

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 75855 / September 8, 2015**

**ACCOUNTING AND AUDITING ENFORCEMENT**  
**Release No. 3687 / September 8, 2015**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-16792**

<p><b>In the Matter of</b></p> <p><b>Donald W. Prosser, CPA,</b></p> <p><b>Respondent.</b></p>
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**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO 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 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against Donald W. Prosser (“Prosser” 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 him and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 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 finds<sup>1</sup> that:

#### **Summary**

MusclePharm Corporation ("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. From July 2012 through April 10, 2014, Prosser was a member of MSLP's board of directors and chair of the audit committee. Beginning in September 2012, Prosser, the board of directors and members of senior management had reason to know that MSLP had not disclosed certain perquisite compensation paid to its executive officers. Prosser, however, knew or should have known that he signed materially false and misleading filings with the Commission that failed to disclose all perquisites MSLP was required to disclose under the securities laws. By summer 2013, MSLP began an internal review to determine the amount of undisclosed perquisites paid by MSLP to its executives since 2010. In July 2013, Prosser became directly involved in MSLP's internal perquisite review. MSLP nevertheless continued to make filings with the Commission that materially understated perquisite compensation through July 2014.

#### **Respondent**

1. Donald W. Prosser, CPA, age 64, a resident of Denver, Colorado, was a member of the MSLP board of directors from July 2012 through April 10, 2014. As an independent member of the MSLP board of directors, Prosser served as chair of the audit committee, a member of the compensation committee, and a member of the nominating and governance committee. From April 10, 2014 through March 2, 2015, Prosser served as interim chief financial officer ("CFO") of MSLP. Prosser has been licensed as a certified public accountant ("CPA") in Colorado since 1977, except for the three year period from June 1, 1998 to June 26, 2001.

#### **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.

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<sup>1</sup> 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.

### **Prosser's Role in MSLP's Executive Compensation Disclosures**

3. In September 2012, according to the MSLP board minutes, Prosser attended a meeting of the MSLP board of directors and compensation committee. During the meeting, 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 in the form of Forms 10-K and Forms S-1, as well as amendments thereto, through July 2014, which failed to include complete disclosure of the perquisites identified at the September 2012 board meeting and otherwise known by senior management. Prosser signed these filings as a director.

4. On January 4, 2013, Prosser attended a meeting of the MSLP Compensation Committee of the board of directors. During the meeting, it was resolved that the cost of the use of a private plane from non-employee relatives of MSLP officers in 2012 would be imputed to the executives. MSLP, however, filed several Commission filings in the form of Forms 10-K and Forms S-1, as well as amendments thereto, through March 2014, which failed to include perquisites related to officer spousal use of a private plane in 2012. Prosser signed these filings as a director.

5. By summer 2013, MSLP began an internal review of its records to determine the amount of undisclosed perquisites paid by MSLP to its executives since 2010. MSLP's CFO began this review and in July identified over \$100,000 of undisclosed perquisites, including jet use, autos, and golf club memberships and informed Prosser of the amount of undisclosed perquisites located to date.

6. In July 2013, the audit committee, with Prosser as its chair, became directly involved in MSLP's perquisite review process. MSLP hired an outside consultant to perform a factual review of documents and information related to potential perquisites. 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. Prosser signed this filing as a director.

7. After the August Form S-1 was filed, Prosser assisted and supervised the independent consultant in connection with his review of perquisites. Prosser also approved the independent consultant's work plan and consulted with the independent consultant during the review.

8. In December 2013, MSLP stopped using the independent consultant. The board approved and MSLP hired an internal auditor and assigned the perquisite review to the internal auditor. Prosser assisted and supervised the work of the internal auditor and consulted with the internal auditor during the review.

9. On March 31, 2014, MSLP filed its Form 10-K for the year ended December 31, 2013. Prosser approved and signed this filing. The 2013 Form 10-K included a revised executive compensation table for the years 2011-2013. In the table, MSLP set forth previously undisclosed perquisites for 2011 and 2012 totaling approximately \$189,000 (\$73,000 for 2011 and \$115,000

for 2012). The table also disclosed approximately \$130,000 of perquisites in 2013. These disclosures, however, still significantly understated perquisites paid to MSLP executives.

10. On April 14, 2014, Prosser resigned from the MSLP board, including as a member of the audit committee as its chair, and became MSLP's interim CFO.

11. On July 23, 2014, MSLP filed a Definitive Proxy Statement, which included the same deficient perquisite disclosure as the 2013 Form 10-K.

12. MSLP and its audit committee 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. Prosser signed these filings as the Principal Financial Officer and Principal Accounting Officer. The 2013 Form 10-K/A disclosed approximately \$252,000 of additional perquisites for the years 2011, 2012, and 2013 that were not included in the 2013 Form 10-K or MSLP's July 2014 proxy statement. The 2012 Form 10-K/A disclosed approximately \$37,000 of additional perquisites for 2010. In total, MSLP failed to report perquisites totaling approximately \$482,000 from 2010-2013.

13. Because MSLP did not properly identify and record perquisites paid to its executives, MSLP's books, records and accounts did not, in reasonable detail, accurately and fairly reflect its transactions and dispositions of assets and its filings with the Commission were materially false and misleading.

### **Violations**

14. As a result of the conduct described above, Prosser caused MSLP's violations of 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.

15. As a result of the conduct described above, Prosser caused MSLP's violations of Section 13(a) of the Exchange Act Rules 13a-1 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.

16. As a result of the conduct described above, Prosser 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.

#### IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Prosser cease and desist from committing or causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 14(a) of the Exchange Act and Rules 12b-20, 13a-1, and 14a-9 thereunder.

B. 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 Donald W. Prosser 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