

1 ZACHARY T. CARLYLE (*pro hac vice forthcoming*)
 CarlyleZ@sec.gov
 2 SHARAN E. LIEBERMAN (*pro hac vice forthcoming*)
 LiebermanS@sec.gov
 3 SECURITIES AND EXCHANGE COMMISSION
 4 1961 Stout Street, Suite 1700
 5 Denver, Colorado 80294-1961
 Telephone: (303) 844-1000
 6 Facsimile: (303) 297-3529

7
 8 Local Counsel:
 DANIEL BLAU (Cal. Bar No. 305008)
 9 blaud@sec.gov
 SECURITIES AND EXCHANGE COMMISSION
 10 444 S. Flower Street, Suite 900
 11 Los Angeles, California 90071
 Telephone: (323) 965-3306
 12 Facsimile: (213) 443-1904

13
 14 **UNITED STATES DISTRICT COURT**
 15 **CENTRAL DISTRICT OF CALIFORNIA**
 16

17
 18 **SECURITIES AND EXCHANGE**
 19 **COMMISSION,**
 20 **Plaintiff,**

Case No. 2:23-cv-05104

COMPLAINT AND JURY DEMAND

21 vs.

22 **BRIAN H. CASUTTO, MATTHEW J.**
 23 **ZUCCO, AND KEVIN R. HARRIS,**
 24 **CPA,**
 25 **Defendants.**

26
 27 Plaintiff United States Securities and Exchange Commission (the "SEC"), for
 28 its Complaint against Defendants Brian H. Casutto, Matthew J. Zucco, and Kevin R.

1 Harris, CPA (collectively, the “Defendants”), alleges as follows:

2 **JURISDICTION AND VENUE**

3 1. The Court has jurisdiction over this action pursuant to Sections 20(b),
4 20(d), 20(e), and 22(a) of the Securities Act of 1933 (“Securities Act”) [15 U.S.C.
5 §§ 77t(b), 77t(d), 77t(e), and 77v(a)] and Sections 21(d), 21(e), and 27(a) of the
6 Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. §§ 78u(d), 78u(e), and
7 78aa(a)].

8 2. Defendants, directly or indirectly, made use of the means or
9 instrumentalities of interstate commerce, or of the mails, or of the facilities of a
10 national securities exchange in connection with the acts, practices, transactions, and
11 courses of business set forth in this Complaint.

12 3. Venue lies in this Court pursuant to Section 22(a) of the Securities Act
13 [15 U.S.C. § 77v(a)] and Section 27 of the Exchange Act [15 U.S.C. §78aa]. During
14 the majority of the time period relevant to this Complaint, MusclePharm, Corp.
15 (“MusclePharm”) was headquartered in Burbank, California, and certain of the acts,
16 practices, transactions, and courses of business alleged in the Complaint occurred
17 within this District. Additionally, Harris is a resident of Los Angeles, California, and
18 Zucco is a resident of Sherman Oaks, California. Although Casutto is a resident of Ft.
19 Lauderdale, Florida, he regularly traveled to and did business in Burbank, California
20 while employed by MusclePharm.

21 **SUMMARY**

22 4. Beginning in 2017, the Defendants engaged in a variety of improper
23 conduct that materially inflated the reported quarterly revenues and gross profits of
24 MusclePharm, a publicly-traded nutritional supplement company, by as much as 25
25 percent and 49 percent, respectively. As a result, in March 2019, MusclePharm
26 announced that its previously reported financial statements should no longer be relied
27 upon and in August 2020, MusclePharm restated its financial statements for 2017 and
28 the first three quarters of 2018 (the “Restatement Period”).

1 5. First, MusclePharm prematurely recognized \$9.2 million in revenue
2 during the Restatement Period by booking sales at quarter end even though it did not
3 ship the “sold” product to customers but instead placed the product in storage trailers
4 and third-party warehouses at the company’s expense. Casutto, MusclePharm’s
5 Executive Vice President for Sales and Operations, directed and condoned this
6 practice, and Zucco, MusclePharm’s Vice President for Sales, implemented the
7 logistics necessary to carry out Casutto’s directives. Harris, MusclePharm’s contract
8 CFO, on several occasions failed to correct the accounting for these transactions
9 when he received information that should have suggested that revenue had been
10 recognized prematurely for certain orders.

11 6. Second, MusclePharm prematurely recognized \$12.8 million in revenue
12 during the Restatement Period by recognizing revenue at the time of shipment and
13 before delivery despite MusclePharm’s most significant customer contracts requiring
14 delivery before revenue could be recognized, as Harris should have known.

15 7. Third, MusclePharm overstated revenues during the Restatement Period
16 by \$15.5 million by classifying credits that MusclePharm granted to certain
17 customers, which allowed the customers to pay a reduced price for MusclePharm
18 products based on the customers’ marketing of the products, as expenses rather than
19 reductions to revenue. As Harris should have known, generally accepted accounting
20 principles (“GAAP”) require such credits to be accounted for as reductions to
21 revenue.

22 8. MusclePharm’s improper revenue recognition resulted in material
23 misstatements to its financial statements, which Harris participated in preparing and
24 were publically disclosed in the company’s 2017 Form 10-K and 2018 Forms 10-Q,
25 as well as in the related earnings releases filed on Form 8-K and earnings calls for
26 those periods.

27 9. Harris also participated in preparing SEC filings and participated in
28 earnings calls that included false or misleading information regarding MusclePharm’s

1 revenue recognition practices and promotional expense trends.

2 10. Additionally, Harris and Casutto failed to ensure that all 2017 executive
3 perquisites were properly disclosed in the company's 2017 Form 10-K and proxy
4 statement filed October 26, 2018.

5 11. By engaging in this conduct, the Defendants are liable as follows, and
6 unless enjoined, are likely to continue to violate the federal securities laws:

- 7 a. Casutto violated Sections 17(a)(1) and 17(a)(3) of the Securities
8 Act [15 U.S.C. §§ 77q(a)(1) and 77q(a)(3)], Sections 10(b),
9 13(b)(5), and 14(a) of the Exchange Act [15 U.S.C. §§ 78j(b),
10 78m(b)(5), and 78n(a)], and Rules 10b-5(a), 10b-5(c), 13b2-1,
11 14a-3, and 14a-9 thereunder [17 C.F.R. §§ 240.10b-5(a), 240.10b-
12 5(c), 240.13b2-1, 240.14a-3, and 240.14a-9], and aided and
13 abetted MusclePharm's violations of Section 17(a)(2) of the
14 Securities Act [15 U.S.C. §§ 77q(a)(2)], Sections 10(b), 13(a) and
15 13(b)(2)(A) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(a) and
16 78m(b)(2)(A)], and Rules 10b-5(b), 12b-20, 13a-1, 13a-11, and
17 13a-13 thereunder [17 C.F.R. §§ 240.10b-5(b), 240.12b-20,
18 240.13a-1, 240.13a-11, and 240.13a-13];
- 19 b. Zucco violated Section 13(b)(5) of the Exchange Act [15 U.S.C. §
20 78m(b)(5)] and Rule 13b2-1 thereunder [17 C.F.R. § 240.13b2-1],
21 and aided and abetted MusclePharm's violations of Section 17(a)
22 of the Securities Act [15 U.S.C. §§ 77q(a)], Sections 10(b), 13(a),
23 and 13(b)(2)(A) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(a)
24 and 78m(b)(2)(A)], and Rules 10b-5, 12b-20, 13a-1, 13a-11, and
25 13a-13 thereunder [17 C.F.R. §§ 240.10b-5(a)-(c), 240.12b-20,
26 240.13a-1, 240.13a-11, and 240.13a-13]; and
- 27 c. Harris violated Sections 17(a)(2) and 17(a)(3) of the Securities
28 Act [15 U.S.C. §§ 77q(a)(2) and 77q(a)(3)], Section 14(a) of the

1 Exchange Act [15 U.S.C. § 78n(a)], and Rules 13b2-1, 14a-3, and
2 14a-9 thereunder [17 C.F.R. §§ 240.13b2-1, 240.14a-3, and
3 240.14a-9], and aided and abetted MusclePharm's violations of
4 Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act
5 [15 U.S.C. §§ 78m(a), 78m(b)(2)(A), and 78m(b)(2)(B)], and
6 Rules 12b-20, 13a-1, 13a-11, 13a-13, and 13a-15(a) thereunder
7 [17 C.F.R. §§ 240.12b-20, 240.13a-1, 240.13a-11, 240.13a-13,
8 and 240.13a-15(a)].

9 DEFENDANTS

10 12. **Brian H. Casutto**, 52, resides in Ft. Lauderdale, Florida. Casutto joined
11 MusclePharm in June 2014 and was promoted to Executive Vice President of Sales
12 and Operations in July 2015. He was also appointed to MusclePharm's board of
13 directors in July 2017. In May 2020, Casutto resigned from the company.

14 13. **Matthew J. Zucco**, 32, resides in Sherman Oaks, California. Zucco
15 joined MusclePharm in August 2013 and served in various sales and business analyst
16 positions before being promoted to Vice President of Sales in October 2017. In June
17 2019, Zucco left the company.

18 14. **Kevin R. Harris, CPA**, 54, resides in Los Angeles, California. Harris
19 joined MusclePharm as its contract CFO in November 2017 and continued in that
20 capacity through March 2020. Harris previously worked in finance at various
21 companies, including public companies in the entertainment and technology sectors.
22 Harris is a CPA licensed in California since 1995. His license has been inactive since
23 approximately 1997.

24 OTHER RELEVANT ENTITY

25 15. **MusclePharm Corp.**, is a Nevada corporation that develops, markets,
26 and distributes branded nutritional supplements. Its current principal place of
27 business is in Las Vegas, Nevada, but it was headquartered in Burbank, California
28 throughout the Restatement Period. MusclePharm's securities are registered pursuant

1 to Section 12(g) of the Exchange Act and trade on OTC Link, operated by OTC
2 Markets Group Inc., under the symbol “MSLP” or “MSLPQ.” In 2015, MusclePharm
3 settled claims by the SEC for violations of Sections 5(a), 5(c), 17(a)(2), and 17(a)(3)
4 of the Securities Act; Sections 13(a), 13(b)(2)(A), 13(b)(2)(B), and 14(a) of the
5 Exchange Act and Rules 12b-20, 13a-1, 13a-11, 13a-13, and 14a-9 thereunder; and
6 Rule 302 of Regulation S-T of the Exchange Act (the “2015 SEC Order”).
7 MusclePharm filed for Chapter 11 bankruptcy protection in the U.S. Bankruptcy
8 Court for the District of Nevada on December 15, 2022.

9 FACTS

10 **I. BACKGROUND AND FINANCIAL RESTATEMENT.**

11 16. In August 2015, MusclePharm announced a restructuring plan focused
12 on reducing costs and reallocating the company’s resources for profitable growth. In
13 its Form 10-K filed on April 2, 2018, MusclePharm announced that this restructuring
14 plan was substantially complete.

15 17. During the earnings call for the fourth quarter of 2017, MusclePharm’s
16 Chief Executive Officer (“CEO”) highlighted the completion of the restructuring
17 program and proclaimed that the company was now on a path to consistent profitable
18 growth.

19 18. In order to achieve consistent growth, the CEO pushed MusclePharm’s
20 sales team, including Casutto and Zucco, to meet unrealistic quarterly sales targets,
21 and threatened to, and did, fire employees who challenged him or failed to achieve
22 the targets.

23 19. In this environment, MusclePharm reported quarter over quarter revenue
24 growth from the fourth quarter of 2017 through the third quarter of 2018. The CEO
25 highlighted this achievement in each of the Company’s press releases and earnings
26 calls during that period.

27 20. During its 2018 audit work, the company’s external auditor detected that
28 MusclePharm had recognized revenue at the end of the fourth quarter of 2018 that it

1 should have recorded in later periods because certain inventory had been temporarily
2 stored off-site in trailers rather than being shipped to MusclePharm's customers prior
3 to year-end.

4 21. The company opened an internal investigation to identify the scope and
5 cause of the errors. The internal investigation uncovered similar errors with
6 unshipped orders impacting the third quarter of 2018, and the company filed a Form
7 8-K on March 14, 2019, announcing that its previously reported financial statements
8 for the three and nine months ended September 30, 2018, should no longer be relied
9 upon. In April 2019, the company announced on Form NT 10-K that it would be
10 unable to timely file its 2018 annual report, and in May 2019, the company's external
11 auditor resigned without completing the 2018 audit work.

12 22. More than a year later, on August 25, 2020, MusclePharm filed a Form
13 10-K that restated its financial statements for year-end 2017 and the first three
14 quarters of 2018 and included the overdue financial statements for 2018 and 2019.

15 23. The restatement disclosed that, during the Restatement Period,
16 MusclePharm inflated its previously reported quarterly revenues by 9 to 25 percent,
17 overstated its gross margins by 22 to 49 percent, understated its customer credits by
18 23 to 38 percent, understated its inventory by 23 to 34 percent, and overstated its
19 advertising and promotional expenses by 284 to 594 percent.

20 24. MusclePharm's financial misstatements were primarily caused by three
21 areas of misconduct by the Defendants: (i) Casutto, with Zucco's assistance, caused
22 MusclePharm to prematurely recognize revenue for orders prior to shipment and
23 Harris failed to correct the accounting; (ii) Harris should have known that the
24 company was prematurely recognizing revenue for shipped orders that had not yet
25 been delivered to and accepted by the customer, as required by the customer
26 agreements; and (iii) Harris should have known that the company was misclassifying
27 customer credits as expenses rather than as reductions to revenue.
28

1 **II. MUSCLEPHARM, THROUGH CONDUCT OF THE DEFENDANTS,**
2 **IMPROPERLY RECOGNIZED REVENUE.**

3 25. The date MusclePharm shipped an order to a MusclePharm customer,
4 and the specific shipping terms of the contract with that customer, had a significant
5 impact on when MusclePharm could properly recognize revenue from an order.
6 Under the relevant GAAP, revenue may be recognized when risk of loss or control
7 has transferred from a seller to a buyer. Depending on the terms of the sale, risk of
8 loss and control may transfer upon shipment from the seller to the buyer (“FOB
9 shipping point”) or upon delivery and acceptance by the buyer (“FOB destination”).

10 26. During the Restatement Period, MusclePharm’s automated accounting
11 system recognized revenue when an order was marked as shipped in the inventory
12 system. MusclePharm’s accounting system assumed that all orders had FOB shipping
13 point terms and that when an order was marked as shipped in the system, the order
14 had in fact been shipped from MusclePharm to the customer.

15 27. Defendants were all aware and understood that marking an order as
16 shipped in the inventory system would trigger the system to recognize the sale. For
17 example, if an order was marked as shipped on December 31, 2017, MusclePharm’s
18 accounting system would recognize revenue in the fourth quarter of 2017. If the order
19 was marked as shipped on the following day, January 1, 2018, the MusclePharm
20 accounting system would recognize the revenue in the first quarter of 2018.

21 28. In order to achieve the CEO’s quarterly sales targets and report
22 consistent sales growth, Casutto directed and condoned the practice of marking orders
23 as shipped in the inventory system at the end of a quarter when he knew that those
24 orders had not been shipped from MusclePharm to customers. The orders were, in
25 fact, held in storage trailers and warehouses at the company’s expense and would not
26 be shipped to customers until a future quarter.

27 29. Zucco implemented the logistics necessary to carry out Casutto’s
28 directive to achieve the CEO’s quarterly revenue targets.

1 30. On multiple occasions specified below, Harris failed to ensure that
2 MusclePharm accounted for certain transactions in accordance with GAAP despite
3 receiving information that should have suggested that revenue had been recognized
4 prematurely.

5 31. The practice of marking orders as shipped prior to shipment to a
6 customer resulted in MusclePharm prematurely recognizing revenue totaling \$9.2
7 million during the Restatement Period for orders that were (i) held in storage trailers,
8 (ii) moved to third-party warehouses, and (iii) left in MusclePharm's own warehouse.
9 The practice also resulted in an additional \$2.5 million in prematurely recognized
10 revenue recorded in MusclePharm's books and records in the fourth quarter of 2018,
11 although this revenue was not publicly reported because MusclePharm's financial
12 statements for this quarter were delayed by the auditors' discovery of the errors with
13 unshipped orders described above.

14 **A. Unshipped Orders Held in Storage Trailers.**

15 32. On December 30, 2017, Casutto directed Zucco to ship orders before
16 certain customers wanted the product in order to meet the CEO's revenue target, even
17 though "shipping" meant placing the orders in trailers. Specifically, Casutto texted
18 Zucco: "[G]et those orders in a trailer [and] park it in the lot for all I care. Every
19 \$100k helps [MusclePharm's CEO] to get a funding deal done. Go time."

20 33. Zucco carried out Casutto's directive. On the last day of 2017, Zucco
21 instructed warehouse personnel to load orders representing approximately \$210,000
22 in sales onto storage trailers, and to mark those orders as shipped in the inventory
23 system, which triggered revenue recognition in the fourth quarter of 2017. The orders
24 were left in the storage trailers in the warehouse parking lot at the end of the quarter.
25 In early 2018, the orders were reloaded onto shipping trucks and sent to customers.

26 34. This conduct resulted in MusclePharm prematurely recognizing revenue
27 of approximately \$210,000 in the fourth quarter of 2017.

28 35. Based on Casutto's direction to engage in this practice in the fourth

1 quarter of 2017, Zucco, with Casutto's approval, continued to apply this practice to
2 other transactions.

3 36. For example, in the second and third quarters of 2018, Zucco directed
4 warehouse personnel to put orders for a major online retailer ("Customer A") in
5 storage trailers parked in the warehouse parking lot at quarter end that he knew, based
6 on emails from Customer A's shipping carrier, would not be picked up until after the
7 end of the quarters. MusclePharm marked the orders as shipped and recognized
8 revenue at the time orders were placed in storage trailers, rather than when the orders
9 were shipped to the customer.

10 37. Casutto was aware of and condoned the practice of marking Customer
11 A's orders as shipped as soon as they were placed in storage trailers. Text messages
12 between Zucco and Casutto confirm that they had spoken about similar conduct with
13 the same customer in a prior quarter, with Zucco writing on March 31, 2018:
14 "confirming we have drop trail[er]s ready just in case the 4 trucks show up late" and
15 "as long as i[t] gets out the warehouse door and the truck leaves before the auditors
16 get there lol." Ultimately the trailers were not needed in the first quarter of 2018
17 because Customer A's carriers arrived before quarter-end.

18 38. This conduct resulted in MusclePharm prematurely recognizing revenue
19 of approximately \$1 million in the second quarter of 2018 and \$110,000 in the third
20 quarter of 2018.

21 39. Additionally, in the fourth quarter of 2018, Zucco told warehouse
22 personnel to rent, at MusclePharm's expense, eleven 53-foot storage trailers and load
23 them in the final days of 2018 with orders from multiple customers totaling
24 approximately \$2.5 million that customers did not want shipped until 2019.

25 40. Casutto directed Zucco to place orders on trailers to prematurely
26 recognize revenue in the fourth quarter of 2018 and was aware of and condoned the
27 continuation of this practice in order to achieve the CEO's revenue target.
28

1 41. After the products were loaded onto storage trailers, the orders were
2 marked as shipped in the inventory system to trigger revenue recognition in the fourth
3 quarter of 2018, and the warehouse manager moved the trailers to an off-site parking
4 lot. MusclePharm’s external auditor then conducted its annual inventory observation
5 and testing, but the auditor was not told about the off-site inventory.

6 42. After the auditor’s inventory testing, the products were returned to the
7 MusclePharm warehouse, reloaded onto shipping trucks, and shipped to customers in
8 January 2019.

9 43. Initially, warehouse personnel uploaded bills of lading (“BOLs”)
10 showing the accurate January 2019 shipment dates into MusclePharm’s accounting
11 system.

12 44. At the direction of Casutto and Harris, Zucco instructed the warehouse
13 and IT personnel to alter the BOLs in the accounting system by deleting BOLs with
14 January 2019 shipment dates and replacing them with BOLs showing December 2018
15 shipment dates.

16 45. The December 2018 BOLs, on their face, contain red flags indicating
17 that they were falsified.

18 46. In a February 2019 email, Harris stated that there was “some confusion
19 with providing accurate shipping/supporting documents” but that he was “assured by
20 Ops [Casutto and Zucco] that everything shipped on or before 12/31[/2018].”

21 47. Any reliance by Harris on assurances from Zucco and Casutto that the
22 product shipped in 2018, without any further investigation, was unreasonable. Had
23 Harris contacted any of the customers, he would have discovered the accurate
24 January 2019 shipment dates.

25 48. This conduct resulted in MusclePharm prematurely recognizing revenue
26 of approximately \$2.5 million in its books and records for the fourth quarter 2018.

27 49. MusclePharm’s external auditors identified these errors with unshipped
28 orders for the fourth quarter of 2018 during their audit work for 2018, prior to

1 MusclePharm reporting its 2018 financial results to the public. MusclePharm delayed
2 its release of its fourth quarter of 2018 financial statements and, in August 2020,
3 restated financial statements of earlier periods and reported its 2018 financial results,
4 which did not include this \$2.5 million in revenue.

5 50. In light of the facts above, Casutto knew or was reckless in not knowing,
6 and should have known, that his conduct in marking orders held in storage trailers as
7 shipped during the Restatement Period and in the fourth quarter of 2018 was
8 improper, fraudulent, and deceptive.

9 51. In light of the facts above, Zucco knew or was reckless in not knowing,
10 and should have known, that MusclePharm was engaged in the improper, fraudulent,
11 or deceitful practice of recognizing revenue for orders held in storage trailers during
12 the Restatement Period and in the fourth quarter of 2018, and he provided substantial
13 assistance to that conduct.

14 52. In light of the facts above and his education, experience, and job
15 responsibilities, Harris should have known that revenue for the fourth quarter of 2018
16 transactions was not recorded in accordance with GAAP after becoming aware of
17 BOLs that indicated that shipping did not occur until 2019.

18 **B. Unshipped Orders Moved to Third Party Warehouses.**

19 53. MusclePharm had a practice of recognizing revenue on sales to a
20 customer in Mexico (“Customer B”) as soon as the products were shipped to a
21 holding warehouse paid for by MusclePharm, despite the fact that the products
22 remained in that holding warehouse for weeks or months before Customer B
23 requested the product be shipped.

24 54. In March 2017, the then-CFO correctly instructed Casutto that, because
25 MusclePharm retained title to the products in the warehouse, MusclePharm should
26 not recognize the revenue, and he directed Casutto via email to cease the practice.

27 55. That CFO left the company shortly thereafter and, through at least the
28 third quarter of 2018, Casutto continued the practice of MusclePharm recognizing

1 revenue for orders for Customer B that were sitting in a holding warehouse.

2 56. This practice resulted in MusclePharm prematurely recognizing revenue
3 for Customer B orders totaling approximately \$188,000 in the fourth quarter of 2017,
4 \$213,000 in the first quarter of 2018, \$429,000 in the second quarter of 2018, and
5 \$425,000 in the third quarter of 2018.

6 57. Harris received emails that should have alerted him to this practice no
7 later than August 2018 (before the second quarter 2018 Form 10-Q was filed). The
8 improper practice continued and Harris took no steps to correct the accounting until
9 April 2019, after the internal investigation and restatement process began.

10 58. In the second of quarter of 2018, MusclePharm prematurely recognized
11 revenue totaling approximately \$472,000 for orders that Zucco instructed the
12 warehouse in an email to ship to a holding warehouse paid for by MusclePharm in
13 June 2018 for delivery to another customer (“Customer C”) in August 2018.

14 59. And in the third quarter of 2018, MusclePharm prematurely recognized
15 revenue totaling approximately \$4.7 million for orders stored in third-party
16 warehouses paid for by MusclePharm in September 2018 for delivery to another
17 customer (“Customer D”) in October 2018. Casutto was responsible for managing
18 Customer D’s account. At Casutto’s direction, Zucco sent an email directing
19 warehouse personnel to store the orders for Customer D in a holding warehouse.

20 60. In light of the facts above, Casutto knew or was reckless in not knowing,
21 and should have known, that his conduct in marking orders moved to third party
22 warehouses as shipped during the Restatement Period was improper, fraudulent, and
23 deceptive.

24 61. In light of the facts above, Zucco knew or was reckless in not knowing,
25 and should have known, that MusclePharm was engaged in the improper, fraudulent,
26 and deceitful practice of recognizing revenue for orders held in third party
27 warehouses paid for by MusclePharm during the Restatement Period, and he provided
28 substantial assistance to that conduct.

1 62. In light of the facts above and his education, experience, and job
2 responsibilities, Harris should have known that MusclePharm’s revenue recognition
3 for Customer B transactions did not comply with GAAP, after he received
4 information that should have suggested that MusclePharm prematurely recognized
5 revenue for Customer B’s orders.

6 **C. Unshipped Orders Left in MusclePharm’s Warehouse.**

7 63. At Casutto’s insistence and with Harris’s approval, MusclePharm
8 improperly recognized \$632,000 of revenue in the fourth quarter of 2017 for a sale to
9 MusclePharm’s Canadian distributor (“Customer E”).

10 64. Recognizing the revenue in that quarter was improper because, as
11 Casutto knew or was reckless in not knowing, and should have known, there was no
12 formal purchase order; the sale was contingent on certain future events; and all the
13 products remained in a Canadian warehouse, which was paid for by MusclePharm, at
14 the end of 2017 (where much of it remained for more than six months). Harris was
15 aware that the products remained in the warehouse at the end of 2017 and approved
16 the revenue recognition for the sale to Customer E in the fourth quarter of 2017
17 without proper support.

18 65. This conduct resulted in MusclePharm prematurely recognizing revenue
19 of approximately \$632,000 in the fourth quarter of 2017.

20 66. In light of the facts above, Casutto knew or was reckless in not knowing,
21 and should have known, that his conduct that caused MusclePharm to recognize
22 revenue for Customer E’s order in the fourth quarter of 2017 was improper,
23 fraudulent, and deceptive.

24 67. In light of the facts above and his education, experience, and job
25 responsibilities, Harris should have known that his conduct in approving revenue
26 recognition for Customer E’s order in the fourth quarter of 2017 caused MusclePharm
27 to improperly recognize revenue.
28

1 **D. Revenue Recognition Contrary to Customer Shipping Terms.**

2 68. During the Restatement Period, MusclePharm’s practice was to
3 recognize revenue for all orders when an order was marked as shipped in the
4 inventory system (*i.e.*, FOB shipping point). Harris should have known that
5 MusclePharm’s most significant customers had contracts with MusclePharm that
6 included shipping terms that required delivery and acceptance before title and risk of
7 loss passed (*i.e.*, FOB destination), meaning that revenue could not be recognized
8 until delivery and acceptance by the customer. Yet Harris continued to allow
9 MusclePharm to recognize all revenue at FOB shipping point, meaning at the
10 moment the product was shipped to the customer.

11 69. As a result, MusclePharm prematurely recognized revenue at the end of
12 each quarter, totaling approximately \$3.3 million in the fourth quarter of 2017, \$3
13 million in the first quarter of 2018, \$3.5 million in the second quarter of 2018, and \$3
14 million in the third quarter of 2018.

15 70. In light of the facts above and his education, experience, and job
16 responsibilities, Harris should have known that his failure to ensure that
17 MusclePharm’s revenue recognition practices aligned with the terms of its customer
18 contracts caused MusclePharm to improperly recognize revenue.

19 **E. Customer Credit Classification.**

20 71. GAAP requires that payments or discounts given to a customer,
21 including a reduction in the amount the customer pays for a product based on
22 advertising or marketing for the product provided by the customer (“customer
23 credits”), be accounted for as a reduction in revenue, unless certain conditions are
24 satisfied. If an issuer improperly accounts for customer credits as expenses, rather
25 than as reductions to revenue as required by GAAP, it overstates its revenue.

26 72. In 2012, MusclePharm filed a restatement, in part, to correct its
27 accounting for customer credits that had been misclassified as advertising expenses,
28

1 instead of reductions to revenue. This misclassification was one of the bases for the
2 2015 SEC Order.

3 73. MusclePharm correctly accounted for customer credits for a short time
4 thereafter by reducing revenue by the amount of customer credits.

5 74. Beginning in 2016, however, MusclePharm again misclassified customer
6 credits as expenses rather than reductions to revenue in conformity with GAAP.

7 75. Upon taking over as contract CFO in November 2017, Harris failed to
8 correct MusclePharm's accounting for customer credits. Rather, during Harris's
9 tenure the scope and magnitude of the error expanded, resulting in MusclePharm
10 overstating its reported revenue by approximately \$6.2 million in 2017, \$2.6 million
11 in the first quarter of 2018, \$3.8 million in the second quarter of 2018, and \$2.9
12 million in the third quarter of 2018.

13 76. In light of the facts above and his education, experience, and job
14 responsibilities, Harris should have known that his failure to ensure that
15 MusclePharm recorded customer credits in compliance with GAAP caused
16 MusclePharm to improperly recognize revenue.

17 **III. MUSCLEPHARM MADE MATERIALLY FALSE AND MISLEADING**
18 **STATEMENTS.**

19 **A. MusclePharm Made Material Misstatements in its Financial**
20 **Statements Filed with the SEC.**

21 77. MusclePharm was required to file annual, quarterly, and current reports
22 with the SEC that presented its financial results in conformity with GAAP.

23 78. During the Restatement Period, MusclePharm filed reports with the SEC
24 that, as a result of the conduct by Defendants described above, contained materially
25 false and misleading financial results. According to MusclePharm's filings with the
26 SEC, MusclePharm materially misstated critical financial results, such as its revenues
27 and gross profit margin. For example, MusclePharm overstated its revenues by
28 approximately 9.2 percent for the end of the year 2017 in its Form 10-K filed on

1 April 2, 2018, 9.8 percent for the first quarter of 2018 in its Form 10-Q filed on May
2 15, 2018, 24.2 percent for the second quarter of 2018 in its Form 10-Q filed on
3 August 14, 2018, and 24.9 percent for the third quarter of 2018 in its Form 10-Q filed
4 on November 14, 2018. In these same filings, MusclePharm also overstated its gross
5 profit margin by approximately 21.6 percent for the end of the year 2017, 49.1
6 percent for the first quarter of 2018, 39.4 percent for the second quarter of 2018, and
7 26.9 percent for the third quarter of 2018.

8 79. MusclePharm also reported these materially false and misleading
9 financial results in its related earnings press releases filed on Form 8-K and on
10 earnings calls. Harris participated in preparing these false and misleading press
11 releases and participated in the earnings calls relaying false and misleading
12 information.

13 80. MusclePharm's misstatement of its financial results, including its
14 revenues and gross profit margins, would be important to a reasonable investor
15 because those metrics are fundamental to understanding a company's financial health
16 and are important to an investor's decision to invest. Additionally, the amount of the
17 misstatements of those metrics were material to a reasonable investor.

18 **B. MusclePharm Made Material Misstatements Regarding Its Revenue**
19 **Recognition Practices and Expense Trends.**

20 81. MusclePharm's 2017 Form 10-K and 2018 Forms 10-Q each state that
21 revenue was recognized in compliance with the relevant GAAP, at the time title and
22 risk of loss transferred or at the time control of the promised goods transferred.
23 Statements regarding a company's revenue recognition policies are material to
24 investors. These statements regarding the company's revenue recognition policies
25 were false and misleading because MusclePharm recognized all revenue upon
26 shipment without regard to when risk of loss or control transferred.

27 82. MusclePharm's 2017 Form 10-K also stated that "advertising related
28 credits" are recorded as a "reduction to revenue as no identifiable benefit is received

1 in exchange for credits claimed by the customer.” Statements regarding a company’s
2 revenue recognition policies are material to investors. These statements were false
3 and misleading because MusclePharm recorded many promotional credits as
4 expenses, not as reductions to revenue.

5 83. Finally, throughout 2018, in earnings releases and earnings calls,
6 MusclePharm claimed that year-over-year increases to advertising and promotion
7 expenses were a result of higher costs. Statements regarding trends in a company’s
8 expenses are material to investors. These statements were false and misleading
9 because the reported increases resulted from reclassification of credits from a
10 discount to revenue to an expense, not from a trend towards higher promotional costs.

11 **IV. CASUTTO AND ZUCCO AIDED AND ABETTED MUSCLEPHARM’S**
12 **FALSE AND MISLEADING STATEMENTS.**

13 84. Casutto’s and Zucco’s conduct, described above, led to prematurely
14 reporting revenue in MusclePharm’s financial statements as filed in its 2017 Form
15 10-K and 2018 Forms 10-Q as well as in the related earnings press releases filed on
16 Form 8-K and on earnings calls. As such, Casutto and Zucco knowingly or recklessly
17 provided substantial assistance to MusclePharm’s false and misleading financial
18 statements.

19 **V. HARRIS WAS NEGLIGENT WITH RESPECT TO, AND OBTAINED**
20 **MONEY FOR MUSCLEPHARM BY MEANS OF, MUSCLEPHARM’S**
21 **FALSE AND MISLEADING STATEMENTS.**

22 85. Throughout the Restatement Period, Harris oversaw the preparation of
23 MusclePharm’s financial statements and SEC filings; read, reviewed, commented on,
24 and gathered information for SEC filings; presented the draft SEC filings to
25 MusclePharm’s audit committee; drafted earnings press releases; and presented
26 MusclePharm’s financial results to investors on quarterly earnings calls. In light of all
27 of the above-alleged facts, including his own role in the accounting misconduct, as
28 well as his education, experience, and job description, Harris should have known that

1 MusclePharm’s financial statements in its 2017 Form 10-K and 2018 Forms 10-Q, as
2 well as in the related earnings press releases filed on Form 8-K and in earnings calls,
3 were materially misstated and did not comply with GAAP.

4 86. When Harris oversaw the preparation of these filings, he should have
5 known that statements in the filings regarding the company’s revenue recognition
6 policies were false and misleading because MusclePharm recognized all revenue
7 upon shipment without regard to when risk of loss or control transferred.

8 87. Harris should have known that disclosures in MusclePharm’s 2017 Form
9 10-K regarding its accounting for “advertising related credits” as a “reduction to
10 revenue” were false and misleading because MusclePharm recorded many
11 promotional credits as expenses, not as reductions to revenue.

12 88. Harris should have known that statements in MusclePharm’s earnings
13 releases and earnings calls throughout 2018 claiming that year-over-year increases to
14 advertising and promotion expenses were a result of higher costs were false and
15 misleading because the reported increases resulted, in part, from Harris’s role in
16 reclassifying certain credits from a discount to revenue to an expense, not from a
17 trend towards higher promotional costs. In fact, after that decision was reversed in the
18 restatement, the year-over-year advertising and promotional expenses decreased in
19 each quarter of 2018 compared to 2017.

20 89. By preparing the false and misleading financial statements and SEC
21 filings and making misleading statements on earnings calls, Harris obtained money
22 for MusclePharm when the company sold stock in private placements at inflated
23 prices.

24 90. Harris obtained money for MusclePharm by means of the misstatements
25 described above because, from at least June 2018 to May 2019, through private
26 placements, MusclePharm sold (i) restricted stock to board members to pay for board
27 fees, (ii) common stock to plaintiffs engaged in civil litigation with the company to
28 pay for litigation settlements, and (iii) common stock to vendors to pay for invoices.

1 91. Harris was involved in implementing the private placements by, for
2 example, writing letters to the stock transfer services company directing them to issue
3 the shares and send stock certificates to the applicable parties.

4 92. In addition to the statements described above, Harris obtained money for
5 MusclePharm by means of untrue statements of material fact relating to
6 MusclePharm's executive perquisite compensation described below.

7 **VI. HARRIS AND CASUTTO FAILED TO PROPERLY DISCLOSE ALL**
8 **EXECUTIVE PERQUISITES IN MUSCLEPHARM'S PUBLIC**
9 **FILINGS.**

10 93. Accurate disclosure of executive perquisites was the primary focus of
11 the 2015 SEC Order. Pursuant to the 2015 SEC Order, MusclePharm engaged an
12 independent compliance consultant ("ICC") to, among other things, strengthen the
13 disclosure controls and procedures relevant to accurate disclosure of perquisite
14 compensation.

15 94. In February 2017, the company certified to the SEC that it had complied
16 with the undertakings in the 2015 SEC Order, in part, by implementing a disclosure
17 control recommended by the ICC to use an "[a]nnual questionnaire[] ... provided to
18 the members of the Board of Directors and executives to identify any perquisites."
19 ("D&O questionnaire").

20 95. MusclePharm used a D&O questionnaire in early 2017 to identify 2016
21 perquisites. But the very next year, after Harris took over as contract CFO, neither he,
22 nor the CEO, nor anyone else at the company used a D&O questionnaire, or any other
23 controls, to identify 2017 perquisites for its named executive officers: the CEO and
24 Casutto.

25 96. MusclePharm's Travel and Expense Policy outlined the procedures for
26 obtaining reimbursement for business expenses, including specifically identifying the
27 business purpose of the expense and submitting original receipts.

28 97. Casutto disregarded these procedures by seeking reimbursement for

1 expenses that were not supported by any business purpose or appropriate
2 documentation.

3 98. Casutto obtained reimbursement for significant commuting expenses and
4 other expenses not integrally and directly related to his job that should have been
5 reported as perquisites.

6 99. Additionally, Harris, Casutto and the CEO failed to ensure that
7 perquisites, which they had personal knowledge of, were properly included in the
8 company's executive compensation disclosures.

9 100. This conduct resulted in MusclePharm materially underreporting
10 executive perquisites in the 2017 Form 10-K and October 26, 2018 proxy statement
11 by approximately \$231,000 (88 percent) for the CEO and approximately \$107,900
12 (54 percent) for Casutto. The unreported perquisites included: (i) personal legal fees,
13 (ii) tax gross-ups on restricted stock, (iii) automobile expenses, and (iv) commuting
14 and living costs.

15 101. Accurate and transparent executive compensation disclosures are
16 material to investors. Additionally, the amount by which MusclePharm underreported
17 its 2017 executive perquisites was material.

18 **VII. THE DEFENDANTS ENGAGED IN DECEPTIVE CONDUCT AND**
19 **AIDED AND ABETTED DECEPTIVE CONDUCT.**

20 102. As detailed above, the Defendants engaged in and/or substantially
21 assisted deceptive conduct in furtherance of a scheme to artificially inflate
22 MusclePharm's revenue and other financial information.

23 103. For example, Cassuto committed numerous fraudulent and deceptive
24 acts. Among other things, Casutto:

- 25 a. instructed Zucco to store orders totaling approximately \$210,000
26 in trailers at the end of fourth quarter of 2017 when he knew they
27 would not be shipped to customers until 2018;
28 b. worked with Harris to approve revenue recognition for a sale to

1 Customer E totaling approximately \$632,000 in the fourth quarter
2 of 2017 when he knew that there was no formal purchase order,
3 the sale was contingent on certain future events, and all the
4 products remained in MusclePharm's Canadian warehouse at the
5 end of 2017;

6 c. directed Zucco to store Customer D orders totaling approximately
7 \$4.7 million in a third-party warehouse paid for by MusclePharm
8 in third quarter of 2018 when he knew Customer D did not want
9 the orders shipped until the following quarter;

10 d. directed Zucco to store invoiced but unshipped orders totaling
11 approximately \$2.5 million in trailers at the end of fourth quarter
12 of 2018 when he knew they would not be shipped to customers
13 until 2019;

14 e. disregarded MusclePharm's Travel and Expense Policy by failing
15 to provide receipts or business justifications for expenditures
16 and/or seeking reimbursement for expenses outside the policy
17 limits and failed to ensure that perquisites, which he had personal
18 knowledge of, were properly included in the company's executive
19 compensation disclosures for 2017.

20 104. In light of all of the above-alleged facts, Casutto knew or was reckless in
21 not knowing, and should have known, that his conduct was deceptive and that it
22 resulted in material misstatements by MusclePharm.

23 105. Additionally, as detailed above, Zucco knowingly or recklessly provided
24 substantial assistance to MusclePharm's fraudulent and deceptive conduct. Among
25 other things, Zucco:

26 a. at Casutto's direction, instructed the warehouse to store orders
27 totaling approximately \$210,000 in trailers at the end of fourth
28

1 quarter of 2017 when he knew they would not be shipped to
2 customers until 2018;

3 b. at Casutto's direction, instructed warehouse personnel to store
4 Customer D orders totaling approximately \$4.7 million in a third
5 party warehouse paid for by MusclePharm in third quarter of 2018
6 when he knew Customer D did not want the orders shipped until
7 the following quarter;

8 c. at Casutto's direction, instructed warehouse personnel to store
9 invoiced but unshipped orders totaling approximately \$2.5 million
10 in trailers at the end of fourth quarter of 2018 when he knew they
11 would not be shipped to customers until 2019; and

12 d. At the direction of Casutto and Harris, instructed warehouse and
13 IT personnel to replace BOLs in the accounting system showing
14 January 2019 ship dates with BOLs showing December 2018 ship
15 dates.

16 106. In light of all of the above-alleged facts, Zucco knew or was reckless in
17 not knowing, and should have known, that his conduct substantially assisted
18 MusclePharm in its violations of the federal securities laws.

19 107. As detailed above, Harris engaged in transactions, practices, and a
20 course of business that operated or would operate as a fraud or deceit. Among other
21 things, Harris:

22 a. approved revenue recognition for a sale to Customer E totaling
23 approximately \$632,000 in the fourth quarter of 2017 without
24 proper support and failed to timely correct the accounting for
25 Customer B's orders after receiving emails that should have
26 alerted him to the fact the revenue was prematurely recognized
27 upon shipment to a holding warehouse instead of the customer;

28 b. participated in replacing BOLs showing December 2018 ship

1 dates with BOLs showing January 2019 ship dates without taking
2 reasonable steps to confirm which ship date was accurate;

3 c. failed to ensure that MusclePharm recognized revenue in
4 accordance with its customer contract terms and classified
5 customer credits in compliance with GAAP;

6 d. failed to ensure that MusclePharm used a D&O questionnaire, or
7 any other disclosure controls and procedure, to identify perquisite
8 compensation for disclosure, and failed to ensure that certain
9 perquisites, which he had personal knowledge of, were properly
10 included in the company's executive compensation disclosures.

11 108. In light of all of the above-alleged facts, as well as his background,
12 education, and job responsibilities, Harris negligently engaged in transactions,
13 practices, and a course of business that operated or would operate as a fraud or deceit
14 that resulted in misstatements by MusclePharm.

15 **VIII. THE DEFENDANTS AIDED AND ABETTED MUSCLEPHARM'S**
16 **VIOLATION OF REPORTING PROVISIONS OF THE FEDERAL**
17 **SECURITIES LAWS.**

18 109. Section 13(a) of the Exchange Act and Rules 13a-1, 13a-11 and 13a-13
19 thereunder require issuers like MusclePharm to file reports with the SEC containing
20 such information as the SEC's rules prescribe. Further, Rule 12b-20 requires that an
21 issuer's statement or report contain such further material information as may be
22 necessary to make the required statements, in light of the circumstances under which
23 they were made, not misleading.

24 110. As detailed above, MusclePharm violated these reporting provisions by
25 filing annual, current, and quarterly reports with the SEC throughout the Restatement
26 Period that, among other things, materially inflated reported revenue.

27 111. Also as detailed above, Casutto, Zucco, and Harris aided and abetted
28 these violations by knowingly or recklessly providing substantial assistance to those

1 violations. Among other things, Harris oversaw the preparation of the filings and
2 participated in the underlying accounting misconduct, as described above. And
3 Casutto and Zucco engaged in a practice of marking orders as shipped prior to
4 shipment for the purpose of prematurely closing sales, which inflated the revenue
5 reported in MusclePharm's financial statements as filed on its 2017 Form 10-K and
6 2018 Forms 10-Q.

7 **IX. THE DEFENDANTS VIOLATED AND/OR AIDED AND ABETTED**
8 **MUSCLEPHARM'S VIOLATION OF BOOKS AND RECORDS AND**
9 **INTERNAL CONTROLS PROVISIONS OF THE FEDERAL**
10 **SECURITIES LAWS.**

11 112. Section 13(b)(2)(A) of the Exchange Act requires issuers like
12 MusclePharm to make and keep books, records, and accounts which, in reasonable
13 detail, accurately and fairly reflect the company's transactions and dispositions of the
14 assets. Section 13(b)(2)(B) of the Exchange Act requires issuers like MusclePharm to
15 devise and maintain a system of sufficient internal accounting controls. Section
16 13(b)(5) of the Exchange Act prohibits any person from knowingly circumventing or
17 failing to implement a system of internal accounting controls or knowingly falsifying
18 books, records, or accounts. Similarly, Rule 13b2-1 prohibits any person from
19 directly or indirectly falsifying or causing to be falsified books, records, or accounts.

20 113. In violation of Section 13(b)(2)(A), MusclePharm failed to make and
21 keep accurate books, records, and accounts. Casutto, Zucco, and Harris aided and
22 abetted MusclePharm's violations of the books and records provision based on their
23 respective roles in MusclePharm's improper revenue recognition during the
24 Restatement Period. Through those same actions, the Defendants also violated Rule
25 13b2-1 of the Exchange Act.

26 114. In violation of Section 13(b)(2)(B), MusclePharm failed to maintain a
27 system of internal accounting controls sufficient to provide reasonable assurance that
28 revenue, customer credits, gross profit margin, advertising and promotional expenses,

1 and inventory complied with GAAP. In his role as contract CFO, Harris was one of
2 the persons responsible for devising and maintaining MusclePharm’s system of
3 internal accounting controls, and his failure to do so aided and abetted
4 MusclePharm’s violation of Section 13(b)(2)(B) of the Exchange Act.

5 115. Casutto and Zucco additionally circumvented MusclePharm’s internal
6 accounting control requiring shipment prior to revenue recognition in violation of
7 Section 13(b)(5) of the Exchange Act by engaging in the practice of storing
8 unshipped inventory off-site in trailers and third-party warehouses and marking it as
9 shipped in the inventory system.

10 **X. HARRIS AIDED AND ABETTED MUSCLEPHARM’S VIOLATIONS**
11 **OF THE REPORTING CONTROLS PROVISION OF THE FEDERAL**
12 **SECURITIES LAWS.**

13 116. Rule 13a-15(a) of the Exchange Act requires issuers like MusclePharm
14 to maintain disclosure controls and procedures (“DCP”) and internal control over
15 financial reporting (“ICFR”). DCP are defined in Rule 13a-15(e), in part, as controls
16 and other procedures “designed to ensure that information required to be disclosed ...
17 is recorded, processed, summarized, and reported.” ICFR is defined in Rule 13a-
18 15(f), in part, as “a process ... to provide reasonable assurance regarding the
19 reliability of financial reporting”

20 117. MusclePharm violated Rule 13a-15(a) by failing to maintain DCP or
21 ICFR as required. Specifically, MusclePharm failed to implement DCP concerning
22 the identification and reporting of executive perquisites, and failed to maintain
23 appropriate ICFR to prevent and detect the revenue recognition misconduct described
24 above. Harris aided and abetted MusclePharm’s violation of Rule 13a-15(a).
25 Although the company certified to the staff in February 2017 that it implemented a
26 D&O questionnaire disclosure control, Harris did not use D&O questionnaires, or any
27 other controls, to identify 2017 perquisites for the 2017 Form 10-K and October 2018
28 proxy statement. Additionally, Harris did nothing to establish and maintain

1 MusclePharm’s ICFR.

2 **XI. CASUTTO AND HARRIS VIOLATED PROXY SOLICITATION**
3 **PROVISIONS OF THE FEDERAL SECURITIES LAWS.**

4 118. Section 14(a) of the Exchange Act makes it unlawful to solicit any proxy
5 with respect to any security (other than an exempted security) registered pursuant to
6 Section 12 of the Exchange Act in contravention of such rules and regulations as the
7 SEC may prescribe. Rule 14a-3 provides that no solicitation of a proxy may occur
8 unless each person solicited is concurrently furnished or has previously been
9 furnished with a proxy statement containing the information specified by Schedule
10 14A, including executive compensation. Rule 14a-9 prohibits the use of proxy
11 statements containing statements that are materially false or misleading by omission.

12 119. On October 26, 2018, MusclePharm filed a definitive proxy statement
13 that it used to solicit proxies in connection with, among other things, the re-election
14 of Casutto to the board of directors and an advisory vote on the executive
15 compensation packages for the CEO and Casutto.

16 120. Harris participated in preparing the proxy statement, and Casutto, as a
17 director of the company, participated in the solicitation.

18 121. In violation of Rule 14a-3, the proxy failed to disclose all compensation
19 received by the CEO and Casutto as required by Item 8 of Schedule 14A.
20 Additionally, in violation of Rule 14a-9, the 2017 “other compensation” was
21 materially misleading because it underreported perquisites for the CEO and Casutto
22 by 88 percent and 54 percent, respectively.

23 **XII. CASUTTO AND ZUCCO RECEIVED ILL-GOTTEN GAINS FROM**
24 **THEIR CONDUCT.**

25 122. Casutto received cash performance bonuses for year-end 2017, first
26 quarter of 2018, and second quarter of 2018 totaling \$65,531 that he would not have
27 received but for his participation in the misconduct described above.

28 123. Zucco received cash performance bonuses for the second quarter of 2018

1 totaling \$12,500 that he would not have received but for his participation in the
2 misconduct described above.

3 **FIRST CLAIM FOR RELIEF**

4 **Fraud: Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c)**
5 **(Casutto)**

6 124. The SEC realleges and incorporates by reference paragraphs 1 through
7 123 as though fully set forth herein.

8 125. Casutto, directly or indirectly, acting with scienter, by use of the means
9 or instrumentalities or interstate commerce, or of the mails, or of a facility of a
10 national securities exchange, in connection with the purchase or sale of a security (i)
11 employed devices, schemes, or artifices to defraud and (ii) engaged in acts, practices,
12 or courses of business which operated or would operate as a fraud or deceit upon
13 another person.

14 126. By virtue of the foregoing, Casutto, directly or indirectly, violated and,
15 unless restrained and enjoined, will again violate Section 10(b) of the Exchange Act
16 [15 U.S.C. § 78j(b)] and Rule 10b-5(a) and (c) [17 C.F.C. § 240.10b-5(a) and (c)]
17 thereunder.

18 **SECOND CLAIM FOR RELIEF**

19 **Fraud: Aiding and Abetting MusclePharm's Violations of**
20 **Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c)**
21 **(Zucco)**

22 127. The SEC realleges and incorporates by reference paragraphs 1 through
23 123 as though fully set forth herein.

24 128. MusclePharm, directly or indirectly, acting with scienter, by use of the
25 means or instrumentalities of interstate commerce, or of the mails, or of a facility of a
26 national securities exchange, in connection with the purchase or sale of a security (i)
27 employed devices, schemes, or artifices to defraud and (ii) engaged in acts, practices,
28 or courses of business which operated or would operate as a fraud or deceit upon

1 another person in violation of Section 10(b) of the Exchange Act and Rules 10b-5(a)
2 and 10b-5(c).

3 129. As a result of the conduct alleged herein, Zucco aided and abetted
4 MusclePharm's violations of Section 10(b) of the Exchange Act and Rules 10b-5(a)
5 and (c) by knowingly or recklessly providing substantial assistance to MusclePharm.

6 130. By reason of the foregoing, Zucco, directly or indirectly, aided and
7 abetted and, unless restrained and enjoined, will again aid and abet violations of
8 Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5(a) and (c) [17
9 C.F.C. § 240.10b-5(a) and (c)] thereunder.

10 **THIRD CLAIM FOR RELIEF**

11 **Fraud: Section 17(a)(1) of the Securities Act**

12 **(Casutto)**

13 131. The SEC realleges and incorporates by reference paragraphs 1 through
14 123 as though fully set forth herein.

15 132. Casutto, directly or indirectly, in the offer or sale of securities, by use of
16 the means or instruments of transportation or communication in interstate commerce
17 or by use of the mails, acting with scienter, employed a device, scheme, or artifice to
18 defraud.

19 133. By virtue of the foregoing, Casutto, directly or indirectly, violated and,
20 unless restrained and enjoined, will again violate Section 17(a)(1) of the Securities
21 Act [15 U.S.C. § 77q(a)(1)].

22 **FOURTH CLAIM FOR RELIEF**

23 **Fraud: Sections 17(a)(3) of the Securities Act**

24 **(Casutto and Harris)**

25 134. The SEC realleges and incorporates by reference paragraphs 1 through
26 123 as though fully set forth herein.

27 135. Casutto and Harris, directly or indirectly, in the offer or sale of
28 securities, by use of the means or instruments of transportation or communication in

1 interstate commerce or by use of the mails, acting with negligence, engaged in a
2 transaction, practice, or course of business which operated or would operate as a
3 fraud or deceit upon the purchasers.

4 136. By virtue of the foregoing, Casutto and Harris, directly or indirectly,
5 violated and, unless restrained and enjoined, will again violate Section 17(a)(3) of the
6 Securities Act [15 U.S.C. § 77q(a)(3)].

7 **FIFTH CLAIM FOR RELIEF**

8 **Fraud: Aiding and Abetting MusclePharm’s Violation of**
9 **Sections 17(a)(1) and (3) of the Securities Act**
10 **(Zucco)**

11 137. The SEC realleges and incorporates by reference paragraphs 1 through
12 123 as through fully set forth herein.

13 138. MusclePharm, directly or indirectly, in the offer or sale of securities, by
14 use of the means or instruments of transportation or communication in interstate
15 commerce or by use of the mails, acting with the requisite state of mind (i) employed
16 a device, scheme, or artifice to defraud and (ii) engaged in transactions, practices, or a
17 course of business which operated or would operate as a fraud or deceit upon
18 purchasers in violation of Section 17(a)(1) and 17(a)(3) of the Securities Act.

19 139. As a result of the conduct alleged herein, Zucco aided and abetted
20 MusclePharm’s violations of Section 17(a)(1) and 17(a)(3) of the Securities Act by
21 knowingly or recklessly providing substantial assistance to MusclePharm.

22 140. By reason of the foregoing, Zucco, directly or indirectly, aided and
23 abetted and, unless restrained and enjoined, will again aid and abet violations of
24 Section 17(a)(1) and (3) of the Securities Act [15 U.S.C. § 77q(a)(1) and (3)].

25 **SIXTH CLAIM FOR RELIEF**

26 **Fraud: Section 17(a)(2) of the Securities Act**
27 **(Harris)**

28 141. The SEC realleges and incorporates by reference paragraphs 1 through

1 123 as though fully set forth herein.

2 142. Harris, directly or indirectly, in the offer or sale of securities, by use of
3 the means or instruments of transportation or communication in interstate commerce
4 or by use of the mails, acting with the requisite state of mind, obtained money or
5 property by means of an untrue statement of material fact or omission to state a
6 material fact necessary in order to make the statements made, in light of the
7 circumstances under which they were made, not misleading.

8 143. By virtue of the foregoing, Harris, directly or indirectly, violated and,
9 unless restrained and enjoined, will again violate Section 17(a)(2) of the Securities
10 Act [15 U.S.C. § 77q(a)(2)].

11 **SEVENTH CLAIM FOR RELIEF**

12 **Fraud: Aiding and Abetting MusclePharm's Violation of Section 17(a)(2) of the**
13 **Securities Act**
14 **(Casutto and Zucco)**

15 144. The SEC realleges and incorporates by reference paragraphs 1 through
16 123 as though fully set forth herein.

17 145. MusclePharm, directly or indirectly, in the offer or sale of securities, by
18 use of the means or instruments of transportation or communication in interstate
19 commerce or by use of the mails, acting with the requisite state of mind, obtained
20 money or property by means of an untrue statement of material fact or omission to
21 state a material fact necessary in order to make the statements made, in light of the
22 circumstances under which they were made, not misleading in violation of Section
23 17(a)(2) of the Securities Act.

24 146. As a result of the conduct alleged herein, Casutto and Zucco aided and
25 abetted MusclePharm's violations of Section 17(a)(2) of the Securities Act by
26 knowingly or recklessly providing substantial assistance to MusclePharm.

27 147. By virtue of the foregoing, Casutto and Zucco, directly or indirectly,
28 aided and abetted and, unless restrained and enjoined, will again aid and abet

1 violations of Section 17(a)(2) of the Securities Act [15 U.S.C. § 77q(a)(2)].

2 **EIGHTH CLAIM FOR RELIEF**

3 **Fraud: Aiding and Abetting MusclePharm’s Violation of Section 10(b) of the**
4 **Exchange Act and Rule 10b-5(b)**
5 **(Casutto and Zucco)**

6 148. The SEC realleges and incorporates by reference paragraphs 1 through
7 123 as though fully set forth herein.

8 149. MusclePharm, directly or indirectly, acting with scienter, by use of the
9 means or instrumentalities of interstate commerce, or of the mails, or of a facility of a
10 national securities exchange, in connection with the purchase or sale of a security
11 made an untrue statement of a material fact or omitted a material fact necessary in
12 order to make the statements made, in the light of the circumstances under which they
13 were made, not misleading in violation of Section 10(b) of the Exchange Act and
14 Rule 10b-5(b) thereunder.

15 150. As a result of the conduct alleged herein, Casutto and Zucco aided and
16 abetted MusclePharm’s violations of Section 10(b) of the Exchange Act and Rule
17 10b-5(b) thereunder by knowingly or recklessly providing substantial assistance to
18 MusclePharm.

19 151. By virtue of the foregoing, Casutto and Zucco, directly or indirectly,
20 aided and abetted and, unless restrained and enjoined, will again aid and abet
21 violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-
22 5(b) [17 C.F.C. § 240.10b-5(b)].

23 **NINTH CLAIM FOR RELIEF**

24 **False SEC Filings: Aiding and Abetting MusclePharm’s Violation of Section**
25 **13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13**
26 **(All Defendants)**

27 152. The SEC realleges and incorporates by reference paragraphs 1 through
28 123 as though fully set forth herein.

1 153. MusclePharm, which is an issuer of securities registered pursuant to
2 Section 12 of the Exchange Act, filed materially false and misleading annual,
3 quarterly, and current reports with the SEC that made untrue statements of material
4 fact or omitted to state material facts necessary in order to make the statements made,
5 in light of the circumstances under which they were made, not misleading in violation
6 of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13
7 thereunder.

8 154. As a result of the conduct alleged herein, Casutto, Zucco, and Harris
9 aided and abetted MusclePharm's violations of Section 13(a) of the Exchange Act
10 and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder by knowingly or recklessly
11 providing substantial assistance to MusclePharm.

12 155. By reason of the foregoing, Casutto, Zucco, and Harris, directly or
13 indirectly, aided and abetted and, unless restrained and enjoined, will again aid and
14 abet violations of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules
15 12b-20, 13a-1, 13a-11, and 13a-13 thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-1,
16 240.13a-11, and 240.13a-13].

17 **TENTH CLAIM FOR RELIEF**

18 **Reporting Controls: Aiding and Abetting MusclePharm's Violations of**
19 **Rule 13a-15(a) of the Exchange Act**

20 **(Harris)**

21 156. The SEC realleges and incorporates by reference paragraphs 1 through
22 123 as though fully set forth herein.

23 157. MusclePharm, which is an issuer of securities pursuant to Section 12 of
24 the Exchange Act and which files annual reports with the SEC pursuant to Section
25 13(a) of the Exchange Act, failed to maintain required disclosure controls and
26 procedures and internal control over financial reporting in violation of Rule 13a-15(a)
27 of the Exchange Act.

28 158. As a result of the conduct alleged herein, Harris aided and abetted

1 MusclePharm's violations of Rule 13a-15(a) of the Exchange Act by knowingly or
2 recklessly providing substantial assistance to MusclePharm.

3 159. By reason of the foregoing, Harris, directly or indirectly, aided and
4 abetted and, unless restrained and enjoined, will again aid and abet violations of
5 Exchange Act Rule 13a-15(a) [17 C.F.R. § 240.13a-15(a)].

6 **ELEVENTH CLAIM FOR RELIEF**

7 **False Books and Records: Aiding and Abetting MusclePharm's Violations of**
8 **Section 13(b)(2)(A) of the Exchange Act**
9 **(All Defendants)**

10 160. The SEC realleges and incorporates by reference paragraphs 1 through
11 123 as though fully set forth herein.

12 161. MusclePharm failed to make and keep books, records, and accounts,
13 which, in reasonable detail, accurately and fairly reflected its transactions and
14 dispositions of assets in violation of Section 13(b)(2)(A) of the Exchange Act.

15 162. As a result of the conduct alleged herein, Casutto, Zucco, and Harris,
16 aided and abetted MusclePharm's violations of Section 13(b)(2)(A) of the Exchange
17 Act by knowingly or recklessly providing substantial assistance to MusclePharm.

18 163. By reason of the foregoing, Casutto, Zucco, and Harris, directly or
19 indirectly, aided and abetted and, unless restrained and enjoined, will again aid and
20 abet violations of Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. §
21 78m(b)(2)(A)].

22 **TWELFTH CLAIM FOR RELIEF**

23 **Internal Accounting Controls: Aiding and Abetting MusclePharm's Violation of**
24 **Section 13(b)(2)(B) of the Exchange Act**
25 **(Harris)**

26 164. The SEC realleges and incorporates by reference paragraphs 1 through
27 123 as though fully set forth herein.

28 165. MusclePharm failed to devise and maintain a system of internal

1 accounting controls sufficient to provide reasonable assurances that transactions were
2 recorded as necessary to permit preparation of financial statements in conformity
3 with GAAP and any other criteria applicable to such statements in violation of
4 Section 13(b)(2)(B) of the Exchange Act.

5 166. As a result of the conduct alleged herein, Harris aided and abetted
6 MusclePharm's violations of Section 13(b)(2)(B) of the Exchange Act by knowingly
7 or recklessly providing substantial assistance to MusclePharm.

8 167. By reason of the foregoing, Harris, directly or indirectly, aided and
9 abetted and, unless restrained and enjoined, will again aid and abet violations of
10 Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)].

11 **THIRTEENTH CLAIM FOR RELIEF**

12 **Falsified Books, Records, or Accounts: Section 13(b)(5) of the Exchange Act** 13 **(Casutto and Zucco)**

14 168. The SEC realleges and incorporates by reference paragraphs 1 through
15 123 as though fully set forth herein.

16 169. As a result of the conduct alleged herein, Casutto and Zucco, knowingly
17 circumvented a system of internal accounting controls or knowingly falsified or
18 caused to be falsified books, records or accounts of MusclePharm.

19 170. By reason of the foregoing, Casutto and Zucco violated and, unless
20 restrained and enjoined, will again violate Section 13(b)(5) of the Exchange Act [15
21 U.S.C. § 78m(b)(5)].

22 **FOURTEENTH CLAIM FOR RELIEF**

23 **Falsified Books, Records, or Accounts: Rule 13b2-1 of the Exchange Act** 24 **(All Defendants)**

25 171. The SEC realleges and incorporates by reference paragraphs 1 through
26 123 as though fully set forth herein.

27 172. As a result of the conduct alleged herein, Casutto, Zucco, and Harris,
28 directly or indirectly, falsified or caused to be falsified books, records or accounts of

1 MusclePharm.

2 173. By reason of the foregoing, Casutto, Zucco, and Harris violated and,
3 unless restrained and enjoined, will again violate Rule 13b2-1 of the Exchange Act
4 [17 C.F.R. § 240.13b2-1].

5 **FIFTEENTH CLAIM FOR RELIEF**

6 **Proxy Disclosures: Violation of Section 14(a) of the Exchange Act**
7 **and Rules 14a-3 and 14a-9**
8 **(Casutto and Harris)**

9 174. The SEC realleges and incorporates by reference paragraphs 1 through
10 123 as through fully set forth herein.

11 175. As a result of the conduct alleged herein, Casutto and Harris, directly or
12 indirectly, by use of mails, or the means or instrumentalities or interstate commerce
13 or any facility of a national securities exchange, solicited proxies without furnishing
14 each person solicited a proxy statement containing the information specified by the
15 proxy rules, and used proxy statements containing statements which, at the time and
16 in light of the circumstances under which they are made, were false or misleading
17 with respect to a material fact, or omitted to state material facts necessary to make the
18 statement therein not misleading or necessary to correct any statement in any earlier
19 communication with respect to the solicitation of a proxy for the same meeting or
20 subject matter which has become false or misleading.

21 176. By reason of the foregoing, Casutto and Harris violated and, unless
22 restrained and enjoined, will again violate Section 14(a) of the Exchange Act [15
23 U.S.C. § 78n(a)] and Rules 14a-3 and 14a-9 thereunder [17 C.F.R. §§ 240.14a-3 and
24 240.14a.9].

25 **RELIEF SOUGHT**

26 **WHEREFORE**, the SEC respectfully requests that this Court:

27 **I.**

28 Find that the Defendants committed the violations alleged in this Complaint;

1
2 **II.**

3 Enter an injunction, in a form consistent with Rule 65 of the Federal Rules of
4 Civil Procedure, permanently restraining and enjoining each of the Defendants from
5 violating, directly or indirectly, the laws and rules they are alleged to have violated in
6 this Complaint;

7 **III.**

8 Pursuant to Sections 21(d)(5) and 21(d)(7) of the Exchange Act [15 U.S.C. §§
9 78u(d)(5) and 78u(d)(7)], order Casutto and Zucco to disgorge all ill-gotten gains,
10 together with pre-judgment interest, derived from the activities set forth in this
11 Complaint;

12 **IV.**

13 Order Casutto, Zucco, and Harris to pay civil money penalties pursuant to
14 Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the
15 Exchange Act [15 U.S.C. § 78u(d)(3)]; and

16 **V.**

17 Issue an order, pursuant to the Court's equitable powers, Section 20(e) of the
18 Securities Act [15 U.S.C. § 77t(e)], and Section 21(d)(2) of the Exchange Act [15
19 U.S.C. § 78u(d)(2)], barring Casutto from acting as an officer or director of any issuer
20 that has a class of securities registered pursuant to Section 12 of the Exchange Act
21 [15 U.S.C. § 78l] or that is required to file reports pursuant to Section 15(d) of the
22 Exchange Act [15 U.S.C. § 78o(d)].

23 **VI.**

24 Grant such other and further relief as this Court may deem just and proper.
25
26
27
28

JURY DEMAND

The SEC demands a trial by jury on all claims so triable.

Respectfully submitted, June 27, 2023.

/s/ Daniel Blau

Daniel Blau

Zachary T. Carlyle

Sharan E. Lieberman

Attorneys for Plaintiff

Securities and Exchange Commission