UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 73678 / November 24, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3972 / November 24, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 31357 / November 24, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-16286

In the Matter of

Alan Gavornik,
Nicholas Mariniello and
Lee Argush,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Alan Gavornik ("Gavornik"), Nicholas Mariniello ("Mariniello") and Lee Argush ("Argush") (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers"), 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 them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, 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 Respondents' Offers, the Commission finds[1] that:

Summary

Respondents Gavornik, Mariniello and Argush, as the principals of Concord Equity Group Advisors, LLC ("Concord"), a formerly registered investment adviser under their majority control, breached their fiduciary duty to advisory clients by failing to disclose a conflict of interest, and by failing to seek to obtain best execution for their clients. In November 2008, Respondents entered into an undisclosed arrangement with an unaffiliated broker-dealer (the "Executing Broker") to provide trade execution for Concord's clients at a commission rate of $0.01 per share executed. However, under the arrangement, the Executing Broker actually charged Concord's clients between $0.04 and $0.06 per share executed, and then paid the amount exceeding $0.01 per share commission to Concord's affiliated broker-dealer, Tore Services, LLC ("Tore"), in the form of a "referral fee."[2] Thus, Tore (and through it, Respondents) were paid between $0.03 and $0.05 per share on Concord client transactions executed through the Executing Broker. In total, between November 2008 and June 2011 (the "relevant period"), Tore collected $1,005,000 in transaction-based fees generated by Concord's clients' trading.

This commission-sharing arrangement represented a conflict of interest because Concord and Respondents (who were fiduciaries) were incentivized to encourage Concord's clients to execute trades through the Executing Broker so that they could share in a portion of the execution commission. Yet, Respondents failed to adequately disclose the commission-sharing arrangement in Concord's Forms ADV Part II, or otherwise inform Concord's clients of the conflict. Gavornik, as the officer responsible for Concord's periodic filings with the Commission, including Concord's Forms ADV, failed to maintain a copy of Concord's Forms ADV Part II and each amendment

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[1] The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

[2] Certain of Concord's clients separately maintained a "soft-dollar" arrangement with the Executing Broker. Respondents did not share in the commissions clients paid in connection with any soft-dollar transactions.

thereto, or keep records of the dates that each Form ADV Part II was given to clients or prospective clients. In addition, by failing to advise clients of the $0.01 execution rate negotiated with the Executing Broker, and instead arranging for clients to execute at higher commission rates – keeping the difference for themselves – Respondents also failed to seek to obtain best execution for their advisory clients.

Respondents

1. **Lee Argush**, age 54, resides in New Jersey. During the relevant period Argush was Concord's and Tore's chief executive officer and chief financial officer, and Concord's chief technology officer. Argush holds Series 3, 4, 7, 24, and 27 licenses. Following a June 2011 acquisition of Concord, Argush worked for Concord's successor entity until August 2013.

2. **Alan Gavornik,** age 53, resides in New Jersey. During the relevant period, Gavornik was Concord's executive managing director and chief compliance officer, and was primarily responsible for drafting and signing Concord's periodic filings with the Commission. He also served as Tore's CEO and chief compliance officer. Gavornik holds Series 7, 24, 63 and 65 licenses. Between June 2011 and December 2013, Gavornik worked for Concord's successor entity until December 2013.

3. **Nicholas Mariniello**, age 54, resides in New Jersey. During the relevant period Mariniello was Concord's and Tore's executive managing director and the president. Mariniello holds Series 4, 7, 24, 55, 63, and 65 licenses. Mariniello worked for Concord's successor entity from June 2011 to December 2013.

Other Relevant Entities

4. **Concord** is a limited liability company organized under the laws of New Jersey and, during the relevant period, it was located in Matawan, New Jersey. Concord was registered with the Commission as an investment adviser from 1994 through August 2012. Concord was wholly-owned by Concord Capital Partners, Inc. ("Concord Capital") until 2011, when it was acquired.

5. **Concord Capital** is a corporation organized under the laws of New Jersey and, during the relevant period, it shared Concord's Matawan, New Jersey address. Until its acquisition in 2011, Concord Capital was 62% owned by Respondents through a holding company named American Capital Acquisitions Partners ("American Capital"), and 38% owned by a private equity fund. The private equity fund played no role in Concord's management. Argush owned an approximately 46% interest in the holding company, while Gavornik and Mariniello each owned approximately 27% of the holding company.

6. **Tore** is a limited liability company organized under the laws of New Jersey and, during the relevant period, it was a broker-dealer registered with the Commission. Like Concord, Tore was a wholly-owned subsidiary of Concord Capital, with no employees or facilities that were independent from Concord, *i.e.*, Respondents held Tore titles but did little or no work for the

broker-dealer. Aside from collecting the fees from the commission-sharing arrangement described herein, Tore conducted no business. Tore was housed in Concord's Matawan, New Jersey office. Tore withdrew its broker-dealer registration effective June 20, 2011.

Facts

Concord's Formation and Organization

7. In 1999, Respondents began marketing what they referred to as an open architecture, web-based asset management and advisory platform (the "Concord Platform"). Argush built the Concord Platform, and served as Concord's chief technology officer, CEO and CFO. Gavornik and Mariniello were Concord's officers and managing directors. Mariniello was primarily responsible for sales and marketing. Gavornik was chiefly responsible for Concord's day-to-day operational and compliance functions, including Concord's filings with the Commission.

8. The Concord Platform was intended to guide Concord's clients – primarily small and medium-sized banks and trusts – through "customized" portfolio research, design and selection. The Concord Platform also enabled their clients' portfolio managers to monitor and rebalance investment portfolios and, beginning in 2008, to execute trades with the Executing Broker. For client trades executed by Executing Broker, the Concord Platform bundled orders from all clients into a single transaction, executed the transaction through the Executing Broker, then allocated the trades back to the appropriate client.

9. Concord also offered access to outside investment advisers ("sub-advisers") that were incorporated into its Concord Platform. Concord was responsible for vetting the sub-advisers, monitoring their performance, and advising Concord's clients on an ongoing basis as to the performance and continuing suitability of the sub-adviser to the clients' particular investment goals. Concord and Respondents also provided personalized advice to clients as to which service options and sub-advisers were best suited to the client's investment objectives, and performed related due-diligence services. Concord's clients paid for their services on a monthly basis at an agreed upon, fixed rate.

10. Respondents formed the broker-dealer Tore in early 2008, initially with the aspiration that it would execute trades for clients and the sub-advisers on the Concord Platform. In reality, as described herein, Tore had no client-facing role and no client or sub-adviser interactions. In fact, it performed no function, except to receive the undisclosed commission-sharing revenues paid to it by the Executing Broker for Concord client execution services.

The Commission-Sharing Arrangement

11. In early 2008, a sales representative for the Executing Broker contacted Concord to offer execution and related services. Negotiations ensued between the parties concerning how, mechanically, Concord could share in the commission-based revenue its clients would generate for

the Executing Broker, and on what terms, that is, how the parties could split the execution commissions.

12. By October 2008, Respondents reached an understanding with the Executing Broker that, through Tore, the Executing Broker would pay Respondents a "referral fee" that was equal to the amount that the Executing Broker charged Concord's clients for execution in excess of $0.01 per share executed. That is, from the amount the Executing Broker charged Concord's clients for execution services – typically $0.04 to $0.06 per share executed – the Executing Broker kept $0.01, and Respondents re-captured the balance in the form of a transaction-based "referral fee," which the Executing Broker paid back to Respondents through Tore. In several instances, the specific rates charged by the Executing Broker were also negotiated and set by the Concord principals.

13. Respondents memorialized their understanding with the Executing Broker in an agreement dated May 27, 2009, which was signed by Mariniello in his capacity as president of Tore. Captioned *Commission Sharing Agreement for Referrals*, the agreement explicitly ratified the terms of the understanding reached in late 2008. The agreement, which was in part drafted by Gavornik, was also explicit that Tore was responsible for disclosing the arrangement to any clients "referred" to the Executing Broker.

14. Although Respondents called this transaction-based fee a "referral fee," Tore did not actually "refer" any clients to the Executing Broker. Rather, for the most part, Mariniello, in his capacity as Concord's chief salesperson, encouraged clients to execute trades through the Executing Broker. Indeed, Tore did not have any interaction with Concord's clients, who were unaware of both Tore's existence and that the Execution Broker was remitting a portion of their commissions to Tore.

15. When recommending the Executing Broker and discussing its commission rates with clients, Respondents did not disclose that they would financially benefit from the recommendation. More specifically, Respondents did not disclose that the Executing Broker had agreed to provide execution to Concord's clients for significantly less than the clients were charged, with the difference going to Respondents, and that this represented a significant source of income to Respondents.

16. Consistent with the May 2009 agreement, and the understanding Respondents reached in October 2008, the vast majority of commissions paid by Concord's clients to the Executing Broker were remitted to Tore. In total, during the relevant period, Tore collected commission-sharing revenues totaling $1,005,000. Tore transferred the majority of that amount, approximately $913,000 – or over 90% of the fees it collected from the Executing Broker – to its parent (and Concord's parent) Concord Capital. Tore used the rest of the commission-sharing revenue, approximately $92,000, to pay its very limited operating expenses.

Concord and the Respondents Failed to Disclose Accurately the Commission-Sharing Arrangement to Concord's Clients

17. The Respondents failed to disclose accurately to Concord's clients the nature or existence of the commission-sharing arrangement or the resulting conflict of interest. This failing rested principally on Gavornik, who (as described below) was responsible for Concord's day-to-day operations and compliance function, and also personally was responsible for Concord's materially deficient Form ADV disclosures. Argush, as Concord's CEO, failed to ensure that Concord fully disclosed to its clients any conflicts of interest, including by ensuring that Gavornik adequately disclosed the commission-sharing arrangement. For his part, Mariniello was the principal architect of the arrangement with the Executing Broker, and signed the *Commission Sharing Agreement for Referrals* in May 2009. At the same time, he was also the Concord employee most responsible for encouraging Concord clients to execute their trades with the Executing Broker, yet he also failed to ensure that Concord disclosed the conflict to its clients.

Concord's Forms ADV Part II Omitted Material Facts and were Misleading

18. As Concord's executive managing director, Tore's CEO, and the CCO for both entities, Gavornik was tasked with signing and filing Concord's Forms ADV with the Commission. He, thus, was responsible for ensuring that Concord disclosed any actual or potential conflicts of interest resulting from commission-sharing agreement. Instead, in the various iterations of Concord's Forms ADV Part II[3] filed with the Commission during the relevant period, Gavornik failed to fully disclose the arrangement, despite knowing that when clients were advised to execute through the Executing Broker that the recommendation resulted in a substantial financial benefit to Respondents. The Forms ADV Part II were therefore materially misleading. In addition, Gavornik, and through him, Concord, failed to maintain a copy of the Concord's Forms ADV Part II and each amendment or revision thereto, or keep records of the dates that each Form was given to clients or prospective clients, as required by Rule 204-2(a)(14) under the Advisers Act.

Concord's Form ADV Part II Dated April 1, 2002

19. Concord is deemed to have filed a Form ADV Part II on April 1, 2002, but did not update it until November 2009.[4] Thus, for the first 12 months the commission-sharing arrangement was in place (from October 2008 through November 2009), when Concord

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[3] Prior to amendments of Form ADV in 2010, Part 2 was designated as "Part II." *See* Rel. IA-3060 (July 28, 2010) at n.6.

[4] Beginning with its annual update filed for the fiscal year ending on or after December 2010, existing registrants are required to file the Part 2 amendment electronically. Prior to that point, the Part II brochure was deemed to be filed with the Commission. *See* Id. at 118.

approached many of its existing clients and encouraged them to execute their trades through the Executing Broker, Concord's Form ADV Part II – which it also provided to clients – contained no discussion concerning Tore or the commission-sharing arrangement.

Concord's Forms ADV Part II Dated November 24, 2009 and March 29, 2010

20. Gavornik updated Concord's Form ADV Part II disclosures on November 24, 2009, and again on March 29, 2010 – 17 months after Concord had implemented the commission-sharing arrangement and 10 months after the agreement was memorialized. However, the updated Forms still failed to disclose the commission-sharing arrangement, and what information that was included was materially misleading. The disclosure stated:

> TORE Services, LLC is a FINRA Member and registered broker dealer and affiliated entity to registrant. TORE may receive referral fees for referring prospective institutions to other broker dealers including customers of registrants (sic) related entities.[5]
>
> [. . .]
>
> An affiliate of Concord, TORE Services, LLC, a broker dealer, can process unsolicited transactions for institutional customers which may include a client of Concord. TORE has yet to commence or transact any such trading. (Emphasis added.)[6]
>
> [. . .]
>
> Registrants [*i.e.*, Concord] may suggest brokers to its financial instituational [sic] clients. Registrant receives no products, research or services in turn. An affiliated entity of Registrant, TORE Services, LLC may also suggest brokers to certain financial institutions in which TORE receives a referral fee. In such cases, all rates charged are determined by and between the broker and financial institution. (Emphasis added.)[7]

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[5] This disclosure was a response to Item 8 of Form ADV Part II, requiring registered advisers to state whether they have "arrangements that are material to its advisory business or its clients with a related person who is a … broker-dealer."

[6] This disclosure responded to Item 9: "Participation or Interest in Client Transactions," which asks whether Concord or a related person acting "[a]s broker or agent effects securities transactions for compensation for any client?"

[7] This disclosure responded to Item 12.B and 13.A, asking, respectively: (1) "Does applicant or a related person suggest brokers to clients?"; and (2) "Does the applicant or a related

21. While these disclosures discussed Tore and the "referral fees," they failed to convey completely and accurately the nature and existence of the conflict of interest presented by commission-sharing arrangement. Concord's clients were not told that Tore played any role in their relationship with either Concord or the Executing Broker. Thus, these clients could not appreciate that they were subject to a commission-sharing arrangement. Indeed, Concord assured clients that if it suggested a broker-dealer to them, Concord would "receive[] no products, research or services in turn." Conversely, Concord told clients that Tore would receive a "referral fee" only if Tore "suggest[ed] brokers" to them. However, as far as clients knew, they had no dealings with Tore and, thus, no reason to think that any referral or fee was being paid.

22. The information Concord provided in response to Item 9 – that Tore had had "yet to commence" any activity for which it would be compensated – was also false and misleading because Tore had been receiving between $0.03 and $0.05 per share on Concord client transactions with the Executing Broker since November 2008. In addition, the use of the prospective "may" in each of the passages quoted above is misleading because it suggested the mere possibility that Tore would make a referral and/or be paid "referral fees" at a later point, when in fact a commission-sharing arrangement was already in place and generating income to Tore and Respondents. Finally, the assertion that the commission rate charged for each client was to be negotiated between the client and the Executing Broker was also false. In reality, Respondents had an active role in negotiating and setting the execution fees clients paid to the Executing Broker, as well as in deciding how the fees would be divided up between Tore and The Executing Broker.

Concord's Form ADV Part II Dated September 15, 2010

23. Following an examination of Concord by the Commission's examination staff that concluded in August 2010, Concord included more expansive – yet still inadequate – language concerning its relationship with Tore in its Form ADV Part II, dated September 15, 2010. Specifically, Concord revised its responses to Item 9 and Items 12 and 13 to add that the fact that Tore "may" receive referral fees also meant that Concord, through Tore, "may have a conflict of interest regarding the recommendation of an executing broker dealer in that it may receive compensation." But because the revised disclosure still failed to accurately describe Respondents' arrangement with the Executing Broker, the modified disclosure still omitted material facts necessary to alert clients that cleared through the Executing Broker that they were in fact paying such fees. This is particularly true because Concord did not correct the false and misleading representations that it would not be compensated in connection with any broker recommendations and that Tore had "yet to commence" transactions.

24. Even with the expanded Form ADV Part II disclosure, Concord's clients could not fully appreciate that by executing trades through the Executing Broker they would be brought

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person have any arrangements, oral or in writing, where it: is paid cash by or receives some economic benefit [. . .] from a non-client in connection with giving advice to clients?"

within the scope of a commission-sharing arrangement such that the bulk of the commissions they paid to the Executing Broker were in fact passed back to the Concord principals via Tore.

25. In 2011, Concord was acquired and became an operating division of the acquiring company. The commission-sharing arrangement was terminated in connection with the acquisition.

Violations

26. As a result of the conduct described above, Respondents willfully[8] violated Section 206(2) of the Advisers Act, which prohibits any investment adviser from engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client. Proof of scienter is not required to establish a violation of Section 206(2) of the Advisers Act but, rather, may rest on a finding of simple negligence. *SEC v. Steadman*, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963)). Specifically, the commission-sharing arrangement with the Executing Broker represented a clear conflict of interest that was not adequately disclosed to Concord clients; and, by arranging for certain of Concord's clients to pay amounts greater than the discounted commission rate Respondents negotiated with the Executing Broker without disclosing this fact, Respondents also failed to seek to obtain best execution for those clients.

27. As a result of the conduct described above, Respondent Gavornik willfully violated Section 207 of the Advisers Act, which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission … or willfully to omit to state in any such application or report any material fact which is required to be stated therein." Specifically, Concord's Forms ADV Part II filed with the Commission in 2009 and 2010 were false and misleading because they did not disclose that Concord's affiliated broker-dealer shared in the commission payments that Concord's clients paid to the Executing Broker or that the affiliated broker-dealer remitted those payments to Concord's affiliated broker-dealer.

28. As a result of the conduct described above, Respondent Gavornik willfully aided and abetted and caused Concord's violations of Section 204(a) of the Advisers Act, and Rule 204-2(a)(14) promulgated thereunder, which require that investment advisers registered with the Commission maintain and preserve certain books and records, including copies of each brochure

[8] 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)).

and each amendment or revision thereof, provided to any client or prospective client, and a record of the dates that each statement was given or offered to any client or prospective client.[9]

Undertakings

Respondent Gavornik has undertaken to provide to the Commission, within 14 days after the end of the twelve month suspension period described below, an affidavit that he has complied fully with the sanctions described in Section IV below.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Section 15(b) of the Securities Act, Sections 203(f) and 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondents Gavornik, Mariniello, and Argush each cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Advisers Act.

B. Respondents Mariniello and Argush are censured.

C. Respondent Gavornik cease and desist from committing or causing any violations and any future violation of Sections 204(a) and 207 of the Advisers Act and Rule 204-2 thereunder.

D. Respondent Gavornik be, and hereby is, suspended from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization for a period of twelve months, effective on the second Monday following the entry of this Order;

E. Respondent Gavornik be, and hereby is, prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter for a period of twelve months, effective on the second Monday following the entry of this Order.

F. Respondent Gavornik be, and hereby is, suspended from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person

[9] Rule 204-2(a)(14) was amended effective October 10, 2010, but the changes were not relevant to the requirements described herein. *See Amendments to Form ADV*, IA Rel. No. 3060 (Aug. 12, 2010).

who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock for a period of twelve months, effective on the second Monday following the entry of this Order.

G. Respondents shall, within ten days of the entry of this Order, pay disgorgement of $1,005,000 and prejudgment interest of $147,827, for a total of $1,152,827, on a joint and several basis, to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600.

H. Respondents Gavornik, Mariniello and Argush each shall, within ten days of the entry of this order, pay a civil money penalty in the amount of $150,000. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717.

I. Payment under this Order must be made in one of the following ways:

(1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondents 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) Respondents 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 Lee Argush, Alan Gavornik and Nicholas Mariniello as Respondents 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 Valerie A. Szczepanik, Assistant Director, Asset Management Unit, New York Regional Office, Securities and Exchange Commission, 200 Vesey Street, Suite 400, New York, New York, 10281, or such other person or address as the Commission staff may provide.

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 Respondents, and further, any debt for disgorgement, prejudgment interest, civil penalty or other

amounts due by Respondents 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 Respondents 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