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

RESPONDENT MOSHE MARC COHEN'S MOTION FOR LEAVE TO FILE A MOTION OF DISPOSITION AS TO 10b-5(a) and 10b-5(c) ALLEGED VIOLATIONS IN OIP

Respondent Moshe Marc Cohen ("Respondent") respectfully requests the Court's Leave to file a Motion of Disposition as to the Division's alleged violations of 10b-5(a) and 10b-5(c) of the Securities Exchange Act of 1934.

INTRODUCTION

The Division filed the "Reply to Cohen's Opposition to its Motion to Quash and for a Protective Order Regarding Subpoenas to Division Counsel" on August 6, 2014.

On Page 1 of the Division's Reply the Division stated the following *"the only relevant facts in this case concern his representation to his broker dealer, Woodbury Financial Services ("Woodbury"), in connection with the issuance of variable annuities measured by the lives of terminally ill people."* They then continue with the following *"This case is not about whether insurance companies were defrauded by Cohen's acts. Indeed the OIP is clear about the Division's claim against Cohen."* They then quote paragraphs 99, 100 and 101 of the OIP which are.

> 99. As part of the principal review, Broker-Dealer 3 principals scrutinized the investment access information that Cohen provided on behalf of his customers to ensure that that each customer would not need access to their investment during the

surrender charge period in the annuity being purchased. Each of the variable annuity products that Cohen sold had a surrender charge period of at least 7 years.

100. Knowing that Broker-Dealer 3 would not approve his variable annuity sales if he provided truthful investment access information for his customers, Cohen provided false information regarding how soon the customers intended to access the investment (i.e., not before "11 to 15 years") on each of the 28 Broker-Dealer 3 "Annuity-Point of Sale" forms that he completed.

101. By providing false investment access information for the nominees of Institutional Investor 1, and by failing to disclose that they intended to access their annuities well within the surrender charge period, Cohen was able to fraudulently obtain principal approval of his stranger-owned annuities sales. As a result of Cohen's fraudulent acts and practices, the insurance companies whose variable annuities Cohen sold unwittingly issued stranger-owned variable annuities to Cohen's customers, and paid out substantial upfront sales commissions to Cohen.

OIP at Paragraphs 99-101.

The Division then makes the following statement *"As such, any facts that do not concern the above alleged conduct are not relevant to any aspect of this case."*

The Division's reply clearly and factually show that their only allegation is the "alleged" misrepresentation of the "investment access information" question on Woodbury's Annuity Point-of Sale form.

By the Division's own admission of the allegations against Cohen, it is clearly a case of an alleged "misrepresentation" case which would fall under the 10b-5(b) and not 10b-5(a) or 10b-5(c).

Any effort to rely on misrepresentations, but then "back doors" them into subsection (a) and (c) claims in order to avoid requirements in (b) is barred by the caselaw. Misrepresentation cases must be brought under section (b). To bring a case under subsection (a) and (c) the Staff must demonstrate that the alleged scheme went beyond any misrepresentation or omission to encompass conduct that could not be charged under (b).

Courts have routinely rejected the SEC's attempt to bypass the elements necessary to impose 'misstatement' liability under subsection (b) by labeling the alleged misconduct a 'scheme' rather than a 'misstatement'. Allegations of scheme liability cannot be used as a back door into liability for those who make a false statement or omission in violation of subsection (b) of rule 10b-5.

Where the SEC alleges a misrepresentation *and* a scheme, courts reject the scheme counts when they merely reiterate the conduct that allegedly caused the misrepresentation. See e.g. *SEC v Lucent Technologies*, 610 F. Supp. 2d 342,361 (D.N.J. 2009) ("[t]he alleged deception in this case arose

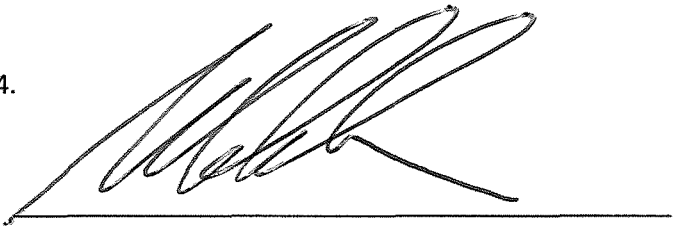
from the failure to disclose 'the real terms of the deal,' which is nothing more than a reiteration of the misrepresentation and omissions that underlie plaintiff's' disclosure claim") (internal citations omitted).

Respondent Cohen will like to present in a **Motion of Disposition** that the Staff's efforts to lighten the SEC's burden by invoking scheme liability under (a) and (c) should not be allowed since case law makes it clear that the SEC cannot back door statements and omissions cases through (a) and (c) by dressing them up as scheme liability. The SEC must bring such cases under subsection (b).

Conclusion

As such respondent Cohen respectfully requests that either the Court allow for Leave of Filing a Motion of Disposition for the 10b-5(a) and 10b-5(c) violations; rule to move the 10b-5(a) and 10b-5(c) without a Motion of Disposition; or allow for a telephonic conference prior to the hearing date to argue to remove the 10b-5(a) and (c) charges. As hearing is only 2 two weeks from today, we respectfully request an expedited Leave or Ruling.

Respectfully Submitted August 11, 2014.



By: Moshe Marc Cohen – Pro-Se