

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9906 / September 8, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 75854 / September 8, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3686 / September 8, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16791

In the Matter of

L. Gary Davis, CPA,

Respondent.

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

I.

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

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

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

II.

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

III.

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

Summary

Davis served as the chief financial officer (“CFO”) of the MusclePharm Corporation (“MSLP”) from July 3, 2012 until April 15, 2014. MSLP is a Denver-based sports nutrition company that develops, manufactures, and markets sports nutrition products. When Davis became CFO of MSLP, he discovered that MSLP had almost no internal controls, policies or procedures. Davis worked to bring MSLP’s accounting and disclosures in compliance with generally accepted accounting principles (“GAAP”) and the Commission’s reporting requirements. During his tenure as CFO, however, Davis failed to ensure sufficient internal controls were enacted and proper books and records were kept. Additionally, Davis became aware of issues regarding undisclosed perquisites and undisclosed related parties, yet continued to sign MSLP Commission filings with misstatements and omissions. As a result, between July 2012 and April 2014, when Davis ceased being CFO, MSLP had a series of accounting and disclosure failures that resulted in the company

violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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

filing materially false and misleading filings with the Commission. Specifically, as described further below, MSLP failed to disclose perquisite compensation to its executive officers, failed to disclose related party transactions, and failed to properly disclose manufacturing concentration, rent expense, and international sales in the financial statements in Commission filings that Davis reviewed, approved, and signed.

Respondent

1. L. Gary Davis, CPA, was the CFO of MSLP from July 3, 2012 through April 15, 2014. Davis continued to be employed by MSLP in a special projects role until December 31, 2014. Davis has been licensed as a CPA in Ohio since 1985 and licensed in Idaho since 1992.

Relevant Entity

2. 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 2012 through 2014

3. From 2012 through April 2014, MSLP materially understated its disclosed perquisites by approximately \$285,000 or 66% in Forms 10-K and Forms S-1 filed with the Commission. Davis reviewed, approved, and signed Forms 10-K and Forms S-1 while CFO. MSLP understated its disclosed perquisites in 2012 by approximately \$214,000 or 93% and in 2013 by approximately \$71,000 or 35%. From 2012 through 2013, MSLP's chief executive officer ("CEO") received approximately \$152,000 of undisclosed perquisites. The perquisites included perquisites related to meals, autos, apparel, and two golf club memberships.

4. In July 2012, MSLP hired Davis as the CFO. Davis realized that MSLP had almost no internal controls or policies or procedures. Davis focused on maintaining MSLP's daily operations and focused on developing the accounting department by hiring additional accounting staff with CPAs. Soon after starting, however, Davis received information that MSLP was reimbursing executives for expenses, including a golf club membership and executive auto use, which were not disclosed as perquisites.

5. In October 2012, Davis received a draft Form S-1, which included a summary compensation table that for the first time included disclosure amounts under the "All Other Compensation" column for 2009, 2010, and 2011. A few weeks later, on October 26, MSLP filed the final Form S-1, which had removed items from the draft and failed to list several undisclosed perquisites. Davis reviewed, approved, and signed the Form S-1.

6. Beginning in November 2012, Davis began to implement travel and expense policies, which required MSLP employees to provide original receipts for their expenses. Davis, however, did not implement any formal policies or procedures to ensure perquisites were being

properly identified and disclosed. Executives continued to submit reimbursement forms and make charges on company credit cards for personal items without providing original receipts. MSLP continued paying for these items without properly identifying them as perquisites. As a result, MSLP filed several Commission filings through April 2014, which failed to include complete disclosure of the perquisites.

7. By summer 2013, Davis had begun conducting an internal review to determine the amount of undisclosed perquisites paid by MSLP to its executives since 2010. In July 2013, Davis identified at least \$100,000 of undisclosed perquisites. Despite the perquisite review not being complete, MSLP filed a Form S-1 in August 2013 with incorrect perquisite disclosures that were identical to amounts previously disclosed before the internal review began. Davis reviewed, approved, and signed the Form S-1.

8. On March 31, 2014, MSLP filed its 2013 Form 10-K, which was reviewed, approved, and signed by Davis. 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 understated perquisites paid to MSLP executives.

9. After Davis was no longer working for MSLP, on October 31, 2014, MSLP filed amended Forms 10-K for the years ended 2012 and 2013. In total, MSLP failed to report perquisites totaling approximately \$285,000 from 2012-2013.

MSLP's Failure to Disclose Related Party Transactions with a Major Customer

10. From August 2012 through the end of the year, MSLP failed to disclose material related party transactions with a major customer in Commission filings that were reviewed, approved, and signed by Davis.

11. In May 2011, MSLP had hired a new chief marketing officer ("CMO"). The CMO was a former executive and co-founder of a major customer of MSLP. Davis knew that the CMO's brother remained the CEO of the major customer. The CMO's brother was also a greater than 10% owner of the major customer. Additionally, Davis 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. Davis also continued to perform work for the CEO of the major customer personally at no charge while he worked at MSLP.

12. In August 2012, MSLP's auditor requested that MSLP update an April 2012 memo it had provided to the auditors addressing whether the major customer was a related party requiring disclosure under GAAP, specifically due to the CMO's or Davis' employment. The August memo concluded that transactions with the major customer did not require disclosure under GAAP. The memo misapplied GAAP, which Davis, the only accountant signing the memo, did not correct. The memo also contained inaccurate information about the relationship between MSLP, the CMO,

Davis, 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.

Other Financial Statement, Accounting, and Disclosure Failures from 2012-2013

13. MSLP, while Davis was CFO, failed to disclose that it had one supplier that accounted for nearly 100% of its product purchases in its 2012 Commission filings as required under GAAP.

14. MSLP, while Davis was CFO, failed to disclose \$100,000 of rent expense related to an August 2012 aircraft lease agreement in its 2012 Form 10-K as required under GAAP. As a result, MSLP understated its disclosed rent expense by 23%. In addition, MSLP, while Davis was CFO, instead of recognizing no gain or loss on the settlement since the \$100,000 paid equaled the \$100,000 owed per the lease agreement, MSLP recorded a \$35,000 gain in 2013 related to the January 2013 settlement.

15. MSLP, while Davis was CFO, failed to disclose the amount of its international sales in its 2012 and 2013 Commission filings as required under GAAP. MSLP's international sales accounted for 30% for 2012 and 31% for 2013.

Books, Records, and Lack of Internal Controls

16. Because MSLP improperly recorded and/or reported its perquisites, related parties, 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.

17. In addition, MSLP failed to implement internal accounting controls relating to its perquisites, related parties, 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

18. As a result of the conduct described above, Davis willfully⁴ violated Sections 17(a)(2) and 17(a)(3) of the Securities Act and caused MSLP's violations of 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

⁴ A willful violation of the securities laws means merely “that the person charged with the duty knows what he is doing.” *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor “also be aware that he is violating one of the Rules or Acts.” *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

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.

19. As a result of the conduct described above, Davis caused MSLP's violations of Section 13(a) of the Exchange Act 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.

20. As a result of the conduct described above, Davis caused MSLP's violations of 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.

21. As a result of the conduct described above, Davis caused MSLP's violations of Section 13(b)(2)(B) of the Exchange Act and willfully violated Rule 13b2-1 thereunder, which require 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 the preparation of financial statements in conformity with GAAP and to maintain the accountability of assets; and prohibit persons from directly or indirectly falsifying or causing to be falsified any book, record, or account.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Davis shall cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act and Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, 13a-13, and 13b2-1 promulgated thereunder.

B. Davis is denied the privilege of appearing or practicing before the Commission as an accountant.

C. After two years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or
2. an independent accountant. Such an application must satisfy the Commission that:
 - (a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;
 - (b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the respondent's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;
 - (c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and
 - (d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

D. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

E. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$30,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. 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 L. Gary Davis 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.

V.

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

By the Commission.

Brent J. Fields
Secretary