UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2297/February 9, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-15790

In the Matter of MICHAEL A. HOROWITZ and MOSHE MARC COHEN	ORDER DENYING MOTION TO CORRECT MANIFEST ERROR OF FACT IN THE INITIAL DECISION

On March 13, 2014, the Securities and Exchange Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP), pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Section 203(f) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940. The case was assigned to me on March 14, 2014. I held three days of public hearings in August 2014, and issued an Initial Decision on January 7, 2015. *Michael A. Horowitz*, Initial Decisions Release No. 733, 2015 SEC LEXIS 43 (Jan. 7, 2015).

On January 13, 2015, the Division of Enforcement (Division) filed a Motion to Correct Manifest Error of Fact in the Initial Decision (Motion), pursuant to Rule 111(h) of the Commission's Rules of Practice. *See* 17 C.F.R. § 201.111. The Motion contends that the following statement in the Initial Decision, in the section entitled Civil Money Penalty, is a manifest error of fact: "Cohen's conduct occurred in January and February 2008, more than five years before the OIP was issued on March 13, 2014. The statute of limitations is therefore an issue." Motion at 1. According to the Division, the statute of limitations was not a basis for me to deny the Division's request for civil money penalties and an associational bar. *Id.*; *see Horowitz*, 2015 SEC LEXIS 43, at *84-85.

The bases for the Division's Motion are twofold:

1. Cohen's "fourth defense" to the OIP, asserted in his Answer, was that the

> [Division's] claim and requested relief are barred by the statute of limitations and the doctrine of laches because the Commission delayed unreasonably and inexcusably in commencing this action and Respondent Cohen suffered prejudice as a result.

Answer at 16.

At a prehearing conference on July 7, 2014, I stated

> I have 29 affirmative defenses that [Cohen] has put in his answer on pages 15 through 20. As far as those affirmative defenses go they are denied. The definition of an affirmative defense is "new facts or arguments that, if true, will defeat the government's claim even if the allegations in the OIP are true." None of those 29 affirmative defenses meet that definition.

Prehearing transcript at 24-25.

The Division argues that I denied Cohen's statute of limitations defense by these statements, and therefore that the burden never shifted to the Division to "present its incontrovertible evidence that the statute of limitations had not expired." Motion at 2-3.

2. The Declaration of James Lee Buck, II, attached to the Motion, with Exhibits 1, 2, and 3 (Declaration), claims that the Division and Michael C. Deutsch, counsel for Cohen, entered into a tolling agreement and two amendments to the agreement. The Declaration states:

> The statute of limitations on Mr. Cohen's February 2008 conduct would have expired in February 2013 but for the Tolling Agreement and its two amendments. The fifteen (15) months added by the Tolling Agreement and its two amendments extended the statute of limitations to May 2014.
>
> . . .
>
> Because the [OIP] was instituted on March 13, 2014, the claims and relief requested therein were not barred by the five-year limitations period set forth in 28 U.S.C. § 2462.

Declaration at 3.

My perusal of the Declaration is that Exhibit 1 is a tolling agreement signed in July and August 2012 that suspended the running of the statute of limitations for the period beginning on June 14, 2012, through September 14, 2012 (the tolling period). Exhibit 2, an agreement signed in September 2012, extended the tolling period through March 14, 2013. Exhibit 3, an agreement signed in March 2013, extended the tolling period through September 14, 2013.

Cohen filed an opposition to the Motion on January 23, 2015.[1] Cohen argues that the Division has failed to identify a manifest error in the Initial Decision, and he objects to the

[1] I granted Cohen's request to extend the deadline for filing this opposition by two days. *Michael A. Horowitz*, Admin. Proc. Rulings Release No. 2232, 2015 SEC LEXIS 204 (Jan. 20, 2015).

Division's attempt to introduce evidence of a tolling agreement "at the eleventh hour." Opp. at 3-4. He also argues that the statute of limitations set forth in 28 U.S.C. § 2462 is jurisdictional in nature, and that therefore he could not waive his defense that civil penalties and an associational bar are time-barred by signing a tolling agreement. *Id.* at 4-10.

The Division filed a reply to Cohen's opposition on January 28, 2015. The Division claims that Cohen's opposition fails to contest that a valid tolling agreement exists, and argues that his jurisdictional argument is both procedurally misplaced and legally unsound. Reply at 1-2.

Ruling

A manifest error is an error that is "plain and indisputable, and that amounts to a complete disregard of . . . the credible evidence in the record." Black's Law Dictionary 563 (7th ed. 1999). I DENY the Motion because there are no facts in the record which show that the statements in the Initial Decision regarding the statute of limitations for a civil money penalty and associational bar were incorrect. My comments at the July prehearing conference were not intended to deprive Cohen, prior to any evidence being adduced, of his defense under 28 U.S.C. § 2462, and there is no mention of any tolling agreement in the record. As noted by the Commission, "once the initial decision is issued, our rules largely divest the law judge of authority over the proceedings (including the authority to set aside the default)." *Alchemy Ventures, Inc*., Exchange Act Release No. 70708, 2013 SEC LEXIS 3459, at *13 (Oct. 17, 2013). The Division has failed to identify a manifest error of fact, and I cannot now consider evidence outside the record in order to reverse my conclusion in the Initial Decision regarding the application of 28 U.S.C. § 2462 to the sanctions sought in this proceeding.

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Brenda P. Murray
Chief Administrative Law Judge