

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10681 / September 6, 2019

SECURITIES EXCHANGE ACT OF 1934
Release No. 86900 / September 6, 2019

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 4071 / September 6, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19426

In the Matter of

Abner Silva

Respondent.

**ORDER INSTITUTING PUBLIC
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933, SECTIONS 4C AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
AND RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Abner Silva (“Silva” or “Respondent”) pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”), Sections 4C¹ and 21C of the Securities Exchange Act of 1934 (“Exchange Act”), and Rule 102(e)(1)(iii) of the Commission’s Rules of Practice.²

¹ Section 4C provides, in relevant part, that:

The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others; (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder.

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over him and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Cease-And-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 4C and 21C of the Securities Exchange Act of 1934, and Rule 102(e) of the Commission’s Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-And-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds³ that:

Summary

This matter involves multiple violations of the federal securities laws by certain former members of DS Healthcare Group, Inc.’s (“DS Healthcare” or the “Company”) senior management, including Abner Silva. During the first three quarters of 2015, Silva, among others, acted to overstate DS Healthcare’s revenues. This consisted of recognizing fictitious revenue; intentionally or severely recklessly overbilling a customer and crediting the customer in a later quarter; and shipping products that were sold pursuant to sales practices that violated the Company’s revenue recognition policies, such as shipping products at the end of quarters with no reasonable expectation of payment at the time of shipment and when the customer was on an accounts receivable hold, improper bill and hold sales, and improper consignment sales. As a result, DS Healthcare’s reported financial statements in its Forms 10-Q for the first three quarters of 2015, in its August 4, 2014 and June 2, 2015 Form S-3 Registration Statements, and in its May 1, 2015 S-8 Registration Statement were materially false and misleading.

² Rule 102(e)(1)(iii) provides, in pertinent part, that:

The 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.

³ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Silva also made selective disclosures to certain persons associated with a broker or dealer and to DS Healthcare shareholders relating to earnings information and pending acquisitions without the Company simultaneously disclosing the same information to the public. When some of the above conduct was discovered in early 2016, recently hired senior management terminated Silva's employment.

Respondent

1. Silva is 38 and resides in Miami, Florida. From at least March 2015 to January 2016, Silva served as DS Healthcare's chief operating officer. He previously served as the Company's investor relations contact and chief information officer while employed as a consultant from 2009 to early 2015. Silva was a registered representative from 2001 to 2011 at various times with FSC Securities Corp., Perrott, Mather & Gilday, Inc., Gray Stone Financial, Inc., and Mediterranean Securities Group, LLC and held Series 7 and 24 licenses.

Other Relevant Entities

2. DS Healthcare is a Florida corporation organized in January 2007 and headquartered in Pompano Beach, Florida. The Company focuses on hair and personal care products. DS Healthcare's fiscal reporting is based on the calendar year. DS Healthcare disclosed in its 2013 and 2014 annual reports that it had material weaknesses in its internal control over financial reporting and warned that without developing or maintaining an effective system of internal controls, it may not be able to accurately report its financial results or prevent fraud. DS Healthcare's common stock ("DSKX") previously was registered pursuant to Section 12(b) of the Exchange Act and traded on the NASDAQ until December 23, 2016, when NASDAQ delisted DS Healthcare. DS Healthcare filed a Form S-3 Registration Statement on June 2, 2015 that went effective June 11, 2015 for the resale of securities previously issued to a consultant. DS Healthcare also filed a Form S-3 Registration Statement that went effective August 4, 2014 and a Form S-8 Registration Statement that went effective May 1, 2015. The above Forms S-3 and S-8 Registration Statements incorporated by reference the Forms 10-Q at issue. DS Healthcare terminated the registration of its securities with the Commission in 2018.

Background

3. DS Healthcare develops proprietary technologies and products for hair and personal care needs. The Company operates through a network of retailers across North America and international distributors. Throughout 2015, DS Healthcare experienced intensified pressure to increase sales due to the declining price of its stock and the pursuit of possible acquisitions, which were reliant, in part, on the value of its stock. This pressure led Silva to improperly recognize revenue from sales that violated the Company's revenue recognition policies and departed from the accounting principles generally accepted in the United States ("GAAP").

4. During the relevant period, Silva engaged in misconduct to increase DS Healthcare's reported revenues. This included: recognizing fictitious revenue; intentionally overbilling a customer and crediting the customer in a later quarter; and shipping products that

were sold pursuant to sales practices that violated the Company's revenue recognition policies, such as shipping products at the end of quarters with no reasonable expectation of payment at the time of shipment and when the customer was on an accounts receivable hold, improper bill and hold sales, and improper consignment sales. DS Healthcare recognized the revenue associated from the above sales practices at the time the products were shipped to the Company's freight forwarder in violation of DS Healthcare's revenue recognition policies, which also departed from the requirements of GAAP.

DS Healthcare Recognized Fictitious Revenue

5. In 2015, Silva and another DS Healthcare officer directed DS Healthcare's Mexico subsidiary ("DS Mexico") to recognize revenue for products that neither DS Mexico nor DS Healthcare sold. Specifically, in the second quarter of 2015, Silva directed DS Mexico to record \$96,000 of revenue for sales of micro-needling devices that were sold and distributed by a separate company partially owned by DS Mexico's president. Silva gave this direction because DS Healthcare needed the additional revenue to assist with a possible acquisition and to help increase the price per share of the Company's stock. Thereafter, with two weeks left in the third quarter of 2015 and the Company behind in its revenue goal by more than \$700,000, Silva directed DS Mexico to record \$201,000 of revenue for the sale of additional micro-needling devices.

6. DS Healthcare's recognition of revenue relating to the micro-needling products constituted a departure from GAAP, as revenue recognition standards include, among other criteria, that revenue may only be recognized if there is persuasive evidence of a sales arrangement between DS Mexico or DS Healthcare and the ultimate purchaser of the products. Here, not only was there no persuasive evidence of a sales arrangement at the time of the transactions, but neither DS Healthcare nor DS Mexico owned or had possession of the micro-needling product inventory; had an agreement to sell or distribute the micro-needling products; or bore the risk of loss for the products; all of which would be required to recognize the revenue under GAAP.

DS Healthcare Intentionally or Severely Recklessly Overbilled a Consignment Sale to a Customer in China

7. At the end of the third quarter of 2015, DS Healthcare intentionally or severely recklessly overcharged a customer in China in order to generate higher revenues for that quarter. Specifically, in the last week of the third quarter of 2015, DS Healthcare entered three orders totaling \$201,708 for a new customer in China. DS Healthcare entered the orders at a high price rather than the correct total price of \$44,796 and did so at Silva's direction. And, the products ordered were to be paid for as they were sold, *i.e.*, on a consignment basis, based on an agreement the customer had with DS Healthcare's senior management, including Silva. Silva and another DS Healthcare officer approved the pricing and terms. Silva knew or was severely reckless in not knowing that consignment sales were not permitted under DS Healthcare's revenue recognition policies. Having received emails on that subject by the Company's finance department as early as 2011, Silva knew DS Healthcare could not recognize the associated revenue at the time the products were shipped because the customer was not obligated to pay

until the products were sold. Despite that understanding, Silva shipped the products, allowing DS Healthcare to recognize the revenue for these sales in the third quarter of 2015. In a later quarter, the Company issued a credit for the amount of the overcharge, *i.e.*, \$156,912. DS Healthcare departed from GAAP by intentionally or severely recklessly overbilling the customer and issuing a credit for the overcharged amount in a subsequent quarter, and by recognizing the revenue from the sale at the time of shipment of the products rather than at the time the customer sold the products.

DS Healthcare Improperly Deployed Other Sales Practices to Increase Revenue

8. During the first three quarters of 2015, Silva authorized: the shipment of products at the end of quarters with no reasonable expectation of payment at the time of shipment as required by GAAP and when the customer was on an accounts receivable hold; improper bill and hold sales that did not pass the risk of ownership to the customer at the time of shipment and which did not have a fixed delivery schedule as required by GAAP; and improper consignment sales that recognized revenue at the time of shipment even though collectability was not assured as the customer was not obligated to pay for the products until the products were ultimately sold as required by GAAP. All but one of these customers were under a credit and/or an accounts receivable hold, requiring advance payment to ensure collectability. DS Healthcare recognized more than \$600,000 in revenue from these transactions at the time of shipment even though doing so was a departure from GAAP and contrary to the Company's revenue recognition policies.

9. Silva knew or was severely reckless in not knowing the above sales practices as implemented did not comply with the Company's revenue recognition policies, having received emails and guidance from the finance department as far back as 2011 and 2012. As a result of the improper recognition of the above revenue, DS Healthcare materially overstated its net revenue, gross profit, and accounts receivable in the first three quarters of 2015. DS Healthcare also materially overstated its operating income and understated its net loss in the second quarter of 2015, and understated its operating and net losses in the first and third quarters of 2015. DS Healthcare also materially misrepresented the same metrics when it incorporated by reference its first through third quarter 2015 financial statements in its August 4, 2014 and June 2, 2015 Form S-3 Registration Statements, and in its May 1, 2015 Form S-8 Registration Statement.

10. On March 23, 2016, following the initiation of an independent investigation by a law firm hired by the Company's audit committee, DS Healthcare reported in a Form 8-K, among other things, that its financial statements for the second and third quarters of 2015 should no longer be relied upon. DS Healthcare's stock fell approximately 35% on the news to close at \$.86 per share on March 24, 2016. DS Healthcare subsequently restated, among others, its financial statements for the first three quarters of 2015, materially decreasing its quarterly net revenues. This had the result of increasing its losses for these periods by 921%, 979%, and 43% to \$869,546, \$103,102, and \$819,436, respectively. As DS Healthcare's chief operating officer during the periods in question, Silva was one of the individuals responsible for preparing, reviewing and commenting on the Company's public filings for the first three quarters of 2015. Based on his knowledge and role in the above transactions, Silva knew or was severely reckless

in not knowing DS Healthcare's reported financial statements were materially inaccurate and not in compliance with GAAP. Likewise, Silva caused the falsification of DS Healthcare's books and records, and failed to devise and maintain a sufficient system of internal accounting controls. Silva's employment with DS Healthcare was terminated in early 2016, following the hiring of new executive leadership at the Company who questioned some of the above conduct.

False Representations to DS Healthcare's Auditor

11. Silva signed a management representation letter to DS Healthcare's auditor in relation to the Company's third quarter 2015 Form 10-Q. Silva specifically represented, among other things, that DS Healthcare's financial statements were prepared and fairly represented in conformity with GAAP; all financial records and related data were made available to the auditor; and the Company had not received any communications, nor had knowledge of any fraud, allegations of fraud, or suspected fraud. Based on his knowledge and role in the above transactions, Silva knew or was severely reckless in not knowing those representations were false at the time he made them.

Selective Disclosure of Material, Non-Public Information

12. On multiple occasions during Silva's tenure, he selectively disclosed material, non-public information relating to DS Healthcare's earnings, revenue and sales forecasts, and pending and future acquisition plans to certain persons associated with a broker or dealer and to DS Healthcare shareholders. For example, on December 20, 2015 Silva provided a new and significant DS Healthcare shareholder, among other things, the anticipated closing date of a pending acquisition and the current and forecast financial projections and models for the combined companies. Silva also shared material non-public information about the status of a DS Healthcare acquisition with others in January and February of 2016. Silva did not obtain express agreements from the individuals to maintain the confidentiality of the information conveyed. Silva knew or was severely reckless in not knowing such communications were improper based on the Company's policies on disclosing material, non-public information to the public. DS Healthcare did not contemporaneously disclose the same information to the broader market.

Violations

13. Securities Act Sections 17(a)(1) and 17(a)(3) and Exchange Act Section 10(b) and Rule 10b-5 thereunder prohibit fraudulent conduct in the offer or sale of securities and in connection with the purchase or sale of securities, respectively.

14. Exchange Act Section 13(a) and Rule 13a-13 thereunder require that every issuer of a security registered pursuant to Exchange Act Section 12 file with the Commission, among other things, quarterly and other reports as the Commission may require.

15. Rule 12b-20 under the Exchange Act requires that, in addition to the information expressly required to be included in a statement or report filed with the Commission, there shall

be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made not misleading.

16. Exchange Act Section 13(b)(2)(A) requires reporting companies to make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect their transactions and dispositions of their assets.

17. Exchange Act Section 13(b)(2)(B) requires all reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with GAAP.

18. Exchange Act Section 13(b)(5) prohibits any person from knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly falsifying any book, record, or account described in Section 13(b)(2).

19. Rule 13b2-1 under the Exchange Act prohibits any person from directly or indirectly, falsifying or causing to be falsified, any book, record, or account subject to Exchange Act Section 13(b)(2)(A). Rule 13b2-2 under the Exchange Act prohibits any officer or director from directly or indirectly making or causing to be made a materially false or misleading statement to an accountant in connection with any audit, review, or examination of the financial statements of an issuer.

20. Regulation FD requires, among other things, that whenever an issuer, or anyone acting on its behalf, intentionally makes a selective disclosure of material, non-public information about the issuer to certain specified persons, including analysts and investors, the issuer is required to make a simultaneous public disclosure of that information.

Findings

21. Based on the foregoing, the Commission finds that Silva: (i) willfully violated Securities Act Sections 17(a)(1) and 17(a)(3), Exchange Act Sections 10(b) and 13(b)(5) and Rules 10b-5, 13b2-1 and 13b2-2 thereunder; (ii) willfully aided and abetted and caused a DS Healthcare principal's violations of Securities Act Sections 17(a)(1) and 17(a)(3) and Exchange Act Section 10(b) and Rule 10b-5 thereunder; and (iii) willfully aided and abetted and caused DS Healthcare's violations of Exchange Act Sections 13(a), 13(b)(2)(A), 13(b)(2)(B) and Rules 12b-20, 13a-13 thereunder, and Regulation FD.

22. Based on the foregoing, the Commission finds that by willfully violating Securities Act Sections 17(a)(1) and 17(a)(3), Exchange Act Sections 10(b) and 13(b)(5) and Rules 10b-5, 13b2-1 and 13b2-2 thereunder, willfully aiding and abetting a DS Healthcare principal's violations of Securities Act Sections 17(a)(1) and 17(a)(3) and Exchange Act Section 10(b) and Rule 10b-5 thereunder, and willfully aiding and abetting DS Healthcare's violations of Exchange Act Sections 13(a), 13(b)(2)(A), 13(b)(2)(B) and Rules 12b-20, 13a-13 thereunder,

and Regulation FD, Silva engaged in conduct subject to Section 4C(a)(3) of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Silva's Offer.

Accordingly, it is hereby ORDERED that:

- A. Silva shall cease and desist from committing or causing any violations and any future violations of Sections 17(a)(1) and 17(a)(3) of the Securities Act and Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B), and 13(b)(5) of the Exchange Act and Rules 10b-5, 12b-20, 13a-13, 13b2-1, and 13b2-2 thereunder, and Regulation FD.
- B. Silva be, and hereby is, prohibited for five (5) years from the date of the Order from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act.
- C. Silva is denied the privilege of appearing or practicing before the Commission as an accountant.
- D. After five (5) years from the date of this Order, Silva may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing and practicing before the Commission as an accountant.
- E. Silva shall within twenty-one (21) days of the entry of the Order, pay a civil money penalty in the amount of \$80,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). Payment shall be made in four installments of \$20,000 each as follows: the first installment of \$20,000 due within 21 days of the date of the entry the Order; the second installment of \$20,000 due within 120 days of the entry of the Order; the third installment of \$20,000 due within 240 days of the entry of the Order; and the fourth and final installment of \$20,000 due within 360 days of the entry of the Order. Payments shall be applied first to post order interest, which accrues pursuant to 31 U.S.C. 3717. Prior to making the final payment set forth herein, Silva shall contact the staff of the Commission for the amount due. If Silva fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.

F. Payment must be made in one of the following ways:

- (1) Silva may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Silva may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Silva may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Abner Silva as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Eric R. Busto, Assistant Regional Director, Securities and Exchange Commission, 801 Brickell Avenue, Suite 1800, Miami, FL 33131.

G. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall he benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by

Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Vanessa A. Countryman
Secretary