

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

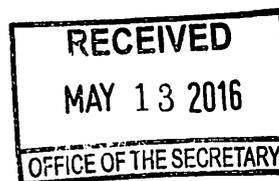
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ADMINISTRATIVE PROCEEDING

File No. 3-17180

In the Matter of

ELLIOT R. BERMAN, CPA and  
BERMAN & COMPANY, P.A.



**ANSWER OF RESPONDENTS ELLIOT R. BERMAN, CPA and  
BERMAN & COMPANY, P.A.**

Pursuant to Rule 220 of the Securities and Exchange Commission's Rules of Practice, Respondents ELLIOT R. BERMAN, CPA and BERMAN & COMPANY, P.A. (the "Respondents"), by undersigned counsel, answer the allegations set forth in the Securities and Exchange Commission's (the "Commission") Order Instituting Public Administrative And Cease-And Desist Proceedings Pursuant To Sections 4c And 21c Of The Securities Exchange Act Of 1934 And Rule 102(e) Of The Commission's Rules Of Practice (the "OIP") dated March 25, 2016, as follows with respect to each numbered paragraph in the OIP:

**A. Respondents**

1. Elliot R. Berman, a resident of Boca Raton, Florida, has been a CPA licensed in Florida since 2005. Berman is the sole owner of Berman & Co., which he founded in 2006. In October 2014, Berman settled, without admitting or denying, to a Cease-and-Desist and 102(e) proceeding in which the Commission found that he willfully violated Section 10A(j) of the Exchange Act, willfully aided and abetted violations of Rule 2-02 of Regulation S-X, and caused a violation of Section 13(a) of the Exchange Act and Rule 13a-1 thereunder, and engaged in improper professional conduct. Berman was thereafter denied the privilege of appearing or practicing before the Commission as an accountant, with the right to apply for reinstatement after one year. Exchange Act Rel. No. 73427 (Oct. 24, 2014). Berman has not been reinstated by the Commission.

**RESPONSE:** Respondents admit the allegations contained in Paragraph 1. Berman has not sought reinstatement given the high unlikelihood that the Commission would reinstate him with this current matter pending. By the time this current matter is resolved, Berman will have been barred from practicing for at least an additional year beyond the one year that was agreed to in the October 2014 settlement.

2. Berman & Company, P.A. is an accounting and auditing firm based in Boca Raton, Florida. Berman & Co. has been registered with the Public Company Accounting Oversight Board (“PCAOB”) since 2006. In October 2014, Berman & Co. settled, without admitting or denying, to a Cease-and-Desist and 102(e) proceeding in which the Commission found that the firm willfully violated Section 10A(j) of the Exchange Act, Rule 2-02 of Regulation S-X, and caused a violation of Section 13(a) of the Exchange Act and Rule 13a-1 thereunder, and engaged in improper professional conduct. Exchange Act Rel. No. 73427 (Oct. 24, 2014).

**RESPONSE: Respondents admit the allegations contained in Paragraph 2.**

**B. Related Issuer**

3. MusclePharm Corporation (“MSLP”) is a Nevada corporation with its principal place of business in Denver, Colorado. Since 2010, MSLP has had a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MSLP engaged Berman & Co. as its auditor in January 2011 and dismissed Berman & Co. in September 2012.

**RESPONSE: Respondents admit the allegations contained in Paragraph 3.**

**C. Summary**

4. Berman & Co. and Berman engaged in improper professional conduct and failed to exercise due professional care and professional skepticism including a critical assessment of the audit evidence as shown by repeated deficiencies during the audits of the 2010 and 2011 financial statements of MSLP. Specifically, Respondents (1) audited MSLP’s 2010 and 2011 financial statements and also issued audit reports knowing Berman & Co. was not independent; (2) ignored audit evidence demonstrating that 3 MSLP’s largest customer in 2011 was a related party requiring disclosure in conformity with Generally Accepted Accounting Principles (“GAAP”) and inappropriately relied on management representations; (3) failed to recognize MSLP improperly accounted for sales incentives, advertising, and promotions (“Sales Incentives”), and inappropriately relied on management representations as sufficient audit evidence regarding the accounting of those Sales Incentives; and (4) failed to recognize that MSLP did not disclose its sponsorship commitments and international sales as required by GAAP.

**RESPONSE: Respondents deny the allegations contained in Paragraph 4.**

**D. Facts Related to Respondents’ Audits of MSLP’s Financial Statements**

5. Berman & Co. issued audit reports containing unqualified opinions on MSLP’s financial statements for fiscal years ended December 31, 2010 and December 31, 2011 (the “MSLP Audits”).

**RESPONSE: Respondents admit the allegations contained in Paragraph 5.**

6. Berman served as the engagement partner on the MSLP Audits. Berman, as the engagement partner, was responsible for the audit engagement team's compliance with professional standards and adequate documentation in the work papers of the findings, analysis, and information on which they relied in forming the audit opinion. Berman also had final authority over the planning, execution, and supervision of the audits and had full responsibility for Berman & Co.'s audit reports. Berman approved the issuance of audit reports containing unqualified opinions.

**RESPONSE: Respondents admit the allegations contained in Paragraph 6.**

7. In each of the MSLP Audits, Berman & Co. represented that the audits were conducted by an independent auditor in accordance with PCAOB standards. Berman signed the audit reports for the MSLP Audits on behalf of Berman & Co. MSLP included these audit reports in its Commission filings.

**RESPONSE: Respondents admit the allegations contained in Paragraph 7.**

8. Berman & Co., however, was not independent and Berman and Berman & Co. failed to conduct the MSLP audits in accordance with PCAOB standards, as described below.

**RESPONSE: Respondents deny the allegations contained in Paragraph 8.**

Independence

9. Berman & Co. failed to comply with Rule 2-01(b) of Regulation S-X, PCAOB Rule 3520, and PCAOB standards (see AU §§ 220, 230 and AS 9), and was not independent from MSLP during the MSLP Audits because of indemnification provisions Berman included in Berman & Co.'s engagement letters. Despite not being independent, Berman & Co. issued audit reports that represented that Berman & Co. was independent. As a result, Berman & Co. willfully violated, and Berman willfully aided and abetted and caused violations of, Rule 2-02(b)(1) of Regulation S-X.

**RESPONSE: Respondents deny the allegations contained in Paragraph 9.**

10. Berman claims to have researched the use of indemnification provisions in engagement letters with SEC registrants around the time he founded Berman & Co. in 2006, including reviewing PCAOB Rule 3520, PCAOB Rule 3500T, and Rule 2-01 of Regulation S-X.

(a) PCAOB Rule 3520, Auditor Independence, provides that a "registered public accounting firm and its associated persons must be independent of the firm's audit client throughout the audit and professional engagement period." Note 1 to PCAOB Rule 3520 states that "a registered public accounting firm or associated person's independence

obligation with respect to an audit client encompasses not only an obligation to satisfy the independence criteria applicable to the engagement set out in the rules and standards of the PCAOB, but also an obligation to satisfy all other independence criteria applicable to the engagement, including the independence criteria set out in the rules and regulations of the Commission under the federal securities laws.”

(Emphasis added)

**RESPONSE: Respondents allege that the contents of the PCAOB Standards speak for themselves and that no further response is required. Respondents allege that the Commission’s statement of the PCAOB Standards in the paragraph is incomplete.**

(b) PCAOB Rule 3500T(b), Interim Ethics and Independence Standards, provides in part that “in connection with the preparation or issuance of any audit report, a registered public accounting firm, and its associated persons, shall comply with independence standards (1) as described in the AICPA’s Code of Professional Conduct Rule 101, and interpretations and rulings thereunder, as in existence on April 16, 2003 (AICPA Professional Standards, ET §§ 101 and 191 (AICPA 2002)), to the extent not superseded or amended by the Board.” The Note to this rule provides: “The Board’s Interim Independence Standards do not supersede the Commission’s auditor independence rules. See Rule 2-01 of Reg. S-X, 17 C.F.R. § 210.2-01. Therefore, to the extent that a provision of the Commission’s rule is more restrictive – or less restrictive – than the Board’s Interim Independence Standards, a registered public accounting firm must comply with the more restrictive rule.” (Emphasis added)

**RESPONSE: Respondents allege that the contents of the PCAOB Standards speak for themselves and that no further response is required. Respondents allege that the Commission’s statement of the PCAOB Standards in the paragraph is incomplete.**

(c) Rule 2-01(b) of Regulation S-X provides that the “Commission will not recognize an accountant as independent, with respect to an audit client, if the accountant is not, or a reasonable investor with knowledge of all relevant facts and circumstances would conclude that the accountant is not, capable of exercising objective and impartial judgment on all issues encompassed within the accountant’s engagement. In determining whether an accountant is independent, the Commission will consider all relevant circumstances, including all relationships between the accountant and the audit client, and not just those relating to reports filed with the Commission.” 17 C.F.R. § 210.2-01(b). Preliminary Note 2 to the rule provides in part: “The rule does not purport to, and the Commission could not, consider all circumstances that raise independence concerns, and these are subject to the general standards in Rule 2-01(b). Preliminary Note 3 to the rule provides: “registrants and accountants are encouraged to consult with the Commission’s Office of the Chief Accountant before entering into relationships, including relationships involving the provision of services, that are not explicitly described in the rule.” (Emphasis added)

**RESPONSE: Respondents allege that the contents of Rule 2-01(b) of Regulations S-X speak for themselves and that no further response is required. Respondents**

**allege that the Commission's statement of Rule 2-01(b) of Regulations S-X in the paragraph is incomplete.**

11. The Commission has published its interpretation and guidance on auditor indemnification provisions in Codification of Financial Reporting Policies Section 602.02f.i ("Indemnification by Client") (the "Codification"). The Codification provides in part that when "an accountant and his client, directly or through an affiliate, have entered into an agreement of indemnity which seeks to assure the accountant immunity from liability for his own negligent acts, whether of omission or commission, one of the 5 major stimuli to objective and unbiased consideration of the problems encountered in a particular engagement is removed or greatly weakened."

**RESPONSE: Respondents allege that the contents of the Codification of Financial Reporting Policies Section speak for themselves and that no further response is required. Respondents allege that the Commission's statement of the Codification of Financial Reporting Policies Section in the paragraph is incomplete.**

12. Berman also claims to have reviewed the Office of the Chief Accountant: Application of the Commission's Rules on Auditor Independence, Frequently Asked Questions, Other Matters, Question 4, dated December 13, 2004 (the "OCA FAQ"). The OCA FAQ notes the "Commission's long standing view" that "when an accountant enters into an indemnity agreement with the registrant, his or her independence would come into question." The OCA FAQ provides that when "an accountant and his or her client, directly or through an affiliate, enter into an agreement of indemnity which seeks to provide the accountant immunity from liability for his or her own negligent acts, whether of omission or commission, the accountant is not independent." The OCA FAQ additionally states that "including in engagement letters a clause that a registrant would release, indemnify or hold harmless from any liability and costs resulting from knowing misrepresentations by management would also impair the firm's independence."

**RESPONSE: Respondents allege that the contents of the OCA FAQ speak for themselves and that no further response is required. However, as specifically noted, the answers to these frequently asked questions represent the views of the Office of the Chief Accountant. They are not rules, regulations or statements of the Securities and Exchange Commission. Further, the Commission has neither approved nor disapproved them.**

13. The PCAOB Office of the Chief Auditor released the PCAOB Standing Advisory Group briefing paper, titled "Emerging Issue – The Effects on Independence of Indemnification, Limitation of Liability, and Other Litigation Related Clauses in Audit Engagement Letters," dated February 9, 2006 [http://pcaobus.org/News/Events/Documents/02092006\\_SAGMeeting/Indemnification.pdf](http://pcaobus.org/News/Events/Documents/02092006_SAGMeeting/Indemnification.pdf) The briefing paper was developed "by the staff of the Office of the Chief Auditor to foster discussion among members of the Standing Advisory Group" and is not a statement of the Board. The briefing paper discusses the Codification and OCA FAQs. The briefing paper also discusses Ethics Ruling Number 94 under Rule 101 of the

American Institute of Certified Public Accountants' ("AICPA") Code of Professional Conduct (included in the PCAOB's interim independence standards), which provides that the auditor's independence would not be impaired for indemnification language. However, the briefing paper notes that auditors must "...comply with the SEC's auditor independence requirements as well as those of the Board in an audit of a public company" and concludes that "[b]ecause SEC independence requirements prohibit indemnification agreements in audit engagement letters, Ethics Ruling Number 94 has no practical effect with respect to audits of public companies."

**RESPONSE: Respondents allege that the contents of this non-authoritative report issued by the PCAOB's Office of the Chief Auditor speak for themselves and that no further response is required. Respondents allege that the characterization of the Commission's rules in this non-authoritative report is incomplete.**

14. The PCAOB has also highlighted that indemnification provisions will impair an audit firm's independence under Commission rules. For example, in 2007, the PCAOB issued a report on its inspection findings noting that indemnification provisions violate the SEC independence rules. See pages 16-18 of the Report on the PCAOB's 2004, 2005, and 2006 Inspections of Domestic Triennially Inspected Firms, PCAOB Rel. No. 2007-2010 (Oct. 22, 2007) [http://pcaobus.org/Inspections/Documents/2007\\_10-22\\_4010\\_Report.pdf](http://pcaobus.org/Inspections/Documents/2007_10-22_4010_Report.pdf).

**RESPONSE: Respondents allege that the contents of this PCAOB non-authoritative report speak for themselves and that no further response is required. Respondents allege that the characterization of the Commission's rules in this non-authoritative report is incomplete.**

15. Other agencies have also issued guidance recognizing the SEC's position that auditors that use indemnification provisions are not independent. See Interagency Advisory on the Unsafe and Unsound Use of Limitation of Liability Provisions in External Audit Engagement Letters, <http://www.federalreserve.gov/boarddocs/srletters/2006/sr0604a1.pdf> (2006).

**RESPONSE: Respondents allege that the contents of the other agencies non-authoritative guidance speak for themselves and that no further response is required. Respondents allege that the Commission's reference to other agencies' non-authoritative guidance in the paragraph is incomplete.**

16. After his claimed research, and despite his claims that he specifically read the PCAOB and Commission rules on independence and the Commission and Commission staff's specific guidance that indemnification provisions impaired an auditor's independence, Berman drafted Berman & Co. engagement letters for use with SEC registrant audit clients that included indemnification provisions.

**RESPONSE: Respondents admit the allegations contained in Paragraph 16, however, the included indemnification provisions are not violations of any rules or**

**regulations.**

17. MSLP signed Berman & Co. engagement letters, dated January 5, 2011 and January 1, 2012, relating to the MSLP Audits (the “MSLP Engagement Letters”). Berman drafted the MSLP Engagement Letters and signed the MSLP Engagement Letters on behalf of Berman & Co.

**RESPONSE: Respondents admit the allegations contained in Paragraph 17.**

18. The MSLP Engagement Letters contained the following indemnification provisions:

(a) “The Company agrees to release, indemnify, and hold Berman & Company, P.A. (its partners, affiliates, heirs, executors, personal representatives, successors, and assigns) harmless from any liability and costs resulting from known misrepresentations by management.”

**RESPONSE: Respondents allege that the statements in the MSLP Engagement letters speak for themselves and are not violations of any rules or regulations.**

(b) “The Company agrees to release, indemnify, and hold Berman & Company, P.A. (its partners, affiliates, heirs, executors, personal representatives, successors, and assigns) harmless from any liability and costs resulting from fraud caused by or participated in by the management of the Company.”

**RESPONSE: Respondents allege that the statements in the MSLP Engagement letters speak for themselves and are not violations of any rules or regulations.**

(c) “Reasonable costs and time spent in legal matters or proceedings arising from our engagement, such as subpoenas, testimony or consultation involving private litigation, arbitration or government regulatory inquiries at your request or by subpoena will be billed to you separately and you agree to pay the same.”

**RESPONSE: Respondents allege that the statements in the MSLP Engagement letters speak for themselves and are not violations of any rules or regulations.**

19. Berman & Co. completed an “Engagement Acceptance Form” for the 2010 MSLP Audit (the “2010 Form”). Berman reviewed and approved this form. Berman & Co. completed an “Engagement Acceptance and Continuance Form” for the 2011 MSLP Audit (the “2011 Form”). Berman reviewed and approved this form.

**RESPONSE: Respondents allege that the statements in the 2010 and 2011 Forms speak for themselves.**

20. Item 11 of the 2010 Form and Item 7 of the 2011 Form provided that the “SEC expects accountants to comply with the independence requirements established by

the PCAOB, Independence Standards Board, and the accounting profession (the ICPA), as well as the requirements promulgated by the Commission and the staff.” (Emphasis added) As noted above, Berman specifically read the guidance by the Commission and the staff that provided indemnification provisions impaired an auditor’s independence.

**RESPONSE: Respondents allege that the statements in the 2010 and 2011 Forms speak for themselves. Except to the extent alleged, Respondents deny the allegations contained in Paragraph 20.**

21. Item 11.h of the 2010 Form and item 7.h of the 2011 Form specifically questioned “Are there any relationships with the client or conflicts of interests that might impair independence? ... vii. Indemnification?” Despite having included indemnification provisions in the MSLP Engagement Letters, Respondents incorrectly responded “no” to this question both years.

**RESPONSE: Respondents allege that the statements in the 2010 and 2011 Forms speak for themselves. Except to the extent alleged, Respondents deny the allegations contained in Paragraph 21.**

22. Aside from the 2010 Form and 2011 Form, there is no evidence in the work papers that Respondents considered Berman & Co.’s independence in relation to the indemnification provisions in the MSLP Engagement Letters for the MSLP Audits.

**RESPONSE: Respondents deny the allegations contained in Paragraph 22.**

23. Berman & Co. invoked the indemnification provisions in the MSLP Engagement Letters and required MSLP to pay approximately \$272,000 of costs Berman & Co. incurred related to an SEC investigation. In fact, Berman provided testimony to the SEC on April 2, 2014 and April 3, 2014, where he was directly questioned about the sufficiency of the MSLP Audits. On August 7, 2014, Berman sent an invoice to MSLP seeking reimbursement for time spent preparing for his testimony, and the testimony itself.

**RESPONSE: Respondents admit that testimony occurred on April 2, 2014 and April 3, 2014. Respondents admit to sending an invoice on August 7, 2014. Respondents deny the remaining allegations contained in Paragraph 23.**

#### Related Party Transactions

24. From 2010 through 2012, one customer served as MSLP’s largest customer for each year based on the percentage of sales (“MSLP’s Largest Customer”).

**RESPONSE: Respondents admit the allegations contained in Paragraph 24.**

25. In May 2011, MSLP hired a new chief marketing officer (“CMO”). The CMO was a former executive and co-founder of MSLP’s Largest Customer. The CMO’s

brother remained the CEO of MSLP's Largest Customer and a greater than 10% indirect owner of the major customer. In 2011, GAAP required MSLP to disclose transactions with MSLP's Largest Customer as related party transactions in its financial statements. (See ASC 850)

**RESPONSE: Respondents admit in May 2011, MSLP hired a CMO, who was a former executive and co-founder of MSLP's largest customer. Respondents deny the remaining allegations contacting in Paragraph 25.**

26. Respondents informed MSLP that transactions with MSLP's Largest Customer were required to be disclosed as related party transactions in its financial statements. Berman testified that MSLP's Largest Customer was a related party due to the family relationship. Berman sent an email to MSLP in which he stated: "I have spoken to the SEC, AICPA, concurring partner, and 2 other accountants. Everyone has concluded this is a disclosure." The work papers do not include this information.

**RESPONSE: Respondents admit that the email was sent to MSLP. However, with a very narrow focus and prior to understanding all facts and circumstances, which included subsequent documentation from management, as well as additional emails, teleconferences and related discussions with relevant parties, not to mention audit testing in other parts of the engagement offering additional evidence refuting the possibility of favorable terms/treatment; taken together and after the initial email, as referenced above in the Staff's allegations, the Respondents' concluded that all relevant documentation was properly placed into the work papers and properly supported the conclusion that no disclosure was required.**

27. MSLP disagreed with Respondents that transactions with MSLP's Largest Customer were required to be disclosed as related party transactions in its financial statements. Respondents agreed to accept MSLP's position that disclosure was not required if MSLP provided Respondents with a memo supporting its reasoning and a representation in the management representation letter. Berman emailed MSLP that the memo had to be "top notch" because "this is a huge deal for me to let this go."

**RESPONSE: Respondents admit MSLP disagreed with the potential related party disclosure. Respondents deny that the acceptance of the memo from MSLP supporting its reasoning along with a management representation letter were the only reasons for agreeing with MSLP not to disclose. All relevant GAAP and a related analysis provided by MSLP were reviewed and assessed for reasonableness of disclosure. Respondents admit the language in the email, however, these phrases have been taken out of context in an attempt to support the Staff's allegations. There are additional communications and witness testimony that address the sufficiency of disclosure as well as the nature of the relationship of the brothers, as evaluated under the appropriate accounting rules and regulations.**

28. A few days later, MSLP provided Respondents with a memo purporting to support its position that MSLP's Largest Customer was not a related party requiring

disclosure and a management representation letter. The MSLP memo was prepared by a non-accountant executive and signed by the CFO, who Respondents had previously determined lacked accounting experience, as well as other MSLP executives. No other accountant signed the MSLP memo.

**RESPONSE: Respondents allege that the statements in the MSLP Memo speak for themselves. Except to the extent alleged, Respondents deny the allegations contained in Paragraph 28. The preparation of the memo was authorized and executed by four (4) corporate officers: The CEO, CFO, COO and CMO. It was believed by Respondents that all officers had the relevant experience and knowledge to address and identify key accounting disclosures pertaining to related parties and accurately portray and verify the nature of any such relationships.**

29. The MSLP memo did not accurately evaluate the necessity of disclosure in accordance with GAAP. The memo incorrectly focused on disclosure only being required if influence was actually present (rather than whether a family member might control or influence or if there is the opportunity to significantly influence) and failed to adequately address the guidance found in ASC 850 regarding immediate family relationships.

**RESPONSE: Respondents allege that the statements in the MSLP Memo speak for themselves. Except to the extent alleged, Respondents deny the allegations contained in Paragraph 29.**

30. The memo also contained facts that Respondents knew or should have known to be red flags and/or that the information in the memo was not accurate. For example, MSLP management represented in the memo that the CMO “refrained from direct involvement” with MSLP’s Largest Customer. Respondents, however, knew or should have known this statement was false because the CMO position was to oversee all sales and marketing activities and the CMO’s bonus was dependent upon MSLP’s revenue growth, which was significantly affected by sales to MSLP’s Largest Customer. There is no evidence, however, that Respondents attempted to corroborate this representation or any other representation in the memo.

**RESPONSE: Respondents allege that the statements in the MSLP Memo speak for themselves. Except to the extent alleged, Respondents deny the allegations contained in Paragraph 30.**

31. The memo also concluded that MSLP “is entitled to the presumption that these are arm’s-length transactions and that the ability or opportunity to influence does not exist.” ASC 850, however, specifically provides that transactions cannot be presumed to be carried out on an arm’s-length basis. ASC 850-50-5 provides that “[T]ransactions involving related parties cannot be presumed to be carried out on an arm’s length basis, as the requisite conditions of competitive, free-market dealings may not exist. Representations about transactions with related parties, if made, shall not imply that the related party transactions were consummated on terms equivalent to those that prevail in arm’s length transactions unless such representations can be substantiated.”

**RESPONSE: Respondents allege that the statements in the MSLP Memo speak for themselves. Except to the extent alleged, Respondents deny the allegations contained in Paragraph 31.**

32. The work papers do not support that Respondents relied on any evidence for the related party disclosure determination aside from the MSLP memo and management representation letter.

**RESPONSE: Respondents deny the allegations contained in Paragraph 32.**

33. MSLP failed to make the required GAAP disclosure of related party transactions with MSLP's Largest Customer in its 2011 financial statements. Berman & Co. expressed an unqualified opinion despite this material omission of which it was aware.

**RESPONSE: Respondents deny the allegations contained in Paragraph 33.**

#### MSLP Sales Incentives

34. Under GAAP, sales incentives, advertising, and promotions (collectively "Sales Incentives") must be accounted for as a reduction of revenue, absent evidence of a specific identifiable benefit in which case they can be recorded as an expense. (See ASC 605-50-45-2) Without evidence of an identifiable benefit, MSLP improperly recorded Sales Incentives as an expense instead of a reduction of revenue, resulting in it overstating revenues in its financial statements by \$845,000 or 26% in 2010 and \$3.6 million or 21% in 2011.

**RESPONSE: Respondents allege that the GAAP Sales Incentives Rules speak for themselves and no further response is required. Except to the extent alleged, Respondents deny the allegations contained in Paragraph 34.**

35. Berman & Co. and Berman identified revenue recognition as significant and a fraud risk area for the MSLP Audits.

**RESPONSE: Respondents admit the allegations contained in Paragraph 35 in compliance with PCAOB Auditing Standards.**

36. During the planning of the 2010 audit and throughout the MSLP Audits, Respondents also identified weak internal controls at MSLP, due in large part to the CFO. Berman & Co.'s 2010 audit planning memo provided that the "CFO lack[ed] requisite technical accounting expertise." Indeed, after the 2010 audit, Berman & Co. specifically warned MSLP that "the CFO is not trained in areas that support SEC financial reporting" and "[t]he potential shortfall in this knowledge base is an internal control matter that should be rectified immediately as it directly affects financial reporting."

**RESPONSE: Respondents allege that the contents of the 2010 audit speak for themselves and that no further response is required.**

37. Despite designating revenue recognition as a fraud risk and determining the CFO lacked the requisite accounting experience, Respondents failed to plan or perform audit procedures to obtain sufficient audit evidence supporting MSLP's accounting for Sales Incentives. Respondents' audit work for the MSLP Audits consisted of reliance upon a memo that MSLP's CFO signed and provided to Berman & Co. in 2010, which stated that advertising credits are issued to customers as a way to increase business and the "credits are typically booked as advertising expenses." The memo did not reference ASC-605-50. Berman & Co.'s 2011 work papers did not contain a similar memo with a representation from MSLP (such as was provided in connection with the 2010 audit mentioned above). Berman also testified that he relied on oral representations that the Sales Incentives were accounted for correctly from the MSLP CFO, however, this is not documented in the work papers. Respondents could not reasonably rely as sufficient audit evidence on either the memo or oral statements of the CFO that they determined was not qualified or trained in areas of SEC financial reporting.

**RESPONSE: Respondents admit that revenue recognition was a fraud risk in compliance with PCAOB Auditing Standards. Respondents deny the remaining allegations in Paragraph 37.**

38. Aside from this single memo identified in paragraph 37, Berman & Co.'s 2010 and 2011 work papers are devoid of any audit procedures designed to test if MSLP properly accounted for Sales Incentives. There were no steps in Berman & Co.'s audit program or otherwise performed by Berman & Co. that evaluated if advertising and promotional credits met the requirements of ASC 605-50 to be expensed. There is not a single reference to ASC 605-50 in Berman & Co.'s 2010 or 2011 audit work papers.

**RESPONSE: Respondents deny the allegations in Paragraph 38.**

39. The lack of documentation in the work papers should have caused Berman to question whether Berman & Co. tested MSLP's Sales Incentive accounting. The staff auditor who performed some of the test work on the 2011 MSLP audit had no prior experience testing Sales Incentives under ASC 605-50 and did not recall receiving any instruction from anyone at Berman & Co. on how to test Sales Incentives.

**RESPONSE: Respondents deny the allegations in the first sentence of Paragraph 39. Respondents admit the remaining allegations contained in Paragraph 39, however just because the staff auditor does not recall receiving the instruction does not mean it did not happen. Testimony from other members of the audit indicate that such instruction was provided.**

40. MSLP filed an amended Form 10-K on July 2, 2012, for the year ended December 31, 2011, restating its 2010 and 2011 financial statements because Sales Incentives were not accounted for properly.

**RESPONSE: Respondents admit the allegations in Paragraph 40.**

41. While Respondents did not perform any work to evaluate if Sales Incentives met the requirements of ASC 605-50 to be expensed, the Respondents' 2010 and 2011 work papers showed that Respondents had reviewed approximately 50 Sales Incentives during the MSLP Audits for other objectives (such as the existence of the sales, the accuracy of the sales amount, and that the sales were recorded in the proper period). Respondents failed to identify that MSLP's accounting for Sales Incentives was incorrect for 45 of the 50 items reviewed. These 45 Sales Incentives were ultimately restated in MSLP's 2012 restatement.

**RESPONSE: Respondents deny the allegations in Paragraph 41.**

**Sponsorship Commitments**

42. In 2011, MSLP had three continuing sponsorship commitments, which required it to make future payments in 2012 and 2013 totaling approximately \$5.3 million (\$2.8 million in 2012 and \$2.5 million in 2013). Contrary to GAAP, MSLP failed to disclose these commitments in its 2011 financial statements. (See ASC 440)

**RESPONSE: Respondents deny the allegations in Paragraph 42.**

43. During the 2011 audit of MSLP, Respondents failed to recognize and properly plan the audit to consider whether MSLP was required to disclose its sponsorship commitments. Berman & Co.'s disclosure checklist, which Berman reviewed and approved and which was used during the MSLP audit, was marked "N/A" for commitments. The audit work papers do not contain any procedures evaluating whether MSLP's sponsorship commitments should or should not be disclosed. Moreover, if any audit work was performed relating to sponsorship commitments, Respondents failed to adequately document that they performed a procedure, obtained evidence, or reached an appropriate conclusion.

**RESPONSE: Respondents deny the allegations in Paragraph 43.**

**International Sales**

44. ASC 280-10-50-41 requires the disclosure of all revenues from external customers attributed to all foreign countries in total from which the public entity derives revenue if material.

**RESPONSE: Respondents allege that the contents of ASC 280-10-50-41 speak for themselves and that no further response is required. Respondents allege that the Commission's statement of the ASC 280-10-50-41 in the paragraph is incomplete.**

45. MSLP failed to disclose in its 2011 financial statements that a material

amount, approximately 23%, of its sales were to customers located outside of the United States (“International Sales”) as required by GAAP. (See ASC 280-10-50-41)

**RESPONSE: Respondents allege that the statements in the MSLP 2011 financial statements speak for themselves.**

46. Berman was aware that MSLP had International Sales. Berman, however, failed to properly plan the 2011 audit to obtain sufficient audit evidence regarding the disclosure of International Sales. Berman & Co.’s 2011 work papers did not contain evidence that Respondents considered whether MSLP was required to disclose its International Sales in conformity with GAAP. Berman & Co.’s disclosure checklist is marked “item not present” for International Sales. No documentation relating to why disclosure of International Sales was not required is in the work papers.

**RESPONSE: Respondents deny the allegations contained in Paragraph 46.**

47. Berman knew MSLP was trying to grow internationally, but because MSLP’s CFO and CEO told him International Sales were nominal, Berman & Co. did not require testing. However, no documentation relating to discussions with management relating to International Sales or that International Sales were “nominal” is in the work papers.

**RESPONSE: Respondents deny the allegations contained in Paragraph 47.**

#### **E. Respondents’ Improper Professional Conduct**

48. Rule 102(e)(1)(ii) provides, in pertinent part, that “[t]he Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.”

**RESPONSE: Respondents allege that the contents of Rule 102(e)(1) speak for themselves and that no further response is required.**

49. Rule 102(e)(1)(iv)(A) defines “improper professional conduct” under Rule 102(e)(1)(ii) to mean “intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards.” Rule 102(e)(1)(iv)(B) defines “improper professional conduct” under Rule 102(e)(1)(ii) to include the following two types of negligent conduct (1) a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted; or (2) repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards that indicate a lack of competence to practice before the Commission.

**RESPONSE: Respondents allege that the contents of Rule 102(e)(1) speak for themselves and that no further response is required.**

50. Respondents engaged in improper professional conduct, as defined in Rule 102(e)(1)(iv)(A) and Rule 102(e)(1)(iv)(B) as explained herein.

**RESPONSE: Respondents deny the allegations contained in Paragraph 50.**

51. Rule 102(e)(1)(iii) provides, in pertinent part, that “[t]he Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.”

**RESPONSE: Respondents allege that the contents of Rule 102(e)(1) speak for themselves and that no further response is required.**

52. Respondents willfully violated and willfully aided and abetted violations of the federal securities laws as explained herein.

**RESPONSE: Respondents deny the allegations contained in Paragraph 52.**

**Berman & Co. was Not Independent for the MSLP Audits**

53. Rule 2-01(b) of Regulation S-X provides in part that “the Commission will not recognize an accountant as independent, with respect to an audit client, if the accountant is not, . . . capable of exercising objective and impartial judgment on all issues encompassed within the accountant’s engagement.” As a result of the indemnification language in the MSLP Engagement Letters, Berman & Co. was not independent pursuant to Rule 2-01(b) of Regulation S-X. By submitting audit reports to MSLP that were filed with the Commission that provided Berman & Co. was independent and the audits were conducted in accordance with PCAOB standards, Berman & Co. violated Rule 2-02(b)(1) of Regulation S-X.

**RESPONSE: Respondents deny the allegations in Paragraph 53.**

54. The Commission in the Codification and the Commission staff in the OCA FAQ have provided guidance relating to Rule 2-01(b) of Regulation S-X that indemnification provisions in engagement letters impair an auditor’s independence.

**RESPONSE: Respondents allege that the contents of OCA FAQ speak for themselves and that no further response is required. Respondents allege that the characterization of the Commission’s independence rules is incomplete.**

55. Both PCAOB Rule 3520 and Rule 3500T have notes which state the Commission independence rules and regulations must be followed. The note to PCAOB Rule 3520 provides “a registered public accounting firm or associated person’s independence obligation with respect to an audit client encompasses not only an

obligation to satisfy the independence criteria applicable to the engagement set out in the rules and standards of the PCAOB, but also an obligation to satisfy all other independence criteria applicable to the engagement, including the independence criteria set out in the rules and regulations of the Commission under the federal securities laws.” The note to PCAOB Rule 3500T provides “The Board’s Interim Independence Standards do not supersede the Commission’s auditor independence rules. See Rule 2-01 of Reg. SX, 17 C.F.R. § 210.2-01. Therefore, to the extent that a provision of the Commission’s rule is more restrictive – or less restrictive – than the Board’s Interim Independence Standards, a registered public accounting firm must comply with the more restrictive rule.”

**RESPONSE: Respondents allege that the contents of the PCAOB Standards speak for themselves and that no further response is required. Respondents allege that the Commission’s statement of PCAOB Standards in the paragraph is incomplete.**

56. The PCAOB has also provided public guidance that indemnification provisions will impair an audit firm’s independence under Commission rules, as identified in paragraph 14.

**RESPONSE: Respondents deny the allegations in Paragraph 56, the referenced guidance is not authoritative as a rule or regulation.**

57. Berman included indemnification provisions in the MSLP Engagement Letters. As a result of the indemnification provisions in the MSLP Engagement Letters, Berman & Co. was not independent as required by Rule 2-01(b). By submitting audit reports to MSLP, which were filed with the Commission, that provided Berman & Co. was independent and the audits were conducted in accordance with PCAOB standards, Berman & Co. violated, and Berman aided and abetted violations of, Rule 2-02(b)(1) of Regulation S-X.

**RESPONSE: Respondents deny the allegations contained in Paragraph 57.**

58. AU § 220, Independence, requires “that the auditor be independent; aside from being in public practice (as distinct from being in private practice), he must be without bias with respect to the client since otherwise he would lack that impartiality necessary for the dependability of his findings, however excellent his technical proficiency may be.” (See AU § 220 ¶ 2)

**RESPONSE: Respondents allege that the contents of AU § 220 speak for themselves and that no further response is required. Respondents allege that the Commission’s statement of AU § 220 in the paragraph is incomplete.**

59. AS 9, Audit Planning, ¶ 6 provides that the auditor should determine compliance with independence requirements at the beginning of the audit.

**RESPONSE: Respondents allege that the contents of AS 9, Audit Planning speak**

**for themselves and that no further response is required. Respondents allege that the Commission's statement of AS 9, Audit Planning in the paragraph is incomplete.**

60. As a result of including indemnification provisions in the MSLP Engagement Letters, Respondents also violated professional standards because Berman & Co. was not independent during the MSLP Audits and the work papers do not contain sufficient evidence that independence was evaluated. (See AU § 220, AS 9)

**RESPONSE: Respondents deny the allegations contained in Paragraph 60.**

#### **Respondents Failed to Properly Plan the MSLP Audits**

61. The auditor is required to properly plan the audit, which includes the planned nature, timing, and extent of procedures to be performed. (AU § 311, Planning and Supervision, ¶¶ 1, 5; AS 9 ¶ 4, 10) Professional standards state the auditor should design and perform audit procedures to address the assessed risks of material misstatement due to fraud. (AU § 316, Consideration of Fraud in a Financial Statement Audit, ¶ 52)

**RESPONSE: Respondents allege that the contents of AU § 311, AS 9 and AU § 316 speak for themselves and that no further response is required. Respondents allege that the Commission's statement of AU § 311, AS 9 and AU § 316 in the paragraph is incomplete.**

62. Despite identifying revenue recognition as a fraud risk area, Respondents failed to properly plan the MSLP Audits to obtain sufficient audit evidence supporting MSLP's accounting for Sales Incentives. (See, e.g., AU §§ 311, 316, AS 9) Respondents also failed to properly plan the 2011 MSLP audit relating to sponsorship commitments and International Sales. (Id.)

**RESPONSE: Respondents deny the allegations contained in Paragraph 62.**

#### **Respondents Failed to Obtain Sufficient Appropriate Audit Evidence**

63. Auditors are required to obtain sufficient audit evidence. In 2010, AU § 326, Evidential Matter, ¶ 22 required auditors to obtain sufficient competent evidential matter to afford a reasonable basis for an opinion regarding the financial statements. Once effective for 2011, AS 15, Audit Evidence, ¶ 4 requires auditors to plan and perform audit procedures to obtain sufficient appropriate audit evidence to provide a reasonable basis for his or her opinion. AS 13, The Auditor's Response to the Risks of Material Misstatement, ¶ 7 further requires the auditor to exercise professional skepticism critically assessing the appropriateness and sufficiency of audit evidence. AU § 316 ¶ 13 further provides that professional skepticism requires an ongoing questioning of whether the information and evidence obtained suggests that a material misstatement due to fraud has occurred, and the auditor should not be satisfied with less-than-persuasive evidence because of a belief that management is honest.

**RESPONSE: Respondents allege that the contents of AU § 326, AS 15, AS 13 and AU § 316 speak for themselves and that no further response is required. Respondents allege that the Commission’s statement of AU § 326, AS 15, AS 13 and AU § 316 in the paragraph is incomplete.**

64. Oral and written representations from management are part of the evidential matter the auditor obtains, but are not a substitute for the application of auditing procedures necessary to afford a reasonable basis for an opinion regarding the financial statements under audit. (AU § 333, Management Representations, ¶ 2) If an audit area is at increased risk of material misstatement, particularly fraud risks, the auditor needs to obtain more reliable evidence regarding relevant assertions and obtain evidence corroborating management’s explanations or representations concerning important matters. (AS 13 ¶ 7; AS 15 ¶ 17) Auditors should obtain more persuasive audit evidence from substantive procedures when they have identified pervasive weaknesses in the company’s control environment. (AS 13 ¶ 6)

**RESPONSE: Respondents allege that the contents of AU § 333 and AS 13 speak for themselves and that no further response is required. Respondents allege that the Commission’s statement of AU § 333 and AS 13 in the paragraph is incomplete.**

#### Related Party Disclosures

65. After an auditor identifies a related party transaction, the auditor is required to consider whether he has obtained sufficient appropriate evidential matter; evaluate all the information available to him; and satisfy himself that it is adequately disclosed in the financial statements. (AU § 334, Related Parties, ¶ 11) Professional standards require the auditor to perform procedures to obtain and evaluate sufficient appropriate evidential matter beyond inquiry of management. (AU § 334, Related Parties, ¶¶ 2 and 9) AS 14, Evaluating Audit Results, ¶ 8 further provides that the auditor should obtain corroboration for management’s explanations regarding significant unusual relationships.

**RESPONSE: Respondents allege that the contents of AU § 334 and AS 14 speak for themselves and that no further response is required. Respondents allege that the Commission’s statement of AU § 334 and AS 14 in the paragraph is incomplete.**

66. Respondents violated professional standards and failed to obtain sufficient audit evidence in the 2011 MSLP Audit related to related party disclosures. (See AU §§ 333, 334; AS 13, 14, 15) After Respondents identified a related party, Respondents failed to obtain sufficient appropriate evidence supporting MSLP’s position that disclosure of the related party transactions was not required. (See id.) Respondents improperly relied upon management representations in MSLP’s memo and management representation letter. (See AU §§ 333, 334; AS 14) The memo, which was prepared by a non-accountant and signed by a CFO who Respondents determined “lacked requisite accounting experience,” did not appropriately evaluate GAAP. Respondents also failed to corroborate MSLP’s management’s underlying representations in the memo, even when

they had information contradicting or, at the very least, calling into question, those representations.

**RESPONSE: Respondents deny the allegations contained in Paragraph 66.**

**Sales Incentives**

67. Respondents violated professional standards and failed to obtain sufficient audit evidence in the 2010 and 2011 MSLP Audits related to Sales Incentives. (See AU §§ 316, 326, 333; AS 13, 15) Respondents designated revenue recognition as a fraud risk. However, aside from a single memo from 2010, the work papers lacked any audit procedures designed to test if MSLP properly accounted for Sales Incentives. (See AU § 326, AS 13, 15). Moreover, Respondents improperly relied on management representations without corroborating statements made by the CFO, who Respondents had determined lacked accounting experience. (See AU § 333, AS 13, 15)

**RESPONSE: Respondents deny the allegations contained in Paragraph 67.**

**Sponsorship Commitments and International Sales**

68. AS 14 ¶ 31 requires that “[a]s part of the evaluation of the presentation of the financial statements, the auditor should evaluate whether the financial statements contain the information essential for a fair presentation of the financial statements in conformity with the applicable financial reporting framework.” Evaluation of the information disclosed in the financial statements includes consideration of the “content of the financial statements (including the accompanying notes).”

**RESPONSE: Respondents allege that the contents of AS 14 speak for themselves and that no further response is required. Respondents allege that the Commission’s statement of AS 14 in the paragraph is incomplete.**

69. In violation of professional standards, Respondents were aware of sponsorship commitments and International Sales at MSLP that required disclosure in the 2011 financial statements but were not disclosed. (See AS 14)

**RESPONSE: Respondents deny the allegations contained in Paragraph 69.**

70. Respondents violated professional standards and failed to obtain sufficient audit evidence in the 2011 MSLP Audit related to sponsorship commitments. (See AS 13, 15) The disclosure checklist was marked “N/A” for commitments and the audit work papers do not contain any procedures evaluating whether MSLP’s sponsorship commitments should be disclosed.

**RESPONSE: Respondents deny the allegations contained in Paragraph 70.**

71. Respondents violated professional standards and failed to obtain sufficient

audit evidence in the 2011 MSLP Audit related to International Sales. (See AU § 333; AS 13, 15) Berman & Co.'s disclosure checklist is marked "item not present" for International Sales and no documentation relating to why disclosure of International Sales was not required is in the work papers. (Id.) Additionally, no references to discussions with management relating to International Sales are in the work papers, and, even if Respondents did rely on representations of management regarding International Sales, this was insufficient audit evidence. (See AU § 333)

**RESPONSE: Respondents deny the allegations contained in Paragraph 71.**

**Respondents Failed to Adequately Document the MSLP Audits**

72. AS 3 requires an auditor to prepare and retain documentation that provides a written record of the basis for its significant conclusions. (AS 3 ¶¶ 4 and 5) Audit documentation must clearly demonstrate that the work was in fact performed. (AS 3 ¶ 6) Among other items, the audit documentation must contain sufficient information to enable an experienced auditor, having no previous connection with the engagement (1) to understand the nature, timing, extent, and results of the procedures performed, evidence obtained, and conclusions reached and (2) to determine, among other items, the person who reviewed the work and the date of such review. (AS 3 ¶¶ 4, 5 and 6) Additionally, audit documentation must include information the auditor has identified relating to significant findings or issues that is inconsistent with or contradicts the auditor's conclusions. (AS 3 ¶ 8)

**RESPONSE: Respondents allege that the contents of AS 3 speak for themselves and that no further response is required. Respondents allege that the Commission's statement of AS 3 in the paragraph is incomplete.**

73. Respondents violated professional standards and failed to adequately document the work performed in the MSLP Audits. (See AS 3) Specific conduct that violated AS 3 includes:

a) Respondents failed to document in either the 2010 or 2011 MSLP work papers if and how they concluded Berman & Co. was independent when the MSLP Engagement Letters included indemnification provisions;

**RESPONSE: Respondents deny the allegations contained in Paragraph 73 (a).**

b) Respondents failed to document the information in Berman's email to MSLP that stated: "I have spoken to the SEC, AICPA, concurring partner, and 2 other accountants. Everyone has concluded this is a disclosure," which contradicted Berman & Co.'s later conclusion that disclosure was not required;

**RESPONSE: Respondents deny the allegations contained in Paragraph 73**

(b).

c) Respondents failed to document representations from management relating to Sales Incentives, which Berman claims to have relied upon;

**RESPONSE: Respondents deny the allegations contained in Paragraph 73 (c).**

d) Respondents failed to document representations from management relating to International Sales, which Berman claims to have relied upon; and

**RESPONSE: Respondents deny the allegations contained in Paragraph 73 (d).**

e) Berman & Co.'s MSLP audit work papers do not contain documentation evidencing sufficient audit evidence was obtained over Sales Incentives, sponsorship commitments, or International Sales. If Respondents did perform any audit work in these areas, then Respondents violated AS 3 because the work papers do not document any work, including the procedures performed, evidence obtained, or conclusions reached.

**RESPONSE: Respondents deny the allegations contained in Paragraph 73 (e).**

#### **Berman Failed to Properly Supervise the MSLP Audits**

74. AS 10 provides that the “engagement partner is responsible for the engagement and its performance,” including “proper supervision of the work of engagement team members and for compliance with PCAOB standards.” (See AS 10 ¶ 3) The engagement partner should review the work of engagement team members and evaluate whether the work was properly performed and documented, the objectives of the procedures were achieved, and the results of the audit work support the conclusions reached. (See AS 10 ¶ 5)

**RESPONSE: Respondents allege that the contents of AS 10 speak for themselves and that no further response is required. Respondents allege that the Commission’s statement of AS 10 in the paragraph is incomplete.**

75. Berman, the engagement partner on the MSLP Audits, failed to properly supervise those audits. Berman failed in his supervision duties because he reviewed all of the audit work papers and failed to recognize that the MSLP Audits were not compliant with PCAOB standards. Berman failed to properly evaluate whether the nature and extent of audit procedures performed over Sales Incentives, sponsorship commitments, and International Sales were sufficient under PCAOB standards. In addition, Berman failed to supervise the documentation of the firm’s audit procedures in accordance with AS 3.

**RESPONSE: Respondents deny the allegations contained in Paragraph 75.**

76. Additionally, Berman failed to inform his staff of their responsibilities about how to audit Sales Incentives. Berman reviewed the audit work papers and failed to recognize that Berman & Co. did not perform any procedures to test whether MSLP properly accounted for Sales Incentives under ASC 605-50. Consequently, Berman failed to recognize that the results of Berman & Co.'s audit work did not support its conclusion that MSLP properly accounted for Sales Incentives.

**RESPONSE: Respondents deny the allegations contained in Paragraph 76.**

77. Additionally, while Berman reviewed the disclosure checklist he failed to recognize that it incorrectly marked sponsorship commitments and International Sales as "N/A" and "item not present," respectively.

**RESPONSE: Respondents deny the allegations contained in Paragraph 77.**

78. Berman also reviewed the Engagement Acceptance Forms and failed to address that they incorrectly stated that there were no indemnification provisions.

**RESPONSE: Respondents deny the allegations contained in Paragraph 78.**

**Respondents Failed to Issue Accurate Audit Reports**

79. The auditor is required to evaluate its audit results and whether the financial statements "contain the information essential for a fair presentation of the financial statements in conformity with the applicable financial reporting framework." (AS No.14 ¶¶ 4 and 31) AU § 508 ¶ 7, Reports on Audited Financial Statements, adds that the auditor may state in his standard report that the financial statements present fairly, in all material respects, an entity's financial position, results of operations, and cash flows in conformity with GAAP only when the auditor has conducted the audit in accordance with standards set forth by the PCAOB.

**RESPONSE: Respondents allege that the contents of AS No.14 and AU § 508 speak for themselves and that no further response is required. Respondents allege that the Commission's statement of AS No.14 and AU § 508 in the paragraph is incomplete.**

80. Berman & Co. and Berman violated PCAOB standards and failed to issue accurate audit reports for the MSLP Audits. (See AS 14, AU § 508) Berman & Co.'s March 31, 2011 and April 13, 2012 audit reports, signed by Berman for the firm and provided to MSLP, wrongly stated that Berman & Co. audited MSLP's December 31, 2010 and 2011 financial statements (1) as an independent auditor; (2) in accordance with the standards of the PCAOB, and (3) in its opinion the financial statements present fairly, in all material respects, the financial position of, and the results of its operations and its cash flows, in conformity with accounting principles generally accepted in the United

States of America. Berman approved the issuance of audit reports containing unqualified opinions.

**RESPONSE: Respondents deny the allegations contained in Paragraph 80.**

**Respondents Failed to Exercise Due Care and Professional Skepticism**

81. PCAOB standards require auditors to exercise due professional care in the planning and performance of the audit. (AU § 230 ¶ 1) Due professional care concerns “what the independent auditor does and how well he or she does it,” requiring the auditor to exercise professional skepticism, including an attitude that includes a questioning mind and a critical assessment of audit evidence. (See AU § 230 ¶¶ 4, 7, 8) Additionally, the auditor’s responses to the assessed risks of material misstatement, particularly fraud risks, should involve the application of professional skepticism in gathering and evaluating audit evidence. (See AS 13) Examples of the application of professional skepticism in response to the assessed fraud risks are “obtaining sufficient appropriate evidence to corroborate management’s explanations or representations concerning important matters, such as through third-party confirmation, use of a specialist engaged or employed by the auditor, or examination of documentation from independent sources.” (See AS 13 ¶ 7, AU § 230 ¶ 7)

**RESPONSE: Respondents allege that the contents of AU § 230 and AS 13 speak for themselves and that no further response is required. Respondents allege that the Commission’s statement of AU § 230 and AS 13 in the paragraph is incomplete.**

82. Respondents violated professional standards and failed to exercise due care and professional skepticism during the MSLP audits. (See AU § 230, AS 13) Respondents’ failures are evidenced by the repeated deficiencies previously set forth herein, including:

- a) Respondents issued audit reports for the MSLP Audits purporting to be from an independent audit firm when the firm was not independent because it had indemnification provisions in the MSLP Engagement Letters;

**RESPONSE: Respondents deny the allegations contained in Paragraph 82 (a).**

- b) Respondents failed to recognize MSLP inappropriately accounted for Sales Incentives and failed to express a qualified or adverse opinion despite knowing that MSLP failed to disclose related party transactions, sponsorship commitments, and International Sales as required by GAAP;

**RESPONSE: Respondents deny the allegations contained in Paragraph 82 (b).**

- c) Respondents ignored audit evidence demonstrating that transactions with

MSLP's Largest Customer were related party transactions requiring disclosure; and

**RESPONSE:** Respondents deny the allegations contained in Paragraph 82 (c).

d) Respondents failed to obtain sufficient audit evidence regarding MSLP's accounting for Sales Incentives, related party transactions, and International Sales by inappropriately relying on management representations.

**RESPONSE:** Respondents deny the allegations contained in Paragraph 82 (d).

#### **F. Violations**

1. As a result of the conduct described above, Berman & Co. willfully violated, and Berman willfully aided and abetted and caused Berman & Co.'s violations of, Rule 2-02(b)(1) of Regulation S-X, which provides in part that the accountant's report shall state "whether the audit was made in accordance with generally accepted auditing standards."

**RESPONSE:** Respondents deny the allegations contained in Paragraph 1.

2. As a result of the conduct described above, Berman & Co. and Berman willfully aided and abetted and caused MSLP's violations of Section 13(a) of the Exchange Act and Rule 13a-1 thereunder, which require issuers with securities registered under Section 12 of the Exchange Act to file annual reports with the Commission and to keep this information current.

**RESPONSE:** Respondents deny the allegations contained in Paragraph 2.

3. As a result of the conduct described above, Respondents engaged in improper professional conduct under Rule 102(e)(1)(ii) as defined in Rule 102(e)(1)(iv)(A) of the Commission's Rules of Practice. The audit failures by Respondents related to independence, related party transactions, Sales Incentives, sponsorship commitments, and International Sales were the result of knowing or reckless conduct that resulted in a violation of applicable professional standards.

**RESPONSE:** Respondents deny the allegations contained in Paragraph 3.

4. As a result of the conduct described above, Respondents engaged in improper professional conduct under Rule 102(e)(1)(ii) as defined in Rule 102(e)(1)(iv)(B)(1) of the Commission's Rules of Practice. The audit failures by Respondents related to independence, related party transactions, and Sales Incentives were the result of highly unreasonable conduct that resulted in a violation of applicable professional standards in circumstances in which Respondents knew or should have

known that heightened scrutiny was warranted.

**RESPONSE: Respondents deny the allegations contained in Paragraph 4.**

5. As a result of the conduct described above, Respondents engaged in improper professional conduct under Rule 102(e)(1)(ii) as defined in Rule 102(e)(1)(iv)(B)(2) of the Commission's Rules of Practice. Respondents' unreasonable conduct included failures with respect to independence, related party transactions, and Sales Incentives discussed herein, as well as unreasonable conduct related to Respondents' failures during the 2011 MSLP Audit relating to sponsorship commitments and International Sales.

**RESPONSE: Respondents deny the allegations contained in Paragraph 5.**

6. As a result of the conduct described above, Respondents willfully violated and willfully aided and abetted violations of provisions of the federal securities laws and rules and regulations thereunder pursuant to Rule 102(e)(1)(iii).

**RESPONSE: Respondents deny the allegations contained in Paragraph 6.**

**AFFIRMATIVE DEFENSES**

Respondents, and each of them, assert the following separate, affirmative defenses to the OIP. In so doing, Respondents do not assume the burden of production or proof with respect to and fact or proposition necessary to the affirmative defenses where the burden of production and/or proof is properly imposed on the Commission.

1. The OIP fails to state a claim upon which relief may be granted against Respondents.
2. This proceeding, as to Respondents, is not warranted by the facts and is unsupported by substantial evidence.
3. This proceeding violates Respondents' constitutional rights, including, but not limited to, Respondents' rights to due process and equal protection. Rather, the claims assumed should be litigated in the United States District for the Southern District of Florida.
4. This proceeding is an improper use of Rule 102(e) of the Commission's Rules of Practice.
5. The Commission's claims against Respondents fail, in whole or in part, because Respondents reasonably relied upon other professionals to address certain issues raised in the OIP.
6. The Commission's claims against Respondents fail, in whole or in part, because the facts pled by the Commission do not give rise to an inference that

Respondents acted with the state of mind required to establish liability under any of the Commission's legal theories.

7. The Commission's claims against Respondents fail, in whole or in part, because Respondents acted independently, reasonably, and in good faith at all relevant times.

8. The Commission's claims against Respondents fail, in whole or in part, because Respondents neither made, nor played a substantial role in making, any statement that contained an untrue statement of material fact or omitted a material fact that should have disclosed under the circumstances.

9. The Commission's claims against Respondents fail, in whole or in part, because the actions and/or audit reports that Commission complains of were not made in connection with a purchase or sale of a security.

10. To the extent that certain claims or relief sought may be barred based upon the application of Statutes of Limitation, this defense is asserted in an abundance of caution to preserve any defenses as discovery is received and reviewed.

11. The Commission's claims against Respondents fail, in whole or in part, because Respondents did not engage in improper professional conduct pursuant to the Commission's Rules of Practice.

12. The Commission's claims against Respondents fail, in whole or in part, because the audits at issue were made in accordance with PCAOB and other professional accounting standards. Imposition of the remedies sought by the Commission against Respondents are not in the public's interest and are contrary to public policy.

13. The Order is untimely under 15 U.S.C. § 78d-5, and the Commission's approval of the institution of these proceedings was therefore arbitrary, capricious and contrary to law.

14. The allegations of the OIP concern an audit and audit procedures conducted some four to five years ago. As such, the OIP's entry as of March 25, 2016, violates fundamental notions of fairness and due process in that the Commission has unjustifiably delayed issuance of its OIP until such a significant amount of time has

elapsed that the Respondents' ability to summon witnesses and produce testimony is significantly and adversely affected. Given the age of events in this matter, it is "inherently unfair" and violative of due process to proceed against Respondents.

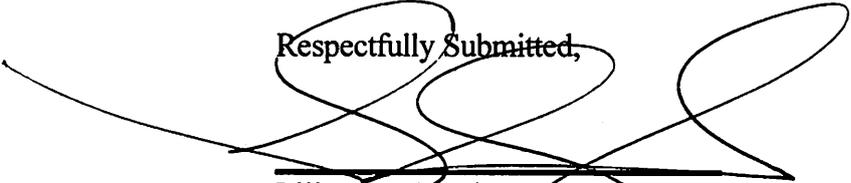
15. The Commission is estopped from finding that Respondents engaged in improper professional conduct because the Commission itself has charged MSLP and management with numerous failures to disclose in the very same accounting matter at issue here and has adopted positions contrary to those asserted in this proceeding.

16. Respondents reserve the right to supplement this Answer with additional defenses that become available or apparent during the course of investigation, reparation, or review of the Commission's investigative file and to amend this Answer accordingly.

**CERTIFICATE OF SERVICE**

I ~~HEREBY~~ CERTIFY that a true and correct copy of the foregoing was delivered on this 17<sup>th</sup> day of May 2016 to: Securities and Exchange Commission, Brent Fields, Secretary, 100 F Street, N.E., Mail Stop 1090, Washington, D.C. 20549; [ALJ@SEC.GOV](mailto:ALJ@SEC.GOV); and Mark L. Williams, Trial Attorney, U.S. Securities and Exchange Commission, Denver Regional Office, 1961 Stout St., Suite 1700, Denver, CO 80294, [williamsml@SEC.GOV](mailto:williamsml@SEC.GOV).

Respectfully Submitted,

  
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