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UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION

IN THE MATTER OF: MICHAEL A. HOROWITZ and MOSHE MARC COHEN RESPONDENTS.	ADMINISTRATIVE PROCEEDING FILE NO: 3-15790

Motion for Summary Disposition

Respondent Moshe Marc Cohen, acting pro se, hereby moves for a Summary Disposition of the OIP dated March 13th ,2014

Respondent Cohen seeks a Motion of Disposition pursuant to Federal Rule of Civil procedure 9(b) for failure to plead fraud particularity, and Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

As set forth in the accompanying Memorandum of Points and Authorities, there is good cause for the relief requested. The SEC fails to describe the alleged fraudulent conduct with requisite specificity and how these vague allegations tie into the purchase or sale of any security.

This motion is based the accompanying Points and Authorities, the pleadings and papers filed in this action: and such further arguments and matters as may be offered at the time of the conference and/or hearing of this motion.

The OIP filed by The Commission on March 13th, 2014, has failed to meet the pleading requirements of the FRCP Rules 9(b) and 12(b)(6). In fact many of the basic facts that one would expect to see in a securities fraud complaint are wholly absent from the SEC's pleading.

A. Motion for Dismissal of OIP for failure to Plead Fraud with Requisite Particularity

The Rule 9(b) standard for pleading fraud is well settled—a plaintiff must allege the "who, what, where and how" of the fraudulent conduct. *Vess v. Ciba-Geigy Corp.*, 317 F. 3rd 1097, 1106 (9th Cir. 2003). Fraud allegations must state the time, place, and specific content of the false

representations as well as the identities of the parties to misrepresentation." *Bassett v. Ruggles*, No. CV_F-09-528, 2009 U.S. Dist Lexis 83349, at * 62 (E.D. Cal., Sept 14, 2009) citing *Schreiber Distrib. V. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

As other federal courts in California and other jurisdictions have recognized, rule 9(b)'s heightened pleading standard applies in SEC enforcement actions grounded in fraud and alleging violations of Section 17(a) of the Securities Act and Section 10b(b) of the 1934 Securities Exchange Act. *See, e.g* SEC v. Berry, 580 F. Supp. 2nd 911 (N.D. cal 2008). Under *Vess,* complaint grounded in fraud which fails to meet the heightened pleading requirements of 9(b) warrants dismissal. *Vess*, 317 f. 3rd at 1107. Here, the claims asserted by the OIP and Commission against the Respondents, arise under Section 17(a) of the 1933 Securities Act and Section 10(b) of the Securities Exchange Act. It is manifest that the SEC's entire complaint or OIP is grounded in fraud and thus meet the strict 9(b) standard for pleading. It does not.

One of many such examples are in Paragraphs 2 of the OIP dated March 13, 2014, the Commission purports *to set forth "misrepresentations and omissions of customer account and/or point-of-sale forms.....as a result of the Respondents' (alleged) fraudulent acts and practices.....".* It does not cover who allegedly did what, with whom, where and etc.

Note that Respondent Cohen's alleged Role only starts at paragraph 90 creating more confusion as to each role and factors alleged in the OIP. There are many example of the OIP being vague thus supporting our motion for Summary Disposition.

The Commission is required to specify particular misstatements that were made, to whom they were made, when they were made, by whom they were made, and why they were false. *In re GlenFed, Inc., Sec. Litg.*, 42 F. 3rd 1541, 1547 n7 (9th Cir. 1994) *(en banc).* As the basis for its claims based on fraud, the SEC points to some representations made by the respondents, but never alleges with specificity that any particular statement were false at the time they were made, in what manner they were made, on what dates, to whom the false statements were made, to which investors, that caused what amount to be allegedly defrauded. Indeed, the SEC has only alleged garden variety" fraud, and completely fails to connect the alleged fraud to any specific offering or sale.

As a result, the Individual Respondents are left to guess what is it that the SEC contends they did that the SEC specifically violated the securities laws. Accordingly, the SEC's OIP fails to meet the requirements of Rule 9(b).

When analyzing a complaint for failure to state a claim under Rule 12(b)(6), "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the non-moving

party." *Smith v. Jackson,* 84 F.3d 1213, 1217 (9th Cir. 1996). Legal conclusions couched as factual allegations are not given a presumption of truthfulness, and "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. F.D.I.C.,* 139 F.3d 696, 699 (9th Cir. 1998).

For the reasons, set forth above Respondent Cohen respectfully requests that the court dismiss all the claims asserted against him.

B. Motion for Disposition or Dismissal of OIP for failure to State a Claim of Securities Fraud

The lack of detail in the OIP makes it deficient not only under Rule 9(b), but Rule 12(b)(6) as well. To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'.... A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,*___U.S.__, 129 S. Ct. 1937,1949, 173 L. Ed. 2d 868 (2009), citing *Bell Atlantic Corporation v. Twombly,* 550 U.S. 544, 556,570, 127 S. Ct. 1995,1965, 1974, 167 L. Ed. 2d 929 (2007).

The Individual Respondents are charged by the SEC with violating both Section 17(a) of the 1933 Securities Act, and Section 10(b) of the Securities Exchange Act and Rule 10(b)-5. These are commonly referred as to the anti-fraud provisions of the federal securities laws. In order to state viable causes of action under these statutes, the Commission must allege that Respondents each made material misrepresentations or omissions with the requisite degree of scienter in connection with the purchase or sale of a security. *SEC v. Rana Research , Inc.* 8 F. 3rd 1538, 1364 (9th Cir 1993). Federal statute require that a misstatement be made in "connection with" the purchase, sale, or offering of a security. 15 U.S.C. § 77(q)(a): U.S.C. § 78(j)(b); 17 C.F.R. § 240.10. 10(b)-5.

In other words,, as the Supreme Court has held, to allege securities fraud, the scheme to defraud must coincide with the sale of the securities. *SEC v. Zandford,* 535 U.S. 813,822 (2002). There can be no claim for securities fraud unless the alleged fraud and the sale or purchases of securities coincide. If they do not coincide there can be no securities law violation.

The SEC's vaguely plead "garden variety" fraud allegations that are not tied to any knowingly false representations alleged to have been made by Respondent Cohen. The reader is left guessing as to the timeline of events and exactly how the alleged misrepresentations were made in furtherance of the alleged fraudulent scheme and further,

whether the Individual respondents had the requisite state of mind at the time the alleged misrepresentations were made (and in furtherance of the alleged fraudulent scheme).

Finally, the insufficient "garden variety" allegations of fraud asserted by the SEC are never connected to any knowingly false representations made in any security. The SEC never points to any particular sale, of any particular security, any particular Broker Dealer, any specific owner or annuitant, any particular Insurance Company, any particular product, on any noted date. With the heightened pleading requirements for fraud, the SEC is not permitted to simply plead a formulaic recitation of the elements to support its claim that misrepresentations were made in the offer and sale of securities. See Bell Atlantic v. Twombly, 550 US 544 (2007). Without more, it is impossible to tell if and when any investors or others received misstated information and further, whether anyone was (or could have been) defrauded

For the reasons, set forth above Respondent Cohen respectfully requests that the court dismiss all the claims asserted against him.

C. Motion of Disposition in Regards to Cease and Desist Order

In the Administrating Proceedings against Anthony Snell & Charles Lecroy Proceedings 3-12359, the Honorable Judge James T. Kelly wrote the following in his decision.

"The Commission's Standard for Issuing Cease-and-Desist Orders is the following:

> In KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1183-92 (2001), recon. denied, 74 SEC Docket 1351 (Mar. 8, 2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002), the Commission addressed the standard for issuing cease-and-desist relief. It explained that "there must be some likelihood of future violations" whenever it issues a cease-and-desist order. Id. at 1185 ("If there is no possible risk of future violation, it is difficult to see the remedial purpose of a cease-and-desist order.").
>
> Although the Commission held that "some" risk of future violation is necessary, it also concluded that the risk need not be very great. Id. It determined that the necessary showing should be "significantly less than" what is required for an injunction and that, "[a]bsent evidence to the contrary," a single past violation ordinarily suffices to raise a sufficient risk of future violations. Id. at 1185, 1191. However, "even in the ordinary case, issuance of a cease-and-desist order is [not] 'automatic' on a finding of past violation." KPMG, 74 SEC Docket at 1360.

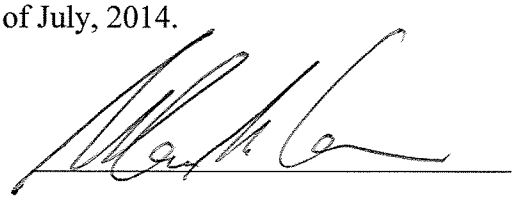
Along with the risk of future violations, the Commission considers the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the respondent's opportunity to commit future violations. KPMG, 54 S.E.C. at 1192. In addition, the Commission considers whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceeding. Id. The Commission weighs these factors in light of the entire record, and no one factor is dispositive.

The United States Court of Appeals for the District of Columbia Circuit has insisted that the Commission adhere to the standards it announced in KPMG. See WHX Corp. v. SEC, 362 F.3d 854, 859-60 (D.C. Cir. 2004) (rejecting the Commission's explanation of the risk of future violations and vacating a cease-and-desist order)."

Based on the above factors we move to dispose and remove the" Cease and Desist" from the OIP dated March 13, 2014. Respondent Cohen has not been in the Securities Industry for over 5 Years and there is no "likelihood to any future violations" nor is there even a slight possibility to any future violations based on his personal situations and willingness to stay out of the Securities in the future.

Based on the above Motions and Information, I hereby respectfully request that the court grant the above motions. I am available for oral Argument at the Court's convenience.

Respectfully submitted this 1st day of July, 2014.



By: Moshe Marc Cohen - Pro Se