Dittman for the conduct set forth in the contemplated information or any other criminal conduct known to this office as of the date of this letter, which conduct concerns the matters currently under federal criminal investigation in this district, as described above and in the September 23, 2015 proffer letter.

5. Mr. Dittman's Advisory Sentencing Guideline Range, Contemplated Sentence And the Parties' Obligations and Rights at Sentencing.

A. The Advisory Sentencing Guideline Range.

The parties would agree to take the sentencing guideline positions ascribed to them in Attachment B accompanying this letter. Based on these positions, the parties would agree that the advisory sentencing guideline range that would otherwise be applicable to Mr. Dittman would exceed the statutory maximum imprisonment term of five years for the offense of conviction. The parties would further agree that, as a consequence, under these circumstances, the effective advisory sentencing guideline range applicable to Mr. Dittman would be five years imprisonment or 60 months. *See* U.S.S.G. §§ 5G1.1& comments.

B. [redacted]

[redacted]

[redacted]

[redacted] Mr. Dittman would [redacted] acknowledge that the government would not be advocating a sentence on his behalf lower than 24 months imprisonment.

C. Mr. Dittman's Right to Advocate for a Variant Sentence.

At the time of sentencing, Mr. Dittman would free to advocate for any lawful sentence, and make any arguments in support thereof, provided, however, that that sentence *include a term of imprisonment not less than 24 months in duration* and any

supporting arguments are consistent with the positions he is obligated to take under the plea agreement with respect to the calculation of his advisory sentencing guideline range and are not factually inconsistent with his entry of a guilty plea and admission of guilt or with the body of stipulated facts set forth in the parties' plea agreement in this case.

D. Mr. Dittman's Recommended Special Supervised Release Conditions.

Mr. Dittman's would agree that, as a condition of supervised release or probation, he will not be involved in any capacity in the securities industry on behalf of another individual or an entity not solely owned and controlled by him. Nor may Mr. Dittman act as an officer or director of company whose securities are publicly traded or otherwise act as a control person of such a company. Further, Mr. Dittman would agree that, as a condition of such supervision, he will not act as a fiduciary or be employed in a fiduciary position and that he will not otherwise be engaged in any other employment or occupation involving his solicitation of funds for investment or his custody or control of investor funds.

Mr. Dittman would further agree that any conditions of supervised release or probation should include the special conditions that (a) his employment be approved in advance by his supervising probation officer; (b) that he provide his supervising probation officer access to any financial records requested by such officer and otherwise be subject to financial monitoring by such officer; (c) that he shall not register any business entities without prior disclosure to his supervising probation officer; and (d) that he shall not conduct any financial transactions through accounts of any business entities or individuals not made known to and approved by his supervising probation officer.

E. Parties' Sentencing Recommendations Not Binding on the Court.

The parties would acknowledge and agree that any sentence to be recommended or proposed to the Court in this case will be made pursuant to and is subject to the provisions of Fed.R.Crim.P. 11(c)(1)(B) and as such is not binding on the Court and so not grounds for Mr. Dittman to withdraw his guilty pleas.

6. Appellate and Collateral Challenge Waivers.

Mr. Dittman would agree to waive the right to appeal any matter in connection with this prosecution, conviction, or sentence unless the sentence exceeds 60 months, that is, the statutory maximum penalty for imprisonment for the offenses of conviction, and the effective guideline sentence with respect to Mr. Dittman. Mr. Dittman would also agree to waive his right to challenge this prosecution, conviction, or sentence and/or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255, except that such waiver provision will not prevent him from seeking relief otherwise available if: (1) there is an explicitly retroactive change in the applicable guidelines or sentencing statute, (2) there is a claim that he was denied the effective assistance of counsel, or (3) there is a claim of

prosecutorial misconduct. Additionally, if the government appeals the sentence imposed by the Court, Mr. Dittman would be released from these waiver provisions.

7. Consequences of Mr. Dittman's Plea Agreement Breach or Misconduct.

The parties would agree that the government's obligations under the contemplated plea agreement would be expressly contingent on Mr. Dittman's performance of his obligations under the plea agreement. The parties would further agree, in particular, that should Mr. Dittman breach this agreement [redacted] the government would be entitled, at its election, to be relieved of its obligations under the plea agreement and could elect to abrogate the agreement and prosecute the defendant to the full extent permitted under law.

Sincerely,

s/Kenneth M. Harmon
Kenneth M. Harmon
Assistant United States Attorney

ACKNOWLEDGED AND AGREED TO BY:

6/2/2016

William L. Taylor, Esq.
Attorney for Scott M. Dittman

Scott M. Dittman