

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

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 98030 / August 1, 2023**

**ACCOUNTING AND AUDITING ENFORCEMENT**  
**Release No. 4433 / August 1, 2023**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-21539**

**In the Matter of**

**JOHN R. BROWNE, CPA,**

**Respondent.**

**ORDER INSTITUTING PUBLIC  
ADMINISTRATIVE AND CEASE-  
AND-DESIST PROCEEDINGS PURSUANT TO  
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” or “SEC”) deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against John R. Browne, CPA (“Respondent” or “Browne”) pursuant to Sections 4C<sup>1</sup> and 21C of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 102(e)(1)(ii) of the Commission’s Rules of Practice.<sup>2</sup>

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<sup>1</sup> 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 violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder.

<sup>2</sup> Rule 102(e)(1)(ii) 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 engaged in unethical or improper professional conduct.

## 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 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 finds<sup>3</sup> that:

### A. SUMMARY

1. These proceedings arise out of improper professional conduct by John R. Browne, a certified public accountant (“CPA”), in connection with the audit of MusclePharm Corporation’s (“MusclePharm”) financial statements for its fiscal year (“FY”) ended December 31, 2017, and the quarterly reviews for the first three quarters of 2018 (collectively, the “relevant reporting periods”). Browne was the engagement partner for the two accounting firms performing the MusclePharm audit and quarterly review work during the relevant reporting periods, “Audit Firm 1” and “Audit Firm 2.”

2. During the relevant reporting periods, MusclePharm (1) prematurely recognized revenues on sales where delivery had not yet occurred and (2) improperly classified certain marketing-related customer credits as operating expenses rather than reductions to revenue. On August 24, 2020, MusclePharm restated its financial statements for the relevant reporting periods to, among other things, adjust for material overstatements of net revenue and gross profit resulting from these, and other, accounting errors.

3. Browne failed to appropriately audit these accounting areas by, among other things, failing to act upon red flags in the working papers he reviewed that showed that MusclePharm’s practices for recording and valuing revenue were not in accordance with generally accepted accounting principles (“GAAP”) or its own public disclosures.

4. As a result, Browne’s conduct departed from multiple auditing standards, including failing to: exercise due professional care; properly supervise the audit engagement; gain an understanding of key aspects of MusclePharm’s business; plan the audit based on assessed risks;

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<sup>3</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.

obtain sufficient appropriate audit evidence; properly evaluate audit results; and adequately document the audit work. Nor did Browne's conduct adhere to the professional standards for the review of interim financial information for the first three quarters of 2018.

## **B. RESPONDENT**

5. **John R. Browne, CPA**, 57, resides in Lakewood, Colorado. Browne was a partner at Audit Firm 2 until his retirement from the firm in June 2023, and, before that, he was a partner at Audit Firm 1. Browne served as the engagement partner for the MusclePharm audit and quarterly review work for each of the relevant reporting periods. Browne joined the MusclePharm engagement team in 2016 as the engagement quality reviewer. Although he is not currently employed, Browne is a CPA licensed in Colorado since 1995.

## **C. OTHER RELEVANT ENTITIES**

6. **MusclePharm Corporation** is a Nevada corporation with its principal place of business in Las Vegas, Nevada, that develops, markets, and distributes branded nutritional supplements. MusclePharm's securities are registered pursuant to Section 12(g) of the Exchange Act and traded on OTC Link, operated by OTC Markets Group Inc., under the symbol "MSLPQ." In 2015, MusclePharm was charged by the Commission in a settled cease-and-desist order for violations of the Securities Act of 1933 ("Securities Act") and the Exchange Act. *See In the Matter of MusclePharm Corp.*, Securities Act Rel. No. 9903 (Sept. 8, 2015) (the "2015 SEC Order"). MusclePharm filed for Chapter 11 bankruptcy protection on December 15, 2022.

7. **Audit Firm 1** was, prior to October 2018, a Public Company Accounting Oversight Board ("PCAOB")-registered accounting and auditing firm. Audit Firm 1 became MusclePharm's external auditor of record in 2013, and served in that capacity for FY 2017 and the first two quarters of 2018 ("Q1 2018" and "Q2 2018").

8. **Audit Firm 2** is a PCAOB-registered accounting and auditing firm. In October 2018, Audit Firm 2 acquired Audit Firm 1's business. After the acquisition, Audit Firm 2 continued to serve as MusclePharm's external auditor for the third quarter of 2018 ("Q3 2018"). Audit Firm 2 resigned as MusclePharm's auditor in May 2019 without completing the FY 2018 audit.

## **D. FACTS**

### **Background**

9. During Audit Firm 2's audit of MusclePharm's FY 2018 financial statements, Audit Firm 2 discovered accounting errors impacting the last two quarters of 2018. The errors were due to MusclePharm recognizing revenue on inventory that was temporarily stored off-site in trailers and not disclosed to Audit Firm 2 during the year-end inventory count. Browne informed MusclePharm's audit committee of these errors. As a result, MusclePharm's audit committee

commenced an internal investigation and, on March 14, 2019, MusclePharm filed a Form 8-K, Item 4.02, notice of non-reliance on its previously issued financial statements for Q3 2018.

10. In May 2019, Audit Firm 2 resigned and Browne advised MusclePharm’s audit committee that (i) the internal controls necessary for MusclePharm to develop reliable financial statements do not exist, and (ii) information has come to Audit Firm 2’s attention that (1) has made it unwilling to be associated with the financial statements prepared by MusclePharm’s management because of multiple material weaknesses in internal control over financial reporting, extraordinary attempts to mislead the Audit Firm 2 engagement team and allegations of noncompliance with laws and regulations, (2) if further investigated, may materially impact the fairness or reliability of the financial statements for the year ended December 31, 2018, or cause Audit Firm 2 to be unwilling to be associated with MusclePharm’s financial statements and (3) it has concluded materially impacts the reliability of previously issued financial statements for 2018.

11. Thereafter, MusclePharm retained another auditing firm (“Audit Firm 3”), which performed extensive audit procedures that identified a number of additional accounting errors impacting earlier reporting periods, including (1) improper sales cutoff and (2) the misclassification of marketing-related customer credits. As a result of these and other accounting errors, MusclePharm subsequently filed a Form 10-K for FY 2019 that included unaudited restated financial statements not only for Q3 2018, but also FY 2017 and the first two quarters of FY 2018.

#### **MusclePharm’s Improper Sales Cutoff**

12. During the relevant reporting periods, MusclePharm improperly accelerated revenue by, among other things, recognizing sales upon shipment for certain customers that had free on board (“FOB”) destination terms, meaning that risk of loss had not transferred and delivery had not occurred until the MusclePharm goods were received and accepted by the customer at the customer’s location. This practice was inconsistent with GAAP and the company’s revenue recognition policy, which stated that MusclePharm recognized revenue when title and risk of loss had transferred. *See* Financial Accounting Standards Board Accounting Standards Codification (“ASC”) 605-10-25-1 (for FY 2017); ASC 606-10-25-30 (for Q1-Q3 2018). As a result, MusclePharm prematurely recognized revenue for each of the relevant reporting periods, totaling approximately \$3.3 million in FY 2017, \$3.0 million in Q1 2018, \$3.5 million in Q2 2018, and \$3.0 million in Q3 2018.

#### **MusclePharm’s Misclassification of Marketing-Related Customer Credits**

13. During the relevant reporting periods, MusclePharm also improperly accounted for certain marketing-related customer credits as expenses instead of reductions to revenue, which led to an overstatement of MusclePharm’s net revenue. Under GAAP, consideration given by a vendor to a customer is accounted for as a reduction to revenue, absent evidence of (1) an identifiable benefit in exchange for the consideration and (2) a reasonable estimate of fair value of the identifiable benefit. *See* ASC 605-50-45-2 (for FY 2017); ASC 606-10-32-25 and 606-10-32-26

(for Q1-Q3 2018).<sup>4</sup> To satisfy the first criterion for expense treatment, the identifiable benefit received by the vendor must be sufficiently separable from the product sold to the customer (*i.e.*, the marketing-related services provided by the customer can be obtained from a third-party not purchasing MusclePharm’s products). *See* ASC 605-50-45-2(a). For this reason, product placement fees are generally reductions to revenue. *See* ASC 605-50-45-4. To satisfy the second criterion, the vendor must be able to reasonably estimate the fair value of the benefit identified. *See* ASC 605-50-45-2(b).

14. MusclePharm’s marketing-related customer credits typically fell into two categories: (1) credits for partnership advertising and (2) product placement fees. Regarding partnership advertising, relevant characteristics of MusclePharm’s arrangements included: (1) agreements whereby a MusclePharm customer provided marketing activities that were integrated into the customer’s website (*e.g.*, to enhance visibility of MusclePharm’s products) or targeted to the users of the website (rather than traditional print or media advertising that could be obtained from parties other than the customer), and (2) agreements whereby the type and amount of advertising was not specified, and MusclePharm did not request or receive this type of information. MusclePharm calculated the price of the partnership advertising (*i.e.*, amount of customer credits) based on a percentage of the purchases made by the customer. Regarding product placement fees, these primarily consisted of agreements with MusclePharm’s largest customer (“Customer 1”) for end-cap promotions (placement of products at the end of store aisles) and fence promotions (placement of products in a display at the front of the store).

15. Without conducting an analysis of the customer credits as contemplated by GAAP, MusclePharm improperly recorded these transactions as operating expenses instead of netting them against revenue. The misclassification of marketing-related customer credits resulted in an overstatement of net revenue (and corresponding overstatement of operating expenses) of approximately \$6.2 million for FY 2017, \$2.6 million for Q1 2018, \$3.8 million for Q2 2018, and \$2.9 million for Q3 2018.

16. The Commission’s prior enforcement action against MusclePharm involved, among other issues, this identical accounting issue. The 2015 SEC Order contained a finding that MusclePharm improperly accounted for advertising and promotion-related costs as advertising expenses rather than reductions of revenue for fiscal years 2010 and 2011, thereby materially overstating revenue for those periods.

### **Browne’s FY 2017 Audit Failures**

#### **Failure to Exercise Due Professional Care When Supervising the Audit of MusclePharm**

17. PCAOB Auditing Standard (“AS”) 1015 states that due professional care imposes a responsibility upon each member of the engagement team to exercise reasonable care and diligence in the performance of his or her work throughout the audit process. *See* AS 1015.01-.08. Due

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<sup>4</sup> Although ASC 606 uses different terminology than ASC 605 (*e.g.*, referring to “distinct good or service” instead of “identifiable benefit”), its consideration-payable-to-a-customer framework closely aligns with ASC 605.

professional care requires the auditor to exercise professional skepticism, which is an attitude that includes a questioning mind and a critical assessment of audit evidence. *See* AS 1015.07.

18. PCAOB Auditing Standard 1201 states that the audit engagement partner is responsible for proper supervision of the work of engagement team members and for compliance with PCAOB standards. *See* AS 1201.03. This includes, when reviewing the work of engagement team members, evaluating whether the work performed is adequately documented and supports the conclusions reached. *See* AS 1201.05(c).

19. Browne, as engagement partner, was responsible for the supervision of the FY 2017 audit work performed by Audit Firm 1, which occurred primarily between December 2017 and April 2018. As set forth below, Browne did not act with due professional care when performing his duties to supervise the audit. In particular, Browne did not exercise professional skepticism when he failed to act on red flags concerning the two accounting errors discussed above in the working papers he reviewed.

#### *Improper Sales Cutoff*

20. During the FY 2017 audit work, Browne reviewed three working papers that included language stating that delivery occurred, and MusclePharm recognized revenue, upon shipment of its products to domestic customers (*i.e.*, revenue recognition based on FOB origin shipping terms). However, Browne also reviewed the principal accounting policies disclosed in MusclePharm's FY 2017 Form 10-K, which stated that MusclePharm recognized revenue when title and risk of loss had transferred, which was "typically" upon shipment. As such, the Form 10-K indicated that certain MusclePharm customers had shipping terms other than FOB origin (*e.g.*, FOB destination). Consequently, Browne should have known that MusclePharm's practice of recognizing revenue upon shipment may not have been appropriate under GAAP, as title and risk of loss for some of MusclePharm's customers did not transfer upon shipment.

21. Browne also reviewed the working papers that tested sales cutoff. In these working papers, the audit team reporting to Browne failed to document whether they considered MusclePharm's customers' different shipping terms during the course of the substantive testing. Instead, the working papers reflect that the audit team assumed that risk of loss transferred and delivery occurred at the time of shipment for all customers. For example, the inventory cutoff testing working paper stated that the engagement team compared MusclePharm's packing slip to the invoice date to determine if sales were booked in the proper period. Browne should have observed that the packing slip date was inappropriate to establish that delivery had occurred for customers with FOB destination terms because it did not reflect the date that delivery had occurred (*i.e.*, the date of receipt and acceptance).

22. In addition, one of the working papers Browne reviewed during the FY 2017 audit work was an internal MusclePharm memorandum documenting its anticipated adoption of the revenue recognition standard ASC 606, which would become effective in FY 2018 (the "ASC 606 Memo"). The ASC 606 Memo raised additional red flags that MusclePharm was recognizing revenue contrary to certain of its customers' shipping terms. While the ASC 606 Memo stated that "revenue would be recognized when the product is shipped," it also provided detailed information

about contracts with certain large domestic customers, including Customer 1, stating that risk of loss transferred and delivery only occurred when the product was received and accepted by those customers (*i.e.*, FOB destination shipping terms).

23. Although the sales cutoff test work was based on a MusclePharm accounting practice – to recognize revenue upon shipment – that was contradicted by other audit evidence and MusclePharm’s revenue recognition policy set forth in its Form 10-K, Browne failed to identify that the shipping terms MusclePharm used to recognize revenue had not been adequately tested by the audit team.

24. Browne failed to exercise professional skepticism in the face of these red flags. He failed to inquire or ask for further information to resolve the inconsistency between MusclePharm’s revenue recognition practice (which assumed FOB origin terms for all customers) and the actual customer shipping terms reflected in the audit evidence (some of which were FOB destination).

25. MusclePharm subsequently restated, among other customers, the Customer 1 transactions that were shipped prior to the end of FY 2017, but delivered after the end of FY 2017.

#### *Misclassification of Marketing-Related Customer Credits*

26. During the FY 2017 audit work, Browne reviewed the working paper that tested MusclePharm’s allowance for sales discounts. This working paper specifically addressed an accrual for partnership advertising costs, almost all connected with MusclePharm’s second largest customer (“Customer 2”), which MusclePharm recorded as operating expenses rather than reductions to revenue (contra revenue). The working paper referenced the partnership advertising contract with Customer 2, and concluded that the Customer 2 arrangement was appropriately recorded as an operating expense in accordance with ASC 605-50-45-2.

27. This conclusion was erroneous as it was contradicted by the underlying source document. The information detailed in the referenced Customer 2 contract, which Browne reviewed, did not support recording the related costs as operating expenses under ASC 605-50-45-2. Among other things, the Customer 2 contract did not contain any information concerning the type and amount of advertising to be provided by Customer 2. Further, the price Customer 2 charged MusclePharm for the partnership advertising was based on a percentage of Customer 2’s purchases from MusclePharm, thus indicating it was a sales discount.

28. Notwithstanding the lack of audit evidence supporting expense treatment for these marketing-related customer credits, and the audit team’s ASC 605-50-45-2 conclusion regarding the Customer 2 contract, Browne failed to inquire or ask for further information from the audit team or MusclePharm’s management to resolve whether MusclePharm’s accounting for the customer credits was proper under GAAP.

29. In addition, Browne reviewed a working paper that evaluated general ledger account balance variances between FY 2016 and FY 2017. For significant variances, the audit team obtained explanations from MusclePharm’s management. As part of these analytical

procedures, the audit team identified a significant variance for MusclePharm’s “Other Advertising” account, which included marketing-related customer credits. The documented explanation provided for this variance explained that it was due to “promotions with some of the Company’s key customers,” and specifically referenced Customer 1 and Customer 2. The balance and variance associated with the “Other Advertising” account exceeded the audit planning materiality threshold.

30. Browne, however, failed to make any additional inquiries or request additional information to understand the substance of these customer credits, or why MusclePharm had classified them as operating expenses rather than contra revenue.

31. Further, MusclePharm’s FY 2017 Form 10-K states in the notes to the financial statements: “We record advertising related credits with customers as a reduction to revenue as no identifiable benefit is received in exchange for credits claimed by the customer.” (Emphasis added). However, the ASC 606 Memo states the opposite:

“The company also noted that significant credits are processed with customers during the year, however, these credits are related to one-off marketing and advertising costs and are recognized as such within the general operating expenses for the company. The most significant costs that the Company experiences with their customers are for partnership advertising, store support and international marketing.” (Emphasis added).

32. Despite the contradiction between the working papers Browne reviewed reflecting that MusclePharm was recording marketing-related customer credits as operating expenses (and not contra revenue) and the Form 10-K disclosure reflecting that such credits were recorded as reductions to revenue, Browne failed to inquire or request further information from the audit team or MusclePharm’s management to resolve the inconsistency. Instead, Browne failed to exercise professional skepticism when he failed to recognize the evidence in the working papers, and instead relied solely on MusclePharm’s 2017 Form 10-K to conclude, erroneously, that MusclePharm was recording marketing-related customer credits in accordance with GAAP.

33. MusclePharm subsequently restated, among other customers, the Customer 2 marketing-related customer credits that were improperly recorded as operating expenses.

### **Failure to Understand Key Aspects of MusclePharm’s Business**

34. PCAOB Auditing Standard 2110 states that an auditor should obtain an understanding of the company and its environment to understand the events, conditions, and company activities that might reasonably be expected to have a significant effect on the risks of material misstatement. *See AS 2110.07.* This includes, for example, understanding the audit client’s key customer relationships, business processes, and application of accounting principles. *See AS 2110.10, .12, and .28.* In addition, the auditor should presume that there is a fraud risk involving improper revenue recognition and evaluate which types of revenue, revenue transactions, or assertions may give rise to such risks. *See AS 2110.68.*



35. Browne failed to gain an understanding of how MusclePharm actually recognized revenue or how it recorded marketing-related customer credits. Moreover, although he was aware of MusclePharm’s previous settlement with the SEC, Browne did not obtain or review a copy of the 2015 SEC Order. Had he done so, Browne would have known the SEC charged MusclePharm with numerous violations, including incorrectly accounting for marketing-related customer credits during 2011 and 2012, which is the same practice MusclePharm engaged in during 2017 and 2018. Browne thus failed to consider this aspect of the 2015 SEC Order when developing an understanding of MusclePharm’s business and accounting practices, and assessing audit risk.

#### **Failure to Plan the Audit Based on an Assessment of Risk When Conducting the Audit**

36. PCAOB Auditing Standard 2101 states that the engagement partner is responsible for planning the work of an audit. *See* AS 2101.03. When developing the audit plan, the auditor should evaluate, among other things, legal or regulatory matters of which the company is aware, and public information about the company relevant to the evaluation of the likelihood of material financial statement misstatements. *See* AS 2101.07. The auditor should modify the overall audit strategy and audit plan, as necessary, if circumstances change significantly during the audit, such as obtaining audit evidence that contradicts the audit evidence upon which the risk assessment was based. *See* AS 2101.15; AS 2110.74.

37. PCAOB Auditing Standard 2301 states the auditor should design and perform audit procedures in a manner that addresses the assessed risks of material misstatement for each relevant assertion of each significant account and disclosure. *See* AS 2301.08. In addition, the auditor should perform substantive procedures, including tests of details, that are specifically responsive to the assessed significant risks, including fraud risks. *See* AS 2301.11.

38. As part of the audit planning, Browne reviewed the working paper in which the audit team assessed revenue recognition (existence of sales) and the valuation of sales as “significant risks” for the MusclePharm FY 2017 audit. Both sales cutoff and the classification of marketing-related customer credits affected revenue recognition and the calculation of net revenue. Despite being significant risks, Browne failed to plan the audit to sufficiently test these areas. Further, he did not adjust the audit plan when the audit team received evidence that MusclePharm was recording revenue and classifying marketing-related customer credits in a manner that was inconsistent with its Form 10-K disclosures and GAAP.

#### **Failure to Obtain Sufficient Appropriate Audit Evidence When Conducting the Audit**

39. PCAOB Auditing Standard 1105 states the auditor must perform audit procedures to obtain sufficient appropriate audit evidence to provide a reasonable basis for his or her opinion. *See* AS 1105.04. If audit evidence obtained from one source is inconsistent with that obtained from another, the auditor should perform the audit procedures necessary to resolve the matter and should determine the effect, if any, on other aspects of the audit. *See* AS 1105.29.

40. PCAOB Auditing Standard 2805 states that if a representation made by management is contradicted by other audit evidence, the auditor should investigate the circumstances and consider the reliability of the representation made. *See* AS 2805.04.

41. The working papers Browne reviewed reflected that MusclePharm was engaging in improper revenue recognition and misclassifying marketing-related customer credits. In addition, the audit evidence, such as the ASC 606 Memo, showed inconsistencies between MusclePharm's actual accounting practices and its Form 10-K disclosures. Browne, however, did not require the audit team to gather the additional audit evidence needed to resolve these matters.

#### **Failure to Properly Evaluate Audit Results When Conducting the Audit**

42. PCAOB Auditing Standard 2810 states that, in forming an opinion on the financial statements, the auditor should take into account all relevant audit evidence, regardless of whether it appears to corroborate or to contradict the assertions in the financial statements. *See* AS 2810.03.

43. Browne did not take into account relevant information in the working papers he reviewed indicating that MusclePharm's financial statements were not, in material respects, prepared in conformity with GAAP.

#### **Failure to Ensure Appropriate Documentation of the Audit Work When Conducting the Audit**

44. PCAOB Auditing Standard 1215 states that audit documentation should be prepared in sufficient detail to provide a clear understanding of its purpose, source, and conclusions reached. *See* AS 1215.04. The audit documentation should, among other things, support the basis for the auditor's conclusions concerning every relevant financial statement assertion. *See* AS 1215.05(b).

45. Browne failed to ensure that the Audit Firm 1 audit team adequately documented evidence supporting the audit team's conclusions. Instead, the working papers prepared by the audit team, and reviewed by Browne, do not provide support for the conclusions reached. For example, the working papers do not support that the Customer 1 arrangement met the revenue recognition criteria upon product shipment or that the Customer 2 arrangement met both criteria of ASC 605-50-45-2 for recording the credits as operating expenses.

#### **Browne's Q1-Q3 2018 Quarterly Review Failures**

##### **Failure to Adhere to PCAOB Standards for Review of Interim Financial Information When Conducting Reviews of MusclePharm's Quarterly Filings**

46. PCAOB Auditing Standard 4105 states that if, in performing a review of interim financial information, an accountant becomes aware of information that leads him or her to believe that the interim financial information may not be in conformity with generally accepted accounting principles in all material respects, the accountant should make additional inquiries or perform other

procedures that the accountant considers appropriate to provide a basis for communicating whether he or she is aware of any material modifications that should be made to the interim financial information. *See* AS 4105.22. The accountant should also prepare documentation in connection with a review of interim financial information that includes any significant findings or issues, such as when results of review procedures indicate that the interim financial information could be materially misstated, including actions taken to address such findings, and the basis for the final conclusions reached. *See* AS 4105.52.

#### *Improper Sales Cutoff*

47. During the Q1-Q3 2018 interim reviews, Browne reviewed information indicating that MusclePharm was recognizing revenue based on the shipment of its products even though it had FOB destination shipping terms with several large customers. In particular, for each of the first three quarters of 2018, Browne reviewed a version of the ASC 606 Memo containing the same red flags presented during the FY 2017 audit. Browne, however, did not inquire or request additional information to resolve these contradictions, or request testing to determine the materiality of the sales cutoff issue.

#### *Misclassification of Marketing-Related Customer Credits*

48. During the Q1-Q3 2018 interim reviews, Browne reviewed the profit and loss (“P&L”) analytical procedures working papers that indicated that MusclePharm continued to record marketing-related customer credits as operating expenses (which was inconsistent with its prior-year disclosures). These working papers also showed that the expenses associated with customer payments were increasing over time, and exceeded the applicable quarterly review materiality thresholds.

49. For example, during the Q1 2018 quarterly review, Browne reviewed the Audit Firm 1 engagement team’s P&L analytical procedures working paper showing that a portion of the increased advertising and promotion expense (an amount substantially over the Q1 2018 materiality threshold) was attributable to “the Company paying [Customer 1] to move product to a better location.” This was an additional red flag that MusclePharm was improperly recording a material amount of product placement fees as operating expenses. Browne, however, failed to require additional quarterly review procedures to resolve whether MusclePharm was recording the marketing-related customer credits in accordance with GAAP.

50. In addition, during the Q1 2018 quarterly review, Browne was provided with the Audit Firm 1 engagement team comments to the Form 10-Q questioning MusclePharm’s classification of marketing-related customer credits as operating expenses instead of as contra revenue. Browne, however, failed to ensure that the engagement team documented the response from MusclePharm, if any, to the inquiry concerning the marketing-related customer credits even though the issue was material to the financial statements for the quarter.

## **E. VIOLATIONS**

51. Section 4C of the Exchange Act and Rule 102(e)(1)(ii) of the Commission's Rules of Practice provide, in part, that the Commission may censure or deny, temporarily or permanently, the privilege of appearing or practicing before the Commission to any person who is found by the Commission to have engaged in improper professional conduct. Exchange Act Section 4C(b) and Rule 102(e)(1)(iv) of the Commission's Rules of Practice define improper professional conduct with respect to persons associated with public accounting firms and persons licensed to practice as accountants to include repeated instances of unreasonable conduct that indicate a lack of competence. As a result of the conduct described above, Browne engaged in improper professional conduct pursuant to Section 4C(a)(2) of the Exchange Act and Rule 102(e)(1)(ii) of the Commission's Rules of Practice. Browne's conduct involved repeated instances of unreasonable conduct, each resulting in violation of PCAOB standards.

52. During the period at issue herein, Rule 2-02(b)(1) of Regulation S-X required an accountant's report to state "whether the audit was made in accordance with generally accepted auditing standards" ("GAAS"). "[R]eferences in Commission rules and staff guidance and in the federal securities laws to GAAS or to specific standards under GAAS, as they relate to issuers, should be understood to mean the standards of the PCAOB plus any applicable rules of the Commission." SEC Release No. 34-49708 (May 14, 2004). As a result of the conduct described above, Browne caused Audit Firm 1 to violate Regulation S-X Rule 2-02(b)(1) when he, as the engagement partner on the FY 2017 audit, approved the issuance of Audit Firm 1's audit report, which stated that Audit Firm 1 had conducted the audit in accordance with PCAOB standards when, in fact, it had not.

## **F. FINDINGS**

53. Based on the foregoing, the Commission finds that Browne engaged in improper professional conduct pursuant to Section 4C(a)(2) of the Exchange Act and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

54. Based on the foregoing, the Commission finds that Browne caused a violation of Rule 2-02(b) of Regulation S-X by Audit Firm 1.

## **IV.**

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

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

A. Browne shall cease and desist from committing or causing any violations and any future violations of Rule 2-02(b) of Regulation S-X.

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

C. After eighteen (18) months from the date of the Order, Respondent may request that the Commission consider Respondent's reinstatement by submitting an application to the attention of the Office of the Chief Accountant.

D. In support of any application for reinstatement to appear and practice before the Commission as a preparer or reviewer, or a person responsible for the preparation or review, of financial statements of a public company to be filed with the Commission, other than as a member of an audit committee, as that term is defined in Section 3(a)(58) of the Exchange Act, Respondent shall submit a written statement attesting to an undertaking to have Respondent's work reviewed by the independent audit committee of any public company for which Respondent works or in some other manner acceptable to the Commission, as long as Respondent practices before the Commission in this capacity and will comply with any Commission or other requirements related to the appearance and practice before the Commission as an accountant.

E. In support of any application for reinstatement to appear and practice before the Commission as a member of an audit committee, as that term is defined in Section 3(a)(58) of the Exchange Act, as a preparer or reviewer, or as a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission, Respondent shall submit a statement prepared by the audit committee(s) with which Respondent will be associated, including the following information:

1. A summary of the responsibilities and duties of the specific audit committee(s) with which Respondent will be associated;
2. A description of Respondent's role on the specific audit committee(s) with which Respondent will be associated;
3. A description of any policies, procedures, or controls designed to mitigate any potential risk to the Commission by such service;
4. A description relating to the necessity of Respondent's service on the specific audit committee; and
5. A statement noting whether Respondent will be able to act unilaterally on behalf of the Audit Committee as a whole.

F. In support of any application for reinstatement to appear and practice before the Commission as an independent accountant (auditor) before the Commission, Respondent must be associated with a public accounting firm registered with the PCAOB and Respondent shall submit the following additional information:

1. A statement from the public accounting firm (the “Firm”) with which Respondent is associated, stating that the firm is registered with the PCAOB in accordance with the Sarbanes-Oxley Act of 2002;
2. A statement from the Firm with which the Respondent is associated that the Firm has been inspected by the PCAOB and that the PCAOB did not identify any criticisms of or potential defects in the Firm’s quality control system that would indicate that Respondent will not receive appropriate supervision; and
3. A statement from Respondent indicating that the PCAOB has taken no disciplinary actions against Respondent since seven (7) years prior to the date of the Order other than for the conduct that was the basis for the Order.

G. In support of any application for reinstatement, Respondent shall provide documentation showing that Respondent is currently licensed as a CPA and that Respondent has resolved all other disciplinary issues with any applicable state boards of accountancy. If Respondent is not currently licensed as a CPA, Respondent shall provide documentation showing that Respondent’s licensure is dependent upon reinstatement by the Commission.

H. In support of any application for reinstatement, Respondent shall also submit a signed affidavit truthfully stating, under penalty of perjury:

1. That Respondent has complied with the Commission suspension Order, and with any related orders and undertakings, or any related Commission proceedings, including any orders requiring payment of disgorgement or penalties;
2. That Respondent undertakes to notify the Commission immediately in writing if any information submitted in support of the application for reinstatement becomes materially false or misleading or otherwise changes in any material way while the application is pending;
3. That Respondent, since the entry of the Order, has not been convicted of a felony or a misdemeanor involving moral turpitude that would constitute a basis for a forthwith suspension from appearing or practicing before the Commission pursuant to Rule 102(e)(2);
4. That Respondent, since the entry of the Order:
  - (a) has not been charged with a felony or a misdemeanor involving moral turpitude as set forth in Rule 102(e)(2) of the Commission’s Rules of Practice, except for any charge concerning the conduct that was the basis for the Order;

- (b) has not been found by the Commission or a court of the United States to have committed a violation of the federal securities laws, and has not been enjoined from violating the federal securities laws, except for any finding or injunction concerning the conduct that was the basis for the Order;
  - (c) has not been charged by the Commission or the United States with a violation of the federal securities laws, except for any charge concerning the conduct that was the basis for the Order;
  - (d) has not been found by a court of the United States (or any agency of the United States) or any state, territory, district, commonwealth, or possession, or any bar thereof to have committed an offense (civil or criminal) involving moral turpitude, except for any finding concerning the conduct that was the basis for the Order; and
  - (e) has not been charged by the United States (or any agency of the United States) or any state, territory, district, commonwealth, or possession, civilly or criminally, with having committed an act of moral turpitude, except for any charge concerning the conduct that was the basis for the Order.
5. That Respondent's conduct is not at issue in any pending investigation of the Commission's Division of Enforcement, the PCAOB's Division of Enforcement and Investigations, any criminal law enforcement investigation, or any pending proceeding of a State Board of Accountancy, except to the extent that such conduct concerns that which was the basis for the Order.
6. That Respondent has complied with any and all orders, undertakings, or other remedial, disciplinary, or punitive sanctions resulting from any action taken by any State Board of Accountancy, or other regulatory body.

I. Respondent shall also provide a detailed description of:

- 1. Respondent's professional history since the imposition of the Order, including:
  - (a) all job titles, responsibilities and role at any employer;
  - (b) the identification and description of any work performed for entities regulated by the Commission, and the persons to whom Respondent reported for such work; and

2. Respondent's plans for any future appearance or practice before the Commission.

J. The Commission may conduct its own investigation to determine if the foregoing attestations are accurate.

K. If Respondent provides the documentation and attestations required in this Order and the Commission (1) discovers no contrary information therein, and (2) determines that Respondent truthfully and accurately attested to each of the items required in Respondent's affidavit, and the Commission discovers no information, including under Paragraph J, indicating that Respondent has violated a federal securities law, rule or regulation or rule of professional conduct applicable to Respondent since entry of the Order (other than by conduct underlying Respondent's original Rule 102(e) suspension), then, unless the Commission determines that reinstatement would not be in the public interest, the Commission shall reinstate the respondent for cause shown.

L. If Respondent is not able to provide the documentation and truthful and accurate attestations required in this Order or if the Commission has discovered contrary information, including under Paragraph J, the burden shall be on the Respondent to provide an explanation as to the facts and circumstances pertaining to the matter setting forth why Respondent believes cause for reinstatement nonetheless exists and reinstatement would not be contrary to the public interest. The Commission may then, in its discretion, reinstate the Respondent for cause shown.

M. If the Commission declines to reinstate Respondent pursuant to Paragraphs K and L, it may, at Respondent's request, hold a hearing to determine whether cause has been shown to permit Respondent to resume appearing and practicing before the Commission as an accountant.

N. Browne shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of \$11,162 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). 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 John R. Browne 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 Ian S. Karpel, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 1961 Stout Street, Suite 1700, Denver, CO 80294-1961.

O. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall he benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

## 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.

Vanessa A. Countryman  
Secretary