

## **AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT**

I, KATE E. FUNK, being duly sworn, depose and state the following:

1. I am a Special Agent employed by the Federal Bureau of Investigation ("FBI"). I have been so employed for approximately four years. I am currently assigned in Denver, Colorado, to investigate economic or white collar crimes. I have participated in several fraud investigations, with many of those investigations involving wire fraud, mail fraud, money-laundering and mortgage fraud. Prior to my employment with the FBI, I received an Accounting degree from the University of Kansas in 1995. I became a Certified Public Accountant in 1996 through the state of Kansas.

2. At all times during the investigation described in this affidavit, I have been acting in my official capacity as a Special Agent with the FBI and have conducted interviews, collected and reviewed documents, and obtained information from the sources outlined in the following paragraphs as they relate to the issue of probable cause.

3. I make this affidavit in support of applications for the issuance of a search warrant for the following premises described more fully herein and in Attachment A (incorporated herein by reference):

- a. Business of FusionPharm, 5850 East 58<sup>th</sup> Avenue, Unit F, and 5750 East 58<sup>th</sup> Avenue Unit J, Commerce City, Colorado, 80022 (hereinafter, the "Subject Premises").

4. The FBI, with the assistance of the Internal Revenue Service's Criminal Investigation Division ("IRS-CID"), is investigating an offering fraud and "pump and dump" microcap stock scheme believed to be perpetrated by Scott Dittman ("Dittman"),

38. In 2011, FusionPharm purportedly focused on two aspects of the organic produce and agriculture market: (1) growing and selling produce (almost always lettuce); and (2) selling PharmPods in the organic produce industry. According to FusionPharm's 2011 Annual Report, FusionPharm claimed to have made \$256,895 in revenues during the 2011 fiscal year. Notably, your affiant's review of FusionPharm's 2011 Annual Report reveals \$0 in Accounts Receivable, suggesting that any revenue generated by FusionPharm during the 2011 fiscal year (January 1, 2011 through December 31, 2011) should be supported by incoming deposits in FusionPharm's bank accounts.

39. In the same report, FusionPharm represented to investors that it derived its revenue from organic food sales. FusionPharm touted its relationship with Circle Fresh Farms as its main partner and revenue driver in 2011. Based on your affiant's review of the SEC Produced Records, SEC Analyses, statements by CW-2 and your affiant's independent investigation, FusionPharm did not generate any significant revenue from: (a) Circle Fresh Farms directly; or (b) agriculture-related business. Moreover, it did not generate anywhere close to \$256,895 in revenues during the 2011 fiscal year.

40. FusionPharm reported its "successful harvest and sale of its initial crop through its collaboration agreement with Circle Fresh Farms." Your affiant's review of the SEC's Analyses and the Bank Records reveals only one check from Circle Fresh Farms at any time between 2011 and 2013 across the bank accounts of FusionPharm and the Sears Controlled Entities – for \$30.60 in 2012. Accordingly, Circle Fresh Farms did not generate any revenue for FusionPharm in 2011.

41. Moreover, CW-2 estimated that FusionPharm only made \$3,000 - \$5,000 in organic produce sales from 2011 through 2013. Your affiant's review of the Bank Records along with the SEC Analyses of the same corroborates the statements made by CW-2. Your affiant found, and the SEC Analyses confirmed, that there was less than \$4,000 worth of organic produce sales across the bank accounts of FusionPharm and the Sears Controlled Entities – and those sales were all in 2012 and 2013. Once again, these sales could not be a basis for claimed 2011 revenue.

42. Furthermore, your affiant's review of the Bank Records and the SEC's Analyses regarding the same provide no evidence of any FusionPharm sales of PharmPods to third parties in 2011. Of the almost \$600,000 of incoming funds into FusionPharm's bank account in 2011, nearly 100% of the funds can be traced to: (a) the Sears Controlled Entities; (b) cash or cashier's checks deposits; or (c) investor deposits. I have reviewed the SEC Analyses of the Bank Records, wherein the SEC was able to trace the majority of cash deposits and cashier's checks directly back to a corresponding withdrawal from one of the accounts for the Sears Controlled Entities for the same dollar amount on the same day. Your affiant's review of the Bank Records confirms these findings.

43. To ensure that payments from third party customers were not made to one of the Sears Controlled Entities, your affiant reviewed the SEC Analyses concerning the incoming wires and deposits into the Sears Controlled Entities' accounts for 2011. Your affiant found no evidence of any FusionPharm PharmPods sales to third parties in 2011 based upon the following: (a) Sears did not open VertiFresh's bank account until 2012; (b) The Meadpoint account only had a single \$100 deposit into the account during 2011

from another Sears Controlled Entity; and (c) Bayside's account was almost wholly funded from incoming wires and deposits from Microcap.

44. Microcap, meanwhile, received over \$1.2 million in incoming wires and deposits in 2011. Of that amount, approximately 99% came from wire transfers. Based on my review of the Bank Records and Brokerage Records, these wire transfers originated from Microcap's brokerage account. The Brokerage Records confirm that nearly all of the money coming into Microcap's brokerage account in 2011 came from sales of FusionPharm common stock. The remaining 1% that came into Microcap's bank account in 2011 was comprised almost entirely of a single deposit from Bayside.

45. As a result, there is no evidence that the money coming into FusionPharm's accounts or the accounts in the name of the Sears Controlled Entities was the result of legitimate sales of produce or PharmPods. Rather, the source of the money appears to be the sale of FusionPharm stock, which was then funneled between and among the Sears Controlled Entities.

#### **MISREPRESENTING SALES REVENUE IN 2012**

46. In its 2012 Annual Report, FusionPharm represented that its net revenues for the year ended December 31, 2012 were \$808,398 an increase of 250+% compared to 2011. When asked if these figures seemed accurate, CW-2 said this revenue figure was "impossible" as the most revenue that could have come into FusionPharm from PharmPod sales in 2012 was \$160,000. CW-2 was aware of only one deal in 2012 to a customer in Arizona for eight PharmPods. CW-2 helped load the PharmPods for delivery. CW-1 said these figures were "bullshit" and "crazy." Based on your affiant's

review of the Bank Records and SEC Analyses regarding the same, FusionPharm did make anywhere close to \$825,594 – or even \$160,000 – in revenue in 2012.

47. In comparison to 2011, the 2012 Annual Report did disclose significant accounts receivable – over \$500,000. Accordingly, your affiant and the SEC analyzed the Bank Records to determine if there was evidence to support approximately \$300,000 in incoming revenues in 2012.

48. Based on your affiant's review of the Bank Records and the SEC's Analyses regarding the same, FusionPharm had approximately \$400,000 in incoming wires and deposits into its accounts in 2012. As in 2011, nearly 100% of the funds can be traced to: (a) Sears Controlled Entities; (b) cash or cashier's checks deposits; or (c) investor deposits. As with 2011, the SEC was able to trace most of the cash deposits back to corresponding cash withdrawals at other Sears Controlled Entities. Your affiant reviewed the Bank Records and the SEC's Analysis on this point and corroborated this conclusion.

49. The SEC and your affiant also reviewed the Bank Records for the Sears Controlled Entities in 2012. The Meadpoint and VertiFresh accounts in 2012 had a very similar pattern – significant deposits and wires coming in to the accounts from other Sears Controlled Entities with little-to-no evidence of any incoming deposits or wires coming into the account from unaffiliated third parties. Consistent with 2011, the majority of the funds coming in to the VertiFresh and Meadpoint accounts were from Bayside and Microcap. More importantly, your affiant's review of the Bank Records reveals evidence of only one possible third-party sale of a PharmPod, with

51. Based on my review, investigation and analysis above, the money coming into FusionPharm's and the Sear Controlled Entities' bank accounts was ultimately the result of Microcap selling FusionPharm stock on the open market, and re-circulating portions of those proceeds to the other Sears Controlled Entities.

**RESTATEMENT TO 2012 SALES  
REVENUE STILL INCLUDES  
MISREPRESENTATIONS**

52. On April 15, 2014, FusionPharm issued its 2013 Annual Report, which included a restatement of 2012 annual revenue, reversing \$500,000 of 2012 revenue. The newly stated revenue with the reversal was \$308,398. The restatement clarified that \$750,000 of initial claimed revenue was purportedly attributable to an "exclusive licensing arrangement with [VertiFresh] for the use of PharmPods growing technologies for agricultural products."

53. The restatement claimed that VertiFresh paid \$250,000 in 2012 in connection with the purported licensing agreement mentioned above, but that the remaining \$500,000 was reflected as revenue in error under GAAP. With the restatement, FusionPharm claimed that it only made an additional \$58,398 (\$308,398 - \$250,000) outside of the licensing revenue from VertiFresh – a figure far more consistent with actual 2012 PharmPod sales based on your affiant's review of the Bank Records, statements made by CW-2 and CW-1 and the SEC's Analyses.

54. However, based on my review of the SEC Produced Records, the SEC Analyses and your affiant's experience and background in accounting, the reported revenue remains inaccurate for at least three reasons:

- a. First, as detailed herein ¶¶68-72, nowhere in the Restatement does FusionPharm disclose that VertiFresh is an affiliate owned, operated and controlled by Sears, a FusionPharm control person.
- b. Second, even if the revised \$250,000 figure could be a legitimate third party transaction, and even if the revenue could be properly recognized under GAAP, FusionPharm misrepresented the basis for possibly recognizing this amount as revenue. In Note 4 to FusionPharm's 2013 Annual Report, FusionPharm claims that "The restatement was based on reevaluating the arrangement with VertiFresh which required \$250,000 be paid during 2012 for the licensing of the Colorado territory (on a nonrefundable basis), and the remaining \$500,000 to be due in equal installments of \$250,000 during 2013 and 2014 for the rights to two additional territories. The initial \$250,000 was paid during 2012 and was reflected as earned revenue. Yet, according to the SEC analyses of the Bank Records, and my review of the same, VertiFresh only contributed approximately \$128,000 in deposits and wires to FusionPharm in 2012.
- c. Third, CW-2 said that FusionPharm did not sell any licenses or receive any licensing income while she worked at FusionPharm, which includes 2012.

**MISREPRESENTING 2013 SALES REVENUE  
AND BUSINESS DEALS**

55. In its 2013 Annual Report, FusionPharm claimed that it made \$594,397 in revenue in 2013. Based on your affiant's review of FusionPharm's 2013 Annual Report, FusionPharm did not have any accounts receivable at the end of 2013. In an email

conversation with UC-1 on April 30, 2014, Dittman confirmed the 2013 revenue was all from the sale of PharmPods. In a subsequent meeting on May 1, 2014, Dittman stated that FusionPharm delivered 34 PharmPods in 2013.

56. CW-1 said that it was “impossible” that the company could have earned these revenues in 2013. Although CW-1 only worked at FusionPharm until October 2013, your affiant’s comparison of FusionPharm’s September 2013 quarterly financial disclosure comparison, which claimed a cumulative revenue figures of \$549,725 through the company’s third quarter, with the year-end revenue claimed in FusionPharm’s 2013 Annual Report, \$594,397, reveals that FusionPharm only claimed to make \$44,672 in revenue in the last quarter of 2013. Accordingly, the bulk of the revenue purportedly came during the time that CW-1 worked at FusionPharm.

57. Furthermore, there were only three PharmPods at the warehouse when CW-1 arrived in January 2013: (a) two were used to grow lettuce; and (b) one was not functioning. Additionally, according to CW-1, there were not any deals in place to sell any PharmPods in 2013 when he started. Throughout 2013, CW-1 was responsible for: (a) preparing PharmPods for sales to customers; and (b) constructing the PharmPods kept at the warehouse where FusionPharm would grow cannabis. This meant that any FusionPharm PharmPod 2013 sales required CW-1 to be involved in the refurbishing and retrofitting of the shipping containers prior to delivery. CW-1 did not believe it was possible for FusionPharm to have sold anywhere close to 34 PharmPods while he was employed without his knowledge.

58. According to CW-1, there were two possible revenue sources in 2013: (a) sales of PharmPods; and (b) sales of marijuana. CW-1 said that the most revenue that

could be derived from PharmPod sales in 2013 was \$200,000-\$250,000 – and CW-1 stated that those figures were a high estimates. CW-1 identified, at most, two possible sales between January – October 2013: (a) FusionPharm sold two PharmPods to a customer in California; and (b) FusionPharm sold five PharmPods to Local Products, a Denver company.<sup>8</sup>

a. CW-1 said there might have been an additional, single PharmPod sale to Mile High Green Cross in 2013, but he could not be sure. Dittman told CW-1 that FusionPharm “gave away” a PharmPod to Mile High Green Cross so CW-1 was not sure that this could be classified as a “sale.” Based on your affiant’s review of the Bank Records, Mile High Green Cross did provide funds to Meadpoint – but this was in 2012. There is no evidence that Mile High Green Cross made any payments to FusionPharm or the Sears Controlled Entities in 2013.

59. Based on the statements from CW-1, FusionPharm did not sell more than 7 PharmPods between January – October 2013. Yet FusionPharm continued to make representations to the contrary to the public. For example, on February 6, 2013 the company issued a press release claiming it “completed the sale of 8 PharmPod High Intensity containers under its licensing agreement with Meadpoint Venture Partners.” CW-1 said there were multiple problems with this: (a) since Dittman and Sears operated the Sears Controlled Entities and FusionPharm as one entity, this release was basically claiming a sale to itself; and (b) as noted above, CW-1 could recall, at most, 7 PharmPod sales *total* in 2013.

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<sup>8</sup> As noted in ¶18, CW-1 originally complained that FusionPharm had not made any sales during his time with the company. CW-1 has revised that statement to match the sales highlighted in ¶58.

60. Additionally, Sears's company, Meadpoint directly participated in the misrepresentations. For example, on July 29, 2013, Meadpoint issued a press release that appears on the FusionPharm web page announcing that it "reached the \$200,000 mark for sales in the past 30 days, including its first ever sale into the California medical cannabis marketplace." The press release also claimed that Meadpoint was "optimistic that we will reach our annual sales goal of 100 PharmPods by the end of the year." CW-1 said that delivering 100 PharmPods to customers in 2013 was "ridiculous" and not even close to actual figures. Moreover, CW-1 said that the \$200,000 figure may have been an annual amount, but certainly not in the last 30 days. Furthermore, based on affiant's review of the Bank Records, there is no evidence of \$200,000 coming in to FusionPharm's or Meadpoint's bank accounts between June 2013 and July 2013 from companies that are not affiliated with Sears or Dittman.

61. For the second possible revenue stream, FusionPharm grew cannabis and sold it to Groundswell, a licensed marijuana retailer on record with the Medical Marijuana Enforcement Division in Colorado, in the latter part of 2013.

62. Based on your affiant's review of the Bank Records, SEC's Analyses of the same, and CW-1's statements, there is little evidence that Groundswell made up the remainder of the claimed 2013 revenue. In fact, there is only one check or incoming wire from Groundswell in 2013: a \$50,000 check to FusionPharm on August 15, 2013.

63. While your affiant observed some significant transactions in the fourth quarter of 2013, Dittman told UC-1 a portion of the December orders were not recognized as revenue because they were not yet delivered. FusionPharm's 2013

Annual Report confirms this statement. Importantly, as noted above in ¶56, FusionPharm made, at most, \$44,672 in revenue in the last quarter of 2013.

64. For the first three quarters of 2013 when CW-1 worked at FusionPharm, based on your affiant's review of the Bank Records and SEC's Analyses regarding the same, as well as statements from CW-1, there is no evidence that FusionPharm made \$549,725 or sold 34 PharmPods.

### **ADDRESSING CONCERNS OF CASH PAYMENTS**

65. Dittman told UC-1 on May 1, 2014 that one of FusionPharm's vendors made cash payments between 2011 and 2013. In an effort to ensure that cash payments were not dismissed as a potential legitimate revenue source, the SEC conducted an analysis of FusionPharm's bank accounts and the accounts in the name of the Sears Controlled Entities to determine if a conservative analysis of the cash transactions could provide sufficient revenue to match the numbers claimed by FusionPharm in its financial disclosures.

66. Even after including all cash deposits that could not be directly traced back to a corresponding withdrawal from an affiliated Sears Controlled Entity account, based on a review of the Bank Records and SEC Analyses regarding the same, your affiant was unable to get anywhere near the revenues that FusionPharm included in the Financial Statements for 2011, 2012 or 2013.

- a. 2011: Your affiant found less than \$25,000 worth of incoming deposits and wires that could be considered from unaffiliated third parties.
- b. 2012: Your affiant uncovered approximately \$200,000 in incoming wires and deposits. Of that amount, approximately \$128,000 came from

VertiFresh (discussed above in ¶¶ 52-54), approximately \$35,000 in cash and approximately \$47,000 from Bayside, MeadPoint and a missing check with the notation “container deposit.”

c. 2013: Your affiant uncovered approximately \$425,000 in incoming wires and deposits in 2013. More than 50% of this amount was cash deposits, with many of these traceable back to Meadpoint. The majority of the remaining checks were from Sears Controlled Entities.

67. Accordingly, even if it were to be assumed that every cash deposit which could not be traced back to a corresponding withdrawal from an affiliated Sears Controlled Entity account was the byproduct of a legitimate, arms-length transaction, the maximum possible revenue under my conservative approach was still more than \$100,000 short every year of the revenue claimed by FusionPharm.

### **OTHER MISREPRESENTATIONS TO INVESTORS**

68. As noted in ¶¶19-20 above, Sears handled numerous responsibilities at FusionPharm that are often reserved for a company officer. Yet, based on statements from CW-1 and CW-2, Sears refused to put his name on any FusionPharm documents or accounts. Rather, Sears attempted to get FusionPharm employees (including CW-1 and CW-2) to open up bank accounts and businesses in their names.

69. Based on affiant’s review of the FINRA Records, Dittman authored FusionPharm’s press releases and reviewed its financial statements. Yet, based on affiant’s review of the same, Dittman never made any disclosures about Sears’s involvement with FusionPharm or the connection between Sears, the Sears Controlled Entities and FusionPharm.