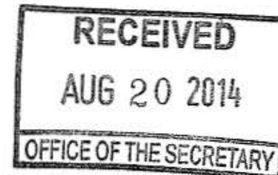
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15790



In the Matter of

MICHAEL A. HOROWITZ
And
MOSHE MARC COHEN

Respondents.

DIVISION OF ENFORCEMENT'S PREHEARING BRIEF

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I. INTRODUCTION

This case arises out of a complex fraudulent scheme to profit from the imminent deaths of terminally-ill hospice and nursing home patients in the sale of variable annuities. While the scheme may have been complex, the Division's case against Respondent Marc Cohen is a straightforward misrepresentations case.

Variable annuities are long-term investment vehicles designed to provide income at retirement. They also contain a death benefit feature. In May 2007 settling respondent Michael Horowitz devised a scheme to exploit this death benefit feature and turn variable annuities into vehicles for short term investment gains. More specifically, Horowitz sought to exploit the fact that, unlike traditional life insurance, certain variable annuity contracts—as long as they were purchased under a certain dollar threshold—required neither a physical examination of, nor proof of an "insurable interest" in, the "annuitant," *i.e.*, the person whose death would trigger the products' payout provisions. Horowitz solicited wealthy individuals and institutional investors to make large investments in variable annuities with lucrative death benefit features. In each of these annuities, a terminally ill hospice or nursing home patient was designated as the contract "annuitant," (the person whose death, under the terms of the annuity, would trigger a death benefit payout). The hospice patients designated as annuitants had no familial or business relationship with the investors who purchased the annuities. Instead, they were selected based on their terminal illnesses and the likelihood that they would die soon, and thereby trigger death benefit payouts in variable annuity contracts in the very near term.[1]

At its height, the scheme grew to include a web of individuals and entities in Los Angeles, Chicago and New York. The head of a Los Angeles charity and an executive at a

[1] The insurance industry has come to refer to such variable annuity contracts as "stranger-owned" annuities.

Chicago nursing home were recruited to identify hospice patients and supply Horowitz with the personal identifying information he needed to designate the patients as annuitants. BDL Group, LLC was ultimately formed by two New York hedge funds that wanted to invest in the annuities, and BDL's sole business purpose was to purchase stranger-owned annuities through nominees. To that end, BDL recruited nominees to purchase the annuities, and ultimately created a series of family trusts to serve as nominees on BDL's behalf.[2]

Cohen (then a registered representative for Woodbury Financial Services, Inc. ("Woodbury")) was recruited by Horowitz to serve as the selling representative on annuities to be purchased by BDL nominees after Horowitz was no longer able to sell the annuities himself. Both Horowitz and Cohen believed they could exploit "loopholes" in the insurance companies' underwriting procedures. But while the insurance companies may not have asked about the health of the annuitant below a certain dollar threshold, both Horowitz's and Cohen's broker-dealer firms had review processes in place to ensure customers purchasing variable annuities had long-term investment time horizons, and to ensure that the annuities were being used for their intended purpose. In order to properly carry out that review process, these firms relied on their representatives to provide them with complete, pertinent and accurate information.

With the promise of incredibly lucrative upfront sales commissions to be paid out by the insurance companies unwittingly issuing the stranger-owned" annuities, Cohen utterly

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[2] Marc Cohen is the sole remaining respondent charged by the Division in connection with this scheme. On March 13, 2014, the Commission instituted settled public administrative and cease-and desist proceedings against "annuitant finders" Harold Ten, Menachem Berger and Debra Flowers. Exchange Act Release No. 71712, Admin. Proc. File No. 3-15787 (Mar. 13, 2014). Simultaneously, the Commission instituted settled public administrative and cease-and-desist proceedings against BDL Manager LLC and Howard Feder (Exchange Act Release No. 71713, Admin. Proc. File No. 3-15788 (Mar. 13, 2014)) and Marc Firestone and Richard Horowitz (Exchange Act Release No. 71714, Admin. Proc. File No. 3-157897 (Mar. 13, 2014)). On July 31, 2014, the Commission entered an order making findings and imposing remedial sanctions and a cease-and-desist order against Michael Horowitz, the scheme architect. (Exchange Act Release No. 71714, Admin. Proc. File No. 3-157897 (Mar. 13, 2014). Pursuant to his settlement with the Commission, Horowitz made admissions of liability concerning the provision of false investment access information to his broker-dealer.

abandoned his role as securities industry gatekeeper and his obligations to provide Woodbury with complete, accurate information concerning his securities sales. In at least twenty-eight separate instances, Cohen falsified Woodbury annuity point of sale forms that (by his own admission) he was required to complete and submit to Woodbury's home office for suitability review. Cohen falsified these forms in connection with his sale of stranger-owned annuities to BDL nominees. Among other things, Cohen: (i) provided false investment access information for his BDL-nominee clients, representing that they intended to hold their annuities for many years when in fact, as Cohen well knew, BDL had a short-term investment strategy; (ii) provided false information concerning his customers' intended use of the annuities (purporting the his customers were purchasing the annuities for, among other reasons, "tax deferred treatment of earnings"); (iii) made false statements concerning the source of funds used to purchase the annuities (representing that the family trusts were funding the annuities when in fact BDL was (BDL in turn was funded by the two hedge funds)); and (iv) falsely certified that, among other things, he was familiar with his clients (when in fact various trustees of the trusts purporting to purchase the annuities have testified that they never met Cohen and didn't even know who he was). By virtue of his false statements, Cohen was able to obtain suitability approval for annuities that he sold and avoid detection by Woodbury of his stranger-owned annuities sales. As the Division will demonstrate at the hearing in the matter, if Woodbury had understood that Cohen was selling stranger-owned annuities to nominees for a hedge fund, it would not, for a variety of reasons, have allowed him to process any of the business. Indeed, when Woodbury ultimately learned what Cohen had been doing, it promptly shut down his sales and ultimately terminated his registration with the firm.

II. BACKGROUND

A. VARIABLE ANNUITIES

1. Variable Annuities Are Long Term Investment Vehicles Designed to Provide Income at Retirement

Variable annuities are designed to serve as long-term investment vehicles, typically to provide income at retirement.[3] Although variable annuities offer investment features similar in many respects to mutual funds, a typical variable annuity offers three basic features not commonly found in mutual funds: (i) tax-deferred treatment of earnings; (ii) a death benefit; and (iii) annuity payout options that can provide guaranteed income for life, or for a fixed period of time.

When an investor purchases a variable annuity, he selects from an array of sub-accounts, which are similar to typical mutual fund offerings, in which to allocate his investment dollars. During the first several years of the contract, if market returns are favorable, the owner's account increases in value. This is referred to as the "accumulation" phase. The later "payout" phase (typically commencing at retirement and often referred to as the "annuity commencement date") allows the owner, when ready to take withdrawals, to choose either a lump sum distribution of the accumulated funds, or a stream of payments over time.

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[3] *See also* the prospectuses and sales materials of the companies whose annuities Cohen sold here: The Hartford Director M Plus annuity is "designed for retirement planning purposes" (Div. Ex. 622 at 40); The Hartford Leaders Plus annuity is "designed for retirement planning purposes" (Div. Ex. 622 at 184); Sun Life Financial Masters annuity is "designed for use in connection with retirement and deferred compensation plans" (Div. Ex. 623 at 20); ING GoldenSelect Premium Plus annuity is "designed for people seeking long-term tax-deferred accumulation of assets, generally for retirement or other long-term purposes" (Div. Ex. 624 at 24); AIG SunAmerica Polaris Platinum annuity is "designed to help you invest on a tax-deferred basis and meet long-term financial goals" (Div. Ex. 625 at 3); Security Benefit Securedesigns annuity is "designed to give you flexibility in planning for retirement and other financial goals" (Div. Ex. 626 at 19); Genworth RetireReady Extra annuity "is a long-term investment designed for retirement purposes" (Cohen Ex. 947 at 5) and "may be used with qualified retirement plans" (Cohen Ex. 1208 at 3).

2. Surrender Charges and Death Benefits

Investors who withdraw money from a variable annuity early (typically within six to eight years, but sometimes as long as ten years, following purchase of the annuity) are charged a "surrender" charge, which can be particularly steep if money is withdrawn within the first several years of the contract. However, surrender charges are typically not imposed when the death benefit[4] provisions of the annuity are triggered by the death of the contract "annuitant." The contract owner is usually, but not always, the contract "annuitant." The death benefit is paid to the contract owner's designated beneficiary if the contract annuitant dies before the annuity commencement date, and typically guarantees that the beneficiary will receive an amount equal to all premiums paid by the owner, minus any early withdrawals.

Many annuity issuers offer enhanced death benefit options. For example, an investor can, for a fee, select a death benefit that guarantees a minimum payout equal to the value of the underlying investment portfolio at a specified date, which may be greater than the sum of the purchase payments less any withdrawals. This enhanced death benefit feature allows an investor to "lock in" positive investment performance as part of the death benefit, but also provides a hedge against losses in the portfolio's value by guaranteeing, in the alternative, a payout of the sum of the purchase payments less withdrawals, if that sum is greater.

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[4] The typical variable annuity death benefit provides for a payment to the beneficiary at the contract annuitant's death equal to either the value of the underlying investment portfolio or the purchase price of the annuity less any withdrawals, whichever is greater. This death benefit option allows an investor to profit from positive investment performance as part of the death benefit while providing a hedge against losses in the portfolio's value by providing for a payout equal to at least the amount invested in the annuity less any withdrawals. In the typical variable annuity, the contract owner is also the contract "annuitant." However, in the scheme described herein, hospice and nursing home patients unrelated to the contract owners were designated as the annuitants.

3. Bonus Annuities

Many annuity issuers also offer "bonus credits." A bonus credit is a sum of money immediately credited to the contract owner's investment account by the annuity issuer (typically a percentage of the premiums being invested in the annuity contract).

4. The Importance of a Long Term Investment Time Horizon

Much like a 401k or similar retirement plan, variable annuities receive preferential treatment under the federal tax code, and taxes on investment gains within the annuity portfolio are deferred until withdrawals are taken. However, individual investors who withdraw money from their annuity before the age of 59 ½ must pay a 10% federal tax penalty on any earned income (in addition to paying the underlying tax owed on any investment gains withdrawn). Accordingly, variable annuities are generally not suitable for meeting short-term investment goals because substantial taxes and surrender charges can be incurred when an investor seeks to withdraw their money early.

B. RESPONDENT HOROWITZ'S "STRANGER-OWNED" VARIABLE ANNUITIES SCHEME

In or about May 2007, Respondent Horowitz devised the scheme that is the subject of this proceeding after learning about the features of certain variable annuity contracts offered by Lincoln National Life Insurance Co. ("Lincoln")[5]. (SEC v. Horowitz 7/31/2014 Commission Order ("Commission Order"), ¶ 11, SEC v. Horowitz Annex of Horowitz Admissions ("Horowitz Admissions"), ¶ 3).[6] In particular, Horowitz learned that, unlike traditional life insurance, these variable annuity contracts—as long as they were purchased under a certain

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[5] Lincoln is referred to as "VA Issuer" in the Commission's July 31, 2014 Order against Horowitz, as well as in Horowitz's Annex of Admissions thereto. Exchange Act Release No. 71714, Admin. Proc. File No. 3-157897 (Mar. 13, 2014). Horowitz's broker-dealer, Morgan Stanley & Co., Inc. ("Morgan Stanley") is referred to as "Broker-Dealer 1" in the Order and Annex.

[6] The Commission's findings against Horowitz (as set forth in the Commission Order) are not binding on Respondent Cohen, but are provided here as background.

dollar threshold—required neither a physical examination of, nor proof of an "insurable interest" in, the "annuitant," *i.e.*, the person whose death would trigger the products' payout provisions.

Horowitz further determined that with respect to certain of Lincoln's deferred variable annuity products: (i) Lincoln provided an immediate "bonus credit" of up to 5% of the amount invested, which was credited to the contract owner's investment account; (ii) the contract owner could invest his or her premiums in mutual funds available under the contract; (iii) the annuities contained death benefit options; (iv) although substantial "surrender charges" were ordinarily assessed if the annuities were liquidated within the first 7-10 years, such charges were typically not incurred in the event of a death benefit payout; and (v) even if the annuitant died before the "surrender charge" period had run, Lincoln would not "claw back" any of the sales commissions it paid to the selling representative. (Commission Order, ¶ 12, Horowitz Admissions, ¶ 4).

Horowitz developed a strategy to exploit these benefits by using terminally ill hospice and nursing home patients as the contract annuitants and soliciting wealthy individual and institutional investors to make large investments in variable annuities that offered these benefits. (Commission Order, ¶ 13, Horowitz Admissions, ¶ 6). In each of these contracts, a terminally ill hospice or nursing home patient was designated as the contract annuitant. At least 16 terminally ill hospice patients were designated as annuitants in more than 50 variable annuities sold by Horowitz, Cohen, or other registered representatives recruited to the scheme. All of the hospice patients were residents of southern California or Chicago, Illinois. (Commission Order, ¶ 14).

The hospice patients designated as annuitants had no familial or business relationship with the investors who purchased the annuities. Instead, they were selected based on their terminal illnesses and the likelihood that they would die soon, and thereby trigger death benefit

payouts in variable annuity contracts in the very near term. (Horowitz Admissions, ¶ 7). As part of his pitch to investors, Horowitz told them that he would supply the annuitants, with investors needing to furnish only their funds. (Commission Order, ¶ 15). These "stranger annuitants" likewise had no contractual right to any portion of the death benefits paid out under the terms of the variable annuities sold during the scheme. Instead, each of the contracts directed these benefits be paid to one of the investor's family members or relatives, or to a family trust created by the investor. (Commission Order, ¶ 16, Horowitz Admissions, ¶ 8).

Anticipating that the annuitants would soon die, triggering death benefit payouts in the annuity contracts, Horowitz advised his customers to invest their premiums aggressively because if the value of their portfolio increased, they would receive the portfolio value as the death benefit payout. If the value of their portfolio decreased, the death benefit nonetheless guaranteed them a payout equal to the value of their premiums paid minus any withdrawals. Horowitz also advised his customers to invest large sums of money in each annuity they purchased to maximize their "bonus credit." (Commission Order, ¶ 17).

Horowitz employed at least two varieties of fraud in carrying out his sale of "stranger-owned" annuities. First, Horowitz and others fraudulently obtained and used the ID and Health Data of certain unwitting terminally ill hospice and nursing home patients who were designated as annuitants.[7] (Commission Order, ¶ 18). Second, Horowitz falsified his Morgan Stanley trade tickets (including suitability questionnaires) to obtain supervisory approval of the annuities that

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[7] As is detailed in various Commission Orders, and as was admitted by Respondent Horowitz as part of his settlement (Annex of Admissions, ¶¶'s 11-13), Horowitz recruited Harold Ten and Menachem "Mark" Berger to identify terminally ill persons to use as annuitants in variable annuity sales. Berger in turn recruited Debra Flowers. The Commission's findings against Horowitz as to the fraud on the terminally ill persons and their caregivers are set forth in detail in the 7/31/2014 Commission Order (*see, e.g.* ¶¶'s 19-38; 51-65; 77-89). The Commission's findings of liability as to Ten, Berger and Flowers are set forth in the March 13, 2014 Commission Order entered against them. Exchange Act Release No. 71712, Admin. Proc. File No. 3-15787 (Mar. 13, 2014). The Division does not contend that Cohen was complicit in, or that he is liable for, this aspect of Horowitz's scheme.

he sold pursuant to the scheme. (Annex of Admission, ¶¶'s 16-19). As a result of these fraudulent acts and practices Lincoln unwittingly issued variable annuities that it would not otherwise have sold. (Commission Order, ¶ 18, Horowitz Admissions, ¶ 19).

C. HOROWITZ'S ADMISSIONS OF WRONGDOING

As part of his settlement with the Commission, Horowitz—the architect of this scheme—has admitted to wrongdoing, including providing false investment access / investment time horizon information in order to obtain broker-dealer principal approval of his stranger-owned annuities sales.

Among other things, Horowitz has admitted[8] that:

- "variable annuities are designed to serve as long-term investment vehicles, typically to provide income at retirement" (Horowitz Admissions, ¶ 1);
- in or about May 2007, Horowitz devised a strategy to market variable annuities as short-term investments after learning about the features of certain variable annuity contracts offered by Lincoln (Horowitz Admissions, ¶ 3);
- Horowitz marketed his stranger-owned annuities investment strategy to customers as an opportunity for obtaining short-term investment gains with a hedge against investment losses, and Horowitz's customers intended to use the variable annuities as short-term investment vehicles (Horowitz Admissions, ¶ 9)
- Horowitz's strategy carried with it the risk that, if the "stranger annuitants" did not die within a matter of months, Horowitz's customers would be locked into unsuitable, highly illiquid long-term investment vehicles that they would be able to exit only by paying substantial surrender charges (Horowitz Admissions, ¶ 10)
- to ensure that its registered representatives were selling suitable investments to their customers, and to ensure that the investment was being used for its intended

[8] While Horowitz's admissions are not binding on Cohen, they lay bare one of the key components of the scheme and are highly probative of Cohen's own state of mind. By Cohen's own admission (and as described in greater detail below), Horowitz recruited Cohen to serve as the registered representative on the sale of additional stranger-owned annuities to nominees of BDL Group, LLC (after Horowitz was no longer able to sell annuities himself). Cohen has previously admitted that he provided Horowitz with his Woodbury point of sale forms, and the Division contends he did so that Horowitz could tell him how to complete and thereafter similarly falsify requested investment access information. As set forth in detail, *infra,* and just as Horowitz had done with Morgan Stanley, Cohen provided false customer investment access information to Woodbury to make it appear as if his customers intended to hold the annuities they were purchasing as long-term investments, when in fact they did not.

purpose, Morgan Stanley required its principals to review and approve each proposed sale of an annuity (Horowitz Admissions, ¶ 14);

- each trade ticket required Horowitz to state how long the customer intended to hold the variable annuity being purchased. As part of the review process, Morgan Stanley's principals closely scrutinized the response to this question to ensure, among other things, that the customer intended to hold the investment for a period of time exceeding the surrender charge period in the deferred variable annuity contract being purchased (Horowitz Admissions, ¶ 15);

- the 14 annuities that Horowitz sold through Morgan Stanley had a nine year surrender charge period (Horowitz Admissions, ¶ 15);

- Horowitz submitted trade tickets falsely stating that his customers intended to hold their annuities from anywhere between 20 and 40 years (Horowitz Admissions, ¶ 16);

- Morgan Stanley's principals would not have approved Horowitz's annuities sales if he had provided truthful timing information concerning his customers' intention to use the annuities as short-term investment vehicles (Horowitz Admissions, ¶ 16)

- by providing false investment access information about his customers, Horowitz obtained Morgan Stanley principal approval of his stranger-owned annuities sales, which were then submitted to Lincoln (Horowitz Admissions, ¶ 16); and

- by falsifying his trade tickets in order to obtain principal approval of his stranger-owned annuities sales, Horowitz violated the federal securities laws (Horowitz Admissions, preamble)

III. COHEN'S VARIABLE ANNUITIES SALES

A. BDL GROUP

By early Fall 2007, Horowitz had sold over $20 million in stranger-owned variable annuities to individual investors but desired to pump greater capital into the scheme. Searching for a large source of financing, Horowitz began pitching his scheme to institutional investors. (Commission Order, ¶ 90). On or about October 25, 2007, Horowitz met with the principals of two affiliated hedge funds in New York City. (Commission Order, ¶ 91). As a result of the meeting, the principals decided to establish an affiliated entity, BDL Group, Inc., to facilitate the

funds' joint investment in Horowitz's stranger-owned annuities strategy. (Commission Order, ¶ 91; 5/26/2011 B. Jedwab Invest. Tr., Div. Ex. 654, at 95:6-100:12).

1. The Business of BDL was to Invest in Variable Annuities through Nominees

In late October 2007, the hedge fund principals retained Howard Feder ("Feder"), a commodities trader, to operate BDL Manager and BDL Group as each entity's sole principal and employee. BDL Group's Certificate of Formation, issued by the State of Delaware on November 7, 2007, stated that the company's business consisted solely of investing and reinvesting in variable annuities through nominees. (Div. Ex. 112).

By mid-November, 2007, several nominees had signed "Nominee Agreements" with BDL Group providing that: (i) BDL Group would deposit funds to purchase the annuities in a brokerage account to be opened by the nominee; (ii) BDL Group would have complete discretion with respect to investing the funds and would be "entitled to all earnings, proceeds, or other profits earned" from the annuities; and (iii) BDL Group would compensate the nominee in an amount equal to $20,000 on an annualized basis. (See, *e.g.*, Richard Jedwab Nominee Agreement, Div. Ex. 113).

2. BDL had a short-term investment strategy

BDL's investment strategy entailed: (i) exploiting the bonus credit and enhanced death benefit provisions of the annuities contracts for "guaranteed" short-term gains; (ii) designating terminally ill hospice and nursing home patients as the annuitants in the expectation that BDL Group would receive death benefit payouts within a few months; (iii) allocating the annuity premiums to aggressive equity sub-accounts with the assurance that, because of the death benefit provisions, BDL Group could gain on market upside, but not lose on market downside; and (iv) liquidating the annuity investments through death benefit payouts when the annuitants died.

(5/11/2011 Feder Invest. Tr., Div. Ex. 639, at 160:7-162:1; 5/26/2011 B. Jedwab Invest. Tr., Div. Ex. 654, at 162:9-163:24; 6/6/2011 Nordlicht Invest. Tr., Div. Ex. 653, at 235:4-238:9).

As Feder has previously testified, BDL intended to purchase and liquidate its annuities investments as quickly as possible, with an investment time horizon of weeks or months (and not years):

> Q: [] Was part of the investment strategy to attempt to realize a gain on the initial investment by virtue of selecting contracts that contained bonus provisions?
> A: Yes.
> Q: Okay. And was part of the strategy to get in and out of the annuities on a short-term basis?
> A: Yes.
> Q: Okay. Did you have a particular time horizon within which you wanted to get in and out of the contracts?
> A: I mean, I can't answer that question. I mean, I guess if we could have picked someone who would have unfortunately been around for a week, that would probably have been better than someone who was going to be around for three months.

(5/11/2011 Feder Invest. Tr., Div. Ex. 639, at 157:14-158:2).

B. COHEN AGREES TO SELL ANNUITIES TO BDL NOMINEES

1. The Meeting in Las Vegas

By December 2007 Respondent Horowitz was in need of a new registered representative through which BDL could purchase additional stranger-owned annuities. According to Cohen, he was introduced to Horowitz through a mutual acquaintance, David Zakheim. (Cohen Ex. 717 at p. 3). At the time, Cohen was employed with U.S. Planning Group and licensed to sell securities through his registration with Woodbury. U.S. Planning was an "independent affiliate" of Woodbury.

In late December 2007, Cohen emailed his Woodbury Customer Account Package (which included Woodbury's variable annuity point of sale form) to Horowitz. (Div. Ex. 283).[9] Thereafter, on January 4, 2008, Cohen and Zakheim traveled to Las Vegas and met with Horowitz, who described his stranger-owned annuities investment strategy to them. (Div. Ex. 289; 1/19/2011 Cohen Invest. Tr., Div. Ex. 636, at 226-229). According to Cohen, he learned that the strategy involved designating individuals with short life expectancies (principally, hospice patients) as the annuitants in contract purchased by third-party investors. (1/19/2011 Cohen Invest. Tr., Div. Ex. 636, at 29; 37-38; 40-41). Cohen has previously testified that he understood the concept offered the investor an opportunity to receive an accelerated payout on their annuity investment:

> Q: So getting back to my original question, how did the use of hospice patients come into this concept that Mr. Horowitz was describing for you?
>
> A: It offered a higher—a much higher probability of an accelerated payout to the investor.

(1/19/2011 Cohen Invest. Tr., Div. Ex. 636, at 37:11-15).

Horowitz told Cohen that he had a "hedge fund" client, who wanted to invest in stranger-owned variable annuities on a short-term basis. (1/19/2011 Cohen Invest. Tr., Div. Ex. 636 at 61-62). Horowitz told Cohen that Horowitz or his associates would supply Cohen with the customers and the hospice patient annuitants, while Cohen would serve as the registered

---

[9] Before undertaking to sell any variable annuities to BDL (through the nominee trusts), and on or about December 24, 2007, Cohen first sent his Woodbury Customer Account Packet (which included the Annuity Point of Sale form) to Respondent Horowitz (who was associated with Morgan Stanley, and has never been associated with Woodbury). (Div. Ex. 283). Cohen has previously testified that he "doesn't know why" he sent the Woodbury Customer Account Packet (Div. Ex. 283) to Horowitz and that he assumes Horowitz wanted to "review these documents." (1/19/2011 Cohen Invest. Tr., Div. Ex. 636, at 157:9-14). But Cohen's transmission of his Woodbury point of sale documents to Horowitz admits of only one real conclusion: Horowitz wanted to gain an understanding of Woodbury's principal review process and determine whether Woodbury asked the same investment time horizon questions as had Morgan Stanley. Having lied previously in order to obtain principal approval of the stranger-owned annuities he sold through Morgan Stanley, Horowitz knew that Cohen would have to provide similarly false investment access information in order to obtain Woodbury principal approval and avoid detection.

representative on the sale of stranger-owned variable annuities sales. (1/19/2011 Cohen Invest. Tr., Div. Ex. 636 at 82-83). In exchange, Cohen would pay Horowitz's associates a "consulting fee." (1/19/2011 Cohen Invest. Tr., Div. Ex. 636, at 82-86).

2. Cohen licenses the "strategy" from Horowitz

Cohen agreed to "license" the stranger-owned annuities strategy from Horowitz ("...Michael Horowitz sold us his initial concept with a licensing right in return for a monthly structure fee") (Cohen Ex. 717, p. 4). Cohen began negotiating a consulting agreement with Horowitz and Horowitz's business partners, Abe and Asher Gottesman. (Div. Ex. 280; 1/19/2011 Cohen Invest. Tr., Div. Ex. 636, at 82-86). The consulting agreement was never finalized, but in its last iteration Cohen was to pay a bi-weekly fee of $2,500,000. (Div. Ex. 280).[10]

3. BDL Group creates purported "family trusts" to serve as the nominal purchasers of annuities from Cohen

In anticipation of purchasing stranger-owned annuities through Cohen, Feder arranged to have purported family trusts established for several of the nominees. (*See, e.g.,* Div. Ex.'s 366, 380, and 458). These included the "Daniel Zeidman Trust," (created on February 4, 2008), the Esther Zeidman Trust" (created on February 4, 2008), the "Richard Jedwab Trust" (created on January 15, 2008), the "Marilyn Jedwab Trust" (created on January 15, 2008), and the "Bina Levy Trust" (created on January 18, 2008).[11] The family trusts were the ostensible purchasers of

[10] Cohen never paid Horowitz, the Gottesmans (or an entity they created to facilitate the consulting arrangement called "AM Consulting, Inc.") monies pursuant to the contemplated consulting arrangement. Cohen was terminated by Woodbury Financial shortly after he began selling the annuities, and Woodbury held back a portion of Cohen's sales commissions. Cohen kept the portion that was paid out to him. Cohen is presently seeking to recover the balance of his commissions from Woodbury in a FINRA arbitration.

[11] The Bina Levy Trust trustee is Isaac Levy (Div. Ex. 628 at 185); the Richard Jedwab Trust trustee is Marilyn Jedwab (Div. Ex. 628 at 338); the Marilyn Jedwab Trust trustee is Richard Jedwab (Div. Ex. 628 at 70); the Daniel Zeidman Trust trustee is Esther Zeidman (Div. Ex. 628 at 581); and the Esther Zeidman Trust trustee is Daniel Zeidman (Div. Ex. 628 at 510).

all of the annuities Respondent Cohen sold (see Chart of Contracts Sold, Attachment A; see Div. Ex. 621). In reality, they functioned as mere conduits for BDL Group's funding of, and receipt of proceeds from, the variable annuities. None of the trusts had an independent trust *res*, or any assets not belonging to BDL Group. (5/12/2011 Feder Invest. Tr., Div. Ex. 640, at 335-336). Put otherwise, each trust functioned as a kind of pass-through entity for BDL Group. Bank accounts were established for the trusts, and as soon as Feder wired funds from BDL Group into a trust bank account, the trustee (a BDL nominee) wired out the funds again to purchase the annuities. (5/12/2011 Feder Invest. Tr., Div. Ex. 640, at 387-391).

Feder has previously testified concerning the relationship between the purported family trusts and BDL:

> Q: [] Did you understand that the trusts were effectively nominees for BDL once they were created?
> A: Yes.
> Q: Okay. And were any of these preexisting trusts, any of the trusts that invested in the annuities? Had any of them been family trusts that had been longstanding?
> A: No. They were—I believe they were all new trusts.
> Q: Okay. And to the extent the trusts were funded, were they funded with BDL's money? Trust accounts?
> A: Yes.
> Q: And ultimately Platinum and/or Centurion's money?
> A: Yes—well, yes.
> Q: ....And to the extent trusts became purchasers of the annuities, the same process was in place? To the extent they got payouts, the trusts got payouts, on an annuity, they would turn that money over to BDL?
> A: Correct.
> Q: ....Were any of the nominees planning their estates by virtue of these investments?
> A: No.
> Q: In fact, did the nominees have any right or entitlement to any of the proceeds flowing from these [annuities] investments?
> A: No.

(5/12/2011 Feder Invest. Tr., Div. Ex. 640, at 335:17-336:5; 336:7-11; 479:3-9).

According to Feder, the "brokers" recommended that he use family trusts, as opposed to individual nominees, to purchase the annuities from Cohen. (5/12/2011 Feder Invest. Tr., Div. Ex. 640, at 333:7-22). In fact, as Cohen knew, the trusts were created and used to purchase the annuities to ensure that all of the annuity contracts were rendered "annuitant" driven—meaning that the death of the designated annuitant (as opposed to the contract owner) triggered the death benefit payout[12]:

> Q: Are you telling us that trusts were used to insure that the death of the annuitant would trigger the payout under the terms of the contract?
> A: Correct.
> Q: And that would in anticipation of circumstances where the contracts would otherwise be owner driven, where the death of the owner would be necessary to trigger a payout?
> A: If that's the difference—I don't remember which is which, but typically yes, there's a difference between the two.

(1/19/2011 Cohen Invest. Tr., Div. Ex. 636, at 88:18-89:3).

4. Cohen's Efforts to Determine Insurance Company "Red Flag" Limits

In early January 2008 Cohen also began calling various insurance companies to determine whether their products could be exploited using the stranger-owned annuities strategy. (See, *e.g.*, Div. Exhibits 334, 287, 1/19/2011 Cohen Invest. Tr., Div. Ex. 636, at 211:4-215:5). Among other things, Cohen wanted to know how: (i) how much could be invested in an annuity without triggering health underwriting or heightened review of an annuity application; (ii) whether the commissions Cohen anticipated earning could be "clawed back" by the insurance company if the annuitant died within one year of issuance; (iii) what the surrender charge period was; (iv) and if the annuity was "owner driven," what kind of trust was needed to render it

[12] An "owner driven" annuity is one in which the owner (if a natural person) is automatically designated as the annuitant, and accordingly, only the death of the owner (and not some third party) triggers a death benefit payout. Owner driven annuities can be rendered "annuitant" driven where a non-natural entity (such as a family trust) is the owner of the contract (necessitating the designation of a natural person as the annuitant).

"annuitant driven." (Div. Ex. 287 & 288; 1/19/2011 Cohen Invest. Tr., Div. Ex. 636, at 211:4-215:5).

One of the companies that Cohen contacted was Penn Mutual Life Insurance Company ("Penn Mutual"). Cohen contacted Penn Mutual in early January 2008 to ask about the company's investment limits and to determine what amounts would raise "red flags." (Div. Ex. 334). The wholesaler who spoke with Cohen was suspicious enough about Cohen's intentions that she contacted Penn Mutual's compliance department and Cohen's name was flagged.

One month later, on Friday February 8, 2008, Penn mutual received a fax consisting of two $4.9 million variable annuity applications (one for the Daniel Zeidman Trust, the other for the Esther Zeidman trust). (Div. Ex. 334). The applications were not signed by the owners, and furthermore that it was apparent from reviewing the materials that no Woodbury principal had approved the sales as suitable. Additionally, Cohen was not appointed with Penn Mutual when he submitted the paperwork. (Div. Exhibit 334, Division Ex. 374). Penn Mutual rejected the applications and returned the $9.8 million that had been wired into its accounts for the investment.[13]

5. The January 12, 2008 Conference Call with BDL and Platinum

Cohen prepared a spreadsheet reflecting his research into which insurance companies' variable annuities products could be exploited using the stranger-owned annuities strategy. (Div. Ex. 288; See Also Div. Ex.'s 396, 397). The spreadsheet identified various components of the annuities Cohen had identified (surrender charge, commission rollback, etc.) and included a column entitled "$1 million investment and Death in 60 Days." (Div. Ex. 288). This same

[13] The events are also notable because, in its annuity application, Penn Mutual specifically required Cohen to provide the "anticipated holding period" for the annuity being purchase. Cohen falsely represented that the Daniel Zeidman Trust intended to hold the annuity for "10+" years. (Div. Ex. 334 at bates page WFS-SEC (MHO10840) 00766).

column provided a number of hypothetical returns on the annuity depending upon market performance. According to Cohen, the contemplated "death" referred to in this column is the death of the hospice patient-annuitant. (1/19/2011 Cohen Invest. Tr., Div. Ex. 636, at 218:14-219:3).

On January 12, 2008, Cohen participated in a conference call with Horowitz, Feder and Mark Nordlicht (who headed the Platinum fund—one of the two principle investors in BDL). (5/12/2011 Feder Invest. Tr., Div. Ex. 640, at 322:9-18; Div. Ex. 396). The purpose of the call was to discuss which annuities Cohen would be able to sell to BDL (through its nominees). (5/12/2011 Feder Invest. Tr., Div. Ex. 640, at 318:7-18). According to Feder, Nordlicht was on the call because he was the one who had authority to determine which annuities BDL should invest in. (5/12/2011 Feder Invest. Tr., Div. Ex. 640, at 326:20-327:5). With respect to the spreadsheet Cohen had prepared, Feder has previously testified as follows:

Q: Okay. The heading above it. One Million Investment and Death in 60 Days, was that effectively the business model that you and BDL were operating under at that point, that you were looking for annuitants who would trigger a death benefit payout within 60 days?

A: I mean, you're asking a God question. I mean, we don't know who's going to die in 60 days. So, I mean, like we would—

Q: I'm not suggesting that you knew with certainty…[] when someone was going to die, But was that what you were looking for?

A: We were looking for people who were going to—who were going to pass away quickly.

(5/12/2011 Feder Invest. Tr., Div. Ex. 640, at 342:1-9; 342:12-15).

Feder also confirmed that the brokers, including Cohen, were well aware of BDL's investment strategy:

Q: Okay. Was there any discussion of surrender charge period during the phone call that you had on the 12th with Mr. Cohen and others?

A: We might have spoken about it. But from our perspective, I don't know if we cared about the surrender charge.

Q: Okay. And again, why is that?

A: Because they were supposed to be short-term annuities.

Q: Okay. And the brokers understood that?
A: Yes.
Q: The brokers understood that the investment strategy was to get in and out as quickly as possible?
A: Yes.

(5/12/2011 Feder Invest. Tr., Div. Ex. 640, at 330:1-14).

6. Cohen's Understanding of BDL's Investment Strategy

Accordingly, as the foregoing chronology of events make clear, by mid-January 2008, Cohen understood: (i) that a hedge fund was his real client; (ii) that nominee trusts were being used by the hedge fund for use in purchasing the annuities to render any owner-drive annuities annuitant driven[14]; and (iii) that BDL had a short term investment strategy. *i.e.* it intended its nominee trusts to purchase variable annuities in which hospice patients were designated as the contract annuitants with the intent of triggering death benefit payouts on the contracts within months after their issuance.

7. Cohen Seeks Appointment With Multiple Annuity Issuers and Notifies Woodbury that he Anticipates Doing Over $50 Million in Variable Annuities Business in the First Quarter of 2008

In early to mid-January 2008 Cohen also sought appointment with a number of different insurance carriers, so that he could sell their variable annuities to BDL's nominees. (Div. Ex. 292; Div. Ex. 374). On January 18, 2008, he notified Woodbury that he anticipated doing over $50 million in variable annuities business in the first quarter of 2008:

[14] *See also* Cohen Ex. 717 at page 6 ("First quarter 2008, I started writing these VA's with the indirect investor behind Centurion LLP—A Billion dollar hedge fund...Feder-he was selected and hired by Centurion LLP as a go between and coordinator of the investors and the Hedge Fund. He would set up the trusts and assist in coordinating the signatures of each of the trustees...").

mcohen@uspny.net
01/18/2008 08:11 AM
Please respond to mcohen@uspny.net

To RobertE.Lee@hartfordlife.com
cc "Bill Feiler" <bill.feiler@woodburyfinancial.com>, "Walter White" <Walter.White@woodburyfinancial.com>, "Steven Smallidge" <steve.smallidge@woodburyfinancial.com>, "Marc Cohen" <mcohen@uspny.com>, "Mike frieda" <mfrieda@uspny.net>
Subject Re: Need Security Benefit Licensing to be executed immediately URGENT

Robert

I am planning on doing over 50 million of variable annuities business in the 1st quarter. I need you to process the appointment paperwork without delay immediately. Woodbury is a great Independent company and they should honor what is preached even if it means that the Hartford product might not be used. I have a competitor right behind me and do not want to lose the business due to some leg dragging on anyones part. In order for me to continue my association with Woodbury, I need you to process all appointments with companies requested immediately.

If you have any questions, feel free to call or email me. Next week is my only shot to sit with this client and I expect to leave the appointment with applications not empty handed and redfaced.

Looking forward to you undoing your phone calls requesting a stop to my appointments.

(Excerpt, Div. Ex. 292)

Steve Smallidge, then Woodbury's Director of IMO and National Sales Director, attempted to reach Mike Frieda, Cohen's business partner and IMO principal seeking additional information concerning Cohen's business, but was unable to reach him because Frieda was out of the office for a surgery. (Div. Ex. 374). Cohen himself never disclosed to Smallidge or any Woodbury Compliance personnel that the "$50 million" in anticipated business would be stranger-owned annuities purchased by nominees for BDL. (Div. Ex. 374).

8. Woodbury's Variable Annuities Sales Procedures

As was the case for Respondent Horowitz at Morgan Stanley, Cohen's variable annuities sales at Woodbury were subject to home office supervisory review to ensure that each proposed sale was suitable and that the investment was being used for its intended purpose. (3/24/2011 Smallidge Invest. Tr., Div. Ex. 643, at 11:22-12:20).

For each annuity he sold, Cohen was required to complete and submit certain documents to Woodbury's home office, so that a suitability review could be conducted, and so that Woodbury's back office could collect and maintain the requisite books and records reflecting

each annuity sale. (3/24/2011 Smallidge Invest. Tr., Div. Ex. 643, at 10:22-11:9). The documents Cohen was required to complete included: 1) a "New Account Form" (if a new customer was purchasing the annuity); 2) a "Point of Sale—Annuity" Form (to be completed with respect to each variable annuity sale; and 3) the annuity application (which was a company-specific document). (*See, e.g.* Div. Exhibit 283; 3/24/2011 Smallidge Invest. Tr., Div. Ex. 643, at 12:1-12). Woodbury required the signature of both the purchasing customer and the selling representative on its New Account and Point of Sale-Annuity forms.[15]

Woodbury's Compliance Manual (Section 11.0) (Div. Ex. 618) provided the following instructions to Woodbury registered representatives concerning securities transactions:

> **11.0 Processing and Submitting Business**
>
> Once a prospective customer has decided to proceed with a purchase, your role is to provide complete, pertinent and accurate information about the prospective customer to the Home Office, so we can effectively perform our suitability functions. If information which could affect the decision process (e.g., income, health conditions, tax status, age, insurance need, ability to pay etc.), were to be withheld or misrepresented, it would be considered unacceptable, irresponsible conduct on your part. It would not only cast doubt on the specific purchase in question, but also raise serious issues about the credibility of past and future applications submitted by you. **Any alterations, changes, additions, deletions, etc. in the application or accompanying paperwork, must be signed by the applicant or a new form completed and signed.**

Woodbury's Compliance Manual (Section 11.5-Sales Transaction) also provided the following instructions to representatives concerning home office suitability review:

> All product applications and payments must be sent directly to Woodbury within 24 hours of receipt and not to the product manufacturers. Woodbury must conduct its suitability review and approve the sale before the business (application, paperwork and funds) can be processed.

(Division Ex. 618 at bates page WFS-SEC(MHO10840) 001605).[16]

[15] In his Answer to the OIP, Cohen admits that Woodbury required him to submit to Woodbury a Variable Annuity Point of Sale form for each annuity he sold: "Mr. Cohen admits that each Variable Annuity sold through his Broker Dealer required a "Variable Annuity Point of Sale" form to be submitted to the Broker Dealer." Answer, ¶ 98.

[16] In certain circumstances, Woodbury did allow representatives to submit business simultaneously to the issuer and to Woodbury's home office. One such instance was annuity business submitted to Hartford Life Ins. Co. Hartford

Cohen has previously acknowledged in testimony that he had an obligation to submit these forms to Woodbury's home office for principal/suitability review:

> Q: So with respect to the new account form and the point of sale form, those forms were submitted to Woodbury?
> A: The new account form and the annuity form?
> Q: And the point of sale annuity form?
> A: Just wanted to make sure I had the right one. Yes, in every case.
> Q: ...And what was the purpose of sending the new account form or the point of sale form to Woodbury? What did Woodbury do with those documents?
> A: They typically do their due diligence and compliance review.
> Q: Did that include a suitability review with respect to the annuity transactions?
> A: This is a suitability review. I mean, at the point of—I believe a point of this packet or at least some of these products is to do the suitability review.
> Q: So that was conducted by a principal at Woodbury Financial?
> A: Yes.
> Q: ...And with respect to the annuity application itself, a copy of that was also sent to Woodbury along with the point of sale form and the account opening form?
> A: In every case.

(1/19/2011 Cohen Invest. Tr., Div. Ex. 636, at 162:17-23; 163:5-18; 164:15-19). Cohen also signed a certificate attesting that he had reviewed Woodbury's Compliance Manual ("I acknowledge that I have read, understood, and agree to abide by its requirements.") (Div. Ex. 612).

9. Woodbury's Annuity Investment Access Questions

Woodbury's Annuity Point of Sale form required Cohen to provide a variety of information concerning the proposed annuity sale to assist Woodbury in conducting its principal review. Section 4 of Woodbury's Point of Sale—Annuity form, which addresses the customer's

---

wholly owned Woodbury, and business submitted directly to Hartford from Woodbury representatives was routed back to Woodbury for suitability review.

anticipated investment access requirements, is excerpted below.

4. Investment Access
I anticipate that I will begin to access this investment: ☐ Never ☐ 0 - 5 years ☐ 6 - 10 years ☐ 11 - 15 years ☐ 15+ years ☐ after age 59½ I anticipate that I will access this investment during the surrender charge period: ☐ Free-out amount ☐ RMD ☐ Pre 59½ (I am aware of the 10% IRS penalty) ☐ Other: ____________
5. Surrender Charges/Sales Charge Structure
There is a surrender charge on this product of ______% in year one, decreasing to zero % in year ________.

As evidenced by the foregoing excerpt, Section 4 of the Annuity Point of Sale form required Cohen to provide two separate representations concerning investment access. First, Cohen was required to state when his customers anticipated that they would begin to access their annuity investment. Second, Cohen was required to identify any circumstances under which his customers anticipated accessing the annuity during the surrender charge period.[17] As part of their suitability review, Woodbury home office principals closely scrutinized the investment access information that their registered representatives provided to ensure that the customer would not need access to their annuity during the surrender charge period in the annuity being purchased.[18]

10. Cohen's Understanding of the Significance of the Investment Access Questions

Cohen understood the purpose and importance of these investment access questions, having acknowledged as much in his investigative testimony before Division staff. He also

[17] A "Free-Out amount" is a limited amount of money that can be withdrawn (typically) annually by the owner of an annuity without paying a contract penalty (surrender charge). But because there are tax penalties for individuals who withdraw monies from their annuity prior to age 59 ½ (regardless of whether there are surrender charges), withdrawals of "Free-Out" amounts are typically advantageous only to individual investors over age 59 ½. "RMD" refers to "required minimum distributions," which are withdrawals which the IRS requires individual investors to take beginning at age 70 ½.

[18] Item 5 on Woodbury's Annuity Point of Sale form (also set forth in the excerpt above) further required Cohen to set forth the surrender charge period in the annuity being purchased so that Woodbury's reviewing principals could compare that information to the customer's investment access expectations.

understood that his responses to the investment access questions would be scrutinized by Woodbury's home office principals in determining whether to approve the sales as suitable or not:

> Q: And turn to page 16 (of Div. Ex. 283), if you would, at the top of the page, investment access?
> A: Okay.
> Q: There are a couple of statements there that it looks like the broker's required to complete.
> A: Okay.
> Q: Is that correct?
> A: Yes.
> Q: The first is a representation that I anticipate I will begin to access [sic] the investment and various options are given. What did you understand the purpose of that statement or question to be?
> A: ***The purpose of it is to make sure I don't sell a person an annuity*** because, again, this is a point of sale annuity form ***with a short-term time horizon and expectation. And all of a sudden now find out, hey, I wanted to invest for a year and now I'm still in this seven-year annuity.*** This is part of the due diligence to protect the client.
> Q: I see. And when you say now I'm stuck in a seven year annuity or you used the term sever year, are referring to the surrender charge period in your example that the annuity would have?
> A: Yes.
> Q: ***You wouldn't want to put someone with a short-term investment time horizon in an annuity with a seven-year surrender charge; is that what you're saying?***
> A: ***Yes.***
> Q: ***Is that something that would be looked at by the principal at Woodbury in processing and approving the transaction?***
> A: ***Correct.***
> Q: The second question appears to relate to our discussion as well, but I want to give you an opportunity to comment on that. It says—or the second statement I should say—I anticipate that I will access this investment during the surrender charge period.
> A: Okay.
> Q: What is the purpose of that statement there?
> A: As far as liquidity. Because there are different possibilities to pull money out of the product without paying a surrender charge.
> Q: Is that something that would have been looked at by the principal of the broker-dealer as well?
> A: I would assume.
> Q: And item number 5 is surrender charges/sales charge structure. Do you see that?
> A: Okay?

Q: Were you required to on each point of sale form that you submitted state what the surrender charge was and how long the surrender charge period lasted?
A: Yes.
Q: And what was the purpose of providing that information to Woodbury?
A: It was to make sure that the investor was aware what the surrender charge period was….
Q: [This is] something that Woodbury would review as part of processing the point of sale form?
A: Yes.
Q: And reviewing it?
A: Yes.
Q: In order to assess whether the investor in [a] variable annuity had an appropriate time horizon, they would need to know what the surrender charge period is?
A: Yes.

(1/19/2011 Cohen Invest. Tr., Inv. Ex. 636, at 166:14-169:11 (emphasis added)).

C. COHEN FALSIFIES AT LEAST TWENTY-EIGHT ANNUITY POINT OF SALE FORMS IN ORDER TO OBTAIN WOODBURY PRINCIPAL APPROVAL AND AVOID DETECTION OF HIS STRANGER-OWNED ANNUITIES SALES

Between late January 2008 and mid-February 2008, Cohen, while an associated person of Woodbury, sold at least 28 deferred variable annuities contracts to nominees of BDL, utilizing the deferred variable annuity products of at least 7 different insurance companies.[19] Collectively, these nominees purchased approximately $40 million in variable annuities. (Div. Exhibits 621, 628-634).

In each of the annuities he sold, Cohen and BDL designated a hospice or nursing home patient as the contract annuitant, utilizing patient ID and Health Data supplied to Cohen by Horowitz's associates (the Gottesmans, who, in turn, had received the data from settling respondents Mark Berger and Debra Flowers). (Div. Exhibits 621, 628-634). Accordingly, Cohen knew that the annuities were being purchased with the intention of using them as vehicles for short-term investment.

[19] The issuers were Hartford, Met Life, SunLife, ING, AIG SunAmerica, Security Benefit and Genworth. (See Div. Ex's 621, 628-634; *See also* Chart of Contracts Sold, Attachment A.)

1. Cohen Provides False Investment Access Information on Each Point of Sale Form He Submits to Woodbury

Each of the variable annuity products that Cohen sold had a surrender charge period of at least 7 years.[20] Knowing that Woodbury would not approve his variable annuity sales if he provided truthful investment access information for BDL and its nominees (see Cohen's own testimony on this issue, in Section III.B.10. above), Cohen provided false investment access information on each of the 28 Woodbury "Annuity-Point of Sale" forms that he completed. (Div. Exhibit 621; *See also* Chart of Contracts Sold, Attachment A).

By way of example, a portion of Div. Ex. 284 is excerpted below. This excerpt reflects the investment access information that Cohen provided to Woodbury for the Bina Levy Trust in connection with the trust's purchase of a Hartford variable annuity with a seven-year surrender charge period.

4. Investment Access
I anticipate that I will begin to access this investment: ☐ Never ☐ 0 - 5 years ☐ 6 - 10 years ☒ 11 - 15 years ☐ 15+ years ☐ after age 59½
I anticipate that I will access this investment during the surrender charge period: ☐ Free-out amount ☐ RMD ☐ Pre 59½ (I am aware of the 10% IRS penalty) ☐ Other: ________
5. Surrender Charges/Sales Charge Structure
There is a surrender charge on this product of 7 % in year one, decreasing to zero % in year 7.

Cohen provided identical responses to the Section 4 "Investment Access" questions on each of the 28 Annuity Point of Sale forms that he submitted to Woodbury for principal review. Put otherwise, for each point of sale form he completed, signed and submitted to Woodbury, Cohen:

- represented that his customers did not intend to begin accessing their annuity before "11 to 15 years" (which was outside the surrender charge period of all of the annuities purchased); and

[20] This fact is not in dispute, as Cohen admits in his Answer that each of the annuities he sold had a surrender charge period of at least seven years. Cohen Answer, ¶ 99.

- in response to the second question within Section 4—whether the customer anticipated accessing the investment during the surrender charge period—Cohen provided no response at all-thus representing that his customers **did not** intend to access the annuity within the surrender charge period. Cohen failed to provide any such response notwithstanding the fact that Woodbury provided an "Other" option via which Cohen could have disclosed that his clients intended to liquidate their investments through death benefit payouts within months after purchasing the annuities.

As the Division will demonstrate at the hearing in this matter (and has already been established by the investigative testimony of Feder, BDL's nominees, and by Cohen's own testimonial admissions) Cohen's responses were clearly false because BDL intended to utilize the annuities as short-term investments, and Cohen was fully aware that this was BDL's investment strategy.

2. Cohen Makes False Statements Concerning the Intended Use of the Annuities

Section 5 of Woodbury's Annuity Point of Sale form required Cohen to identify the reasons why his customers were purchasing the annuities. Among other reasons, Cohen selected "Tax deferred treatment of earnings." As Cohen knew, this was a false statement because BDL's nominees were purchasing the annuities to generate accelerated payouts, and not as any sort of tax shelter.

5. Surrender Charges/Sales Charge Structure

There is a surrender charge on this product of 7 % in year one, decreasing to zero % in year 7.

I am purchasing/replacing/exchanging for the following reason(s) *(Check all that apply)*:

☐ Potential for greater returns	☐ Lower expenses
☒ Death benefit features	☒ Participate in equities market
☒ Tax deferred treatment of earnings	☐ Principal protection
☐ Living benefits	☐ Guaranteed withdrawal benefits
☒ Multiple fund managers	☐ Annuitization options
☐ Specific fund selections	☐ Current crediting rate
☒ Bonus feature	☐ Protection from index decline
☐ Other: ______	

3. Cohen Makes False Statements Concerning the Source of Funds Used To Purchase the Annuities

Section 7 Woodbury's Annuity Point of Sale form required Cohen to disclose the source of funds being used to purchase each annuity. (Div. Ex. 283). In response to this question,

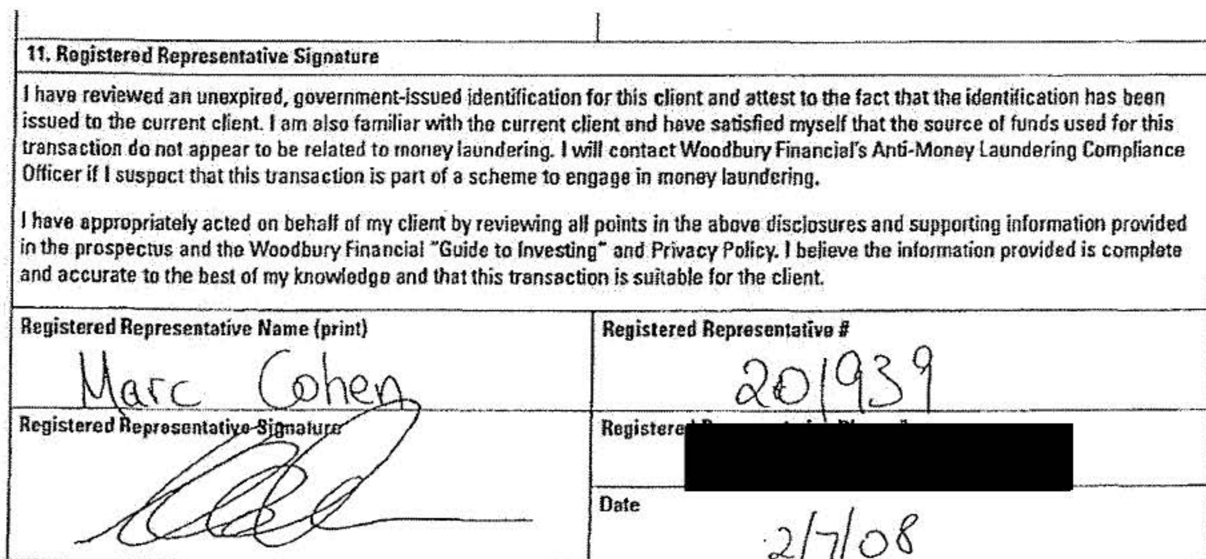
Cohen indicated that the source of funds was the "Trust" purchasing the annuity, rather than disclosing that BDL was in fact funding the investment (excerpt from Div. Ex. 461 below).

7. Source of Funds	
The following sources DO NOT require Section 8 to be completed unless investments were liquidated in the last 30 days. ☒ Cash/Checking/Savings/CD ☐ Legal Settlement/QDRO ☐ Inheritance/Gift ☒ Other: Trust	The following sources REQUIRE Section 8 to be completed ☐ Sales of Stocks/Bonds ☐ Sale of existing Mutual Fund ☐ Sale of Annuity ☐ Life Insurance replacement ☐ Retirement plan distribution/rollover (401k, 403b etc.) ☐ Other:

In reality, as Cohen knew, or was reckless in not knowing, none of the trusts had any independent trust *res*, net worth, or annual income. Instead, each trust functioned as a kind of pass-through entity for BDL Group.

4. Cohen Falsely Certifies That He is Familiar with His Purported Clients and that All of the Information He Was Providing Was True and Accurate

With respect to each Woodbury Annuity Point of Sale form he completed, Cohen was required to make the following certification:



11. Registered Representative Signature

I have reviewed an unexpired, government-issued identification for this client and attest to the fact that the identification has been issued to the current client. I am also familiar with the current client and have satisfied myself that the source of funds used for this transaction do not appear to be related to money laundering. I will contact Woodbury Financial's Anti-Money Laundering Compliance Officer if I suspect that this transaction is part of a scheme to engage in money laundering.

I have appropriately acted on behalf of my client by reviewing all points in the above disclosures and supporting information provided in the prospectus and the Woodbury Financial "Guide to Investing" and Privacy Policy. I believe the information provided is complete and accurate to the best of my knowledge and that this transaction is suitable for the client.

Registered Representative Name (print)	Registered Representative #
Marc Cohen	20939
Registered Representative Signature	Registere[redacted]
	Date 2/7/08

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Cohen's certifications were false because: (i) he had not met with the trustees of the purported family trusts and was not familiar his purported clients; and (ii) because Cohen knew

that the investment access and source of funds information he was providing was false, and that the his responses were designed to avoid detection of his stranger-owned annuities sales.

BDL nominees have testified that they never had any interaction with Cohen and didn't even know who he was. By way of example, Daniel Zeidman, a BDL nominee and purported trustee of the Esther Zeidman Trust (which ostensibly purchased 8 variable annuities through Cohen), has previously testified as follows:

> Q: Are you familiar with an entity known as Woodbury Financial Services?
> A: No.
> Q: Do you know an individual by the name of Marc Cohen?
> A: Only from preparatory.
> Q: You mean only through discussions with your counsel in preparation for your testimony today?
> A: Yes.
> Q: Are you aware of ever having communicated in any way with Mr. Cohen?
> A: No.
> Q: Are you aware that you or your wife have ever signed any account opening documents with Woodbury Financial Services?
> A: No.
> Q: ...Just so the record is clear, did you sign any papers in the presence of Mr. Cohen?
> A: Of Mr. Cohen? I don't know who Mr. Cohen is.

(6/14/2011 D. Zeidman Invest. Tr., Div. Ex. 658, at 78:5-20; 80:11-13; *See also* Div. Ex.'s 460 and 461).

Richard Jewab, a BDL nominee and purported trustee of the Marilyn Jedwab Trust (which ostensibly purchased 3 annuities through Cohen) has offered similar testimony:

> Q: Ever speak with an individual named Mark[sic] Cohen?
> A: No.
> Q: ...Did you ever meet with Mark Cohen?
> A: No.
> Q: ...Okay. And I take it...[] that an individual named Mark Cohen never met with you, in New Jersey, to have you sign paperwork associated with these annuities investments?
> A: As I said, not only I never met him, I don't know the name, it's the first that I've even heard that name, here today.

(3/28/2011 R. Jedwab Invest. Tr., Div. Ex. 644, at 66:23-25; 70:8-9; 82:14-21).

5. Woodbury would have rejected Cohen's annuities sales if Cohen had provided truthful responses on his Annuity Point of Sale forms

By (i) providing false investment access information for BDL's nominees; (ii) failing to disclose that BDL's nominees intended to access their annuities well within the surrender charge period; (iii) failing to properly disclose that BDL was the source of funds for each of the annuities being purchased; and (iv) by falsely attesting that he was familiar with his purported clients (who have separately testified they never met or spoke with Cohen), Cohen was able to fraudulently obtain principal approval of his stranger-owned annuities sales.

If Cohen had provided truthful investment access information (*i.e.*, if he had indicated that BDL's nominees intended to access their investment within the surrender charge period and within "0-5 years") Woodbury would have rejected the sales as unsuitable or, at a minimum, further inquired into the nature of the sales, because each of the annuities being purchased had a surrender charge period of at least seven (7) years. (See discussion in Sections B.8 to B.10, *above*).

Furthermore, if Woodbury had learned that Cohen was attempting to sell stranger-owned annuities, or that a hedge fund was behind the investments, it would similarly have rejected the business that Cohen submitted. Tim Stone, then chief compliance specialist for Woodbury's IMO channel, has previously testified as follows:

> Q: Did Mr. Cohen consult with you or to your knowledge anyone else in Woodbury's Compliance Department on any issues pertaining to the annuities business that he submitted before he submitted that business?
>
> A: The only communication that anyone had was just his phone calls with [Steve Smallidge, head of Woodbury's Independent Marketing Organization business channel] about what he called his "success stories" that he was going to process, but he would give any information other than he was hanging out with Leonard Nimoy and other celebrities, big players that were going to introduce him to these people.

In addition, he did call our Sales Review Department right before he submitted the business. He wanted to give them a head's up that he was going to be processing all these giant cases, and he didn't want them to be held up at all.

--

Q: Did Mr. Cohen disclose to you at any point or to your knowledge anyone at Woodbury during the course of your investigation or prior to submitting the business, that his clients were purchasing the annuities not as long term investment vehicles, but instead as vehicles for short term gains?

A: No.

Q: Did he disclose to you or to your knowledge anyone at Woodbury prior to submitting the business or at any point during your investigation that his clients were seeking to realize short term investment gains on the annuities by designating hospice or other terminally ill individuals as the contracts annuitants, with the expectation of triggering the death benefit provisions in those annuity contracts?

A: No.

Q: If Mr. Cohen had come to you prior to submitting the business and disclosed this strategy, what would you have done?

A: I would have told him he could not do it.

Q: Why is that?

A: It's essentially creating a constructive viatical.

Q: Woodbury already had prohibitions on viatical settlements in place?

A: Yes.

--

Q: If Mr. Cohen had come to Woodbury's Compliance Department, specifically to you, prior to submitting the business or contemporaneous with submitting the business, and disclosed to you that it was a hedge fund that was utilizing the strategy and funding these investments, what would you have done?

A: Told him we weren't going to allow the business or reverse any business that would have come in.

Q: Is that for the reasons you have already described for us, or are there additional reasons?

A: There are additional reasons.

Q: Can you describe those reasons for us?

A: With the hedge fund set up, we weren't comfortable doing business with hedge funds because there is not enough transparency. We don't know who is behind it, who the end customer is. A lot of times the customers don't know what investments are being made. We always wanted to keep a clear separation between hedge fund money and the broker-dealer world.

Q: Just to clarify, if a hedge fund had approached Woodbury and wanted to purchase a variable annuity, not even with this strategy that we have been discussing, just purely wanting to purchase a variable annuity, would you also have rejected that business?

A: If we knew it was a hedge fund, yes.

(4/6/2011 Stone Invest. Tr., Div. Ex. 641, at 78:3-19; 79:9-80:6; 81:24-83:1).

D. COHEN REPEATEDLY LIES TO WOODBURY ABOUT HIS ANNUITIES SALES, REFUSES TO COOPERATE WITH WOODBURY'S INVESTIGATION INTO THE SALES, AND REMOVES DOCUMENTS FROM HIS OFFICE BEFORE WOODBURY COMPLIANCE PERSONNEL ARRIVE

1. The Call from Penn Mutual

On February 12, 2008 Tim Stone of Woodbury's Compliance Department was contacted by Jay Baker, who then headed Penn Mutual's Market Conduct department (see discussion in Section III.B.4., *supra*). Baker relayed to Stone the facts surrounding Cohen's submission of annuity applications to Penn Mutual, including Penn Mutual's determination that: (i) the amounts to be invested ($4.9 million each) were immediately below Penn Mutual's "red flag" limit; (ii) the annuity applications had been faxed directly to the company by Cohen and had not gone through Woodbury suitability review; and (iii) one of the annuitants appeared to be living in a "skilled nursing facility" and was most likely ill. (Div. Ex. 374).

2. Woodbury Pulls Cohen's Business and Takes Steps to Stop any Additional Annuities Sales

Woodbury's Compliance department immediately pulled and examined the new account paperwork and annuity applications that Cohen had submitted over the course of the preceding three weeks. (Div. Ex. 374). Woodbury quickly determined that the annuitants were unrelated to the trusts (or the trustees of the trusts) and a background check reflected that the annuitants lived in economically depressed areas. Investigators working with Woodbury were subsequently able to determine the annuitants all lived in nursing homes or hospice facilities and that they had terminal medical diagnoses. (Div. Ex. 374). Woodbury took immediate action to stop any additional annuities business, contacted the annuity carriers through whom Cohen had sold annuities to date, and placed a hold on Cohen's commissions. (Div. Ex. 374).

3. Woodbury Attempts to Obtain Details of the Transactions from Cohen; Cohen misleads Woodbury and Refuses to Cooperate

On Feburary 13, 2008, Steve Smallidge spoke with Cohen and attempted to obtain an explanation from Cohen as to the transactions. (Div. Ex. 335; Div. Ex. 374). Cohen told Smallidge that the annuities sales did not involve "market timing and the intent its tax deferral and wealth preservation," and further, that the annuities were purchased for "estate planning purposes." (Div. Ex. 335). As Cohen well knew, these were false statements because BDL had purchased the annuities through its nominees, intending to utilize the annuities as vehicles for short term investment gains.

On February 19, 2008, Cohen emailed Smallidge, rebuffing Smallidge's requests for complete copies of the family trusts that had purchased the annuities through Cohen. Cohen asserted that his customers were "Wealthy individuals" who "set up trusts as an added layer of privacy." Cohen reiterated that "These are legitimate clients and law abiding citizens with nothing to hide but their right to properly plan their estate." Cohen email to Smallidge (Div. Ex. 336) is excerpted below:

"Marc Y Cohen" <mcohen@uspny.net>
02/19/2008 01:57 PM

To <Steve.Smallidge@woodburyfinancial.com>
cc "Marc Y Cohen" <mcohen@uspny.net>
Subject RE: Request for Information

Steve,

Hope all is well. I have spoken to the Attorney that referred us to these very wealthy and influential clients and he was adamant in not sending us the complete trusts that you requested. I would love to help on this matter, so please help me with a letter or something of substance in order for him to soften his stance. His response was that Wealthy individuals set up trusts as an added layer of privacy and he felt that WFS should not need the complete trusts in order abide by the "Know your Customer Rule". These clients are legitimate and law abiding citizens with nothing to hide but their right to properly plan their estate.

Please assist in this and help me help you in satisfying WFS's request for info.

Sincerely,

Marc

(Excerpt, Div. Ex. 336).

4. Cohen Resigns and Abandons His Office

On February 20, 2008, Cohen emailed Woobury's President, Walter White, along with Smallidge, indicating he was resigning his registration with Woodbury. (Div. Ex. 374; Div. Ex. 337). On February 21, 2008, Stone, together with an investigator from the Hartford, travelled to US Planning's offices in Manhattan, in an attempt to meet with Cohen. When they arrived, they were notified by Cohen's US Planning business partners (Mike Frieda and Fredda Elzwig), that Cohen had cleaned out his office, submitted his resignation, and left the office, along with his assistant. (Div. Ex. 374). Another call to Cohen was attempted; Cohen indicated he had resigned and would not talk further, unless his remaining sales commissions were released by Woodbury. (Div. Ex. 374). Woodbury terminated Cohen's registration on February 25, 2008. (Div. Ex. 374)

E. COHEN'S ILL-GOTTEN GAINS

Cohen was paid at least $766,958.00 in sales commissions by the insurance companies which unwittingly issued stranger-owned annuities to BDL's nominees. (Div. Ex. 304). In a separate arbitration instituted by Cohen against Woodbury, Cohen contends Woodbury improperly withheld an additional $1,444,758.88 in sales commissions to which he is entitled. (Div. Ex. 305).

V. <u>ARGUMENT</u>

A. COHEN VIOLATED THE ANTI-FRAUD PROVISIONS OF THE SECURITIES LAWS

Securities Act Section 17(a) prohibits fraud "in the offer or sale" of securities and Exchange Act Section 10(b) and Rule 10b-5 thereunder prohibit fraud "in connection with the purchase or sale" of any security. The Supreme Court has noted that "in" and "in connection with" have been used interchangeably both by the Court and by Congress, thus implying that

Section 17(a) is as broad as Section 10(b). *See United States v. Naftalin*, 441 U.S. 768, 773 n.4 (1979); *see also SEC v. Wolfson*, 539 F.3d 1249, 1263-64 (10th Cir. 2008). It is well-settled that a variable annuity is a "security" within the meaning of the federal securities laws. *SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 67-73 (1959); *Daniels-Hall v. Nat'l Educ. Ass'n.*, 629 F.3d 992, 1006 (9th Cir. 2010); *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 109 (2d Cir. 2001).

Securities Act Section 17(a)(2) and Exchange Act Section 10(b) and Rule 10b-5(b) thereunder proscribe untrue statements of material fact or omissions of material facts necessary to make statements made not misleading. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). Securities Act Section 17(a)(1) and Exchange Act Section 10(b) and Rules 10b-5(a) and (c) thereunder proscribe schemes to defraud. To establish scheme liability, courts generally require that the defendant commit a deceptive or fraudulent act or orchestrate a fraudulent scheme. *See, e.g., SEC v. Collins & Aikman Corp.*, 524 F. Supp. 2d 477, 485-6 (S.D.N.Y. 2007). A fraudulent statement can satisfy the deceptive act requirement. *See Cady, Roberts & Co.*, 40 SEC 907, 913 (1961) ("the three main subdivisions of [Securities Act] Section 17 and [Exchange Act] Rule 10b-5 have been considered to be mutually supporting rather than mutually exclusive").

Violations of Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 require scienter. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). Scienter is a "mental state embracing intent to deceive, manipulate, or defraud." *VanCook v. SEC*, 653 f.3d 130, 138 (2d Cir. 2011). Proof of reckless conduct or motive and opportunity to commit fraud establishes scienter. *SEC v. Aragon Capital Advisors, LLC*, No. 07 Civ. 919, 2011 WL 3278907, at *11 (S.D.N.Y. July 26, 2011). No finding of scienter is required to establish a

violation of Section 17(a)(2); negligence is sufficient. *See Aaron v. SEC*, 446 U.S. 680, 696-97 (1980).[21]

Cohen violated Securities Act Sections 17(a)(1) and (2) and Exchange Act Section 10(b) and Rules 10b-5(a), (b) and (c) thereunder by making materially false statements on the Woodbury "Annuity Point of Sale" forms that he signed and submitted to Woodbury for suitability review. Among other false statements, Cohen stated that each of his customers did not anticipate accessing their investments until within "11 to 15 years" (i.e., not during the surrender charge period). The false entries were material because if accurate investment access entries had been provided, the Woodbury's reviewing principals would have rejected the sales as unsuitable or, at a minimum, further inquired into the nature of the sales.[22] As a result of his fraudulent conduct, Cohen received hundreds of thousands of dollars in sales commissions.

1. Cohen acted with a high degree of scienter

Cohen acted with a high degree of scienter because the crux of the strategy involved turning long-term annuities into short-term investments. As Cohen well knew, if he provided

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[21] In determining whether a fraud occurred "in connection with" the purchase or sale of a security, the Supreme Court has explained that "the statute should be construed not technically and restrictively, but flexibly to effectuate its remedial purpose." *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (internal quotations and citations omitted). The "in connection with" element requires only that there be "deceptive practices touching" the purchase or sale of securities. *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12-13 (1971); *Arrington v. Merrill Lynch, Pierce, Fenner & Smith*, 651 F.2d 615, 619 (9th Cir. 1981) ("When there is a sale of a security and fraud touches the sale, there is redress under Section 10(b)...It does not matter that the fraud is not of the garden variety associated with securities sales.") (internal quotations omitted).

[22] The fact that Cohen made the false statements to his broker-dealer—Woodbury—who was reviewing the sales for suitability, as opposed to the insurance companies that ultimately issued the annuities, is no defense to liability. *See, e.g., SEC v. Czarnik*, 2010 WL 4860678 (S.D.N.Y. 2010) at * 4 (the language of the antifraud provisions "does not require that the fraud occur in any particular phase of the selling transaction...") (internal citations and quotations omitted); *SEC v. Greenstone Holdings*, 2012 WL 1038570 (S.D.N.Y. 2012) at *5 ("The fact that a statement is made in private—for example, to a transfer agent—rather than to the public does not foreclose a statement's materiality."). *See Also, Naftalin,* 441 U.S. at 776 ("the welfare of investors and financial intermediaries are inextricably linked—frauds perpetrated upon either business or investors can redound to the detriment of the other and to the economy as a whole").

truthful investment access information his responses would have been flagged by Woodbury in the suitability review process:

A: ***The purpose of*** [the first investment access question] ***is to make sure I don't sell a person an annuity*** because, again, this is a point of sale annuity form ***with a short-term time horizon and expectation. And all of a sudden now find out, hey, I wanted to invest for a year and now I'm still in this seven-year annuity.*** This is part of the due diligence to protect the client.
Q: I see. And when you say now I'm stuck in a seven year annuity or you used the term sever year, are referring to the surrender charge period in your example that the annuity would have?
A: Yes.
Q: ***You wouldn't want to put someone with a short-term investment time horizon in an annuity with a seven-year surrender charge; is that what you're saying?***
A: ***Yes.***
Q: ***Is that something that would be looked at by the principal at Woodbury in processing and approving the transaction?***
A: ***Correct.***

(1/19/2011 Cohen Invest. Tr., Div. Ex. 636, at 166:14-169:11 (emphasis added)).

2. Cohen has offered conflicting and ever-evolving explanations for his investment access responses

Cohen initially tells the staff he "doesn't know" the basis for his investment access responses

When first confronted by Division staff about his responses to the investment access questions, Cohen testified as follows:

Q: In response to the—or the statement, I anticipate that I will begin to access this investment in various time periods, you've selected 11 to 15 years?
A: Yes.
Q: What was the basis for that response?
A: **I don't know.** Again, you're assuming these annuitants are going to die. They're annuitants that are still alive. So typically a bonus annuities—hold on a second. I don't know. **I don't know what the basis is.**
Q: Did you complete this portion of the point of sale form which is at page 223?
A: I believe so.
Q: [Wasn't] the investment strategy to designate hospice patients with limited life expectancies in order to trigger payouts under the annuities under a short-term basis?
A: I wasn't playing God.

Q: ...Did the investors in this annuity, whether it be the hedge fund or the trust themselves, seek to designate hospice patients in an expectation that they would be able to realize payout...[on] the annuities on a short-term basis?

A: Perhaps that was their hope, but they were fully—hedge funds or these investors are sophisticated investors. You're not talking about someone putting in 100,000 or 200,000 in their annuity. They did due diligence on the concept. They were fully aware of this way before I was made aware of any of this.

Q: Did they invest in these annuities with the intention of holding them as long-term investments for retirement [purposes]?

A: With the hope or the expectation?

Q: With the expectation?

A: Perhaps they hoped people did—they did become liquid. At the end of the day, they were fully aware that they would have to hold these to maturity if they wanted to pull these out without a surrender charge.

Q: ....***Wasn't it the intention of the investors as part of this investment strategy to submit a payout claims form upon the death of the annuitants?***

A: I'm not going to speculate on the mind of the investor.

Q: Is that—as your customer, what was your understanding at the time? Was it their—

A: My customer? Yes and no. They had cases that they did not submit the death certificates immediately. I don't know. Did they hope the person died or perhaps did people die? ***Were they joyous, I don't think so, <u>but it was part of their overall investment strategy</u>.***

(1/19/2011 Cohen Invest. Tr., Div. Ex. 636, at 173:20-174:20; 174:25-175:21; 178:18-179:5) (emphasis added).

Cohen then tells the staff that his customers—the trustees—provided him with the investment access information

At another point in his investigative testimony, Cohen contended that his customers told him to provide the "11 to 15 years" investment access response:

Q: With respect to this investor, the [redacted] trust, was it your understanding at the time that you checked that box that it was a true statement?

A: If I was told that they—this is what they told me to answer, the 11 to 15 years. If you're the investor and you said, look, I anticipate to access this money in 10 to 15 years, I can rely on what you said.

(1/19/2011 Cohen Invest. Tr., Div. Ex. 636, at 177:16-24)

But Feder, BDL's principal, vigorously disputes that either he or any of BDL's nominees told Cohen how to complete Woodbury's Annuity Point of Sale forms. Feder has previously

testified that neither Respondents Horowitz or Cohen ever had any discussions with him about what representations the registered representatives would have to make concerning the length of time BDL (through its nominees) intended to hold the annuity contracts. (5/12/2011 Feder Invest. Tr., Div. Ex. 640, at 330:1-21). According to Feder, he instructed the nominees to sign blank documents and the registered representatives filled out the rest of the forms. (5/12/2011 Feder Invest. Tr., Div. Ex. 640, at 349:12-350:23). Indeed, when shown a completed copy of one of the Woodbury Annuity Point of Sale forms, Feder testified as follows:

> Q: Okay. Turn if you would, to the second page of that form, at the top of the page, question 4, Investment Access.
> A: All right.
> Q: Were you involved in preparing responses to the questions under number 4, Investment Access?
> A: No. I never asked that question to the nominees.
> Q: Okay. So you never put those questions to the nominees, and the nominees never provided responses to Mr. Cohen or anyone else who would have completed the form?
> A: No.
> Q: Okay. Did you separately provide a response to Mr. Cohen?
> A: No.
> Q: All right. The investment strategy[y], you've told us on a number of occasions over the past day and half, was to get in and out of these annuities on a short-term basis. Is that fair?
> A: Yes. Yes.
> Q: **Okay. The response given to this question, "I anticipate that I will begin to access this investment" is—they've selected the option "in 11 to 15 years." Is that accurate, in your opinion?**
> A: **No.**
> Q: **Okay. And why is it not accurate?**
> A: **Because we wanted them to be, I assume, from zero to five years.**

(5/12/2011 Feder Invest. Tr., Div. Ex. 640, at 382:2-383:3) (emphasis added).

Feder went on to characterize as "a hundred percent false" any contention by Cohen that either Feder or the nominees provided Cohen with the investment access responses for Section 4 of the Annuity Point of Sale form:

Q: Mr. Feder, I've shown you a couple of different exhibits which are variable annuity applications processed through Mar[c] Cohen and his broker dealer, Woodbury Financial. And specifically, I've directed you to the annuity point of sale forms that were completed and submitted with those annuity applications. And I've specifically direct you to item number 4, which is the length of time that the investor intends to hold the investment. And you have indicated that the response, 11 to 15 years, that's given there is in your opinion not accurate. To the extent that Mar[c] Cohen has testified that he got the information via which to respond to this question from you or from the nominees, is that testimony, in your opinion, accurate or correct?

A: A hundred percent false.

Q: **Okay. And just so the record's clear, you never told Mr. Cohen how to complete responses to section 4 of the Woodbury point of sale form?**

A: **No. And I don't even ever believe he spoke to the nominees. So if he said he got it from the nominees, I don't think he ever spoke to them.**

(5/12/2011 Feder Invest. Tr., Div. Ex. 640, at 406:3-23) (emphasis added).

Cohen now contends that Woodbury's investment access questions only embraced anticipated "withdrawals" of monies from the annuities

Now, after being sued by the Division for falsifying his annuity point of sale forms, Cohen apparently contends that the investment access questions in Section 4 pertain only to access through "*withdrawals*" from the annuity. Cohen Answer, ¶ 98. Presumably, Cohen means to suggest that the investment access questions don't address liquidation of the investment through the filing of a death benefit claim (under which circumstances a surrender charge typically would not be incurred). But the questions in Section 4 are simply not qualified in the way Cohen now proposes—instead they clearly seek information concerning any anticipated access to the investment (which would include liquidation of the investment by filing a death benefit claim).[23]

[23] Indeed, any contention by Cohen that the questions in Section 4 are designed to capture only instances where a surrender charge might be incurred is belied by the questions themselves. For instance, Section 4 requires a registered representative to disclose a client's intention to take advantage of any "Free Out" amount (*see* Footnote 17 above)—which is an amount the investor could withdraw without incurring a surrender charge.

Cohen should have disclosed his customers' investment strategy by checking the "Other" box in response to Question 2 in Section 4, and should have stated that his customers anticipated accessing their investment through the death benefit. Woodbury would not have allowed the sale of *any* stranger-owned annuities if they had understood what Cohen was doing.

In any event, even if the investment access questions in Section 4 were qualified in the way that Cohen contends that they are, his responses were still false, because BDL—a hedge fund—did not intend for its nominees to annuitize the contracts or otherwise take withdrawals from the annuities beginning in "11 to 15 years." As Cohen well knew, BDL intended to use the annuities as short term investment vehicles, and BDL's nominees ultimately surrendered certain contracts when the annuitant did not pass away in a "timely" manner.

B. COHEN CAUSED AND WILLFULLY AIDED AND ABETTED WOODBURY FINANCIAL'S BROKER-DEALER BOOKS AND RECORDS VIOLATIONS

Section 17(a) of the Exchange Act and the rules thereunder require a registered broker or dealer to make and keep current specific books and records relating to its business. Exchange Act Rule 17a-3(a)(6) requires that every registered broker or dealer make and keep a memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities showing the terms and conditions of the order or instructions. Implicit in these provisions is the requirement that information contained in a required record or report be accurate. *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Exchange Act Rel. No. 33367, 55 SEC Docket 1970 (Dec. 22, 1993). This requirement applies regardless whether the information entered itself is mandated. *See Sinclair v. SEC*, 444 F.2d 399, 401 (2d Cir. 1971); *In re James F. Novak,* Exchange Act Release No. 19660, 83 SEC Docket 1078 (Apr. 8, 1983).

To establish aiding and abetting liability, it is necessary to show (1) a securities law violation by a primary wrongdoer; (2) "substantial assistance" to the primary violator; and (3)

that the accused provided the requisite assistance with knowledge of the securities law violation. *See Howard*, 376 F.3d at 1143 (holding that extreme recklessness is sufficient).

Cohen knowingly or recklessly falsified his Woodbury point-of-sale forms to obtain approval of his variable annuities sales. Accordingly, Cohen aided and abetted and caused Woodbury's violations of Exchange Act Section 17(a) and Rule 17a-3(a)(6) thereunder.

C. THE COURT SHOULD ORDER DISGORGEMENT, PENALTIES AND OTHER EQUITABLE RELIEF

1. Cohen should disgorge at least $766,958.00 Plus Pre-Judgment Interest

Section 8A of the Securities Act and Section 21C of the Exchange Act authorize the Commission to require an accounting and disgorgement, including reasonable interest. 15 U.S.C. § 77h-1(e); 15 U.S.C. § 78u-3(e). As Courts have long recognized, wrongdoers should not be allowed to profit from their misconduct. *SEC v. First Jersey Sec., Inc.,*101 F.3d 1450, 1474 (2d Cir. 1996) ("The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws."). This principal is incorporated into the federal securities laws which provide that those who violate the federal securities laws, including the anti-fraud provisions, should disgorge their ill-gotten gain. 15 U.S.C. § 77h-1(e); 15 U.S.C. § 78u-3(e).[24] Thus, Cohen should disgorge the entirety of the profits from his fraud – at least $766,958.00 – plus any prejudgment interest.[25]

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[24] Disgorgement is an equitable remedy designed to compel a defendant or respondent "to give up the amount by which he was unjustly enriched" and to deter him or her (and others) from committing securities law violations by making them unprofitable. *SEC v. First Pacific Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998). Courts and the Commission also have the authority to order defendants to pay prejudgment interest on their ill-gotten gains. *SEC v. Cross Financial Services, Inc.*, 908 F. Supp. 718, 734 (C.D. Cal. 1995).

[25] To the extent Cohen prevails in his arbitration against Woodbury, he should likewise be compelled to disgorge any portion of his arbitration award that includes the commissions Woodbury withheld related to his variable annuities sales, as those amounts would also constitute ill-gotten gains of Cohen's fraud.

2. Cohen Should be Ordered to Pay Civil Money Penalties

Exchange Act Section 21B(a) authorizes the Commission to assess a civil money penalty where a respondent has willfully violated the Exchange Act or rules and regulations thereunder. A willful violation of the securities laws means the intentional commission of an act that constitutes the violation. Put another way, there is no requirement that the actor "must also be aware that he is violating one of the Rules or Acts." *Wonsover v. SEC*, 205 F.3d 408, 414 (C.A.D.C. 2000) (internal quotations marks and citation omitted).

The Exchange Act has a three-tier system identifying the maximum amount of penalty. For each "act or omission" by a natural person, the maximum amount of a penalty is $7,500 in the first tier, $75,000 in the second tier, and $150,000 in the third tier. See 17 C.F.R. § 201.1003, Subpt. E, Table IV. To determine whether to issue a penalty, courts consider the following six statutory factors: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) need for deterrence; and (6) such other matters as justice requires. *See* Exchange Act Section 21B(c) ("Determination of Public Interest").

A third-tier penalty is warranted against both Cohen for each of his multiple violations, in order to deter other market participants from engaging in similar conduct.[26]

3. Cohen Should Be Ordered to Cease-and-Desist

Exchange Act Section 21C authorizes the Commission to enter a cease-and-desist order against any person who is "is violating, has violated, or is about to violate" any provision of the Exchange Act or rule or regulation thereunder. 15 U.S.C. § 78u-3. In considering whether a cease-and-desist order is appropriate, the Court looks to see whether there is some risk of future violations. *KPMG Peat Marwick LLP*, Exchange Act Rel. No. 43862, 54 S.E.C. 1135, 1185

[26] The penalties in Section 21B are based on "each act or omission." 15 U.S.C. § 78u-2. Cohen violated the anti-fraud provisions and aided and abetted violations of the books and records provisions of the federal securities laws on at least 28 occasions.

(2001). The risk of future violations required to support a cease-and-desist order is significantly less than that required for an injunction. *Id.* at 1191. In fact, a single violation can be sufficient to indicate some risk of future violation. *In the Matter of Ofirfan Mohammed Amanat*, Exchange Act Rel. No. 54708, 2006 WL 3199181 at *12 n. 64 (Nov. 3, 2006). The Commission has indicated that other factors may demonstrate the need for a cease-and-desist order such as the seriousness of the violation, the degree of harm to investors or the marketplace resulting from the violation, the sincerity of assurances against future violations, the opportunity to commit future violations and the remedial function to be served by the cease-and-desist order in the context of other sanctions sought in the proceeding. *Id.* at *12. In this case, Cohen should be ordered to cease-and-desist from violating the securities laws. Cohen has refused to acknowledge that his conduct violated the securities laws and poses a substantial, continuing risk of harm to investors and the marketplace.

4. Cohen Should Be Barred

Exchange Act Section 15(b)(6) authorizes the Commission to bar a person associated with a broker-dealer if he has willfully violated the federal securities laws and such sanction is in the public interest. In determining whether an industry bar is in the public interest, courts consider the factors identified in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979). Those factors include: (1) the degree of scienter involved; (2) the isolated or recurrent nature of the violations; (3) the sincerity of assurances against future violations; (4) and the likelihood that a respondent's occupation will present opportunities for future violations. *Id.* As described herein, Cohen's violations of the federal securities laws were egregious and numerous. Without an industry bar, Cohen will have the opportunity to commit more violations of the securities laws.

The Division asks that Cohen be permanently barred from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized rating organization. Cohen should also be barred from 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. Finally, Cohen should be barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance of trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

IV. CONCLUSION

As the foregoing demonstrates, Cohen violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rules 10b-5 thereunder and aided and abetted Woodbury's violations of Section 17(a) of the Exchange Act and Exchange Act Rule 17a-3(a)(6) thereunder by falsifying his Woodbury point of sale forms in an effort to ensure that his stranger-owned variable annuities sales survived suitability review and avoided detection. The Court

should order disgorgement from Cohen, enter a cease and desist order regarding his conduct, permanently bar Cohen from activity in the securities markets, and impose substantial civil penalties.

Dated: August 20, 2014

Respectfully submitted,

Dean M. Conway (202) 551-4412
Britt Biles (202) 551-4779
Peter J. Haggerty (202) 551-4570
Christopher Mathews (202) 551-5926
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

COUNSEL FOR
DIVISION OF ENFORCEMENT

Attachment A

Issuer	Owner[1]	Annuitant[1]	Contract Number[1]	Commissions Received[2]	Surrender Period Provided by Cohen on Point of Sale Form[3]	Actual Contract Surrender Period[1]	Representation as to When the Customer Will Begin to Access Investment (POS Question 4)[3]	Disclosure that Customer Anticipates Accessing Investment During Surrender Charge Period (POS Question 4)[3]	Death Benefit Claimed[1]	Contract Surrendered[1]	Contract Annuitized[1]
Hartford	rust				7 Years	9 Years	11 - 15 years	No		Yes - 1/26/2010	No
	rust				7 Years	9 Years	11 - 15 years	No		Yes - 1/26/2010	No
	rust				7 Years	9 Years	11 - 15 years	No	Yes - 6/16/2008		No
	rust				7 Years	9 Years	11 - 15 years	No	Yes - 6/16/2009		No
	Trust			$58,604.00	8 Years	9 Years	11 - 15 years	No	Yes - 7/1/2008		No
	Trust			$58,604.00	9 Years	9 Years	11 - 15 years	No		Yes - 1/22/2010	No
				$58,305.00	7 Years	9 Years	11 - 15 years	No	Yes - 8/21/2008		No
				$58,305.00	7 Years	9 Years	11 - 15 years	No	Yes - 8/21/2008		No
Met Life	rust				9 Years	8 Years	11 - 15 years	No	Yes - 6/15/2008		No
	rust				9 Years	8 Years	11 - 15 years	No		Yes - 1/26/2010	No
	Trust			$61,180.00	9 Years	8 Years	11 - 15 years	No	Yes - 6/16/2008		No
Sunlife				$102,120.00	8 Years	7 Years	11 - 15 years	No	Yes - 12/30/2008		No
	Trust			$104,880.00	8 Years	7 Years	11 - 15 years	No	Yes - 6/25/2008		No
	Trust			$104,880.00	8 Years	7 Years	11 - 15 years	No		Yes - 1/20/2010	No
	Trust				8 Years	7 Years	11 - 15 years	No		Yes - 2/4/2010	No
	rust				8 Years	7 Years	11 - 15 years	No	Yes - 6/11/2008		No
ING	Trust				10 Years	9 Years	11 - 15 years	No		Yes - 2/11/2010	No
	Trust				10 Years	9 Years	11 - 15 years	No			No
	Trust			$160,080.00	10 Years	9 Years	11 - 15 years	No	Yes - 3/18/2011		No
AIG SunAmerica					9 Years	9 Years	11 - 15 years	No		Contract Rescinded by AIG on Grounds of Fraud	No
	Trust				10 Years	9 Years	11 - 15 years	No		Contract Rescinded by AIG on Grounds of Fraud	No
	Trust				10 Years	9 Years	11 - 15 years	No		Contract Rescinded by AIG on Grounds of Fraud	No
	Trust				10 Years	9 Years	11 - 15 years	No		Contract Rescinded by AIG on Grounds of Fraud	No
	Trust				10 Years	9 Years	11 - 15 years	No		Contract Rescinded by AIG on Grounds of Fraud	No
Security Benefit	Trust				8 Years	8 Years	11 - 15 years	No			No
	Trust				8 Years	8 Years	11 - 15 years	No	Yes - 6/5/2008		No
Genworth	Trust				9 Years	8 Years	11 - 15 years	No		Yes - 1/22/2010	No
	Trust				9 Years	8 Years	11 - 15 years	No	Yes - 5/15/2008		No
				$766,958.00							

1-See Hartford (Exhibit 628), MetLife (Exhibit 629), Sunlife (Exhibit 630), ING (Exhibit 631), AIG Sunamerica (Exhibit 632), Security Benefit (Exhibit 633), Genworth (Exhibit 634)
2-See Exhibits 303 & 304
3-See Exhibit 621
4 - As of the date these contracts were surrendered, [redacted] was still alive. Public records indicate that he is still alive
5- As of the date these contracts were surrendered, [redacted] was still alive. Public records indicate that she subsequently died on March 8, 2010