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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17180

In the Matter of

ELLIOT R. BERMAN, CPA

and

BERMAN & COMPANY, P.A.,

Respondents.

DIVISION OF ENFORCEMENT'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY DISPOSITION

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I. INTRODUCTION

Elliot R. Berman ("Berman") and Berman & Company, P.A. ("Berman & Co.") (collectively "Respondents") conducted an audit of MusclePharm Corporation's ("MSLP") 2010 and 2011 financial statements. There is no dispute that Respondents were aware of the Securities and Exchange Commission's ("Commission") long standing determination that indemnification clauses impair independence, that Respondents nonetheless included indemnification clauses in their engagement letters with MSLP, and that Respondents subsequently demanded (and received) funds after invoking such indemnification. Thus, Respondents were not independent pursuant to Rule 2-01(b) of Regulation S-X.

However, in "determining whether an accountant is independent," Rule 2-01(b) provides that "the Commission will consider all relevant facts and circumstances." In their Motion for Summary Disposition ("Motion"), Respondents argue only that their independence was not impaired by inclusion of indemnification provisions found in the MSLP engagement letters. While Respondents quarrel with the Commission's allegation that the indemnification provisions alone impaired their independence, they ignore all other facts and circumstances alleging Respondents' lack of independence in conducting the MSLP audits. Thus, at a minimum, there remain material factual disputes – whether Respondents were independent on the facts and circumstances of this case – making summary disposition inappropriate.

Moreover, even were the Court to consider only the text of the indemnification provisions in adjudicating the allegations that Respondents violated independence requirements, summary disposition would still be inappropriate. That is because the indemnification provisions at issue violate Rule 2-01(b) of Regulation S-X, as recognized by the Commission, the PCAOB, and the

AICPA, among others. For these reasons, and as more fully outlined herein, Respondents' Motion should be denied.

II. SUMMARY OF ARGUMENT

By including indemnification provisions in the MSLP engagement letters, Respondents were not independent pursuant to Commission Rule 2-01(b) of Regulation S-X. Moreover, the regulatory bodies that Respondents' claim support their arguments in fact do the opposite, as both the PCAOB and AICPA have publically held that pursuant to Commission rules and regulations, indemnification provisions impair independence.

As more fully outlined herein, Respondents' independence was impaired pursuant to Rule 2-01(b) of Regulation S-X. Respondents attempt to avoid the application of this rule by claiming it does not specifically address indemnification. However, Rule 2-01(b) provides the general standard of independence. The Notes to Rule 2-01 specifically explain that 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)." 17 C.F.R. § 210.2-01(b), Note 2. The rule further provides that accountants "are encouraged to consult with the Commission's Office of the Chief Accountant ["OCA"] before entering into relationships, including relationships involving the provision of services, that are not explicitly described in the rule." *Id.* at Note 3. After passage of Rule 2-01, OCA, in 2004, published specific guidance on indemnification (1) confirming the Commission's long standing position that indemnification impairs independence (which had been set forth by the Commission in published interpretations years before), and (2) further clarifying additional indemnification language that impaired

independence (the "OCA FAQ"). The Commission and staff interpretations make clear that under Rule 2-01(b), indemnification provisions impair independence.

It is undisputed that Respondents read both Rule 2-01 and the OCA FAQ and, despite the specific instructions above, opted not to consult with OCA, and more troubling, knowingly disregarded the OCA FAQ and falsified their audit workpapers by claiming there were no indemnification agreements with MSLP. In fact, Respondents not only included indemnification provisions in the MSLP engagement letters, but deliberately included an indemnification provision that contained near identical language to that in the OCA FAQ, which was identified as facially impairing independence.

In attempting to justify their misconduct, Respondents now claim they were permitted to include indemnification language specifically rejected by the OCA FAQ because of the PCAOB interim rules, which adopted AICPA rules when the PCAOB was first established. This argument is without merit.

First, multiple PCAOB rules make clear that Commission rules and regulations, especially if more restrictive, must be followed and, as noted above, Commission Rule 2-01(b) of Regulation S-X disallowed indemnification.

Second, the PCAOB, the organization which Respondents' claim permits the use of indemnification provisions, has issued multiple statements setting forth its position that Commission rules and regulations do not permit indemnification and, therefore, indemnification in audits of SEC registrants impairs independence.

Third, the AICPA – the organization that originally passed the ruling Respondents allege permits indemnification, which was later adopted by the PCAOB interim rules – specifically

passed a rule in 2008 recognizing that pursuant to the Commission's requirements, indemnification would impair independence. The AICPA rule further stated that accountants were required to follow not only regulatory agencies' laws and regulations, but also "published interpretations," and that failure to do so would constitute an act discreditable to the profession. Thus, even if Respondents believed Rule 2-01 was inapplicable, the AICPA required Respondents to follow the OCA FAQ and Commission guidance, which they failed to do.

Finally, Respondents' reliance on the PCAOB interim rules, even if applicable, applies to only one of Respondents' indemnification provisions. Respondents provide no justification for the usage of the others that also violate Rule 2-01(b) of Regulation S-X.

III. STATEMENT OF FACTS[1]

1. Elliot R. Berman, a resident of Boca Raton, Florida, has been a CPA licensed in Florida since 2005. (OIP ¶ 1.) Berman is the sole owner of Berman & Co., which he founded in 2006. (*Id.*)
2. Berman & Company, P.A. is an accounting and auditing firm based in Boca Raton, Florida. (OIP ¶ 2.) Berman & Co. has been registered with the Public Company Accounting Oversight Board ("PCAOB") since 2006. (*Id.*)
3. MusclePharm Corporation ("MSLP") is a Nevada corporation with its principal place of business in Denver, Colorado. (OIP ¶ 3.) Since 2010, MSLP has had a class of securities registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act"). (*Id.*)

[1] Pursuant to Commission Rule of Practice 250, because this motion was brought by Respondents, the facts contained in the Order Instituting Proceedings ("OIP") shall be taken as true. *See* Rule 250.

4. MSLP engaged Berman & Co. as its auditor in January 2011 and dismissed Berman & Co. in September 2012. (OIP ¶ 3.)

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"). (OIP ¶ 5.)

6. Berman served as the engagement partner on the MSLP Audits. (OIP ¶ 6.) Berman approved the issuance of audit reports containing unqualified opinions. (*Id.*)

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

8. Berman researched the use of indemnification provisions in engagement letters with SEC registrants around the time he founded Berman & Co. in 2006, which included reviewing PCAOB Rule 3520, PCAOB Rule 3500T, and Rule 2-01 of Regulation S-X. (OIP ¶ 10.)

9. Berman testified that he did not remember ever contacting anyone at the SEC about indemnification provisions in engagement letters. (Exhibit. A, Testimony of Berman, at 538:7-10; 605:1-9.) Berman had consulted with OCA on other matters, such as related party transactions. (Ex. A, at 328:11-331:16.)

10. 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"). (OIP ¶ 11.) 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 major stimuli to objective and unbiased consideration of the problems encountered in a particular engagement is removed or greatly weakened." (*Id.*)

11. Berman testified that he "might have looked at [the Codification]...I have a very general recollection, but I – I'm not a hundred percent sure." (Ex. A at 608:5-13.)

12. Berman also claims to have reviewed the OCA FAQ. (OIP ¶ 12; Ex. A at 605:13-21.) 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." (*Id.*) 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." (*Id.*) 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.*" (*Id.*) (Emphasis added.)

13. Berman testified that he considered the OCA FAQ when drafting the MSLP engagement letters. (Exhibit A at 606:22-25.)

14. 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.[2] (OIP ¶ 13.) 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. (*Id.*) The briefing paper discusses the Codification and OCA FAQs. (*Id.*) The briefing paper also discusses Ethics Ruling Number 94 under Rule 101 of the AICPA's Code of Professional Conduct (included in the PCAOB's interim independence standards), which provides that the auditor's independence would not be impaired by indemnification language. (*Id.*) 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."* (*Id.*) (Emphasis added.)

15. The PCAOB has also highlighted that indemnification provisions will impair an audit firm's independence under Commission rules. (OIP ¶ 14.) For example, in 2007, the PCAOB issued a report on its inspection findings noting that indemnification provisions violate the SEC independence rules.[3] (*Id.*)

16. Other agencies have also issued guidance recognizing the Commission's determination that

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[2] *See* http://pcaobus.org/News/Events/Documents/02092006_SAGMeeting/Indemnification.pdf

[3] *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.

the use of indemnification provisions impairs independence.[4] (OIP ¶ 15.)

17. After his research, and despite specifically reading 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. (OIP ¶ 16.)

18. MSLP signed Berman & Co. engagement letters, dated January 5, 2011 and January 1, 2012, relating to the MSLP Audits (the "MSLP Engagement Letters"). (OIP ¶ 17.) Berman drafted the MSLP Engagement Letters and signed the MSLP Engagement Letters on behalf of Berman & Co. (*Id.*)

19. Berman & Co. completed an "Engagement Acceptance Form" for the 2010 MSLP Audit (the "2010 Form"). (OIP ¶ 19.) Berman reviewed and approved this form. (*Id.*) Berman & Co. completed an "Engagement Acceptance and Continuance Form" for the 2011 MSLP Audit (the "2011 Form"). (*Id.*) Berman reviewed and approved this form. (*Id.*; *see also* Exhibit B, which contains the 2010 and 2011 Forms.)

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 AICPA), *as well as the requirements promulgated by the Commission and the staff.*" (OIP ¶ 20; Ex. B.) (Emphasis added.)

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[4] *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).

21. Item 11.h of the 2010 Form and item 7.h of the 2011 Form specifically asked "[a]re there any relationships with the client or conflicts of interests that might impair independence? ... vii. Indemnification?" (OIP ¶ 21; Ex. B.) The 2010 Form explicitly stated that if Berman & Co. answered this questioned "Yes," "the firm would be precluded from accepting the engagement." (Ex. B.) Despite having included indemnification provisions in the MSLP Engagement Letters, Respondents falsely responded "no" to this question both years, thereby allowing Berman & Co. to continue with the engagement. (*Id.*)

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. (OIP ¶ 22.)

23. Berman & Co. also provided a letter to the MSLP Audit Committee, signed by Berman, for each audit pursuant to PCAOB Rule 3526, *Communication with Audit Committees Concerning Independence*. (Exhibit C, Rule 3526 Letters). Despite having indemnification provisions in the MSLP Engagement Letters, Respondents represented to the MSLP Audit Committee: "We are not aware of any relationships between our Firm and the Company that, in our professional judgment, may reasonably be thought to bear on our independence..." (*Id.*) Moreover, Respondents in these letters represented: "We hereby confirm that as of the date of this letter we are independent accountants with respect to the Company, within the meaning of the Securities Acts administered by the United States Securities and Exchange Commission, PCAOB (we are in compliance with Rule 3520) and the requirements of the American Institute of Certified Public Accountants." (*Id.*)

24. 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. (OIP ¶ 23.)

25. The Commission first sent Berman & Co. a voluntary document request in November 2012. (Motion, Ex. C.) Berman & Co. submitted an invoice for payment to MSLP of $6,000 on December 5, 2012 with a description "[i]n connection with an inquiry from the Denver office of the U.S. Securities and Exchange Commission (Division of Enforcement)." (Exhibit D.)

26. On July 29, 2013, the Commission issued its first subpoena to Berman & Co. (Motion, Ex. D.)

27. On August 6, 2013, Berman emailed MSLP, introducing his legal counsel and writing: "As we discussed yesterday, MSLP will be covering all legal expenses of Berman & Company, P.A., pursuant to our engagement letter from the 2011 year-end audit." (Exhibit E.)

28. On October 7, 2013, Respondents' counsel emailed MSLP's counsel demanding payment pursuant to the engagement letter, specifically referencing the language "[r]easonable costs and time spent in legal matters or proceedings arising from our engagement . . . at your request or by subpoena will be billed to you separately and you agree to pay the same." (Exhibit F.) In the email, Respondents' counsel refers to the provision as an "indemnification issue." (*Id.*)

29. On October 22, 2013, Berman & Co. submitted an invoice for payment to MSLP of $47,075.00 for "SEC Investigation." (Exhibit G.)

30. 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. (OIP ¶ 23.) On August 7, 2014, Berman sent an invoice to MSLP seeking reimbursement for time spent preparing for

his testimony, and the testimony itself. (*Id.*)

IV. INDEMNIFICATION PROVISIONS RELEVANT TO RESPONDENTS' MOTION

The MSLP Engagement Letters contained the following indemnification provisions:[5]

(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."

(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."

(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."

(OIP ¶ 18(a)-(c).)

V. LEGAL STANDARD

Under Rule of Practice 250(b), the "hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 17 CFR § 201.250(b).

The federal securities statutes should be construed broadly and flexibly, not technically and restrictively, to effectuate their remedial purpose. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

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[5] The Respondents' Motion refers only to the first two provisions, (a) and (b), as "Indemnification Provisions" and refers to the third provision, (c), as the "Other Services Provision." (Motion at ¶¶ 6-7.) While all three provisions were intended to indemnify Respondents, as confirmed by Berman's attorney (*see* Ex. E), the Commission uses these separate terms in this Reply for ease of understanding.

In this vein, the Exchange Act was designed "to insure honest securities markets and thereby promote investor confidence." *United States v. O'Hagan*, 521 U.S. 642, 658 (1997). It was also designed to achieve a high standard of business ethics in every aspect of the securities industry. *United States v. Naftalin,* 441 U.S. 768, 775 (1979); *Graham v. SEC*, 222 F.3d 994, 1002 (D.C. Cir. 2000).

VI. ARGUMENT

a. Summary Disposition is Inappropriate Because Respondents Attack Only Some Facts and Circumstances Evidencing their Lack of Independence.

Rule 2-01(b) of Regulation S-X provides the general standard of auditor independence, which requires that an auditor be independent in fact and appearance. 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 . . . . 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 audit client, *and not just those relating to reports filed with the Commission.*" 17 C.F.R. § 210.2-01(b) (emphasis added.)

The 2000 Adopting Release to Rule 2-01 explained:

> Circumstances that are not specifically set forth in our rule are measured by the general standard set forth in final Rule 2-01(b). Under that standard, we will not recognize an accountant as independent with respect to an audit client if the accountant is not, or if a reasonable investor knowing 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.

See Release Nos. 33-7919, 34-43602, and 35-27279 at https://www.sec.gov/rules/final/33-7919.htm ("Adopting Release").

In their Motion, Respondents argue that because "all three provisions cited in the OIP provide[d] for indemnification or payment only in limited circumstances" and therefore "d[id] not impair Berman & Co.'s independence in violation of SEC rules and regulations and/or PCAOB standards," there is "no genuine issue with regard to any material fact" and the "lack of independence [claims] should be dismissed." (Motion at 6.) However, even if the text of the indemnification provisions alone did not impair auditor independence under Rule 2-01(b) (which they did), summary disposition would nonetheless be inappropriate. That is because Respondents do not address the other facts pleaded by the Commission evidencing their lack of independence in conducting the MSLP Audits.

Specifically, Respondents failed to adequately document the audits relating to independence as required by AS 3 (OIP ¶¶ 72-73(a)), Berman failed to properly supervise the audits relating to independence as required by AS 10 (OIP ¶¶ 74, 78), Respondents failed to issue accurate audit reports relating to independence, as required by AS 14 and AU § 508 (OIP ¶¶ 79-80), and Respondents failed to exercise due care and professional skepticism relating to independence as required by AS 13 and AU § 230 (OIP ¶¶ 81-82(a).) Additionally, as a result of Respondents' lack of independence, 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 and Respondents engaged in improper professional conduct under Rule 102(e)(1)(ii) as defined in Rule 102(e)(1)(iv)(A) and (B)(2) of the Commission's Rules of Practice, and 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). (OIP, Section F, Violations, ¶¶ 1-6.)

In fact, as set forth in the OIP, the indemnification provisions also contributed to Respondents' other audit failures. Because Respondents included indemnification provisions in the MSLP Engagement Letters, Respondents failed to obtain sufficient appropriate audit evidence as a result of inappropriately relying on oral and written representations of MSLP's management, without conducting sufficient audit procedures. (*See* OIP at ¶¶ 63, 64.) Respondents inappropriately relied on management representations, which contributed to audit failures relating to related party disclosures (*id.* at ¶¶ 32, 66), sales incentives (*id.* at ¶¶ 37, 67), and international sales (*id.* at ¶¶ 47, 71). At the administrative hearing, these facts will support the Commission's allegations that the failures were in part the result of Respondents knowing they were indemnified, or at a minimum, a reasonable investor could conclude, that Respondents failed to do additional audit work beyond management representations because of the indemnification provisions.

Accordingly, even if the Court determines that the text of the three indemnification provisions discussed in Respondents' Motion do not facially impair independence, summary disposition is nevertheless inappropriate.

b. Indemnification Provisions Impair Auditor Independence

Even were the Court to consider only the text of the indemnification provisions in adjudicating whether Respondents' independence was impaired, summary disposition would

nevertheless be inappropriate. That is because the indemnification provisions at issue violate Rule 2-01(b) of Regulation S-X.[6]

It is axiomatic that independence is a key principle of public accounting. "Public faith in the reliability of a corporation's financial statements depends upon the public perception of the outside auditor as an independent professional." *United States v. Arthur Young & Co.*, 465 U.S. 805, 819 n.15 (1984). Congress established the requirement for independent audits with the passage of the Securities Act of 1933. Securities Act of 1933, Section 7(a), Schedule A. With the

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[6] Respondents' aver that this is the "very first time" the Commission has sanctioned an auditor for indemnification provisions in engagement letters. (Motion at 4.) Assuming this is true, Respondents' offer no explanation as to why this is relevant. In any event, Respondents cannot credibly claim to be surprised by this enforcement action, as their conduct was reprehensible and their violations blatant and willful. Berman researched the use of indemnification provisions in engagement letters and reviewed Commission Rule 2-01, which specifically provides that the rule does not list all situations that would impair independence and encourages auditors to consult with OCA. (OIP ¶ 10.) Berman, however, could not recall ever consulting with anybody at the SEC on indemnification provisions. (Ex. A at 538:7-10; 605:1-9.) However, Berman testified that he did review the OCA FAQ, which confirms the Commission's long standing view that indemnification impairs independence and provides examples of specific language that OCA determined would impair independence (and that Berman used). (OIP at ¶ 12.) Berman also recalled reading the Codification, which similarly held that indemnification impaired independence. (Ex. A at 605:5-13.) Despite this, Berman included indemnification provisions in the MSLP Engagement Letters that he drafted and signed on behalf of Berman & Co. (OIP at ¶¶ 16-18.) Moreover, during the course of the MSLP Audits, Respondents falsified the Engagement Acceptance Forms in the work papers, hiding the fact that indemnification existed. (*Id.* at ¶¶ 19-21; Ex. B.) Respondents further informed the MSLP Audit Committee that they were independent and in compliance with Commission, PCAOB, and AICPA rules, despite (as described below) being in violation of each organization's rules. Respondents then continued to perform insufficient audit procedures, in part due to the indemnification provisions, in which Respondents' improperly relied on management representations resulting in audit failures concerning related party disclosures, sales incentives, and international sales. Finally, when the Commission began to investigate the public filings of MSLP, Respondents demanded indemnification pursuant to the engagement letters, and continued demanding payment throughout the investigation, including after Berman's own deposition. (*Id.* at ¶ 23; Respondents' Motion, Exs. D & E.) Respondents have also both been sanctioned for other violations of federal securities laws. (OIP ¶¶ 1, 2.)

passage of the Sarbanes-Oxley Act of 2002 ("SOX"), Congress reconfirmed the authority of the Commission to adopt its own auditor independence rules. (SOX, Public L. No. 107-204, Section 3(c)(2), 116 Stat. 745 (2002).)

i. Commission Rule 2-01 of Regulation S-X

As noted above, Rule 2-01(b) of Regulation S-X provides the general standard of auditor independence, which provides 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." 17 C.F.R. § 210.2-01(b). Further guidance is provided by the Preliminary Notes to Rule 2-01. Note 1 explains that Rule 2-01 "is designed to ensure that auditors are qualified and independent of their audit clients both in fact and in appearance." Relevant to the instant case, Note 2 makes clear that 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)." Similarly, Note 3, reiterates that "in determining whether an accountant is independent, the Commission will consider all relevant facts and circumstances" and that "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."

ii. Respondents Violated Commission Rule 2-01(b) of Regulation S-X

Berman included indemnification provisions in the MSLP Engagement Letters. As a result, Berman & Co. was not independent as required by Rule 2-01(b).[7] Berman & Co. violated, and Berman aided and abetted violations of, Rule 2-02(b)(1) of Regulation S-X 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. The crux of Respondents' counterargument is that no Commission rule or regulation holds that any of the indemnification clauses at issue impair independence. Therefore, according to Respondents, their conduct cannot have violated independence rules. (Motion at 5-6.) Respondents are mistaken.

Respondents' argument ignores the explicit language of Rule 2-01, which (1) specifically explains that the "rule does not purport to, and the Commission could not, consider all circumstances that raise independence concerns," (2) unambiguously states that the Commission will "consider all circumstances that raise independence concerns" and (3) therefore encourages accountants to consult with OCA "before entering into relationships, including relationships involving the provision of services, *that are not explicitly described in the rule*." 17 C.F.R. § 210.2-01 (emphasis added.) The Commission could not have been more clear that Rule 2-01's application is not limited to explicit examples set forth in the rule, and as a result specifically encourages consultation with OCA.

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[7] As detailed in the OIP, in addition to failing to comply with Rule 2-01(b) of Regulation S-X, Respondents also failed to comply with auditing standards AU § 220 and AS 9. (*See* OIP ¶¶ 58-60.)

On this topic, OCA has published guidance that indemnification impairs independence. It unequivocally states that at least one of the indemnification provisions at issue impairs an auditor's independence. The OCA FAQ provides:

> "Q: Has there been any change in the Commission's ***long standing view*** (Financial Reporting Policies ("FRP") — Section 600 — 602.02.f.i. "Indemnification by Client") that when an accountant enters into an indemnity agreement with the registrant, his or her independence would come into question? A: No. 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. ***Further, 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.***"

(Issued Dec. 31, 2004.) (emphasis added.)

Most troubling, Berman read, but chose to disregard, the OCA FAQ that specifically alerted him the indemnification clauses he included in MSLP Engagement Letters impaired independence. (OIP ¶ 16.) Thus, Berman was on notice that (1) Rule 2-01 did not purport to consider all circumstances that raise independence concerns, (2) the rule encouraged contacting OCA; and (3) OCA's position, along with the Commission's long standing view, was the indemnification provisions in the MSLP Engagement Letters impaired independence. It is therefore not surprising that despite consulting with OCA on other matters, such as related party transactions (Ex. A, at 328:11-331:16) , Berman could not recall contacting anyone at the SEC about indemnification provisions in engagement letters (Ex. A, at 538:7-10; 605:1-9.) This is because Berman knew there was no question that indemnification impaired independence.

In attempting to excuse their conduct, Respondents argue the OCA FAQ is a "non-authoritative source," and therefore Respondents were free to ignore OCA's determination, which confirmed the Commission's long standing view, that indemnification impairs independence. (Motion at 15.) Respondents fail to explain, however, how they could have believed indemnification provisions were permissible after reading the OCA FAQ, and after reading Rule 2-01, in which the Preliminary Notes specifically state the Commission does not (and cannot) "consider all circumstances that raise independence concerns" and explicitly encourages "consult[ation] 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." 17 C.F.R. § 210.2-01, Notes 2, 3. Implicit in Respondents' argument is that either they were permitted to disregard the Notes of Rule 2-01 that stated the rule was more expansive than its text, or they were free to disregard OCA and Commission guidance without running afoul of Rule 2-01. Regardless, their argument should be rejected.

Moreover, Respondents find no support for their argument that Rule 2-01's requirement of independence does not incorporate OCA's determination, confirming the Commission's long standing view, that indemnification impairs independence. In fact, as more fully explained below, the PCAOB has not surprisingly recognized that Rule 2-01 incorporates this very guidance, and has published its own reports making clear that "if an issuer audit client agrees to release, indemnify, and hold harmless its audit firm and the firm's personnel from liability arising out of knowing misrepresentations by management, the audit firm's independence is impaired."[8] Ironically, Respondents argue the PCAOB provides authoritative guidance on this issue of

[8] *See* footnote 3.

indemnification (Motion at 11), but at the same time argue they were free to disregard the PCAOB's recognition that Commission rules and regulations have determined indemnification clauses impair independence because the PCAOB cited as support "the Codification and the staff's FAQ." (Motion at 16.) This only illustrates how far Respondents must stretch in attempting to excuse their misconduct.

Put simply, the indemnification provisions in the MSLP Engagement Letters impaired Berman & Co.'s independence under Rule 2-01(b) of Regulation S-X. The Court should reject Respondents' arguments that a independence violation cannot exist absent text in the rule explicitly prohibiting indemnifications clauses. This is contrary to the language (and spirit) of Rule 2-01, as recognized by the PCAOB and other authorities, discussed *supra.*

iii. Respondents Violated Section 602.02f.i of the Codification set forth by the Commission

Even were the Court to consider only the text of indemnification provisions in adjudicating Respondents' independence, and even were the Court to accept Respondents' arguments that Rule 2-01 does not hold indemnification impairs independence and that the OCA FAQ can be ignored, summary disposition is still inappropriate. That is because the provisions did not only indemnify Respondents against management misrepresentations and fraud, but also against their own negligence.

The Commission has provided additional interpretation and guidance regarding independence in the Codification, which was revised with the release of the revised Rule 2-01 in 2000.[9] The revised Codification contains the Commission's "interpretations that may continue to

[9] *See* Footnote 7.

be useful in situations not specifically or definitely addressed" in Rule 2-01. *Id.* "Examples of these items include business relationships, unpaid prior professional fees, *indemnification by client*, and litigation." *Id.* (emphasis added.)

Accordingly, in Section 602.02f.i of the Codification the Commission provided specific guidance on indemnification. The introduction to Section 602.02 of the Codification provides that "the guidelines and illustrations presented in this section cannot be, nor are they intended to be, definitive answers on any aspect of this subject," but it continues to state that the guidelines and illustrations "*are designed to apprise the practitioners of typical situations which have involved loss of independence, whether in appearance or in fact, and by so doing to place them on notice of these and similar potential threats to their independence.*" (emphasis added.) Section 6.02.02f.i provides:

> "When an accountant and his client, directly or through an affiliate, have entered into an agreement of indemnity which seeks to assure to the accountant immunity from liability for his own negligent acts, whether of omission or commission, one of the major stimuli to objective and unbiased consideration of the problems encountered in a particular engagement is removed or greatly weakened. Such condition must frequently induce a departure from the standards of objectivity and impartiality which the concept of independence implies. In such difficult matters, for example, as the determination of the scope of audit necessary, existence of such an agreement may easily lead to the use of less extensive or thorough procedures than would otherwise be followed. In other cases it may result in a failure to appraise with professional acumen the information disclosed by the examination. *Consequently, the accountant cannot be recognized as independent for the purpose of certifying the financial statements of the corporation.*"

(emphasis added.) Berman testified that he likely read the Codification (Ex. A at 608:5-13), and was at a minimum aware of the Codification because the OCA FAQ referenced it. Yet, despite the

Codification stating that it placed accountants on notice that the specific examples and similar items could impair independence, Berman still did not recall seeking advice prior to including three indemnification provisions in the MSLP Engagement Letters.

First, as more fully explained in Section VI(e) below, Respondents used the "Other Services Provision" to indemnify themselves against their own negligence acts. The Commission brought this action as a result of Respondents' negligence due to several failures under Generally Accepted Auditing Standards ("GAAS") – this action against Respondents is not based on management misrepresentations. Therefore, when Respondents demanded indemnification in relation to the investigation, they sought and received (and likely have not paid back) indemnification for their own negligent acts. Indeed, Berman & Co. was subpoenaed for documents on July 29, 2013 (Motion, Ex. D), and only days later Berman and Respondents' counsel contacted MSLP demanding payment pursuant to the engagement letters. (Exhibits E & F.). Moreover, Berman provided testimony to the SEC on April 2-3, 2014, where he was directly questioned about the sufficiency of the MSLP Audits, for which he also sought indemnification from MSLP. (OIP ¶ 23.) Prior the initiation of this action, Respondents had no issue calling this an indemnification provision and demanding reimbursement pursuant thereto. (Exhibit F.)

Moreover, the other two indemnification provisions, while referring to "known misrepresentations by management" and "fraud caused by or participated in by the management of the Company," necessarily include indemnification for auditor negligence.[10] That is because by

[10] Section 6.02.02f.i of the Codification's reference to indemnification "from liability for [an accountant's] own negligent acts" in no way implied that an accountant may be permitted to obtain indemnification from management misrepresentations. This Section stems from a 1941 public opinion that dealt with a "particular case [that] cited the accountant was indemnified and

including these indemnification provisions in an engagement letter, the auditor is indemnified, so long as a he can point to a known misrepresentation made by management, even if he was negligent in conducting his audit, including accepting that misrepresentation. Because the representations by management are so broad, this essentially could indemnify the auditor for any deficiencies in the audit. For instance, in the 2010 and 2011 MSLP Audits, MSLP management provided representation letters with 57 management representations, including a representation that "the financial statements referred to above are fairly presented in conformity with U.S. generally accepted accounting principles and include all disclosures necessary for such fair presentation and disclosures required to be included therein by the laws and regulations to which the company is subject." (Exhibit I). Put another way, because the auditor is indemnified for management misrepresentations, the auditor can, without fear, accept the misrepresentation (even if he knew it was a misrepresentation), rather than conduct an audit compliant with PCAOB standards, including questioning management regarding their statements as is expected from an independent auditor.

This is exactly the type of behavior the Codification warns indemnification may lead to, stating that "[i]n such difficult matters, for example, as the determination of the scope of audit necessary, existence of such an agreement [an indemnification provision] may easily lead to the

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held harmless from all losses and liabilities arising out of his certification, other than those flowing from [the accountant's] own willful misstatements or omissions." (Exhibit H at 3.) The Commission explained that when an accountant enters into an "agreement on indemnity which seeks to assure to the accountant immunity from liability for his own negligent acts, whether of omission or commission," it was the opinion of the Commission that "one of the major stimuli to objective and unbiased consideration of the problems encountered in a particular engagement is removed or greatly weakened." *Id.* As outlined herein, indemnification from management misrepresentations not only indemnifies against the auditor's negligent acts of omission (e.g. merely accepting as true statements the auditor would otherwise challenge), but it also similarly removes or weakens "one of the major stimuli to objective and unbiased consideration of the problems encountered in a particular engagement." Section 6.02.02f.i.

use of less extensive or thorough procedures than would otherwise be followed." (Section 6.02.02f.i.) Similarly, the indemnification provisions may impair the auditor's compliance with the PCAOB standards requiring due professional care and professional skepticism. As discussed in Section VI(a) above, this likely occurred between Respondents' and MSLP management resulting in audit failures concerning related party disclosures, sales incentives, and international sales.

c. PCAOB Does Not Permit Indemnification Clauses for Auditors of Public Companies Filing with the Commission.

The core of Respondents' argument is that Berman & Co. was permitted to use indemnification provisions under the PCAOB Rules. (Motion at 11-13.) This argument is similarly misplaced. Contrary to Respondents' assertions, PCAOB standards do not permit indemnification clauses for auditors associated with SEC registered companies. Moreover, as discussed below, the PCAOB ruling that Respondents' rely upon, even if it was applicable, would only apply to one of the three indemnification provisions used by Berman & Co. Respondents cite no support that would allow the other two indemnification provisions.

The PCAOB was established and authorized by Congress with the passage of SOX, which gave the PCAOB the ability to establish independence and auditing standards rules for auditors. SOX, Public L. No. 107-204, Section 101, 116 Stat. 745 (2002) As previously mentioned, SOX also reconfirmed the authority of the Commission to adopt its own auditor independence rules. (*Id.*)) Congress also stated in SOX that state boards of accountancy could set differing

independence rules that would apply to audits of non-public companies. (*Id.* at Section 209) The AICPA rules have been established by and for the members of the AICPA.[11]

When the PCAOB was first established, it adopted the then existing auditing, ethical, and independence rules of the AICPA as "interim rules."[12] The Commission approved these PCAOB rules in April 2003. Securities Act of 1933 Release No. 8222 and Exchange Act Release No. 47745, April 25, 2003, located at http://www.sec.gov/rules/other/33-8222.htm. In its order, the SEC approved the language, noting the SEC's rules that are more prescriptive must be followed by auditors of public companies. (*Id.*)

i. PCAOB Rule 3500T[13]

Rule 3500T(b), Interim Ethics and Independence Standards, provides that in connection with the preparation or issuance of any audit report, a registered public accounting firm, and its associated persons shall comply with the 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*

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[11] *See* PCAOB Release No. 2003-006, located at https://pcaobus.org//Rulemaking/Interim_Standards/Release2003-006.pdf

[12] *See id.*

[13] This Rule was originally 3600T when adopted in 2003. *See* PCAOB Release No. 2003-026, located at https://pcaobus.org//Rulemaking/Docket011/2003-12-17_Release_2003-026.pdf

Standards, a registered public accounting firm must comply with the more restrictive rule." (emphasis added.)

ii. AICPA Rules and Interpretations

The AICPA's Code of Professional Conduct Rule 101, Independence, which was adopted by Rule 3500T, like the Commission's Rule, does not explicitly address indemnification. Rather, the rule provides: "A member in public practice shall be independent in the performance of professional services as required by standards promulgated by bodies designated by Council." The PCAOB, in Rule 3500T, also adopted, to the extent there were not more restrictive Commission Rules, the interpretations and rulings under AICPA Rule 101 in ET § 191, which contained rulings on 111 topics. Ruling 94 in the Ethics Rulings under ET § 191, which serves as the basis for Respondents' Motion, sets forth the following Question and Answer:

> Question - A member of his or her firm proposes to include in engagement letters a clause that provides that the client would release, indemnify, defend, and hold the member (and his or her partners, heirs, executors, personal representatives, successors, and assigns) harmless from any liability and costs resulting from knowing misrepresentations by management. Would inclusion of such an indemnification clause in engagement letters impair independence?
>
> Answer – No.

(ET § 191 ¶¶188-189.)

iii. PCAOB Independence Rule 3520

In addition to the interim ethical rules of the AICPA that the PCAOB adopted, the PCAOB has also adopted its own ethical rules. PCAOB Rule 3520, Auditor Independence, provides: "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." This rule, like the Commission rule, does not explicitly mention indemnification. Note 1 of PCAOB Rule 3520 does, however, specifically state 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.) Therefore, the PCAOB makes clear that Respondents were required to follow not only PCAOB rules, but also any rules or regulations of the Commission.

iv. The PCAOB Recognizes that, Pursuant to the Commission, Indemnification Impairs Independence

Respondents argue that Ruling 94 in ET § 191 is the authoritative guidance which allows the use of indemnification provisions in the MSLP Engagement Letters without impairing independence. (Motion at 11.) Respondents concede that the PCAOB rules require that Commission rules and regulations be followed, but claim that no Commission rule or regulation exists on this issue. (*Id.* at 12-13.)

As discussed above, however, there is a more restrictive Commission Rule – Rule 2-01(b) of Regulation S-X. The Codification by the Commission and the OCA FAQ provide additional guidance relating to Rule 2-01 determining that indemnification impairs independence. Moreover, the notes to Rule 2-01 specifically acknowledge the language of the rule cannot cover every

independence issue, and encourages consultation with OCA. One need not even consult with OCA on this issue because of OCA FAQ is unequivocal.

Thus, Rule 2-01(b) is more restrictive than PCAOB Ruling 94 in ET § 191 because Rule 2-01 prohibits indemnification related to "knowing misrepresentation by management." Accordingly, because both PCAOB Rule 3500T and Rule 3520 require the more restrictive Commission rules and regulations to be followed, Respondents were required to follow the Commission Rule 2-01 of Regulation S-X.

Moreover, even if Ruling 94 under ET § 191 applied to audits of SEC registrants, which both the Commission and PCAOB have repeatedly publicly stated it does not (as explained below), Ruling 94 would only permit the text of one of Respondents' three indemnification provisions from facially impairing Respondents' independence. Respondents group two of the indemnification provisions together, arguing that Ruling 94 permits both provisions. (Motion at 13.) However, the ethics ruling only addresses one of the indemnification provisions. While both indemnification provisions begin the same, stating: "The Company agrees to release, indemnify, and hold Berman & Company, P.A...harmless from any liability and costs resulting from," the endings are distinct. The first provision indemnifies against "known misrepresentations by management," while the second provision indemnifies against "fraud caused by or participated in by the management of the Company." Although ET § 191 concludes that indemnification provisions indemnifying "knowing misrepresentations by management" would not impair independence – nowhere does it address whether indemnification for fraud caused by or participated in by management impairs independence, nor have Respondents cited to any support this this is permissible indemnification language under any rule.

Respondents' argument is further weakened because the PCAOB, the authority upon which Respondents' claim to rely, has stated that under Commission rules, indemnification impairs independence.

In 2006, the PCAOB Office of the Chief Auditor released a briefing paper, the SAG Memo, providing that Ethics Ruling Number 94 under ET § 191, upon which Respondents rely, does not apply to audits of public companies.[14] While this was a statement by the staff of the Chief Auditor, and not an official statement of the board, the 2006 SAG briefing paper discussed both the Codification and Ruling 94 under ET § 191, and concluded that because auditors must comply with the "SEC's auditor independence requirements" and "because 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*." (emphasis added.)

Moreover, in 2007, the PCAOB board itself issued a report that included a summary of deficiencies the PCAOB found in the various inspections its staff had performed (the "2007 Release").[15] The 2007 Release stated the PCAOB inspections found violations of the SEC's auditor independence rules. It also stated that the PCAOB was providing the report so that audit firms could be advised of the more common deficiencies the PCAOB has found in inspections of audits. This report was issued over three years before the date of Respondents' first MSLP Engagement Letter. The 2007 Release has a section titled "Indemnification," which explicitly states "[u]nder the SEC's independence requirements, agreements between an auditor and its issuer

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[14] *See* footnote 2.

[15] *See* footnote 3. The PCAOB 2007 Release states that it includes "descriptions of deficiencies that the Board views as warranting emphasis in a general public report."

audit clients that provide certain types of limits on the auditor's potential liability impair the auditor's independence." The report continues to explain: "*For example, if an issuer audit client agrees to release, indemnify, and hold harmless its audit firm and the firm's personnel from liability arising out of knowing misrepresentations by management, the audit firm's independence is impaired.*" (Emphasis added.)

The PCAOB Board yet again affirmed that indemnification impaired independence under Commission rules and regulations in a report published in 2013. In this report, the Board discusses and specifically includes "inclusion of indemnification clauses" as an example of "certain independence violations."[16] [17]

Respondents attempt to dismiss these reports, referring to them as non-authoritative sources, seemingly because the reports cite to the Codification and OCA FAQ, which Respondents state are not rules. (Motion at 15-16.) This argument should fail..

First, Respondents do not explain how statements from the PCAOB Board, which is the entity that adopted the interim rule Respondents are attempting to rely upon, are "non-

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[16] PCAOB Report on 2007-2010 Inspections of Domestic Firms that Audit 100 or Fewer Public Companies, dated February 25, 2013; http://pcaob.org/Inspections/Documents/02252013_Release_2013_001.pdf

[17] Additional regulators have also promulgated guidance recognizing that indemnification provisions may make external audits unreliable. For instance, the Office of Thrift Supervision, Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency collectively issued an advisory noting that limitation of liability provisions (including indemnification provisions), may weaken external auditors' objectivity, impartiality, and performance. *See* footnote 4. While the Advisory applies to engagement letters between financial institutions and external auditors with respect to financial statement audits, it also notes that based on Commission guidance, indemnification provisions in engagement letters are inappropriate between auditors and public financial institutions that file reports with the SEC, specifically citing the FAQ and Codification.

authoritative."[18] Second, even if the reports from the PCAOB are relying upon only the Codification and the OCA FAQ, it does not make the PCAOB conclusions wrong. Rather, the PCAOB's citation to the Codification and OCA FAQ, shows that the industry understands that auditor independence is impaired under the Commission rule when indemnification provisions are present. Thus, because the PCAOB repeatedly made clear that pursuant to Commission rules and regulations indemnification impaired independence, and because the PCAOB directs that the Commission rules and regulations must be followed, the Respondents were on notice that even the PCAOB does not claim that ET § 191 permits indemnification in audits of public companies registered with the Commission.

It is also worth noting that the AICPA, which issued the Ruling 94 under ET § 191, upon which Respondents rely, and of which Berman was a member of since 1996, requires accountants to follow not only Commission rules and regulations, *but also published interpretations*. ET Section 501, Acts Discreditable, provides that a member of the AICPA shall not commit an act discreditable to the profession. In 2008, three years prior to Respondents' MSLP Engagement Letters, interpretation ET 501.09 501-8 was issued, which makes unequivocal that accountants must follow the guidance of regulators, including published interpretations. It provides:

> "Certain governmental bodies, commissions, or other regulatory agencies (collectively, *regulators*) *have established requirements through laws, regulations, or published interpretations that prohibit entities subject to their regulation (regulated entity) from including*

[18] Respondents' Motion misstates the SAG Memo: "But the report itself discloses that the basis for its characterization of the SEC's position is the FAQs discussed above that were issued by the SEC ***staff*** and expressly do not represent the Commission rules." (Motion at 16) (emphasis in original.) While the SAG Memo does cite to the OCA FAQ, along with the Codification, it does not state that these authorities or the SAG Memo statements "do not represent Commission rules."

> *certain types of indemnification and limitation of liability provisions in agreements for the performance of audit or other attest services that are required by such regulators or that provide that the existence of such provisions causes a member to be disqualified from providing such services to these entities. For example, federal banking regulators, state insurance commissions, and the SEC have established such requirements.* If a member enters into, or directs or knowingly permits another individual to enter into, a contract for the performance of audit or other attest services that are subject to the requirements of these regulators, the member should not include, or knowingly permit or direct another individual to include, an indemnification or limitation of liability provision that would cause the regulated entity or a member to be in violation of such requirements or that would cause a member to be disqualified from providing such services to the regulated entity. *A member who enters into, or directs or knowingly permits another individual to enter into, such an agreement for the performance of audit or other attest services that would cause the regulated entity or a member to be in violation of such requirements, or that would cause a member to be disqualified from providing such services to the regulated entity, would be considered to have committed an act discreditable to the profession.*

(Emphasis added.) Thus, Respondents' argument that they were permitted to ignore "published interpretations" prohibiting indemnification is in fact, under the AICPA, an act discreditable to the profession. (*Id.*)

Respondents additionally claim to rely upon AU 310 (Statement of Audit Standard ("SAS") No. 83), which was issued in 1997, to support their argument that the indemnification provisions did not impair their independence. (Motion at 11.) Yet, SAS 83 specifically states, as does the PCAOB, that the Commission may have different rules. While AU 310 states that an engagement letter may include "[a]ny limitation of or other arrangement regarding the liability of the auditor or the client, such as indemnification to the auditor for liability arising from knowing misrepresentations to the auditor by management," this provision is immediately qualified by a

statement that *the Commission "may restrict or prohibit such liability limitation arrangements."* Therefore, Respondents did not have a basis upon which to choose to follow SAS 83 over Commission rules and regulations.

The industry's understanding of the Commission rule is further highlighted in a 1997 Journal of Accountancy article, which discusses SAS 83 and specifically warns practitioners that legal counsel should be consulted before including an auditor indemnification provision limiting an auditor's liability. Gibson, Kim, Kurt Pany, and Steven Smith, "Do We Understand Each Other?" Journal of Accountancy (Dec. 31, 1997) (attached Exhibit J.)

Also, as with ET § 191, AU 310 only specifically mentions "knowing misrepresentations to the auditor by management." Accordingly, even if this provision did apply, it would only apply to one of the three indemnification provisions.

d. Berman & Co.'s Own Audit Engagement Forms Informed Him that Indemnification would Impair Berman & Co.'s Independence.

Notably, Respondents fail to address that Berman & Co.'s own Engagement Acceptance Forms, which were completed for each audit of MSLP, specifically informed Berman & Co. that the Commission expected accountants to comply with not only the Commission rules, but also the "requirements promulgated by the Commission *and the staff*." (OIP ¶ 23) (emphasis added.) In fact, the initial Engagement Acceptance Form stated that if Respondents had indemnification agreements with the client, they could not continue with the audit.

For each audit, Berman & Co. filled out an "Engagement Acceptance Form." (Ex. B.) The 2010 Form stated that if Berman & Co. answered "Yes" to question 11, "the firm is precluded from accepting the engagement." (*Id.*) Question 11 of the 2010 Form stated: "Document consideration

of whether the firm is independent of the prospective client by answering the following questions. The SEC expects accountants to comply with the independence requirements established by the PCAOB, Independence Standards Board, and the accounting profession (the AICPA), as well as the requirements promulgated by the Commission and the staff. The general standard of independence – set forth in Rule 2-01 – requires both the fact and appearance of independence." (*Id.*) Subpart h asked: "Are there any relationships with the client or conflicts of interest that might impair independence? Explain "Yes" answers." (*Id.*) Subpart vii, then questioned: "Indemnification?" Despite having multiple indemnification provisions in the MSLP Engagement Letters, Respondents responded "No" to this question. (*Id.*) The 2011 Form asked the same question (item 7 in the 2011 Form), and again, when asked whether there was indemnification, Respondents incorrectly responded "No." (*Id.*)

Berman reviewed and approved each of the MSLP Engagement Acceptance Forms. (OIP ¶ 19) There is no other evidence in the work papers that Berman & Co. considered its independence in relation to the indemnification provisions. (*Id.* at 22.)

e. <u>The "Other Services" Provision was Impermissibly Used as an Indemnification Clause.</u>

The "Other Services Provision" provides:

> This engagement includes only those services specifically described in this letter. 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.

(OIP ¶ 18(a)-(c); Motion Ex. A.) Respondents argue that (1) the provision's plain language belies the conclusion that the "Other Services Provision" is an indemnification clause against

Respondents' own liability (Motion at 17-19) and (2) the "Other Services Provision" does not – and cannot – indemnify Berman & Co. for its own negligent acts (Motion at 19-21).

Even were Respondents correct (which the Commission does not concede) on what the Other Services Provision does or does not cover, or even what it *could* cover in a Florida court of law, the facts in this case belie their claim that this provision did not impair Respondents' independence. That is because Respondents specifically contacted MSLP and demanded payments invoking this provision – which they specifically referred to as an indemnification provision – as soon as Berman & Co. received a subpoena from the Commission. (Exhibits. E & F.) Moreover, 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 and subsequently sent an invoice to MSLP seeking reimbursement for time spent preparing for his testimony, and the testimony itself. (OIP ¶ 23.) While Respondents maintain reimbursement was permitted because it was related to testimony and document subpoenas "in the MSLP investigation" (Motion at 21), there is nonetheless a material factual dispute on this point making summary disposition inappropriate.

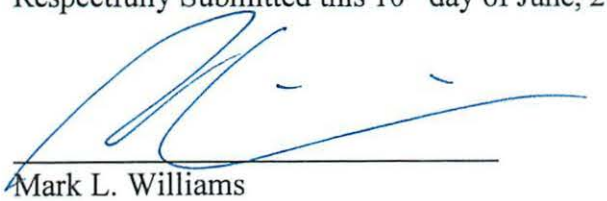
In sum, Respondents are not entitled summary disposition.

VII. CONCLUSION

For the reasons stated above, Respondents' motion for summary disposition should be denied.

Rule 450(d) Certification: Undersigned counsel certifies that this brief contains 9,787 words and therefore complies with the limitations set forth in Rule of Practice 450(c).

Respectfully Submitted this 10th day of June, 2016.



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Joint Prehearing Conference Statement was served on the following on this 10th day of June, 2016, in the manner indicated below:

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Nicole L. Nesvig

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UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)
) File No. D-03309-A
MUSCLEPHARM CORP.)

WITNESS: Elliot Berman
PAGES: 289 through 487
PLACE: Securities and Exchange Commission
1801 California Street, Suite 1500
Denver, Colorado 80202-2656
DATE: Thursday, April 3, 2014

The above-entitled matter came on for examination, pursuant to Notice, at 9:06 a.m.

Diversified Reporting Services
(202) 467-9200

0290

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ALSO PRESENT:
JASON S. FLEMMONS, Senior Marketing Director

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C O N T E N T S

would be included in that.
Q. Okay. And is Jeremy DeLuca reaping any type of personal benefit from increasing those sales?
A. Not that we were aware of.
Q. Are you aware if Mr. DeLuca was receiving a bonus based on increase in sales revenues year after year?
A. I don't recall that. I don't know if his employment agreement said that or not.
Q. Okay. Well, if his employment agreement did say that and revenues were going up in part due to increases in revenue to BodyBuilding.com, do you agree that that would have a personal benefit to himself in the form of a bonus?
A. In this case, yes, I could see that.
Q. Okay. I want to turn to the last page of Exhibit 84.
A. (The witness complies.)
Q. The box at the bottom of the page, where you discuss -- indicate that you discussed the matter with John Dersh at the SEC and OCA --
A. Yes.
Q. -- which you mentioned yesterday as well?
A. Yes.
Q. In this process of trying to determine if a disclosure was required for the relationship between MusclePharm and BodyBuilding.com, when was this discussion with Mr. Dersh in that process?
A. This would have occurred at the time of the memo being written, sometime in that. It could have been a day before. Sometime before the memo was provided to us, I did independent research before getting information back from them, back from MusclePharm.
Q. You did independent research before hearing back from MusclePharm?
A. Yes.
Q. And what independent research did you do?
A. I called the SEC and AICPA.
Q. Okay. And so you talked to the SEC before the memo we're looking at, several days before it was prepared, before you received it?
A. On or about the same time. I don't -- I would say it would have to be before because I needed that information to discuss with the client.
Q. Okay. And what information about the relationship did you provide to John Dersh and OCA?
A. My recollection is exactly what's largely contained in this document, the family relationship, the sales, the material amount of sales, both before and after, DeLuca's involvement and that there was no special treatment.
Everything appeared to be arm's length, and the company had believed for reasons stated in the memo that no required disclosure was necessary.
Q. And what was -- strike that.
And this was what you provided to Mr. Dersh verbally?
A. Yes.

Q. On the phone?
A. Yes.
Q. And did you provide him anything in writing?
A. No.
Q. Did you send him any e-mails?
A. No.
Q. What was his response?
A. In the box here, it says they said we were on the right track, both himself and Arthur Romano from the AICPA. He said there that was no exact bright line that said you have to or don't have to. He said it's facts and circumstances and every case could be different.
Q. Okay. So he didn't conclude on whether disclosure was required or not?
A. He said we were on the right track, because I did tell him that the company doesn't want to provide disclosure. We believe that no disclosure is necessary, and it says here he couldn't provide the exact guidance, but he said we're on the right

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track with the analysis.
Q. Right. He says you're on the right track and it depends on the facts and circumstances?
A. Which I told him what the facts were.
Q. But he didn't conclude on whether disclosure was required or not?
A. Correct.
Q. Okay. And this was just one conversation, telephone conversation, you had with Mr. Dersh?
A. One, it could have been two, but I would say one. Occasionally, I would follow up if there's -- if there's something else that comes to my attention I would have called him back.
Q. Right. But to your best recollection it was just one call?
A. Yes.
Q. Okay. So tell me about the call then with Mr. Romano. Was that the same time?
A. Probably the same day and same conversation.
Q. You gave Mr. Romano the same facts that you gave Mr. Dersh that you just told me?
A. Yes.
Q. Okay. And what was Mr. Romano's response?
A. The same. You're on the right track. It's not a bright line. It's fact specific. And based

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on the fact pattern you're giving us, it sounds like you're on the right track.
He didn't specifically say, yes, I agree to disclose or, no, you shouldn't. What he did say was you're on the right track with the analysis which I guess could be interpreted that if we told them, if we communicated to the SEC and the AICPA that no disclosure was necessary, then saying you're on the right track could be interpreted as no disclosure, although I don't specifically say that in the memo.
Q. Okay. But once again, Mr. Romano didn't conclude one way or the other, other than saying you're on the right track, and it depends on facts and circumstances?

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UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)
) File No. D-03309-A
MUSCLEPHARM CORPORATION)

WITNESS: Elliot Reaves Berman
PAGES: 488 through 673
PLACE: Securities and Exchange Commission
1961 Stout Street
Denver, Colorado 80294
DATE: Thursday, October 15, 2015

The above-entitled matter came on for hearing, pursuant to notice, at 9:15 a.m.

Diversified Reporting Services, Inc.
(202) 467-9200

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APPEARANCES:

On behalf of the Securities and Exchange Commission:
KIMBERLY L. FREDERICK, ESQ.
MICHAEL F. D'ANGELO, SENIOR ACCOUNTANT
Securities and Exchange Commission
Division of Enforcement
1961 Stout Street
Denver, Colorado 80294
(303) 844-1115

On behalf of the Witness:
ARTHUR G. JAKOBY, ESQ.
Herrick, Feinstein LLP
2 Park Avenue
New York, New York 10016
(212)592-1438

ALSO PRESENT:
Jason S. Flemmons, FTI Consulting

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C O N T E N T S

well, back up a second here. Did you sign the engagement letter on the -- as indicated on the last page for Berman & Company?

A Yes.

Q Okay. And did you draft this engagement letter?

A Yes.

Q Okay. If you'd turn to Page 7 of 8 of this engagement letter.

A Yes.

Q Okay. Specifically Paragraphs 3 and 4. Just read those to yourself for a second.

A Okay.

Q At any point do you recall these two paragraphs being removed from Berman & Company's engagement letters with its audit clients?

A You asked previously. Miss Frederick I think asked previously.

Q Right. I'm just following up now, having seen the language if that refreshes any recollection.

A I'm familiar with the language. I don't remember whether or why it was removed.

Q But do you recall it was removed then?

A I don't.

0535

Q Okay. At any point did you ever do any research on indemnification provisions in engagement letters with SEC registrants?

A Yes.

Q When did you do such research?

A I would say probably when I opened the firm in 2006.

Q Okay. What research do you recall doing?

A I reviewed the PCAOB standards, the interim standards that adopts the AICPA standards. I'm going to go off memory here. I think it's -- I want to say it's Section 3520. And there's a reference to -- I believe it's ET 191. And I know there's a paragraph in there, 1 -- I don't know if I'm this good, but maybe 188. Okay. And it references the fact that indemnification clauses in engagement letters are specifically allowable and they do not impair independence.

Q Okay. And this is -- just to make sure I got it right, Section 3520, ET 191. Is that a PCAOB or AICPA cite? What are you citing there?

A ET 191 is an AICPA standard that was adopted into the PCOB interim standards.

Q And Section 3520, is that a PCAOB reference?

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A Yes.

Q Okay. Okay in 2006 did you do any other research with respect to indemnification provisions?

A Yes.

Q What else did you do?

A The PCAOB standards indicate that if the SEC has independence rules that -- or any rules in general that are more restrictive, you would follow the more restrictive rule.

Q Okay.

A And so in the codification, I know it's

SX 201, the indemnification provision is specifically excluded, and it's not referenced in that literature, so I don't think that that would be a more restrictive rule. So the PCAOB standards adopt the rule that, I guess you could say, is final.

Q Okay. I think it was SX 201 you said.

A I think so.

Q Okay.

A Maybe it's CFR 17.

Q Okay.

A I don't want to swear by these numbers, but I think so.

Q Right. Okay. In 2006 did you do any

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other research regarding indemnification provisions?

A I think that's it.

Q Okay. After 2006 did you subsequently refer to any of these cites that you just gave me on indemnification provisions?

A Yeah. Yes.

Q Okay. When was the next time after 2006?

A In preparation for this testimony.

Q Okay. And when was that exactly or as close to exactly as you can get on when?

A From the time that, I guess, the subpoena came to us. Between then and today.

Q Okay. And which subpoena are you referring to?

A What was the date? September 8th, maybe.

Q Okay. Let me just pull it out.

A I don't remember. It's on one of the exhibits.

Q We sent several subpoenas, so I'm not sure which one you're referring to.

A The one where you asked for the engagement letters.

Q Okay.

A Here it is.

Q I believe it's the July 16, 2015,

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subpoena. Is that correct?

A Yeah. Correct.

Q Okay. So you believe it was around that time that you looked, again, at the rules with respect to indemnification provisions?

A Yes.

Q Okay. At any point did you ever talk to anyone at the SEC about indemnification provisions in engagement letters?

A Not that I remember.

Q Oops. Sorry. Just handed you what has been marked as Exhibit 489 in this investigation. It's an e-mail from Larry Meer, dated April 13th, 2012, to yourself and Mr. Redensky. And attached is an engagement letter dated January 1st, 2012. Did you sign this engagement letter on behalf of Berman & Company?

A Yes.

Q And did you draft it?

A Yes.

Q Has Berman & Company sent any invoices to MusclePharm after the August 7th, 2014, invoice that

stuff?
Q Not stuff. Just about BodyBuilding.com.
A I don't specifically. I mean, it's a long time ago. I don't remember what we talked about.
Q Okay.
MR. D'ANGELO: Let's go off the record.
(Lunch break taken.)
A F T E R N O O N S E S S I O N
MR. D'ANGELO: Back on the record after our lunch break.
BY MR. D'ANGELO:
Q During the lunch break there were no substantive communications between Mr. Berman and the SEC staff; is that correct?
A Yes.
Q Just want to revisit something we talked about this morning regarding the indemnification agreements and the research you had conducted.

A Okay.
Q In addition to the research that you testified about this morning, did you call OCA and get any advice from them or opinions from them on indemnification provisions?
A Did I call them?
Q Or e-mail them or communicate with them in some way.
A Not that I recall.
(SEC Exhibit 504 was marked for identification.)
BY MR. D'ANGELO:
Q Mr. Berman, I'm handing you what has been marked as Exhibit 504. It's a 24-page document. Numbers are on the bottom left portion of the page. It's titled Office of the Chief Accountant, Application of the Commission's Rules on Auditor Independence, Frequently Asked Questions. And if you look in the upper right-hand corner, there is the -- their Web address where this document was printed from.
A Okay.
Q Have you ever seen this document before?
A Yes.
Q When's the first time you saw this -- a

document -- this document?
A I don't remember the first time.
Q Okay. Do you believe you looked at this document in about 2006 when you did your other research with respect to indemnification provisions and independence?
A Yes.
Q Is there a reason you didn't mention it this morning when you listed out your research?
A You refreshed my memory by showing this to me.
Q Do you recall this document discussing indemnification provisions?
A Yes. There's an FAQ.
Q Okay. If you'll turn to Page 14 of 24. Just read it to yourself. It's Question 4. There's an issue date of December 13th, 2014.
A Okay.

Q Do you believe you read this FAQ in about 2006 when you did your other research?
A Yes.
Q Okay. Did you consider this research in drafting or crafting Berman & Company's engagement letters to SEC registrants?
A Yes.

Q And how did you consider it?
A Well, I read the -- I read -- this is just guidance. But can I point you back to the first page?
Q Sure.
A The lead in -- pardon me. And I'll read this. 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 or -- nor disapproved them.
Q Okay.
A So this is not a rule or a regulation. The PCOB standards indicate you follow the more restrictive rule. And this is a view of the OCA. This is not a rule.
Q Okay. Did you consider -- after seeing this FAQ, did you consult with anyone with respect to this FAQ that we're looking at?
A That's nine years ago. I couldn't tell you. I don't remember.
Q Okay. How about after 2006, have you ever consulted with anyone regarding this FAQ that we're looking at on Page 14 of 24?

MR. JAKOBY: Other than with counsel?
BY MR. D'ANGELO:
Q Other than with counsel, yes.
A No. Not that I recall.
Q The question also references financial reporting policy -- policies, Section 600-602.02.F.I. Do you see that?
A Yes.
Q Did you read that guidance or that policy?
A I would say back then I must have looked at it if I evaluated FAQ No. 4, Question 4. I have a very general recollection, but I -- I'm not a hundred percent sure, but I believe this section was removed from the final independence rules in CFR 17201, if I'm quoting correctly. I'm not a hundred percent sure, but I think that's where you'll find it.
Q How am I going to find it if it was removed? I'm not sure.
A Yeah, it was removed, so you won't find it.
Q You believe it was in there at one point?
A I don't know reading this now -- I don't know what I knew nine years ago.
Q Okay.

A But in the final independence rules, indemnification is not mentioned.
Q Okay.

A I would expect maybe it would have said something. Then I would have evaluated differently.
Q Okay. Prior to the SEC -- prior to November 2012 when you received your voluntary request for documents from the SEC -- so prior to November of 2012, did you consult with any attorneys with respect to indemnification provisions in engagement letters?
A Did I consult with them?
Q Consult with them, communicate with them, ask them about it.
A I don't remember. I don't think so.
Q Okay. Anything we've talked about since lunch refresh any recollection about why Berman & Company removed the indemnification provisions in its engagement letters with the SEC registrants?
A You know, my under -- my long understanding of the rules, sort of what we just talked about, my only thing is I just maybe decided to take it out. But it wasn't because anybody pointed to it. Maybe we changed the way we customized the engagement letters at that point, and

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it just so happened that came out. But it wouldn't have been incorrect to leave it in based on the PCOB standard and the SEC final rule.
Q But you don't recall why it was taken out, you're speculating?
A Speculating.
Q Okay.
BY MS. FREDERICK:
Q When you reviewed what we're looking at in Exhibit 504, Question 4 on Page 14, the last sentence says, Further, 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. Do you see that?
A Yes.
Q Were you aware that your engagement letter had such a clause in it when you read this provision?
A Yes.
Q Did you have concern in keeping that provision in there when it went against the OCA guidance?
A No. I mean, OCA you reference as

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guidance, and to me that's all it is is guidance of. It's not -- as it says on the intro, they're not rules or regulations or statements of the Securities and Exchange Commission, and the Commission has neither approved nor disapproved them. So would I have considered it? Yes. And if it was part of a final rule, I believe I would have considered it and maybe have changed the way, you know, the engagement letter came out, but not based on the FAQ.
Q If you considered Exhibit 504 to just be guidance and not binding, why did you bother reading it?
A Probably would have been whatever I did nine years ago just in the course of doing research.

And I read stuff. So just reading to read. I don't know, maybe if I learned something I would have had a different answer.

Q Have you ever made changes to your procedures based on OCA guidance?

A Not that I can I think of off the top of my head.

Q Did you -- after you read what's in Exhibit 504 with the OCA guidance, did you consult anyone, attorney, SEC, anyone about whether you should change your engagement letters?

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A Not that I recall.

Q Okay.

BY MR. D'ANGELO:

Q Okay. Changing topics and talk about sponsorship agreements now.

A Okay.

Q During the 2011 audit, were you aware that MusclePharm had sponsorship agreements with various sponsors?

A Yes.

Q So, for example, were you aware that MusclePharm had a sponsorship agreement with Zuffa Marketing?

A Yes.

Q Were you aware of a sponsorship agreement with Michael Vick?

A Yes.

Q Were you aware of a sponsorship agreement with Chad Ochocinco?

A Yes.

Q Okay. During the 2011 audit were you also aware that the sponsorship agreements called for payments in 2011, but also future payments in 2012 and 2013 with respect to these multiyear sponsorship agreements?

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A Yes.

Q During the 2011 audit, did you consider if these future sponsorship commitments needed to be disclosed in MusclePharm's financial statements?

A Yes.

Q What did you do to evaluate that?

A Well, first thing is read the agreement, understand the nature, the terms, everything that's, you know, relevant or pertinent in -- in the contract. Knowing myself, I -- you know, in the course of doing a disclosure checklist, we would look there to see if it's something that's relevant for disclosure, and going back to the GAAP, which I believe is ASC 440, which is commitments.

Q Okay. So during the 2011 audit did you read these three agreements?

A Yes.

Q Okay. And during the 2011 audit did you look at and review ASC 440?

A I believe I did.

Q And your review of literature, was that documented anywhere in the work papers?

A Documentation may be in the form of a disclosure checklist. That's all I can think of right now.

Index [WPRef]

PCA-CX-1.1: Engagement Acceptance Form

Company: MusclePharm Corporation
Completed by: [ ]

Balance Sheet Date: December 31, 2010
Date: [ ]

Instructions: This form should be completed for all potential audit clients. The form is a guide for assessing potential clients, but it is not necessarily a complete listing of all factors that might be considered. Specific circumstances may require additional considerations. Explain any "Yes" answers, excluding question 1. You should be familiar with the matters discussed in section 201 . If questions 7 or 11 are answered "Yes," the firm is precluded from accepting the engagement. Information gathered when completing or updating this form should be considered when completing PCA-CX-3.1 and PCA-CX-7.1 . If an audit of internal control is being performed, information gathered while completing this form that may indicate a deficiency in internal control should be carried forward to PCA-CX-15.1 , "Control Deficiency Evaluation Form," for summarization and evaluation.

Although this form should be prepared before the initial engagement, assessment of these factors continues throughout the engagement. At least annually the firm should evaluate whether to continue auditing the client's financial statements. This form or the "Engagement Continuance Form" at PCA-CX-1.2 , can be used to identify issues that should be considered when making the continuance decision. If this form is used to assess continuance at PCA-AP-1 , refer to the "List of Substantive Changes" included with each annual supplement of the *Guide* to determine whether the form has been revised in the current edition.

Auditors should be familiar with Chapter 2 before completing this form.

	Yes	No	N/A	Comments
1. What services does the company desire from our firm?				
a. Audit of financial statements?	✓			
b. Audit of internal control?		✓		
c. Preparation of tax returns? (Specify) [ ]		✓		
d. Other? (Specify.) [ ]			✓	

2. Briefly describe the intended use of the financial statements.

   Financial statements will be filed on Form 10-K.

	Yes	No	N/A	Comments
3. Does the firm possess the necessary competence and capabilities to serve the client, including any specialized industry, regulatory, or reporting requirement knowledge?	✓			
4. Does the firm possess the necessary competence regarding PCAOB standards, SEC rules and regulations, and the subject matter of auditing internal control over financial reporting to serve the client?	✓			
5. Is the staffing commitment, including the use of specialists, required by the engagement within the capabilities of the firm?	✓			

	Yes	No	N/A	Comments
6. Document the results of communications with the predecessor auditor and of reading Form 8-Ks filed related to auditor changes (if applicable).				
a. Has the predecessor had disputes with the client about accounting principles, proposed adjustments, or other significant matters?	___	✓	___	
b. Has the predecessor been prevented from applying necessary procedures?	___	✓	___	
c. Does the predecessor auditor have reason to doubt management's integrity?	___	✓	___	
d. Have other auditors refused to serve this client?	___	✓	___	
e. Are there unpaid fees to the predecessor for services rendered?	✓	___	___	Fees will be paid per discussion with Brad Pyatt, CEO
f. Are there any fee disputes with the predecessor auditor?	___	✓	___	
g. Has management been domineering in dealing with the predecessor auditor?	___	✓	___	
h. Has management placed unreasonable demands (such as unreasonable time constraints on the concerning of the audit) on the predecessor auditor?	___	✓	___	
i. Has the predecessor had any communications with the client concerning fraud, illegal acts, or internal control deficiencies?	___	✓	___	
j. Were there any disagreements or other matters reported on Form 8-K regarding the change in auditors?	___	✓	___	
k. Document the identified reasons for a change in auditors and any additional comments based on inquiries of the predecessor auditor and on reading Form 8-K: **Predecessor auditor did not have the experience in dealing with complicated equity and debt transactions.**				
7. Does it appear that the company's financial reporting system is insufficient to provide evidence to support that transactions have occurred and that all of the transactions that should be recorded are, in fact, recorded? (A "yes" answer precludes the auditor from accepting the engagement.)	___	✓	___	
8. Are there any concerns about management's integrity, including the identity and business reputation of key management, related parties, the board of directors and the audit committee, or the risks associated with providing professional services, based on:				
a. Contacts or discussions with others, such as:				
i. Bankers?	___	✓	___	
ii. Attorneys?	___	✓	___	
iii. Credit services, rating agencies, or lenders?	___	✓	___	
iv. Others having business relationships with the client?	___	✓	___	

	Yes	No	N/A	Comments
b. Reading Form 8-Ks, if applicable, to determine any changes in officers or directors, including resignations or declinations to stand for reelection.		✓		
9. Are there any concerns about management's integrity that might be derived from SEC or other regulatory actions in process or settled?		✓		
10. If the firm's policy is to obtain a background investigation on potential clients, have the results of the investigation raised any concerns about management's integrity?		✓		See workpaper series FF for additional responses.
11. Document consideration of whether the firm is independent of the prospective client by answering the following questions. The SEC expects accountants to comply with the independence requirements established by the PCAOB, Independence Standards Board, and the accounting profession (the AICPA), as well as the requirements promulgated by the Commission and its staff. The SEC's independence rules are set forth in Rule 2-01 of Regulation S-X. Rule 2-01's general standard of independence requires both the fact and the appearance of independence. **(See section 202 for a discussion on independence, including the PCAOB's *Ethics and Independence Rules Concerning Independence, Tax Services, and Contingent Fees*.)**				
a. If a continuing client, have the audit partners been rotated off the audit engagement team after the required number of years (five or seven) and prohibited from rejoining the audit team for the required number of years (five or two)? Explain a "No" answer.			✓	N/A – First year audit
b. Have all audit and allowable nonaudit services been (or will be) pre-approved by the audit committee? Explain a "No" answer.	✓			
c. Has an audit partner received (or is expected to receive) compensation for procuring engagements to provide products or services to the client other than the audit, review, or attestation services? Explain a "Yes" answer.		✓		
d. Does the firm, any covered person, or any covered person's immediate family members have a direct or material indirect financial interest in the client or in an entity over which the client has significant influence? Explain a "Yes" answer.		✓		
e. Does the client have an interest in the audit firm; or has the client been engaged to be an underwriter, broker-dealer, market maker, promoter, or analyst for the firm's issuance of securities? Explain a "Yes" answer.		✓		
f. Have material fees for prior-year audit services or other services been collected? Explain a "No" answer.			✓	N/A – First year audit
g. Do the fees for this client, and its related group, represent a significant portion of the firm's total fees? Explain a "Yes" answer.		✓		
h. Are there any relationships with the client or conflicts of interests that might impair independence? Explain "Yes" answers.				

	Yes	No	N/A	Comments
i. Employment relationships?	___	✓	___	
ii. Business relationships?	___	✓	___	
iii. Contingent fee or commission arrangements?	___	✓	___	
iv. Competing against the client?	___	✓	___	
v. Litigation?	___	✓	___	
vi. Unpaid fees (including unpaid accounting support fees assessed by the PCAOB)?	___	✓	___	
vii. Indemnification?	___	✓	___	
viii. Other? (Specify.) [ ]	___	___	___	
i. Have any prohibited nonaudit services been performed for this client? Explain a "Yes" answer.	___	✓	___	
12. Are there circumstances that would not permit an adequate audit and the expression of an unqualified opinion? (If so, the auditor should discuss the possibility of a disclaimer of opinion.)	___	✓	___	
13. Has our review of the following, provided information that would cause us to regard the engagement as requiring special attention or presenting unusual risks or that would cause us not to want to be associated with the client?	___	✓	___	
a. Latest annual and interim financial statements?	___	✓	___	
b. Income tax returns?	___	✓	___	
c. Auditor's reports?	___	✓	___	
d. SEC filings?	___	✓	___	
e. Analysts' reports?	___	✓	___	
f. Information from rating agencies?	___	✓	___	
g. Press releases?	___	✓	___	
h. Reports to other regulatory agencies?	___	✓	___	
i. Other auditor communications, if any?	___	✓	___	
j. Other? (Specify)[ ]	___	___	___	
14. Does the engagement fail to meet the firm's standards from an economic standpoint. If yes, document your considerations.[ ]	___	✓	___	

Acceptance: (Some firms require concurrence with the acceptance decision by the managing partner, another designated partner, or a policy making committee.)

We should accept X or not accept [ ] the engagement.

If issues were identified and the firm has decided to accept the engagement, document how those issues were satisfactorily resolved.[ ]

[ ]
Lead Partner

[ ]
Concurring Partner

[ ]
Date

[ ]
Date

Index [WPRef]

PCA-CX-1.1: Engagement Acceptance and Continuance Form

Company: **MusclePharm Corporation**
Completed by: [ ]

Balance Sheet Date: **December 31, 2011**
Date: [ ]

Instructions: This form should be used to assess potential audit clients and perform the annual reevaluation of existing audit clients. However, this form is not necessarily a complete listing of all factors that might need to be considered. Specific circumstances may require additional considerations. Complete this form before the engagement begins. Part I applies to all new or recurring engagements and includes general acceptance and continuance considerations. Part II includes additional considerations for initial audit engagements.

Explain any "Yes" answers, excluding question 1. You should be familiar with the matters discussed in section 201 . Information gathered when completing or updating this form should be considered when completing PCA-CX-3.1 and PCA-CX-7.1 . If an audit of internal control is being performed, information gathered while completing this form that may indicate a deficiency in internal control should be carried forward to PCA-CX-15.1 , "Control Deficiency Evaluation Form," for summarization and evaluation.

Although this form should be prepared before the initial engagement, assessment of these factors continues throughout the engagement. At least annually, the firm should evaluate whether to continue auditing the client's financial statements. Auditors should be familiar with Chapter 2 before completing this form.

The PCAOB Interim Quality Control Standards require firms to establish policies and procedures to provide reasonable assurance of minimizing the likelihood of accepting or continuing association with a client whose management lacks integrity. However, the Interim QC Standards are less rigorous than the AICPA Quality Control Standards (for auditors of nonpublic entities) in several areas, including the acceptance and continuance of client relationships and engagements. As a result, the authors recommend that auditors of issuers consider implementing the AICPA Quality Control Standards to the extent appropriate. In 2010, the AICPA issued Statement on Quality Control Standards (SQCS) No. 8, *A Firm's System of Quality Control (Redrafted)*, effective for a firm's system of quality control as of January 1, 2012. The acceptance and continuance requirements of SQCS No. 8 have been incorporated as appropriate throughout this form.

Part I—General Acceptance/Continuance Considerations

	Yes	No	N/A	Comments
1. What services does the company desire from our firm?				
a. Audit of financial statements?	✓			
b. Audit of internal control?		✓		
c. Preparation of tax returns? (Specify) [ ]		✓		
•				
•				
d. Other? (Specify.) [ ]			✓	
•				

	Yes	No	N/A	Comments
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2. Briefly describe the intended use of the financial statements.				
To be included in form 10-K filed with the SEC				
3. Has management refused (or are there indications that management will refuse) or be unable to do the following:				
a. Accept responsibility for the financial statements or for the design, implementation, and maintenance of internal control over the financial statements?	___	✓	___	
b. Provide us with unrestricted access to all information relevant to the preparation and fair presentation of the financial statements, any additional information we may request for the audit, and persons within the company from whom we determine we need to obtain audit evidence?	___	✓	___	
4. Do firm personnel lack (or will they be unable to obtain) the necessary competence and capabilities to serve the client, including the ability to comply with any specialized industry, legal, regulatory, or reporting requirements?	___	✓	___	
5. Does firm lack the necessary competence regarding PCAOB standards, SEC rules and regulations, and the subject matter of auditing internal control over financial reporting to serve the client?	___	✓	___	
6. Is the staffing commitment, including the use of specialists, required by the engagement beyond the capabilities of the firm?	___	✓	___	

	Yes	No	N/A	Comments
7. Document consideration of whether the firm is independent of the prospective client by answering the following questions. The SEC expects accountants to comply with the independence requirements established by the PCAOB, Independence Standards Board, and the accounting profession (the AICPA), as well as the requirements promulgated by the Commission and its staff. The SEC's independence rules are set forth in Rule 2-01 of Regulation S-X. Rule 2-01's general standard of independence requires both the fact and the appearance of independence. **(See section 202 for a discussion on independence, including the PCAOB's *Ethics and Independence Rules Concerning Independence, Tax Services, and Contingent Fees*.)**				
a. If a continuing client, has the firm *failed* to rotate the audit partners off the audit engagement team after the required number of years (five or seven) and prohibited them from rejoining the audit team for the required number of years (five or two)?	___	✓	___	
•				
•				
•				
b. Has the firm *failed* to have all audit and allowable nonaudit services pre-approved by the audit committee?	___	✓	___	
•				
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o				
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c. Has an audit partner received (or is expected to receive) compensation for procuring engagements to provide products or services to the client other than the audit, review, or attestation services?	___	✓	___	
•				
d. Does the firm, any covered person, or any covered person's immediate family members have a direct or material indirect financial interest in the client or in an entity over which the client has significant influence?	___	✓	___	
•				
•				
o				
o				

	Yes	No	N/A	Comments
○				
○				
•				
•				
e. Does the client have an interest in the audit firm; or has the client been engaged to be an underwriter, broker-dealer, market maker, promoter, or analyst for the firm's issuance of securities?	___	✓	___	
•				
f. Are there material uncollected fees for prior-year audit services or other services?	___	✓	___	
•				
g. Do the fees for this client, and its related group, represent a significant portion of the firm's total fees?	___	✓	___	
•				
h. Are there any relationships with the client or conflicts of interests that might impair independence?				
i. Employment relationships?	___	✓	___	
ii. Business relationships?	___	✓	___	
iii. Contingent fee or commission arrangements?	___	✓	___	
iv. Competing against the client?	___	✓	___	
v. Litigation?	___	✓	___	
vi. Unpaid fees (including unpaid accounting support fees assessed by the PCAOB)?	___	✓	___	
vii. Indemnification?	___	✓	___	
viii. Other? (Specify.) [ ]	___	✓	___	
•				
•				
•				
i. Have any prohibited nonaudit services been performed for this client?	___	✓	___	
•				
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○				

	Yes	No	N/A	Comments
j. Have procedures performed as part of the firm's quality control monitoring system indicated that there may be violations of firm independence policies?	___	✓	___	
8. Does it appear that the company's financial reporting system (including internal control) is insufficient to provide evidence to support that transactions have occurred and that all of the transactions that should be recorded are, in fact, recorded?	___	✓	___	
9. Are there any concerns about management's integrity, including the identity and business reputation of key management, related parties, the board of directors and the audit committee, or the risks associated with providing professional services? (If you conclude that the client lacks integrity, the firm should not be engaged to perform the audit.)	___	✓	___	

	Yes	No	N/A	Comments
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▪				
10. Are you aware of any actual instances of fraud or illegal acts, or any allegations of fraud?	___	✓	___	
11. Are there circumstances that would not permit an adequate audit and the expression of an unqualified opinion? (If so, the auditor should discuss the possibility of a disclaimer of opinion.)	___	✓	___	
•				
12. Has our review of the following or our previous experience with the client provided information that would cause us to regard the engagement as requiring special attention, presenting unusual risks, or causing us not to want to be associated with the client?	___	✓	___	
a. Latest annual and interim financial statements?	___	✓	___	
b. Income tax returns?	___	✓	___	
c. Auditor's reports?	___	✓	___	
d. SEC filings?	___	✓	___	
e. Analysts' reports?	___	✓	___	
f. Information from rating agencies?	___	✓	___	
g. Press releases?	___	✓	___	
h. Reports to other regulatory agencies?	___	✓	___	
i. Other auditor communications, if any?	___	✓	___	
j. Other? (Specify)[ ]	___	___	___	
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13. Does the engagement fail to meet the firm's standards from an economic standpoint?	___	✓	___	
•				
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•				

	Yes	No	N/A	Comments
•				
•				
14. Is there anything else about the client or the engagement that causes us to be uncomfortable about being associated with this client or the related engagement?	___	✓	___	The Company has had a drastic increase in sales from prior year but still has financial issues that could affect its ability to continue as a going concern.
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Acceptance or Continuance: (Some firms require concurrence with the acceptance decision by the managing partner, another designated partner, or a policy making committee.)

We should accept/continue ☑ not accept/continue ☐ the engagement.

If issues were identified and the firm has decided to accept or continue the engagement, document how the issues were resolved. [ ]

Elliot Berman
Lead Partner
12/12/2011
Date

[ ]
Concurring Partner
[ ]
Date

Part II—Additional Acceptance Considerations for Initial Audit Engagements – NA (2nd yr audit)

	Yes	No	N/A	Comments
1. Document the results of communications with the predecessor auditor and of reading Forms 8-K filed related to auditor changes.				
a. Has the predecessor had disputes with the client about accounting principles, proposed adjustments, or other significant matters?	___	___	___	
b. Has the predecessor been prevented from applying necessary procedures?	___	___	___	

	Yes	No	N/A	Comments
c. Does the predecessor auditor have reason to doubt management's integrity?	—	—	—	
d. Have other auditors refused to serve this client?	—	—	—	
e. Are there unpaid fees or fee disputes with the predecessor for services rendered?	—	—	—	
f. Has management been domineering in dealing with the predecessor auditor?	—	—	—	
g. Has management placed unreasonable demands (such as unreasonable time constraints on the completion of the audit) on the predecessor auditor?	—	—	—	
h. Has the predecessor had any communications with the client concerning fraud, illegal acts, or internal control deficiencies?	—	—	—	
i. Were there any disagreements or other matters reported on Form 8-K regarding the change in auditors?	—	—	—	
j. Document the identified reasons for a change in auditors based on inquiries of the predecessor auditor and on reading Form 8-K: [ ] • •				
2. Have contacts with bankers, attorneys, credit services, rating agencies, or others having business relationships with the client; reviews of Forms 8-K regarding changes in officers and directors; or SEC or other regulatory actions in process or settled raised any concerns about management's integrity or other concerns about the client? (If you conclude that the client lacks integrity, the Firm should not accept the engagement.)	—	—	—	
3. If the firm's policy is to obtain a background investigation on potential clients, have the results of the investigation raised any concerns about management's integrity? •	—	—	—	

BERMAN & COMPANY, P.A.
Certified Public Accountants and Consultants

January 31, 2011

MusclePharm Corporation and Subsidiary
4721 Ironton Street
Denver, Colorado 80239

Dear Audit Committee:

We have been engaged to audit the consolidated financial statements of MusclePharm Corporation and Subsidiary for the year ended December 31, 2010 and the related statements of operations, stockholders' deficit and cash flows for the year then ended.

The Public Company Accounting Oversight Board ("PCAOB" or "Board") adopted an ethics and independence rule, Rule 3526, *Communication with Audit Committees Concerning Independence,* requires that we disclose to you in writing at least annually all relationships between our Firm and the Company that, in our professional judgment, may reasonably be thought to bear on our independence. We have prepared the following comments to facilitate our discussion with you regarding independence matters.

We are not aware of any relationships between our Firm and the Company that, in our professional judgment, may reasonably be thought to bear on our independence, which have occurred during the year ended December 31, 2010 and through the date of this letter.

We hereby confirm that as of the date of this letter we are independent accountants with respect to the Company, within the meaning of the Securities Acts administered by the United States Securities and Exchange Commission, PCAOB (we are in compliance with Rule 3520) and the requirements of the American Institute of Certified Public Accountants.

This report is intended solely for the use of the Audit Committee, Board of Directors, management, and others within the Company and should not be used for any other purposes.

We look forward to discussing with you the matters addressed in this letter as well as other matters that may be of interest to you. We will be prepared to answer any questions you may have regarding our independence as well as other matters.

Very truly yours,

Berman & Company, P.A.
Certified Public Accountants

551 NW 77th Street Suite 201 • Boca Raton, FL 33487
Phone: (561) 864-4444 • Fax: (561) 892-3715
www.bermancpas.com • info@bermancpas.com
Registered with the PCAOB • Member AICPA Center for Audit Quality
Member American Institute of Certified Public Accountants
Member Florida Institute of Certified Public Accountants

BERMAN & COMPANY, P.A.
Certified Public Accountants and Consultants

February 13, 2012

The Board of Directors of:
MusclePharm Corporation
C/O Mr. Brad Pyatt, Chairman of the Board of Directors
4721 Ironton Street
Denver, Colorado 90839

Dear Board of Directors:

We have been engaged to audit the consolidated financial statements of MusclePharm Corporation for the year ended December 31, 2011 and the related consolidated statements of operations, stockholders' deficit and cash flows for the year then ended.

The Public Company Accounting Oversight Board ("PCAOB" or "Board") adopted an ethics and independence rule, Rule 3526, *Communication with Audit Committees Concerning Independence,* requires that we disclose to you in writing at least annually all relationships between our Firm and the Company that, in our professional judgment, may reasonably be thought to bear on our independence. We have prepared the following comments to facilitate our discussion with you regarding independence matters.

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Very truly yours,

Berman & Company, P.A.

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Certified Public Accountants
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Boca Raton, FL 33487-
Tel: (561) 864-4444 Fax: (561) 892-3715
eberman@bermancpas.com
www.bermancpas.com

Invoice

Invoice Date: Dec 5, 2012
Invoice Num: 2309

Mr. Brad J Pyatt
MusclePharm Corporation - SEC Investigation
4721 Ironton Street, Building A
Denver, CO 80239

MusclePharm Corporation - SEC Investigation (MusclePharm Corporation - SEC Investigation) - Managed by (Berman, Elliot)

Services:

Description	Cost	Tax %	Amount
In connection with an inquiry from the Denver office of the U.S. Securities and Exchange Commission (Division of Enforcement)	$6,000.00		$6,000.00
Subtotal:	**$6,000.00**		**$6,000.00**

Amount Due This Invoice: $6,000.00

This invoice is due upon receipt

PAID

Account Summary

Services BTD	Expenses BTD	Last Inv Num	Last Inv Date	Last Inv Amt	Last Pay Amt	Prev Unpaid Amt
$ 6,000.00	$ 0.00	--	--	$ 0.00	$ 0.00	$ 0.00

Total Amount Due Including This Invoice: $6,000.00

Message

From: Jakoby, Arthur [ajakoby@herrick.com]
Sent: 8/8/2013 2:25:04 AM
To: Elliot Berman [eberman@bermancpas.com]; Brad Pyatt [brad.pyatt@musclepharm.com]; Shea, Daniel F. [dan.shea@hoganlovells.com]
Subject: RE: In the matter of Musclepharm
Attachments: image001.jpg; image001.jpg

Mr. Pyatt,

In accordance with Musclepharm's retainer agreement with Berman & Company and your conversation with Mr. Berman, below please find my firm's wire instructions.

Bank:	Citibank, N.A. 666 Fifth Avenue, Fifth Floor New York, NY 10103		
ABA#:	021000089	**Acct#:**	[redacted]
Acct Name:	Herrick, Feinstein LLP		

Thank you, Arthur

Arthur G. Jakoby, Esq.
Partner
Herrick, Feinstein, LLP
2 Park Avenue
New York, New York 10016

Tel: 212-592-1438
Fax: 212-545-3340
e-mail: ajakoby@herrick.com
www.herrick.com

From: Elliot Berman [mailto:eberman@bermancpas.com]
Sent: Tuesday, August 06, 2013 1:54 PM
To: 'Brad Pyatt'; 'Shea, Daniel F.'; Jakoby, Arthur
Subject: In the matter of Musclepharm

EXHIBIT
tabbies
E

BERMAN & COMPANY, P.A.
Certified Public Accountants and Consultants

GOVERNMENT
EXHIBIT
SEC
10/15/15
502
D-03309

Brad, please meet my legal counsel Arthur Jakoby of Herrick Feinstein. Arthur will be assisting in all MSLP related matters.

As we discussed yesterday, MSLP will be covering all legal expenses of Berman & Company, P.A. pursuant to our engagment letter from the 2011 year end audit.

At this time, kindly forward a retainer of $10,000 to Arthur's firm. Arthur will provide you the necessary wire instructions in a future email. Arthur has confirmed that any unused portion will be refunded to MSLP.

If there are any questions specifically pertaining to this matter, kindly coordinate through Arthur.

I appreciate your assistance in this matter. Thanks very much.

Elliot Berman, CPA
Managing Director
Berman & Company, P.A.
551 NW 77th Street, Suite 201
Boca Raton, Florida 33487

Phone: 561-864-4444 ext 11
Cell Phone: [redacted]
Fax 561-892-3715

Web: www.bermancpas.com

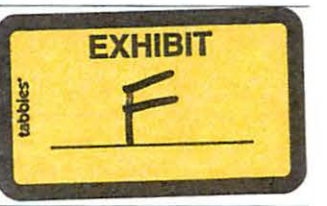
Message

From: DONALD W PROSSER [dpro-cpa@msn.com]
Sent: 10/7/2013 8:58:08 PM
To: Jim Greenwell [/O=DATRIAINT/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=JGREENWELL]
Subject: FW: Berman & Co. / Musclepharm - engagement letter

From: dan.shea@hoganlovells.com
To: dpro-cpa@msn.com
CC: david.demarco@hoganlovells.com
Subject: Fw: Berman & Co. / Musclepharm - engagement letter
Date: Mon, 7 Oct 2013 17:03:35 +0000

Fyi

From: Jakoby, Arthur [mailto:ajakoby@herrick.com]
Sent: Monday, October 07, 2013 10:20 AM Mountain Standard Time
To: Shea, Daniel F.
Subject: Berman & Co. / Musclepharm - engagement letter



Dan,

Attached is a copy of the engagement letter you ask for this morning. The operative language can be found at the bottom of page 6. I have pasted it below:

> This engagement includes only those services specifically described in this letter. 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.

As we explained Friday, responding to the SEC subpoena has already required Berman & Co., partners to spend dozens of hours culling through documents and, at this point, they have barely scratched the surface of document review at this time.

The retainer agreement clearly requires Musclepharm to pay for the time incurred by Berman & Co. to respond to the SEC subpoena and related items such as these document requests. Furthermore, although Musclepharm has paid $10,000 toward Berman & Co.'s legal fees, that is unlikely to cover all of the fees incurred in producing the documents, dealing with the SEC and your office in connection with this matter. Insofar as the document production is concerned -- other than my dealing with the issues raised by Brad's threat and this indemnification issue -- neither I nor any *lawyer* at my firm will be reviewing the documents (only if Mr. Berman needs to discuss documents with us insofar as relevance or any particular issue). My e-discovery team (who have low hourly rates) have been working for two weeks with Mr. Berman

and have helped him search for relevant documents and through relevancy techniques, reduced the number of documents he will need to review. Although at this point we cannot predict the amount of our total fees (Herrick Feinstein not Berman) it may total as much as $15,000 (i.e., slightly more than the $10,000 retainer already paid). You should know that the document production is going to be very significant.

We believe that the language from the engagement letter above is crystal clear but we are going to need an affirmation of Musclepharm's contractual obligation to pay for both Berman & Co.'s time and my firm's time. This includes not just a current obligation in connection with the pending SEC subpoena but also in the event that one or more representative of Berman & Co. is subpoenaed for testimony, which we are anticipating a likely occurrence. As you know, the cost of preparing my client for testimony, conferring with you about issues, and then attending the testimony is going to be expensive.

Finally, as you and I discussed a long time ago, it is imprudent for Musclepharm's employees to call Mr. Berman to discuss this matter or our production. And, as discussed this morning, Musclepharm is not authorized -- and was not authorized -- to make any representations about what Berman & Co., is doing or may do vis-à-vis the SEC inquiry. The representation concerning Berman & Co. in Musclepharm's 8K filed earlier this week was unauthorized. Additionally, the tone of the disclosure implies that the SEC is investigating Berman & Company, and while we have cooperated in document production, this public disclosure could reflects negatively on my client as readers may improperly assume, at this time, that Berman is actually under a formal order of investigation. In the future please seek our permission before referring to Berman & Co. in any public filing, even if the terms used are "our auditor" or any variation thereof that would give the connotation that Berman is the audit firm.

Dan, we are looking to cooperate with Musclepharm but you can certainly appreciate our concerns in light of our recent dealings.

Please have your client agree to our request herein in writing and Berman will supply the workpaper you requested. Please note that at this time, Berman anticipates between 100-125 hours for document production, this could change to be more or less as time goes on while assembling documents for production. The partners at Berman currently bill at $375/hour, however, they have agreed to honor the old engagement letter at $350/hr. My client is requesting a payment for 100 hours @ $350/hr, which is $35,000, with such payment to be made by wire this week, at that time, any workpaper requests can and will be addressed promptly. My client has also agreed to make themselves available to answer any related questions. In the event not all time is used, the amount will be refunded.

Thanks, Arthur

Arthur G. Jakoby, Esq.
Partner
Herrick, Feinstein, LLP
2 Park Avenue
New York, New York 10016
Tel: 212-592-1438
Fax: 212-545-3340
e-mail: ajakoby@herrick.com

communication in error, please immediately notify us by return e-mail and delete the original and any copies. To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (and its attachments), unless expressly stated otherwise, was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matter(s) addressed herein.

Berman & Company, P.A.
7700 Congress Avenue, Suite 3208
Boca Raton, FL 33487-
Tel: (561) 864-4444 Fax: (561) 892-3715
eberman@bermancpas.com
www.bermancpas.com

Invoice Submitted To:

Mr. Brad J Pyatt
MusclePharm Corporation - SEC Investigation
4721 Ironton Street, Building A
Denver, CO 80239

Invoice

Invoice Date: Oct 22, 2013
Invoice Num: 2454
Billing Through: Oct 21, 2013

In Reference To: MusclePharm Corporation - SEC Investigation (MusclePharm Corporation - SEC Investigation:)

Professional Services:

			Hours	Rate	Amount
8/12/2013	Berman, Elliot	SEC Investigation	4.00	$350.00	$1,400.00
8/14/2013	Berman, Elliot	SEC Investigation	5.00	$350.00	$1,750.00
8/15/2013	Redensky, Felix	SEC Investigation	1.00	$350.00	$350.00
8/15/2013	Berman, Elliot	SEC Investigation	3.00	$350.00	$1,050.00
8/16/2013	Berman, Elliot	SEC Investigation	5.00	$350.00	$1,750.00
9/24/2013	Redensky, Felix	SEC Investigation	7.00	$350.00	$2,450.00
9/30/2013	Redensky, Felix	SEC Investigation	2.00	$350.00	$700.00
9/30/2013	Berman, Elliot	SEC Investigation	3.00	$350.00	$1,050.00
10/1/2013	Redensky, Felix	SEC Investigation	2.00	$350.00	$700.00
10/1/2013	Berman, Elliot	SEC Investigation	1.00	$350.00	$350.00
10/2/2013	Redensky, Felix	SEC Investigation	2.00	$350.00	$700.00
10/2/2013	Berman, Elliot	SEC Investigation	5.00	$350.00	$1,750.00
10/3/2013	Berman, Elliot	SEC Investigation	5.00	$350.00	$1,750.00
10/4/2013	Redensky, Felix	SEC Investigation	6.50	$350.00	$2,275.00
10/4/2013	Berman, Elliot	SEC Investigation	3.00	$350.00	$1,050.00
10/7/2013	Redensky, Felix	SEC Investigation	8.00	$350.00	$2,800.00
10/7/2013	Berman, Elliot	SEC Investigation	4.00	$350.00	$1,400.00
10/8/2013	Redensky, Felix	SEC Investigation	8.00	$350.00	$2,800.00
10/8/2013	Berman, Elliot	SEC Investigation	4.00	$350.00	$1,400.00
10/9/2013	Redensky, Felix	SEC Investigation	10.00	$350.00	$3,500.00
10/9/2013	Berman, Elliot	SEC Investigation	4.00	$350.00	$1,400.00
10/10/2013	Redensky, Felix	SEC Investigation	5.00	$350.00	$1,750.00
10/10/2013	Berman, Elliot	SEC Investigation	4.00	$350.00	$1,400.00
10/11/2013	Redensky, Felix	SEC Investigation	0.50	$350.00	$175.00
10/11/2013	Berman, Elliot	SEC Investigation	4.00	$350.00	$1,400.00
10/14/2013	Berman, Elliot	SEC Investigation	3.00	$350.00	$1,050.00
10/15/2013	Berman, Elliot	SEC Investigation	5.00	$350.00	$1,750.00
10/16/2013	Berman, Elliot	SEC Investigation	3.00	$350.00	$1,050.00
10/17/2013	Redensky, Felix	SEC Investigation	3.75	$350.00	$1,312.50
10/17/2013	Berman, Elliot	SEC Investigation	2.00	$350.00	$700.00
10/18/2013	Redensky, Felix	SEC Investigation	7.75	$350.00	$2,712.50
10/18/2013	Berman, Elliot	SEC Investigation	1.00	$350.00	$350.00
10/21/2013	Berman, Elliot	SEC Investigation	3.00	$350.00	$1,050.00
		For Professional Services Rendered:	134.50		$47,075.00

Main Service Tax:

Retainer Applied:	($47,075.00)
Total Amount Of This Bill:	$0.00

Berman & Company, P.A.
7700 Congress Avenue, Suite 3208
Boca Raton, FL 33487-
Tel: (561) 864-4444 Fax: (561) 892-3715
eberman@bermancpas.com
www.bermancpas.com

Invoice Submitted To:

Mr. Brad J Pyatt
MusclePharm Corporation - SEC Investigation
4721 Ironton Street, Building A
Denver, CO 80239

Invoice

Invoice Date: Oct 22, 2013
Invoice Num: 2454
Billing Through: Oct 21, 2013

In Reference To: MusclePharm Corporation - SEC Investigation (MusclePharm Corporation - SEC Investigation;)

Professional Services:

	Hours	Rate	Amount
Previous Balance:			**$0.00**
Balance Due:			**$0.00**

This invoice is due upon receipt

This Statement Contains Charges Through October 21, 2013

PAID

5093

ACCOUNTING SERIES RELEASES

and STAFF ACCOUNTING BULLETINS

as of June 1, 1981

TEN DOLLARS

COMMERCE CLEARING HOUSE, INC.
PUBLISHERS of TOPICAL LAW REPORTS
4025 W. PETERSON AVE., CHICAGO, ILLINOIS 60646

If any significant change in accounting principle or practice, or any significant retroactive adjustment of the accounts of prior years, has been made at the beginning of or during any period covered by the profit and loss statements filed, a statement thereof shall be given in a note to the appropriate statement, and if the change or adjustment substantially affects proper comparison with the preceding fiscal period, the necessary explanation.

The foregoing action shall be effective March 1, 1941.

[¶ 3023] **RELEASE NO. 22**

March 14, 1941, 11 *F.R.* 10922; *Securities Act Release No.* 2498, *Exchange Act Release No.* 2820.

Independence of Accountants—Indemnification by Registrant.

The Securities and Exchange Commission today made public an opinion in its Accounting Series Releases regarding the independence of certifying accountants who have been indemnified, by the company whose statements are certified, against all losses, claims and damages arising out of such certification other than as a result of their willful misstatements or omissions. The opinion, prepared by William W. Werntz, Chief Accountant, follows:

"Inquiry has been made as to whether an accountant who certifies financial statements included in a registration statement or annual report filed with the Commission under the Securities Act of 1933 or the Securities Exchange Act of 1934 may be considered to be independent if he has entered into an indemnity agreement with the registrant. In the particular illustration cited, the board of directors of the registrant formally approved the filing of a registration statement with the Commission and agreed to indemnify and save harmless each and every accountant who certified any part of such statement, 'from any and all losses, claims, damages or liabilities arising out of such act or acts to which they or any of them may become subject under the Securities Act of 1933, as amended, or at 'common law,' other than for their willful misstatements or omissions.'

"The Securities Act of 1933 requires statements to be certified by independent accountants and the Securities Exchange Act of 1934 gives the Commission power to require that the certifying accountants be independent. The requirement of independence is incorporated in the several forms promulgated by the Commission and is partially defined in Rule 2-01(b) of Regulation S-X which reads: 'The Commission will not recognize any certified public accountant or public accountant as independent who is not in fact independent. An accountant will not be considered independent with respect to any person in whom he has any substantial interest, direct or indirect, or with whom he is, or was during the period of report, connected as a promoter, underwriter, voting trustee, director, officer or employee.[1]

"This concept of independence has also been interpreted in Accounting Series Release No. 2[2] and in several stop-order opinions. In the matter of *Cornucopia Gold Mines*, 1 S.E.C. 364 (1936), the Commission held that the certification of a balance sheet prepared by an employee of the certifying accountants, who was also serving as the unsalaried but principal financial and accounting officer of the registrant, and who was a shareholder of the registrant, was not a certification by an independent accountant. In the matter of *Rickard Ramore Gold Mines, Ltd.*, 2 S.E.C. 377 (1937), an accountant was held to be not independent by reason of the fact that he was an employee or partner of another accountant who owned a large block of stock issued to him by the registrant for services in connection with its organization. In the matter of *American Terminals and Transit Company*, 1 S.E.C. 701 (1936), conscious falsification of the facts by the certifying accountant was held to rebut the presumption of independence arising from an absence of direct interest or employment. In the matter of *Metropolitan Personal Loan Company*, 2 S.E.C. 803 (1937), it was held that accountants who completely subordinate their judgment to the desires of the client are not independent. In the matter of *A. Hollander & Son, Inc.*, Securities Exchange Act of 1934, Release No. 2777 (1941) [8 S.E.C. 586, '41-'44 CCH FEDERAL SECURITIES LAW REPORTS ¶ 75,129], the Commission held that an accountant could not be considered independent when the combined holdings of

himself, one of his partners, and their wives in the stock of the registrant had a substantial aggregate market value and constituted over a period of 4 years from 1½ percent to 9 percent of the combined personal fortunes of these persons. It was also held to be evidence of lack of independence, with respect to the registrant, that the accountant had made loans to, and received loans from, the registrant's officers and directors. In the same case, the evidence showed that registrant's president, over a period of years, had used the accountant's name as a false caption for an account on books of an affiliate not audited by such accountant and that upon learning of these facts the accountant protested and procured a letter of indemnification in connection with such use. It was held that this continued use of the accountant's name, after his protest, and the overriding attitude apparently assumed by the registrant's president in this matter, constituted additional evidence of lack of independence.

"I think the purpose of requiring the certifying accountant to be independent is clear. Independence tends to assure the objective and impartial consideration which is needed for the fair solution of the complex and often controversial matters that arise in the ordinary course of audit work. On the other hand, bias due to the presence of an entangling affiliation or interest, inconsistent with proper professional relations of accountant and client, may cause loss of objectivity and impartiality and tends to cast doubt upon the reliability and fairness of the accountant's opinion and of the financial statements themselves. Lack of independence, moreover, may be established otherwise than solely by proof of misstatements and omissions in the financial statements. As was said in a recent opinion of the Commission:[3]

" 'We cannot, however, accept the theory advanced by counsel for the intervenors that lack of independence is established only by the actual coloring or falsification of the financial statements or actual fraud or deceit. To adopt such an interpretation would be to ignore the fact that one of the purposes of requiring a certificate by an independent public accountant is to remove the possibility of impalpable and unprovable biases which an accountant may unconsciously acquire because of his intimate nonprofessional contacts with his client. The requirement for certification by an independent public accountant is not so much a guarantee against conscious falsification or intentional deception as it is a measure to insure complete objectivity. It is in part to protect the accounting profession from the implication that slight carelessness or the choice of a debatable accounting procedure is the result of bias or lack of independence that this Commission has in its prior decisions adopted objective standards. Viewing our requirements in this light, any inferences of a personal nature that may be directed against specific members of the accounting profession depend on the facts of a particular case and do not flow from the undifferentiated application of uniform objective standards.'

"While Rule 2-01(b) quoted above designates certain relationships that will be considered to negative independence, it is clear from the opinions cited that other situations and relationships may also so impair the objectivity and impartiality of an accountant as to prevent him from being considered independent for the purpose of certifying statements required to be filed by a particular registrant.

"In the particular case cited the accountant was indemnified and held harmless from all losses and liabilities arising out of his certification, other than those flowing from his own willful misstatements or omissions. When an accountant and his client, directly or through an affiliate, have entered into an agreement of indemnity which seeks to assure to the accountant immunity from liability for his own negligent acts, whether of omission or commission, it is my opinion that one of the major stimuli to objective and unbiased consideration of the problems encountered in a particular engagement is removed or greatly weakened.[4] Such condition must frequently induce a departure from the standards of objectivity and impartiality which the concept of independence implies. In such difficult matters, for example, as the determination of the scope of audit necessary, existence of such an agreement may easily lead to the use of less extensive or thorough procedures than would otherwise be followed. In other cases it may result in a failure to appraise with professional acumen the information disclosed by the examination. Consequently, on the basis of the facts set forth in your inquiry, it is my opinion that the accountant cannot be recognized as independent for the purpose of certifying the financial statements of the corporation."

—Footnotes—

[1] Rule 2-01(b) of Regulation S-X was subsequently amended, most recently in ASR No. 125 dated June 23, 1972. As amended it reads:

The Commission will not recognize any certified public accountant or public accountant as independent who is not in fact independent. For example, an accountant will be considered not independent with respect to any person or any of its parents, its subsidiaries, or other affiliates (1) in which, during the period of his professional engagement to examine the financial statements being reported on or at the date of his report, he or his firm or a member thereof had, or was committed to acquire, any direct financial interest or any material indirect financial interest, or (2) with which, during the period of his professional engagement to examine the financial statements being reported on, at the date of his report or during the period covered by the financial statements, he or his firm or a member thereof was connected as a promoter, underwriter, voting trustee, director, officer, or employee, except that a firm will not be deemed not independent in regard to a particular person if a former officer or employee of such person is employed by the firm and such individual has completely disassociated himself from the person and its affiliates and does not participate in auditing financial statements of the person or its affiliates covering any period of his employment by the person. For the purposes of Rule 2-01 the term "member" means all partners in the firm and all professional employees participating in the audit or located in an office of the firm participating in a significant portion of the audit.

[2] Accounting Series Release No. 2 reads in part:

"... the Commission has taken the position that an accountant can not be deemed to be independent if he is, or has been during the period under review, an officer or director of the registrant or if he holds an interest in the registrant that is significant with respect to its total capital or his own personal fortune.

"In a recent case involving a firm of public accountants, one member of which owned stock in a corporation contemplating registration, the Commission refused to hold that the firm could be considered independent for the purpose of certifying the financial statements of such corporation and based its refusal upon the fact that the value of such holdings was substantial and constituted more than 1 percent of the partner's personal fortune."

[3] In the Matter of *A. Hollander & Son, Inc., supra.*

[4] It may be noted that Section 152 of the English Companies Act (1929) makes comparable indemnity agreements void:

"152. Subject as hereinafter provided, any provision, whether contained in the article of a company or in any contract with a company or otherwise, for exempting any director, manager or officer of the company, or any person (whether an officer of the company or not) employed by the company as auditor from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void."

[¶ 3024] **RELEASE NO. 23**

April 9, 1941, 11 *F.R.* 10923; *Securities Act Release No.* 2524, *Exchange Act Release No.* 2853.

Treatment of Federal Income and Excess Profits Taxes. (*Rescinded and Omitted*)

[¶ 3025] **RELEASE NO. 24**

May 23, 1941; *Securities Act Release No.* 2566, *Exchange Act Release No.* 2903, *Investment Company Act Release No.* 134.

Amendment to Articles 1, 6, and 12 of Regulation S-X. (*Text of Release Omitted*)

[¶ 3026] **RELEASE NO. 25**

May 29, 1941, 11 F.R. 10923; *Securities Act Release No.* 2574, *Exchange Act Release No.* 2912, *Investment Company Act Release No.* 137.

Procedure in Quasi-Reorganization.

MUSCLEPHARM

{ THE ATHLETES COMPANY }

April 13, 2012

Berman & Company, P.A.
551 NW 77th Street, Suite 201
Boca Raton, Florida 33487

We are providing this letter in connection with your audit of the consolidated balance sheets of MusclePharm Corporation and Subsidiary (the "Company") as of December 31, 2011 and 2010, and the related consolidated statements of operations, stockholders' deficit and cash flows for the year then ended, for the purpose of expressing an opinion as to whether these financial statements present fairly, in all material respects, the financial position, results of operations, and cash flows of MusclePharm Corporation in conformity with U.S. Generally Accepted Accounting Principles. We are also responsible for adopting sound accounting policies, establishing and maintaining internal control, and preventing and detecting fraud.

Certain representations in this letter are described as being limited to matters that are material. Items are considered material if they involve an omission or misstatement of accounting information that, in light of surrounding circumstances, makes it probable that the judgment of a reasonable person relying on the information would be changed or influenced by the omission or misstatement. An omission or misstatement that is monetarily small in amount could be considered material as a result of qualitative factors.

We confirm, to the best of our knowledge and belief, as of April 13, 2012, the following representations made to you during the audit:

1. The financial statements referred to above are fairly presented in conformity with U.S generally accepted accounting principles and include all disclosures necessary for such fair presentation and disclosures required to be included therein by the laws and regulations to which the company is subject.

2. We have made available to you all:

   a. Financial records and related data.

   b. Minutes of the meetings of the stockholders, directors, and committees of directors, or summaries of actions of recent meetings for which minutes have not yet been prepared.

EXHIBIT
tabbies
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3. There has been no:

a. Fraud involving management or employees who have significant roles in the system of internal accounting control.

b. Fraud involving other employees that could have a material effect on the financial statements.

c. Communication from the SEC or other regulatory agencies concerning noncompliance with, or deficiencies in, financial reporting practices that could have a material effect on the financial statements.

d. Other fraud that could have a material effect on the financial statements.

e. We believe that we are in compliance with the provisions of SAS No. 99.

4. We have no knowledge of any allegations of fraud or suspected fraud affecting the Company received in communications from employees, former employees, regulators, or others.

5. We have no plans or intentions that may materially affect the carrying value or classification of assets and liabilities.

6. The following, if material, have been properly recorded or disclosed in the financial statements:

a. Significant estimates and material concentrations known to management that are required to be disclosed in accordance with the AICPA's Statement of Position 94-6, "Disclosure of Certain Significant Risks, and Uncertainties. (Significant estimates are estimates at the balance sheet date that could change materially within the next year. Concentrations refer to volumes of business, revenues, available sources of supply, or markets or geographic areas for which events could occur that would significantly disrupt normal finances within the next year.

b. Related party transactions and related amounts receivable or payable, including sales, purchases, loans, transfers, leasing arrangements, and guarantees.

c. Stock options and warrants issued as compensation or pursuant to employment/consulting agreements for services.

d. Guarantees, whether written or oral, under which the company is contingently liable.

7. There are no:

a. Violations or possible violations of laws or regulations whose effects should be considered for disclosure in the financial statements or as a basis for recording a loss contingency.

b. Other material liabilities or gain or loss contingencies that are required to be accrued or disclosed by Statement of Financial Accounting Standards No. 5.

8. There are no unasserted claims or assessments that we are aware of or that our lawyer has advised us are probable of assertion and must be disclosed in accordance with Statement of Financial Accounting Standards No. 5.

9. There are no significant deficiencies, including material weaknesses, in the design or operation of internal control over financial reporting that are reasonably likely to adversely affect the Company's ability to record, process, summarize, and report financial data.

10. We acknowledge our responsibility for the design and implementation of programs and controls to prevent and detect fraud.

11. From time to time, the Company may be involved in litigation through the normal course of business. The Company is not currently experiencing any pending, resolved or threatened litigation except as made known to you.

12. There are no material transactions that have not been properly recorded in the accounting records underlying the financial statements.

13. We believe that the effects of uncorrected financial statements misstatements are immaterial, both individually and in the aggregate, to the financial statements taken as a whole. No material uncorrected financial misstatements were noted for the year ended December 31, 2011.

14. The Company has satisfactory title to all owned assets, and there are no liens or encumbrances on such assets nor has any asset been pledged as collateral.

15. Provision has been made for any material loss to be sustained in the fulfillment of, or from inability to fulfill, any sales commitments.

16. There are no estimates that may be subject to a material change in the near term that have not been properly disclosed in the financial statements. We understand that *near term* means the period within one year of the date of the financial statements. In addition, we have no knowledge of concentrations existing at the date of the financial statements that make the Company

vulnerable to the risk of severe impact that have not been properly disclosed in the financial statements.

17. We have complied with all aspects of contractual agreements that would have a material effect on the financial statements in the event of noncompliance.

18. No events have occurred subsequent to the balance sheet date that would require adjustment to, or disclosure in the financial statements, other than those which have been disclosed or with respect to which an adjustment has been made. All significant subsequent events have been disclosed in the notes on the financial statements.

19. We have fully disclosed to you all sales terms, including all rights of return or price adjustments and all warranty provisions.

20. The Company has determined that under SFAS 131, it operated in one segment of business, thus separate disclosure is not required.

21. Receivables recorded represent valid claims against debtors for sales or other charges arising on or before the balance-sheet date and have been reduced to their estimated net realizable value.

22. The Company has appropriately reconciled its general ledger accounts to their related supporting information. All related reconciling items considered to be material were identified and included on the reconciliations and were appropriately adjusted in the financial statements.

23. We confirm that all formal employment agreements that would require the recording or disclosure of a commitment have been recorded and disclosed as such.

24. Arrangements with financial institutions involving compensating balances or other arrangements involving restrictions on cash balances, lines of credit, or similar arrangements have been properly disclosed. At December 31, 2011, there were no such arrangements.

25. The registrant's other certifying officers and I have notified you, our auditors' whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of our most recent evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

26. We confirm that all formal and informal communications throughout the audit to implement suggestions to improve our internal controls as well as improve any perceived weaknesses and reportable conditions are under review and we intend to make any necessary changes. We also intend to review and comply with PCAOB AS5 in order to document and disclose management's effectiveness over internal controls. We will continue to provide supporting documentation and/or narratives commencing in fiscal year 2012.

27. We confirm that there is substantial doubt about our inability to continue as a going concern entity. We have certain negative financial indicators; and do not have sufficient cash to meet our current or expected obligations over the next twelve months. There is a high probability that our business will cease operations within twelve months from the date of our most recent balance sheet that has been audited (December 31, 2011). NO BB we have over a million dollars in the bank!

28. We confirm that since we expect no net income in the future, that our deferred tax asset balance should be reserved at 100%.

29. We confirm that we believe the use of the black-scholes option pricing model is an accurate reflection of fair value. We understand that the SEC has considered the use of the lattice model for more complicated transactions, however, we do not have the expertise to properly compute this valuation. We have informally consulted professionals in accounting and legal profession and believe our valuation methodology is sufficient.

30. As of December 31, 2011, we confirm that we only had 3 material disclosable legal matters that have not been settled. These are accurately described in the footnotes to the financial statements.

31. We confirm that since our inception all share based payments, meals and entertainment, impairment losses and officers' life insurance are permanent differences under ASC 740 and are non-deductible (including share based payments, derivative expense and change in fair value of derivative liability). Additionally, FIN No. 48 is not applicable. The Company has taken a full valuation allowance and will not report any deferred tax assets at December 31, 2011.

32. We confirm that all property and equipment is in service as of December 31, 2011.

33. We confirm that no IRS notices have been received for payroll taxes past due to which the payroll tax liability as of December 31, 2011 can be agreed to for reasonableness. We understand that non-payment of IRS payroll taxes can be considered a very serious matter that could impose penalties and sanctions to the Company and its officers.

34. We confirm that the payroll taxes past due are complete and accurately presented in the financial statements as of December 31, 2011.

35. We confirm that we have common stock equivalents totaling 511,925,538 at December 31, 2011. We have sufficient authorized unissued capital to service all potential conversions. We also confirm that since we have a net loss, that we have no diluted earnings per share to report.

36. We confirm that at the time we executed a reverse recapitalization with Tone in Twenty, the net equity of their books on February 18, 2010 was approximately $100 as previously disclosed in 2010.

37. We intend to service the majority of our debt through the issuance of stock, both free trading in Section 3A-10 transactions as well as restricted stock.

38. We confirm that our intention is to settle all previously issued convertible debt and warrants that were accounted for as liabilities through the issuance of cash and stock. Our footnotes discuss this.

39. We confirm that all prepaid stock based compensation is recoverable and that all services are expected to be performed as agreed upon. No impairment is required at December 31, 2011 or today.

40. All management estimates are reviewed for appropriateness and accuracy. Our most sensitive material estimates have been disclosed in our financial statement footnotes in note 1.

41. We confirm that the only material lease existing as of December 31, 2011 and April 16, 2012 is the lease for office space located at 4721 Ironton Street, Denver, Colorado 90839.

42. We confirm that all shipments, except for our customer GNC, which is FOB destination, are FOB shipping point.

43. The Company has an informal 7-day right of return for products. There were nominal returns in 2011 and 2010. There have also not been any material returns in 2012 pertaining to the 2011 year.

44. We confirm that all credit memos issued subsequent to year end pertaining to the prior year have been properly applied to the year ended December 31, 2011.

45. We confirm that all accounts receivable confirmations received have been reconciled to actual accounts receivables ledger and that the accounts receivable ledger is an accurate reflection of balances owed from vendors.

46. We confirm that all debt and equity transactions reported in the financial statements as of December 31, 2011 and through April 13, 2012 are complete and accurate. We understand that we process a high volume of potentially complex transactions and have provided all necessary supporting documentation as to existence and valuation.

47. A notice of conversion downloaded from NetSuites dated January 26, 2012 which references a December 8, 2011 note to Carriage Group, LLC in the amount of $500,000 was drafted in error. We confirm that no note exists in the amount of $500,000 from Carriage Group, LLC dated December 8, 2011.

48. Dale & Lessmann, LLP was paid a retainer to assist with the Company's possible expansion into Canada. No legal matters exist with which this attorney was assisting.

49. The Company paid Monohan & Padel as an agent pertaining to the Company's payoff of an existing liability to C-4 Analytics. No additional accruals or litigation exist in regards to these payments.

50. JAH & CO, IP assist the Company with intellectual property and patents in the Middle East. No legal matters exist with which these attorneys are assisting.

51. There are no unpaid/past due PCAOB support fees.

52. We confirm that MP Canada has had no activity, no lease has been entered into and no operations have commenced in Canada. However, we have issued a press release in April 2012 that was informational on the intent of our Company. There are no closing documents or executed legal agreements for this.

53. Accrued compensation for all officers is accurately stated.

54. We confirm that Jeremy Deluca, under ASC No. 850 is not a related party based upon our analysis and memo provided to you.

55. We confirm the internal control matters noted in the 10K, item 9(A).

56. We confirm that we are in receipt of your independence letter and note there have been no direct or indirect material or immaterial relationships between our Company and any members of your firm.

57. We confirm that our representations above are consistent, complete and accurate as of the date of our response (manual signature and date below).

The following is the Company's representation pertaining to journal entries that affect the books and records:

The Company has recorded adjusting, reclassification and/or eliminating journal entries as part of the required financial reporting for the presentation of the December 31, 2011 financial statements. These entries have been summarized in the accounting software package used, which is Netsuite, and is maintained by Company personnel, specifically, Larry Meer, CFO.

I hereby certify that any and all such journal entries have been reviewed and approved by me. Additionally, I represent that all such entries are made timely when evidence becomes available that these transactions should be recorded. For any entries proposed by Berman & Company, P.A. during the course of this audit, we are in full agreement and have recorded the necessary adjustments**. We do not believe that audit entries would cause any concern as to our internal controls pertaining to financial

statement disclosure and presentation. We intend to make any adjustments for future reporting periods in accordance with SEC Rules and Regulations as well as U.S. G.A.A.P.

**See attached listing of journal entries for 2011. We confirm that we approved all entries that are being submitted back to us for our records.

MusclePharm Corporation

By: Officer Signature _____ Date 4/13/12
By: (Brad Pyatt) (Chief Executive Officer)

By: Officer Signature _____ Date 4/13/12
By: (Lawrence Meer) (Chief Financial Officer)

By: Officer Signature _____ Date 4/13/12
By: (John Bluher) (Chief Operating Officer)

Journal of Accountancy

Do We Understand Each Other?

Clear communication at the start averts trouble later.

BY KIM M. GIBSON, KURT PANY AND STEVEN H. SMITH

December 31, 1997

EXECUTIVE SUMMARY

- THE AUDITING STANDARDS BOARD issued SAS no. 83 and SSAE no. 7 to provide CPAs with guidance on establishing an understanding with the client.
- THE TWO NEW STATEMENTS ARE IN LINE with SQCS no. 2, which requires firms to have policies and procedures in place for obtaining an understanding.
- CPAs MUST DOCUMENT THEIR UNDERSTANDING of an engagement in the working papers and include its objectives, the responsibilities of the auditor and of management and the engagement's limitations.
- A VARIETY OF OTHER ITEMS MAY be included in an engagement letter, including how the engagement is to be conducted, fee and billing arrangements and the use of specialists or internal auditors.

Kim M. Gibson , CPA, is a technical manager in the American Institute of CPAs audit and attest division.
Kurt Pany , CPA, PhD, is a professor in the school of business at Arizona State University, Tempe, and a member of the auditing standards board and auditor communications task force.
Steven H. Smith is a doctoral student in the school of business at Arizona State University. Ms. Gibson is an employee of the American Institute of CPAs and her views, as expressed in this article, do not necessarily reflect the views of the AICPA. Official positions are determined through certain specific committee procedures, due process and deliberation.

In October 1997, the American Institute of CPAs auditing standards board issued Statement on Auditing Standards no. 83 and Statement on Standards for Attestation Engagements no. 7, both titled *Establishing an Understanding With the Client* . These standards provide guidance on the

understanding a CPA should have with a client when performing auditing and other attestation services. This article explains why the American Institute of CPAs issued the standards and provides guidance on how to apply them.

Why Issue New Standards?

Statement on Quality Control Standards (SQCS) no. 2, *System of Quality Control for a CPA Firm's Accounting and Auditing Practice* , which became effective on January 1, 1997, requires firms to have policies and procedures for obtaining an understanding about the services to be performed. These policies and procedures are intended to minimize the risk of misunderstandings with the client regarding the nature, scope and limitations of engagements.

While most CPAs have always—at least implicitly—realized the need for such an understanding, SQCS no. 2's explicit requirement suggested to the ASB the need to provide related guidance for audit and attestation engagements. The board issued the new standards to provide that guidance and to help firms comply with the SQCS requirement.

What's Required?

Both statements require the CPA to establish an understanding with the client for each engagement and provide details on the nature of the understanding. Auditors must document that understanding in the working papers, preferably in writing. CPAs generally can meet these requirements with an engagement letter.

The understanding addresses four areas:

- The objectives of the engagement.
- The responsibilities of management.
- The responsibilities of the practitioner.
- The limitations of the engagement.

Rather than simply identify the areas that need to be addressed, in SAS no. 83 the board provides illustrations of matters that must be included. Exhibit 1 , presents the required elements of an understanding in an audit. Exhibit 2 , is a sample engagement letter, containing the elements and several other items frequently included in an understanding.

Using Professional Judgement In Attestation Engagements

While SSAE no. 7, like SAS no. 83, requires an understanding in the four areas, it does not provide a list of matters that must be included. The board concluded that the wide variety of attestation services made it impossible to develop such a list. Therefore, a CPA should use judgment on what matters to include. However, for any attestation service, the list included in SAS no. 83 (exhibit 1) may provide a valuable starting point.

Exhibit 1: Required Elements of an Understanding With the Client for a Financial Statement Audit

Objective of the Engagement

- The objective of the audit is the expression of an opinion on the financial statements.

Management's Responsibility

- Management is responsible for the entity's financial statements.
- Management is responsible for establishing and maintaining effective internal control over financial reporting.
- Management is responsible for identifying and ensuring that the entity complies with the laws and regulations applicable to its activities.
- Management is responsible for making all financial records and related information available to the auditor.
- Management will provide the auditor with a letter that confirms certain representations made during the audit.

Auditor's Responsibility

- The auditor is responsible for conducting the audit in accordance with generally accepted auditing standards.
- The auditor is responsible for ensuring that the audit committee or others with equivalent authority or responsibility are aware of any reportable conditions that come to his or her attention.

Limitations of the Engagement

- GAAS requires that the auditor obtain reasonable, rather than absolute, assurance that the financial statements are free of material misstatement, whether caused by error or fraud. Accordingly, a material misstatement may remain undetected. Also, an audit is not designed to detect error or fraud that is immaterial to the financial statements.
- If, for any reason, the auditor is unable to form or has not formed an opinion, he or she may decline to express an opinion or decline to issue a report as a result of the engagement.
- An audit includes obtaining an understanding of internal control sufficient to plan the audit and to determine the nature, timing and extent of audit procedures performed. An audit is not designed to provide assurance on internal control or identify reportable conditions.

Additional Matters

In addition to the matters listed in exhibit 1, SAS no. 83 presents other items that may be included in the engagement letter:

- Arrangements regarding the conduct of the engagement (for example, timing, client assistance regarding the preparation of schedules and availability of documents).

- Arrangements concerning any involvement of specialists or internal auditors.

- Arrangements involving a predecessor auditor.

- Arrangements regarding fees and billing.

- Any limitation of or other arrangements regarding the liability of the auditor or the client, such as indemnification to the auditor for liability arising from knowing misrepresentations by management to the auditor. (Regulators, including the Securities and Exchange Commission, may restrict or prohibit such liability limitation arrangements.)

- Conditions under which access to the auditor's working papers may be granted to others.

- Additional services relating to regulatory requirements.

- Arrangements regarding other services to be provided in connection with the engagement.

Exhibit 3, contains sample wording that may be used in an engagement letter. However, the evolving nature of the law and differences in each state's laws make it advisable for CPAs to consult with legal counsel to develop acceptable wording in some areas.

Implementation Issues

The brevity of SAS no. 83 and SSAE no. 7 may lead to questions concerning how they should be implemented. Some guidance follows.

Alternatives to engagement letters. The auditing standards board realizes that in some circumstances these letters will not be used. For some engagements, a formal contract might include all details on the needed understanding. Alternatively, an oral discussion with the client

may be summarized in a memo. Board members unanimously believe, however, that following up an oral discussion with an engagement letter is a much better approach than relying entirely on a discussion. The standards state a preference for written communication with the client.

Timing. The standards are silent on when the CPA must obtain the understanding. The first standard of fieldwork reads: "The work is to be adequately planned and assistants, if any, are to be properly supervised." Therefore, we anticipate that CPAs will obtain an understanding during the planning phase. Often CPAs will be able to obtain a signed engagement letter from a client before beginning audit fieldwork. However, occasions may arise in which a CPA obtains the understanding during the audit process. In those situations, the practitioner should consider that the later the understanding is obtained, the more likely the occurrence of misunderstandings.

Exhibit 2: Sample Engagement Letter

ABC Co.
123 Main Street
Anytown, USA 12345

Dear _____:

This will confirm our understanding of the arrangements for our audit of the financial statements of ABC Co. for the year ending December 31, 1999.

We will audit the company's financial statements of the year ending December 31, 1999, for the purpose of expressing an opinion on the fairness with which they present, in all material respects, the financial position, results of operations and cash flows in conformity with generally accepted accounting principles.

We will conduct our audit in accordance with generally accepted auditing standards. Those standards require that we obtain reasonable, rather than absolute, assurance that the financial statements are free of material misstatement, whether caused by error or fraud. Accordingly, a material misstatement may remain undetected. Also, an audit is not designed to detect error or fraud that is immaterial to the financial statements; therefore, the audit will not necessarily detect misstatements less than this materiality level that might exist due to error, fraudulent financial reporting or misappropriation of assets. If, for any reason, we are unable to complete the audit or are unable to form or have not formed an opinion, we may decline to express an opinion or decline to issue a report as a result of the engagement.

While an audit includes obtaining an understanding of internal control sufficient to plan the audit and to determine the nature, timing and extent of audit procedures to be performed, it is not designed to provide assurance on internal control or to identify reportable conditions. However, we are responsible for ensuring that the audit committee (or others with equivalent authority or responsibility) is aware of any reportable conditions that come to our attention.

The financial statements are the responsibility of the company's management. Management is also responsible for (1) establishing and maintaining effective internal control over financial reports, (2) identifying and ensuring the company complies with the laws and regulations applicable to its activities, (3) making all financial records and related information available to us and (4) providing to us at the conclusion of the engagement a representation letter that, among other things, will confirm management's responsibility for the preparation of the financial statements in conformity with generally accepted accounting principles, the availability of financial records and related data, the completeness and availability of all minutes of the board and committee meetings, and, to the best of its knowledge and belief, the absence of fraud involving management or those employees who have a significant role in the entity's internal control.

Assistance to be supplied by your personnel, including the preparation of schedules and analyses of accounts, is described on a separate attachment. Timely completion of this work will facilitate the completion of our audit.

As part of our engagement of the year ending December 31, 1999, we will also prepare the federal and state income tax returns for ABC Co.

Our fees will be billed as work progresses and are based on the amount of time required at various levels of responsibility, plus actual out-of-pocket expenses. Invoices are payable upon presentation. We will notify you immediately of any circumstances we encounter that could significantly affect our initial estimate of total fees of $_____.

If this letter correctly expresses your understanding, please sign the enclosed copy and return it to us.

We appreciate the opportunity to serve you.

Sincerely,

_____

Partner's Signature

_____

Firm Name

Accepted and agreed to:

_____

Client Representative's Signature

Title _____

Date _____

Who is the client? While the requirement is to establish an understanding with the client, SAS no. 83 and SSAE no. 7 do not indicate the identity of the client for this purpose. Because the Code of Professional Conduct in *AICPA Professional Standards* defines the client in ET section 92.01, the board did not believe a redefinition was necessary. ET section 92.01 defines a client as "any person or entity, other than the member's employer, that engages a member or a member's firm to perform professional services or a person or entity with respect to which professional services are performed." The board anticipates that practitioners ordinarily will obtain an understanding with management, including the chief executive officer and the chief financial officer, on behalf of the company.

Changes during engagement. A CPA must use judgment when the understanding changes. For example, if the client requests significant additional services, the CPA may wish to use an additional engagement letter to provide assurance that an understanding has been obtained. If a practitioner does not use an engagement letter, at a minimum he or she should discuss the change with the client and document the understanding in the working papers.

Documentation. An understanding in the form of an engagement letter signed by the client ordinarily is adequate. If no engagement letter is used, the practitioner must use judgment on documentation. In certain government audits, a signed contract may serve as proper documentation. In other engagements, the working papers should document the information discussed, including the matters in exhibit 1.

No understanding. Both standards require that a CPA decline an engagement when he or she believes that an understanding with the client has not been obtained. However, the board believes this will be very rare. SAS no. 83 also says that if the auditor is unable to complete the audit or is unable to form or has not formed an opinion—for any reason—he or she may decline to express an opinion or decline to issue a report as a result of the engagement.

Codification and dates. SAS no. 83 amends AU sec. 310, "Relationship Between the Auditor's Appointment and Planning," of *AICPA Professional Standards* and renames that section "Appointment of the Independent Auditor." SSAE no. 7 amends SSAE no. 1, *Attestation Standards* , AT sec. 100, "Attestation Standards." Both standards are effective for engagements for periods ending on or after June 15, 1998.

Exhibit 3: Additional Topics Relating to an Understanding

Additional Topics	Sample Wording
Use of a specialist	Due to the complex and/or subjective nature of the subject matter of [*name area of complexity*], which is potentially material to the financial statements, during our audit we will require the special skill and knowledge of [*include name of specialist and area of expertise*].
Use of internal auditors	We will consider many factors in determining the nature, timing and extent of the auditing procedures to be performed. One is the existence of internal auditors in the organization who may be used during the audit. Because we ultimately have the responsibility to express an opinion on the financial statements, judgments about assessments of inherent and control risks, the materiality of misstatements, the sufficiency of tests performed, the evaluation of significant accounting estimates and other matters affecting our audit report will always be ours.
Predecessor auditor	Since this is the initial audit of the company, inquiry of the predecessor auditor and review of the prior-period working papers are necessary procedures because they may provide us with information that will assist in the planning of the engagement. You will agree to authorize the predecessor auditor to respond fully to our inquiries and grant us access to the working papers. If the predecessor auditor requests that authorization in writing, you will comply with that request.
Indemnification clause	The company will indemnify [*name of CPA firm*] and its partners, principals and employees and hold them harmless from any claims, liabilities, losses and costs arising in circumstances where there has been a knowing misrepresentation by a member of [*name of company*]'s management, regardless of whether such person was acting in the company's interest. **Note:** Regulators, including the Securities and Exchange Commission, may restrict or prohibit such liability limitation arrangements. Practitioners who wish to include this clause in an engagement letter should consult with their legal counsel before using this clause.
Jury waiver clause	In the unlikely event that differences concerning our services or fees should arise that are not resolved by mutual agreement, we both recognize that the matter probably will involve complex business or accounting issues that would be decided most equitably to us both by a judge hearing the evidence without a jury. Accordingly, you and we agree to waive any right to a trial by jury in any action, proceeding or counterclaim arising out of or relating to any of our services or fees for this engagement. **Note:** Practitioners who wish to include this clause in an engagement letter should consult with their legal counsel first.

Alternative dispute resolutions/binding arbitration

In the event either party claims a breach of any term of this engagement, the dispute first shall be submitted to voluntary mediation. If this is unsuccessful, then the dispute will be brought to binding arbitration conducted under the rules then prevailing of the American Arbitration Association in the city where this agreement is signed, and the judgment or award of the arbitration shall be binding and conclusive upon the parties and may be entered in any court having proper jurisdiction. **Note:** Certain professional indemnity liability insurers may prohibit the insured from agreeing to binding arbitration in these circumstances. Practitioners need to check their insurance policies, contact their insurance carriers or consult with legal counsel.

Access to working papers

The working papers for this engagement are the property of [*name of CPA firm*] and constitute confidential information. Except as discussed below, any requests for access to our working papers will be discussed with you before making them available to requesting parties.

1. Our firm, as well as other accounting firms, participate in a peer review program covering our audit and accounting practices. This program requires that once every three years we subject our system of quality control to an examination by another accounting firm. As part of this process, the other firm will review a sample of our work. It is possible that the work we perform for you may be selected for review. If it is, the other firm is bound by professional standards to keep all information confidential.

2. We may be requested to make certain working papers available to [*name of regulator*] pursuant to authority given to it by law or regulation. If requested, access to such working papers will be provided under the supervision of [*name of CPA firm*] personnel. Furthermore, upon request, we may provide photocopies of selected working papers to [*name of regulator*]. The [*name of regulator*] may intend, or decide, to distribute the photocopies or information contained therein to others, including other government agencies.

Electronic filings

With regard to electronic filings, such as in connection with the SEC Electronic Data Gathering Analysis and Retrieval (EDGAR) system or the WorldWide Web area of the Internet, you understand that electronic sites are a means of distributing information and, therefore, we are not required to read the information contained in these sites or to consider the consistency of other information in the electronic site with the original document.

Year 2000	Because many computerized systems use only two digits to record the year in date fields (for example 1998 is recorded as 98), such systems may not be able to accurately process dates ending in the year 2000 and after. The effects of this problem will vary from system to system and may adversely affect an entity's operations as well as its ability to prepare financial statements. An audit of financial statements conducted in accordance with generally accepted auditing standards is not designed to detect whether a company's information systems are Year 2000 compliant. Further, we have no responsibility with regard to the company's efforts to make its information systems, or any other systems, such as those of the company's vendors, service providers or any other third parties, Year 2000-compliant or provide assurance on whether the company has addressed or will be able to address all of the affected systems on a timely basis. However, for the benefit of management, we may choose to communicate matters that come to our attention relating to the Year 2000 issue.
Other services to be provided	You have requested that we provide other services [*list other services*] in connection with the engagement. The terms of these other services will be provided in a separate engagement letter. *Or* The engagement includes only those services described in this engagement letter. Any additional time spent regarding judicial proceedings, government organizations or regulatory bodies will be billed to you separately.