

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 79723 / January 3, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-17180

In the Matter of

ELLIOT R. BERMAN, CPA

and

BERMAN & COMPANY, P.A.,

Respondents.

**ORDER MAKING FINDINGS, IMPOSING
REMEDIAL SANCTIONS, AND A CEASE-
AND-DESIST ORDER PURSUANT TO
SECTIONS 4C AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934 AND
RULE 102(e)(1)(ii) AND 102(e)(1)(iii) OF THE
COMMISSION'S RULES OF PRACTICE**

I.

On March 25, 2016, the Commission instituted public administrative and cease-and-desist proceedings pursuant to Sections 4C¹ and 21C of the Securities Exchange Act and Rules 102(e)(1)(ii) and (iii) of the Commission's Rules of Practice² against Elliot R. Berman and

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 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)(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.

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

Berman & Company, P.A.’s (“Berman & Co.”) (collectively, “Respondents”) (Rel. No. 34-77447).

II.

In connection with these proceedings, Respondents have 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 them 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 Making Findings, Imposing Remedial Sanctions, and a Cease-and-Desist Order Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e)(1)(ii) and Rule 102(e)(1)(iii) of the Commission’s Rules of Practice (“Order”), as set forth below.

III.

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

SUMMARY

A. SUMMARY

These proceedings arise out of Berman & Co.’s audit of MusclePharm Corporation’s (“MSLP”) 2010 and 2011 financial statements. Berman & Co. and Berman – who served as the lead engagement partner – engaged in improper professional conduct and failed to exercise due professional care and professional skepticism including a critical assessment of the audit evidence as shown by repeated deficiencies during the audits of the 2010 and 2011 financial statements of MSLP. Specifically, Respondents (1) audited MSLP’s 2010 and 2011 financial statements and also issued audit reports despite Berman & Co. not being independent; (2) incorrectly evaluated audit evidence demonstrating that MSLP’s largest customer in 2011 was a related party requiring disclosure in conformity with Generally Accepted Accounting Principles (“GAAP”) and inappropriately relied on management representations; (3) failed to recognize MSLP improperly accounted for sales incentives, advertising, and promotions (“Sales Incentives”), and inappropriately relied on management representations as sufficient audit evidence regarding the accounting of those Sales Incentives; and (4) failed to recognize that MSLP did not disclose its sponsorship commitments and international sales as required by GAAP.

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 Respondents’ Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

B. RESPONDENTS

Berman & Company, P.A. (“Berman & Co.”) is an accounting and auditing firm based in Boca Raton, Florida. Berman & Co. has been registered with the Public Company Accounting Oversight Board (“PCAOB”) since 2006. Berman & Co. audited MSLP’s 2010 and 2011 financial statements and reviewed its financial statements through the second quarter of 2012.

Elliot R. Berman (“Berman”) is a resident of Boca Raton, Florida, has been a CPA licensed in Florida since 2005. Berman is the sole owner and managing director of Berman & Co., which he founded in 2006. Berman served as the lead engagement partner on the MSLP audits and reviews for the years ended 2010 and 2011 and through the second quarter of 2012.

C. OTHER RELEVANT PARTIES

MusclePharm Corporation is a Nevada corporation with its principal place of business in Denver, Colorado. Since 2010, MSLP has had a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MSLP engaged Berman & Co. as its auditor in January 2011 and dismissed Berman & Co. in September 2012.

D. FACTS

1. Berman & Co. issued audit reports containing unqualified opinions on MSLP’s financial statements for fiscal years ended December 31, 2010 and December 31, 2011 (the “MSLP Audits”).
2. Berman served as the engagement partner on the MSLP Audits. Berman, as the engagement partner, was responsible for the audit engagement team’s compliance with professional standards and adequate documentation in the work papers of the findings, analysis, and information on which they relied in forming the audit opinion. Berman also had final authority over the planning, execution, and supervision of the audits and had full responsibility for Berman & Co.’s audit reports. Berman approved the issuance of audit reports containing unqualified opinions.
3. In each of the MSLP Audits, Berman & Co. represented that the audits were conducted by an independent auditor in accordance with PCAOB standards. Berman signed the audit reports for the MSLP Audits on behalf of Berman & Co. MSLP included these audit reports in its Commission filings.

Independence

4. Berman & Co. failed to comply with Rule 2-01(b) of Regulation S-X, PCAOB Rule 3520, and PCAOB standards (*see* AU §§ 220, 230 and AS 9), and was not independent from MSLP during the MSLP Audits because of indemnification provisions Berman included in Berman & Co.’s engagement letters. Despite not being independent, Berman & Co. issued audit reports that represented that Berman & Co. was independent. As a result, Berman & Co. willfully violated, and Berman

- willfully aided and abetted and caused violations of, Rule 2-02(b)(1) of Regulation S-X.
5. The Commission has published its interpretation and guidance on auditor indemnification provisions in Codification of Financial Reporting Policies Section 602.02f.i (“Indemnification by Client”) (the “Codification”). The Codification provides in part that when “an accountant and his client, directly or through an affiliate, have entered into an agreement of indemnity which seeks to assure the accountant immunity from liability for his own negligent acts, whether of omission or commission, one of the major stimuli to objective and unbiased consideration of the problems encountered in a particular engagement is removed or greatly weakened.”
 6. MSLP signed Berman & Co. engagement letters, dated January 5, 2011 and January 1, 2012, relating to the MSLP Audits (the “MSLP Engagement Letters”). Berman drafted the MSLP Engagement Letters and signed the MSLP Engagement Letters on behalf of Berman & Co.
 7. The MSLP Engagement Letters contained the following indemnification provisions:
 - (a) “The Company agrees to release, indemnify, and hold Berman & Company, P.A. (its partners, affiliates, heirs, executors, personal representatives, successors, and assigns) harmless from any liability and costs resulting from known misrepresentations by management.”
 - (b) “The Company agrees to release, indemnify, and hold Berman & Company, P.A. (its partners, affiliates, heirs, executors, personal representatives, successors, and assigns) harmless from any liability and costs resulting from fraud caused by or participated in by the management of the Company.”
 - (c) “Reasonable costs and time spent in legal matters or proceedings arising from our engagement, such as subpoenas, testimony or consultation involving private litigation, arbitration or government regulatory inquiries at your request or by subpoena will be billed to you separately and you agree to pay the same.”
 8. Berman & Co. completed an “Engagement Acceptance Form” for the 2010 MSLP Audit (the “2010 Form”). Berman reviewed and approved this form. Berman & Co. completed an “Engagement Acceptance and Continuance Form” for the 2011 MSLP Audit (the “2011 Form”). Berman reviewed and approved this form.
 9. Item 11 of the 2010 Form and Item 7 of the 2011 Form provided that the “SEC expects accountants to comply with the independence requirements established by the PCAOB, Independence Standards Board, and the accounting profession (the AICPA), as well as the requirements promulgated by the Commission and the staff.”
 10. Rule 2-01(b) of Regulation S-X provides in part that “the Commission will not recognize an accountant as independent, with respect to an audit client, if the

accountant is not, . . . capable of exercising objective and impartial judgment on all issues encompassed within the accountant's engagement." As a result of the indemnification language in the MSLP Engagement Letters, Berman & Co. was not independent pursuant to Rule 2-01(b) of Regulation S-X. By submitting audit reports to MSLP that were filed with the Commission that provided Berman & Co. was independent and the audits were conducted in accordance with PCAOB standards, Berman & Co. violated Rule 2-02(b)(1) of Regulation S-X.

Related Party Transactions

11. From 2010 through 2012, one customer served as MSLP's largest customer for each year based on the percentage of sales ("MSLP's Largest Customer").
12. In May 2011, MSLP hired a new chief marketing officer ("CMO"). The CMO was a former executive and co-founder of MSLP's Largest Customer. The CMO's brother remained the CEO of MSLP's Largest Customer and a greater than 10% indirect owner of the major customer. In 2011, GAAP required MSLP to disclose transactions with MSLP's Largest Customer as related party transactions in its financial statements. (*See* ASC 850)
13. Respondents informed MSLP that transactions with MSLP's Largest Customer were required to be disclosed as related party transactions in its financial statements.
14. MSLP disagreed with Respondents that transactions with MSLP's Largest Customer were required to be disclosed as related party transactions in its financial statements. Respondents agreed to accept MSLP's position that disclosure was not required if MSLP provided Respondents with a memo supporting its reasoning and a representation in the management representation letter.
15. MSLP provided Respondents with a memo purporting to support its position that MSLP's Largest Customer was not a related party requiring disclosure and a management representation letter. The MSLP memo was prepared by a non-accountant executive and signed by the CFO, who Respondents had previously determined lacked accounting experience, as well as other MSLP executives. No other accountant signed the MSLP memo.
16. The MSLP memo did not accurately evaluate the necessity of disclosure in accordance with GAAP. The memo incorrectly focused on disclosure only being required if influence was actually present (rather than whether a family member might control or influence or if there is the opportunity to significantly influence) and failed to adequately address the guidance found in ASC 850 regarding immediate family relationships. The memo also contained facts that Respondents knew or should have known to be red flags and/or that the information in the memo was not accurate.

17. MSLP failed to make the required GAAP disclosure of related party transactions with MSLP's Largest Customer in its 2011 financial statements. Berman & Co. expressed an unqualified opinion despite this material omission of which it was aware.

MSLP Sales Incentives

18. Under GAAP, sales incentives, advertising, and promotions (collectively "Sales Incentives") must be accounted for as a reduction of revenue, absent evidence of a specific identifiable benefit in which case they can be recorded as an expense. (*See* ASC 605-50-45-2). Without evidence of an identifiable benefit, MSLP improperly recorded Sales Incentives as an expense instead of a reduction of revenue, resulting in it overstating revenues in its financial statements by \$845,000 or 26% in 2010 and \$3.6 million or 21% in 2011.
19. Berman & Co. and Berman identified revenue recognition as significant and a fraud risk area for the MSLP Audits.
20. During the planning of the 2010 audit and throughout the MSLP Audits, Respondents also identified weak internal controls at MSLP, due in large part to the CFO.
21. Despite designating revenue recognition as a fraud risk and determining the CFO lacked the requisite accounting experience, Respondents failed to plan or perform audit procedures to obtain sufficient audit evidence supporting MSLP's accounting for Sales Incentives.
22. Respondents' directed MSLP to file an amended Form 10-K on July 2, 2012, for the year ended December 31, 2011, restating its 2010 and 2011 financial statements because Sales Incentives were not accounted for properly.

Sponsorship Commitments

23. In 2011, MSLP had three continuing sponsorship commitments, which required it to make future payments in 2012 and 2013 totaling approximately \$5.3 million (\$2.8 million in 2012 and \$2.5 million in 2013). Contrary to GAAP, MSLP failed to disclose these commitments in its 2011 financial statements. (*See* ASC 440)
24. During the 2011 audit of MSLP, Respondents failed to recognize and properly plan the audit to consider whether MSLP was required to disclose its sponsorship commitments. Berman & Co.'s disclosure checklist, which Berman reviewed and approved and which was used during the MSLP audit, was marked "N/A" for commitments. The audit work papers do not contain any procedures evaluating whether MSLP's sponsorship commitments should or should not be disclosed.

International Sales

25. ASC 280-10-50-41 requires the disclosure of all revenues from external customers attributed to all foreign countries in total from which the public entity derives revenue if material.
26. MSLP failed to disclose in its 2011 financial statements that a material amount, approximately 23%, of its sales were to customers located outside of the United States (“International Sales”) as required by GAAP. (See ASC 280-10-50-41)
27. Berman was aware that MSLP had International Sales. Berman, however, failed to properly plan the 2011 audit to obtain sufficient audit evidence regarding the disclosure of International Sales. Berman & Co.’s 2011 work papers did not contain evidence that Respondents considered whether MSLP was required to disclose its International Sales in conformity with GAAP. Berman & Co.’s disclosure checklist is marked “item not present” for International Sales. No documentation relating to why disclosure of International Sales was not required is in the work papers.

Violations

28. As a result of the conduct described above, Berman & Co. willfully⁴ violated, and Berman willfully aided and abetted and caused Berman & Co.’s violations of, Rule 2-02(b)(1) of Regulation S-X, which provides in part that the accountant’s report shall state “whether the audit was made in accordance with generally accepted auditing standards.”
29. As a result of the conduct described above, Berman & Co. and Berman willfully aided and abetted and caused MSLP’s violations of Section 13(a) of the Exchange Act and Rule 13a-1 thereunder, which require issuers with securities registered under Section 12 of the Exchange Act to file annual reports with the Commission and to keep this information current.
30. As a result of the conduct described above, Respondents engaged in improper professional conduct under Rule 102(e)(1)(ii) as defined in Rule 102(e)(1)(iv)(A) of the Commission’s Rules of Practice. The audit failures by Respondents related to independence, related party transactions, Sales Incentives, sponsorship commitments, and International Sales were the result of knowing or reckless conduct that resulted in a violation of applicable professional standards.
31. As a result of the conduct described above, Respondents engaged in improper professional conduct under Rule 102(e)(1)(ii) as defined in Rule 102(e)(1)(iv)(B)(1) of

⁴ A finding of willfulness does not require intent to violate, but merely intent to do the act which constitutes a violation. *SEC v. K. W. Brown & Co.*, 555 F. Supp. 2d 1275, 1309 (S.D. Fla.2007) (citing *Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.C. Cir. 2000)); *SEC v. Steadman*, 603 F.2d 1126, 1135 (5th Cir. 1979); *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 180 (2d Cir. 1976).

- the Commission's Rules of Practice. The audit failures by Respondents related to independence, related party transactions, and Sales Incentives were the result of highly unreasonable conduct that resulted in a violation of applicable professional standards in circumstances in which Respondents knew or should have known that heightened scrutiny was warranted.
32. As a result of the conduct described above, Respondents engaged in improper professional conduct under Rule 102(e)(1)(ii) as defined in Rule 102(e)(1)(iv)(B)(2) of the Commission's Rules of Practice. Respondents' unreasonable conduct included failures with respect to independence, related party transactions, and Sales Incentives discussed herein, as well as unreasonable conduct related to Respondents' failures during the 2011 MSLP Audit relating to sponsorship commitments and International Sales.
33. As a result of the conduct described above, Berman & Co. willfully violated and willfully aided and abetted violations of provisions of the federal securities laws and rules and regulations thereunder pursuant to Rule 102(e)(1)(iii) and Berman willfully aided and abetted violations of provisions of the federal securities laws and rules and regulations thereunder pursuant to Rule 102(e)(1)(iii).

Findings

34. Based on the foregoing, the Commission finds that Berman & Co. willfully violated, and Berman willfully aided and abetted and caused Berman & Co.'s violations of, Rule 2-02(b)(1) of Regulation S-X, which provides in part that the accountant's report shall state "whether the audit was made in accordance with generally accepted auditing standards."
35. Based on the foregoing, the Commission finds that Respondents willfully aided and abetted and caused MSLP's violations of Section 13(a) of the Exchange Act and Rule 13a-1 thereunder, which require issuers with securities registered under Section 12 of the Exchange Act to file annual reports with the Commission and to keep this information current.
36. Based on the foregoing, the Commission finds that Respondents engaged in improper professional conduct under Rule 102(e)(1)(ii) of the Commission's Rules of Practice.
37. Based on the foregoing, Berman & Co. willfully violated and willfully aided and abetted violations of provisions of the federal securities laws and rules and regulations thereunder pursuant to Rule 102(e)(1)(iii) and Berman willfully aided and abetted violations of provisions of the federal securities laws and rules and regulations thereunder pursuant to Rule 102(e)(1)(iii).

IV.

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

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

A. Elliot Berman and Berman & Co. shall cease and desist from committing or causing any violations of and any future violations of Section 13(a) of the Exchange Act and Rule 13a-1 thereunder and Rule 2-02(b)(1) of Regulation S-X.

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

C. After 2 years from the date of this Order, Elliot Berman 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 Berman'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) Berman, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;
 - (b) Berman, or the registered public accounting firm with which he is associated, has been inspected by the PCAOB and that inspection did not identify any criticisms of or potential defects in Berman's or the firm's quality control system that would indicate that Berman will not receive appropriate supervision;
 - (c) Berman has resolved all disciplinary issues with the PCAOB, and has complied with all terms and conditions of any sanctions imposed by the PCAOB (other than reinstatement by the Commission); and
 - (d) Berman acknowledges his responsibility, as long as Berman appears or practices before the Commission as an independent

accountant, to comply with all requirements of the Commission and the PCAOB, 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 Berman 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 Berman's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

E. Berman & Co. is denied the privilege of appearing or practicing before the Commission as an accountant.

F. After two years from the date of this Order, Berman & Co. may request that the Commission consider its 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 Berman & Co.'s work in its practice before the Commission will be reviewed either by the independent audit committee of the public company for which it works or in some other acceptable manner, as long as it practices before the Commission in this capacity; and/or
2. an independent accountant. Such an application must satisfy the Commission that:
 - (a) Berman & Co. is registered with the PCAOB in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;
 - (b) Berman & Co. hired an independent CPA consultant ("consultant"), who is not unacceptable to the staff of the Commission and is affiliated with a public accounting firm registered with the PCAOB, that has conducted a review of Berman & Co.'s quality control system and submitted to the staff of the Commission a report that describes the review conducted and procedures performed, and represents that the review did not identify any criticisms of or potential defects in the firm's quality control system that would indicate that any of Berman & Co.'s employees will not receive appropriate supervision. Berman & Co. agrees to require the consultant, if and when retained, to enter

into an agreement that provides that for the period of review and for a period of two years from completion of the review, the consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Berman & Co., or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the consultant in performance of his/her duties under this Order shall not, without prior written consent of the staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Berman & Co., or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the review and for a period of two years after the review;

- (c) Berman & Co. has resolved all disciplinary issues with the PCAOB, and has complied with all terms and conditions of any sanctions imposed by the PCAOB (other than reinstatement by the Commission); and
- (d) Berman & Co. acknowledges its responsibility, as long as it appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the PCAOB, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

G. Respondents shall jointly and severally pay civil penalties in the amount of \$25,000 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 shall be made in the following installments:

(1) Within 60 days of the issuance of this Order	\$5,000
(2) Within 120 days of the issuance of this Order	\$5,000
(3) Within 180 days of the issuance of this Order	\$5,000
(4) Within 240 days of the issuance of this Order	\$5,000
(5) Within 300 days of the issuance of this Order	\$5,000

Prior to making the final payment described in Section IV.G(5), Respondents shall contact the Commission staff to ensure the inclusion of interest. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. 3717, shall be due and payable immediately, at the discretion of the Commission staff, without further application.

Payment must be made in one of the following ways:

- (a) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (b) 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
- (c) 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 Elliot Berman and Berman & Co. 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 Kurt Gottschall, Associate Regional Director, Denver Regional Office, 1961 Stout St., Suite 1700, Denver, CO 80294. SEC Trial Attorney Mark Williams shall be notified, via email, of each payment at the time each payment is made.

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, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they 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 Respondents 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 Berman, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Berman 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 Berman 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