

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9903 / September 8, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 75851 / September 8, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16788

In the Matter of

MusclePharm Corporation,

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933 AND SECTION 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING A
CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) and Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against MusclePharm Corporation (“MSLP” or “Respondent”).

II.

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

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

MSLP is a Denver-based sports nutrition company that develops, manufactures, and markets sports nutrition products. When MSLP became a public company in 2010, it was unprepared for the Commission's reporting requirements and lacked sufficient infrastructure to support its rapid growth. MSLP's revenues greatly increased each year (MSLP's reported revenue was \$3M in 2010, \$17M in 2011, \$67M in 2012 and \$111M in 2013). MSLP's senior management lacked public company or accounting experience. While the company focused on revenue growth, it failed to establish sufficient internal controls and keep proper books and records. As a result, between 2010 and 2013, MSLP engaged in a series of accounting and disclosure failures that resulted in the company filing materially false and misleading filings with the Commission from 2010 through July 2014. Specifically, as described further below, MSLP failed to disclose perquisite compensation to its executive officers, failed to disclose related party transactions, failed to disclose bankruptcies of its executive officers, and committed other financial statement, accounting, and disclosure failures. Additionally, MSLP engaged in the unregistered offer and sale of its securities.

Respondent

1. MSLP is a Nevada corporation, based in Denver, Colorado, that manufactures and markets sports nutrition products. From 2010 to present, MSLP's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act and was quoted on the OTC Bulletin Board.

MSLP's Failure to Disclose Perquisites from 2010 through July 2014

2. From 2010 through July 2014, MSLP significantly understated its disclosed perquisites by approximately \$482,000 or 76% in Forms 10-K, Forms S-1, and proxy statements filed with the Commission. MSLP understated its disclosed perquisites in (1) 2010 by approximately \$37,000 or 100%; (2) in 2011 by approximately \$160,000 or 100%; (3) in 2012 by approximately \$214,000 or 93%; and (4) in 2013 by approximately \$71,000 or 35%.

3. MSLP paid its chief executive officer ("CEO") approximately \$244,000 of undisclosed perquisites during this time period. The perquisites included perquisites related to meals, autos, apparel, personal professional tax and legal services, and two golf club memberships. During this time, MSLP also paid for perquisites of other executives that were not disclosed, including items such as the medical costs of the birth of a child, eye surgery, and personal golf club memberships.

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

4. From 2010 until mid-2012, MSLP executives knew or should have known that executive compensation was required to be disclosed in Commission filings and failed to educate themselves regarding the required reporting of executive compensation in Commission filings or what were considered perquisites with respect to executive officers. As a consequence, MSLP did not disclose any perquisites in its filings with the Commission prior to October 2012.

5. From mid-2012 through 2013, MSLP executives failed to properly identify or fully investigate undisclosed perquisites. As a consequence, MSLP continued to fail to identify or disclose many perquisites in its filings with the Commission through July 2014.

6. In September 2012, the MSLP board of directors determined perquisites related to autos, golf club memberships, and private plane usage would be disclosed in Commission filings. MSLP, however, filed several Commission filings through July 2014, which failed to include complete disclosure of the perquisites identified at the board meeting and otherwise known by senior management.

7. By summer 2013, MSLP began an internal review to determine the amount of undisclosed perquisites paid by MSLP to its executives since 2010. MSLP identified over \$100,000 of undisclosed perquisites, including jet use, autos, and golf club memberships. MSLP, however, filed a Form S-1 in August 2013 with incorrect perquisite disclosures that were identical to amounts previously disclosed before the internal review began.

8. MSLP continued its internal investigation of undisclosed perquisites from fall 2013 through spring 2014. On March 31, 2014, MSLP filed its 2013 Form 10-K. In the summary compensation table, MSLP set forth previously undisclosed perquisites for 2011 and 2012 totaling approximately \$189,000 (previously undisclosed perquisites of \$74,000 for 2011 and \$115,000 for 2012). The table also disclosed approximately \$134,000 of perquisites in 2013. These disclosures, however, still significantly understated perquisites paid to MSLP executives.

9. MSLP reexamined its perquisite investigation results from spring 2014 through fall 2014. On October 31, 2014, MSLP filed amended Forms 10-K for the years ended 2012 and 2013. The 2013 Form 10-K/A disclosed an additional \$252,000 of undisclosed perquisites that were not included in the 2013 Form 10-K or its July 2014 proxy statement. The 2012 Form 10-K/A disclosed an additional \$37,000 of perquisites for 2010. In total, MSLP failed to report perquisites totaling approximately \$482,000 from 2010-2013.

MSLP's Failure to Disclose Related Party Transactions with a Major Customer from 2011 through 2012

10. MSLP knew or should have known that policies regarding identifying and disclosing related party transactions were required and MSLP failed to implement sufficient policies regarding identifying and disclosing related party transactions. As a result, from May 2011 through 2012, MSLP failed to disclose in Commission filings significant related party transactions with a major customer.

11. In May 2011, MSLP hired a new chief marketing officer (“CMO”). The CMO was a former executive and co-founder of a major customer of MSLP. The CMO’s brother remained the CEO of the major customer and a greater than 10% owner of the major customer. From May 2011 to April 2012, MSLP did not identify the related party relationship or consider if disclosure was necessary.

12. In March 2012, MSLP’s auditor informed MSLP that transactions with the major customer were related party transactions requiring disclosure. In April 2012, MSLP provided a memo to its auditors concluding that transactions with the major customer did not require disclosure under generally accepted accounting principles (“GAAP”). The memo contained inaccurate information about the relationship between MSLP, the CMO, and the major customer. MSLP did not consider whether transactions with its major customer needed to be disclosed as related party transactions under Item 404 of Regulation S-K. The 2011 Form 10-K was filed three days after the memo, without any related party disclosure regarding the major customer.

13. In July 2012, MSLP hired a new CFO. The CFO had previously been CFO of MSLP’s major customer (where the CMO’s brother was CEO) and acquired a 1.75% indirect interest in the major customer. The CFO also continued to perform work for the CEO of the major customer personally at no charge while he worked at MSLP.

14. In August 2012, MSLP’s auditor requested that MSLP update the April 2012 memo to address whether the major customer was a related party requiring disclosure under GAAP, specifically due to the CMO’s or CFO’s employment. The August memo concluded that transactions with the major customer did not require disclosure under GAAP. The memo contained inaccurate information about the relationship between MSLP, the CMO, the CFO, and the major customer. As a result, MSLP failed to disclose transactions with its major customer as related party transactions in Commission filings until it filed its Form 10-Q for the quarter ended March 30, 2013 in May 2013.

MSLP’s Failure to Disclose Bankruptcies Related to Executive Officers from 2010-2012

15. MSLP’s CEO filed for personal bankruptcy in 2008 in the United States District Court for the District of Colorado. Two companies owned by one of MSLP’s former CFOs also filed for bankruptcy in 2008 in the United States District Court for the Southern District of Florida. From April 2011 through July 2012, MSLP’s filings did not include disclosure of the CEO’s bankruptcy. MSLP never disclosed the bankruptcies of the CFO’s former companies. From April 2011 through October 2012, MSLP’s filings also included a misstatement that “[n]one of the members of the board of directors or other executives has been involved in any bankruptcy proceedings.”

Other Financial Statement, Accounting, and Disclosure Failures from 2010-2013

16. MSLP improperly accounted for advertising and promotional related costs for 2010 and 2011. Instead of accounting for advertising and promotional related costs as a reduction of revenue as required under GAAP, MSLP recorded these costs as advertising expenses resulting in it overstating revenue by \$845,000 or 26% in 2010 and \$3.6 million or 21%

in 2011. As a result, MSLP filed an amended Form 10-K for the year ended December 31, 2011 on July 2, 2012 restating its 2010 and 2011 financial statements.

17. MSLP recorded approximately \$1.5 million of loss on settlement of accounts payable in the first quarter of 2011, when GAAP required it be disclosed in 2010. By reporting the loss in the wrong quarter, MSLP understated its 2010 loss on settlement of accounts payable as presented on its income statement by 78% and overstated it by 455% in the first quarter of 2011. MSLP's net loss was understated 8% in 2010 and overstated 42% in 2011.

18. MSLP failed to disclose continuing sponsorship commitments in its Form 10-K for the year ended December 31, 2011 and its Forms S-1 filed during 2012 as required under GAAP. The future sponsorship commitments required MSLP to make future payments totaling \$6.9 million through 2013.

19. MSLP failed to disclose that it had one supplier that accounted for nearly 100% of its product purchases in its 2011 and 2012 Commission filings as required under GAAP.

20. MSLP failed to disclose \$100,000 of rent expense related to an August 2012 aircraft lease agreement in its 2012 Commission filings as required under GAAP. As a result, MSLP understated its disclosed rent expense by 23%.

21. MSLP failed to disclose the amount of its international sales in its 2011 through 2013 Commission filings as required under GAAP. MSLP's international sales accounted for 23%, 30% and 31% of its sales for 2011, 2012, and 2013 respectively.

Stock Issuances without a Registration Statement

22. In 2011, MSLP lacked funds to pay approximately \$1.1 million of outstanding invoices to vendors dating back to services and products purchased in 2009 and 2010. To pay off the vendors, MSLP entered into numerous transactions with third-parties who were willing to pay MSLP's vendors in cash in exchange for shares of MSLP stock that the third-parties immediately sold into the market after counsel representing MSLP opined to the transfer agent that the shares could be issued without a restrictive legend. No registration statement was filed with the Commission for these transactions and no exemption from registration was available.

Retention of Signature Pages for Commission Filings

23. MSLP failed to maintain signed signature pages for most of its filings with the Commission from 2010 through 2013 as required under Rule 302 of Regulation S-T. MSLP failed to receive or maintain any manually signed signature pages prior to December 2012. After December 2012, while MSLP had made over 23 Commission filings, MSLP only received or maintained original signature pages for all signatories on eight filings.

Books, Records, and Lack of Internal Controls

24. Because MSLP improperly recorded and/or reported its perquisites, related parties, revenue, losses on settlement of accounts payable, sponsorship commitments, manufacturing concentration, leases, and international sales, its books, records and accounts did not, in reasonable detail, accurately and fairly reflect its transactions and dispositions of assets.

25. In addition, MSLP failed to implement internal accounting controls relating to its perquisites, related parties, revenue, losses on settlement of accounts payable, sponsorship commitments, manufacturing concentration, leases, and international sales, which were sufficient to provide reasonable assurances that transactions were recorded as necessary to permit the preparation of financial statements in conformity with GAAP and to maintain the accountability of assets.

Violations

26. As a result of the conduct described above, MSLP violated Sections 17(a)(2) and 17(a)(3) of the Securities Act, which make it unlawful for any person in the offer or sale of any securities by the use of interstate commerce to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

27. As a result of the conduct described above, MSLP violated Sections 5(a) and 5(c) of the Securities Act, which prohibits directly or indirectly offering to sell, selling, and delivering after sale to the public, or offering to sell or to buy through the use or medium of any prospectus or otherwise, certain securities, as to which no registration statement was or is in effect or on file with the Commission, and for which no exemption was or is available.

28. As a result of the conduct described above, MSLP violated Section 14(a) of the Exchange Act and Rule 14a-9 thereunder, which prohibits solicitations by means of a proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing a statement which, at the time and in the light of the circumstances under which it was made, was false or misleading with respect to any material fact, or which omitted to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

29. As a result of the conduct described above, MSLP violated Section 13(a) of the Exchange Act and Rules 13a-1, 13a-13, and 12b-20 thereunder, which require every issuer of a security registered pursuant to Section 12 of the Exchange Act file with the Commission information, documents, and annual and quarterly reports as the Commission may require, and mandate that periodic reports contain such further material information as may be necessary to make the required statements not misleading.

30. As a result of the conduct described above, MSLP violated Section 13(b)(2)(A) of the Exchange Act, which requires reporting companies to make and keep books, records and accounts, which in reasonable detail, accurately and fairly reflect their transactions and dispositions of assets.

31. As a result of the conduct described above, MSLP violated Section 13(b)(2)(B) of the Exchange Act, which requires all reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with GAAP and to maintain the accountability of assets.

32. Lastly, as a result of the conduct described above, MSLP violated Rule 302 of Regulation S-T of the Exchange Act, which requires that (1) a signatory to an electronic filing manually sign the signature page either before or at the time of the electronic filing; (2) the filer retain the original executed document for five years; and (3) that the filer provide the Commission staff with a copy of the document upon request.

IV.

Undertakings

Respondent has undertaken to:

Retain an independent consultant (the “Independent Consultant”) for a period of one year, not unacceptable to the staff of the Commission, to conduct a comprehensive review of MSLP’s policies, procedures, controls, and training relating to payment of expenses, related party transactions, and required financial statement disclosures in accordance with GAAP; and to recommend, if and where appropriate, policies, procedures, controls, and training reasonably designed to ensure:

- (a) MSLP’s compliance with Item 402 of Regulation S-K requiring, among other things, the disclosure of perquisites as executive compensation;
- (b) MSLP has processes and internal controls in place to reasonably ensure payments for private club memberships, private airplane use, meals and entertainment, financial services, and other expenses that have a personal element are properly evaluated for perquisite disclosure;
- (c) MSLP’s related party disclosures are complete, not misleading, and in accordance with Item 404 of Regulation S-K and FASB ASC Topic 850, Related Party Disclosures; and
- (d) MSLP’s financial statements, including related notes, for external purposes are prepared in accordance with GAAP.

Require the Independent Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the

Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with MSLP, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Independent Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Consultant in performance of his/her duties under this Order shall not, without prior written consent of the Denver Regional Office of the Commission, enter into any employment, consultant, attorney-client, auditing or other professional relationship with MSLP or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

Certify, in writing, compliance with the undertaking(s) set forth above. The certification shall identify the undertaking(s), provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Mary S. Brady, Assistant Regional Director, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

V.

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

Accordingly, it is hereby ORDERED that:

- A. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondent MSLP cease and desist from committing or causing any violations and any future violations of Sections 5(a), 5(c), 17(a)(2) and 17(a)(3) of the Securities Act, Sections 13(a), 13(b)(2)(A), 13(b)(2)(B), and 14(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-13, and 14a-9 thereunder, and Rule 302 of Regulation S-T of the Exchange Act.
- B. Respondent shall comply with the undertakings enumerated in Section IV above.
- C. Respondent shall pay civil penalties of \$700,000 to the Commission. Payment shall be made in the following installments:
 - a. \$175,000.00 within 10 days of the entry of this Order;
 - b. \$175,000.00 within 120 days of the entry of this Order;
 - c. \$175,000.00 within 240 days of the entry of this Order;
 - d. \$175,000.00 plus interest on the payments described in Section V.C(a)-(d) pursuant to 31 U.S.C. 3717 within 365 days of the entry of this Order.

Prior to making the payment described in Section V.C(d), MSLP shall contact the Commission staff to ensure the inclusion of interest. If any payment is not made by the date the payment is

required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. 3717, shall be due and payable immediately, at the discretion of the Commission staff, without further application. Payment must be made in one of the following ways:

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

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

Payments by check or money order must be accompanied by a cover letter identifying MSLP as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Thomas J. Krysa, Division of Enforcement, Securities and Exchange Commission, 1961 Stout Street, Suite 1700, Denver, CO 80294.

By the Commission.

Brent J. Fields
Secretary