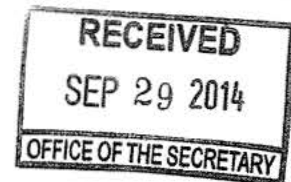
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15790

In the Matter of

MICHAEL A. HOROWITZ
And
MOSHE MARC COHEN

Respondents.



DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF AGAINST RESPONDENT COHEN

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I. INTRODUCTION

At the hearing held on August 25, 2014, the Division of Enforcement ("Division") conclusively proved that Respondent Marc Cohen ("Cohen") knowingly misrepresented the true nature of twenty-eight variable annuities sales to his broker-dealer, Woodbury Financial Services, Inc. ("Woodbury"). By doing so, Cohen abdicated his industry gatekeeper responsibilities and violated the federal securities laws.

The evidence presented at the hearing unequivocally demonstrated that Cohen sold the twenty-eight variable annuities at issue in this case to trusts working on behalf of two New York-based hedge funds. The hedge funds were pursuing a short-term investment strategy whereby they invested substantial capital in variable annuities with bonus features and designated strangers who were terminally ill as the annuitants or measuring lives. When the annuitants died, the hedge funds received back the principal they invested in each annuity (even if the market declined), plus any return on the underlying investment portfolio. The payouts guaranteed by the annuities combined with the annuitants' short life expectancies gave the hedge funds the expectation of "exponential" returns in only a matter of months. Cohen admits that he knew that the hedge funds were investing in variable annuities with terminally ill annuitants for the short-term gains and that he helped the hedge funds execute the strategy.

Cohen's efforts to execute the hedge funds' short-term variable annuities strategy included deceiving the broker-dealer with whom he was affiliated. As established by the evidence at the hearing, Cohen provided false and misleading answers on point of sale forms to skirt the mandatory principal review Woodbury had in place for all variable annuities sales. Woodbury mandated that its registered representatives submit variable

annuities sales to the home office for suitability review, and insurers issued variable annuities only if the home office made a positive suitability determination on the investments. Cohen knew that none of his sales to the hedge funds would pass Woodbury's principal review because Woodbury did not permit annuity sales to either hedge funds or to short-term investors. Cohen also knew that he would collect no commissions on his sizable sales to the hedge funds unless he could get them through Woodbury's principal review. To overcome the obstacle presented by the principal review, Cohen tricked Woodbury into finding that the annuity sales to the hedge funds were suitable investments.

Cohen deceived Woodbury by falsely answering significant questions on the point of sale forms for each of the twenty-eight variable annuities he sold to the hedge funds. Among other things, Cohen: (i) concealed that the hedge funds were the ultimate purchasers of the annuities; (ii) falsely stated that the annuities would be held for "11-15 years" when he knew that the hedge funds had a short-term investment strategy measurable only in months, not years; (iii) falsely claimed that the annuities were purchased for reasons other than short-term gains, such as "tax deferred treatment of earnings"; (iv) falsely identified family trusts as the source of the funds used to purchase the annuities when in fact the money came from the hedge funds; and (v) falsely certified that, among other things, he was familiar with the trusts that purportedly owned the annuities when the trustees of those trusts testified that they never met Cohen and did not even know who he was. By virtue of these false statements, Cohen was able to camouflage his stranger-owned annuities sales to the hedge funds and receive positive suitability determinations from Woodbury. Indeed, Cohen was so successful in deceiving

Woodbury that the broker-dealer paid him more than $750,000 in illicit sales commissions before his fraud was discovered. When Woodbury learned the true nature of Cohen's variable annuities sales, however, it withheld more than $1.3 million in additional commissions, which Cohen claims that he is still owed.[1]

Cohen's undeniable intent to deceive Woodbury (and the SEC) was made patent by the incontrovertible evidence presented at the hearing. From the fraud's discovery by Woodbury through the hearing in this matter, Cohen has provided ever-shifting, illogical, and unpersuasive explanations about the twenty-eight variable annuities sales. For example, when Woodbury first sought more information about the sales, Cohen fabricated a cover story about private "wealthy families" engaged in "estate planning" to hide his misconduct. He maintained that false narrative throughout Woodbury's investigation of the sales and the ultimate termination of his registration with the broker-dealer. But later, in 2011, when the SEC asked Cohen to identify his clients during investigative testimony, Cohen testified that the trusts were his clients—the same individuals who testified that they did not know Cohen and had never met or communicated with him. Nonetheless, under cross-examination at the hearing, Cohen testified for the first time that his clients were actually two individuals carrying out the variable annuities strategy for the hedge funds: Abe Gottesman and Howard Feder.

In his Pre-Hearing Brief and at the hearing, Cohen changed tactics and simply argued that he was permitted to make material misrepresentations on the Woodbury point of sale forms because the forms were "not required" and "optional." Not only is this

[1] Cohen is seeking to recover these ill-gotten gains in a pending FINRA arbitration against Woodbury along with compensatory and punitive damages in excess of $30 million.

audacious defense defeated by the evidence, its natural corollary is that Cohen was somehow excused from telling his broker-dealer the truth about the annuity sales.

The sum of all the evidence in this case definitively establishes that Cohen knowingly and intentionally committed securities fraud by making material misrepresentations on the Woodbury point of sale forms. Accordingly, Cohen should be ordered to cease and desist from violating the anti-fraud provisions of the federal securities laws, as well as aiding and abetting violations of the books and records provisions. For these violations, Cohen should disgorge his ill-gotten gains (with pre-judgment interest), pay civil monetary penalties, and be barred from the industry.

II. EVIDENTIARY RECORD

A. COHEN'S VARIABLE ANNUITIES BUSINESS.

1. Hedge Funds Pursue Stranger-Owned Variable Annuities Strategy.

By early Fall 2007, settling Respondent Michael Horowitz ("Horowitz") had sold over $20 million in stranger-owned variable annuities to individual investors. Horowitz desired to pump greater capital into the scheme, so he began pitching his scheme to institutional investors. (Tr. 21:9-13; 22:3-11; 28:14-23).[2] In October 2007, Horowitz lined up two New York hedge funds to invest in stranger-owned variable annuities. (Tr. 22:15-18; 29:6-25-30:1-9).

To pursue the stranger-owned annuities strategy brought to them by Horowitz, the hedge funds established an affiliated entity called BDL Group, Inc. ("BDL"). (Tr. 31-35). Howard Feder ("Feder"), a commodities trader, was hired by the hedge funds in late October 2007 to operate BDL as its principal and only employee. (Tr. 231:8-16; Tr.

[2] The Division will cite to the transcript of the hearing as "(Tr. __)" and will cite to its exhibits as "(Div. Ex. __)." Cohen's January 19, 2011 investigative transcript, Div. Ex. 636, will be referred to as "(Cohen Invest. Tr. __)."

240:12-17). BDL's business consisted solely of investing and reinvesting in variable annuities through nominees. (Tr. 240:21-25; 242:6-18).

By mid-November, 2007, several nominees had signed "Nominee Agreements" with BDL providing that: (i) BDL would deposit funds to purchase the annuities in a brokerage account to be opened by the nominee; (ii) BDL 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 would compensate the nominee in an amount equal to $20,000 on an annualized basis. *See, e.g.*, Div. Ex. 347.

2. Cohen's Involvement.

Despite his success in pitching the stranger-owned variable annuities strategy to the hedge funds, Horowitz could not sell them any variable annuities. By December 2007, Morgan Stanley had learned about his variable annuities business model and shut him down. *See* Resp. Pre-Hearing Br. at 15. Therefore, Horowitz needed a new registered representative to sell the stranger-owned annuities to the hedge funds. *Id.* At that point, Horowitz was introduced to Cohen by a mutual acquaintance, David Zakheim. *Id.* Cohen was a partner in U.S. Planning Group, which was an independent "affiliate" of Woodbury. Cohen held Series 6, 7, 24, 63, and 65 licenses and sold securities through his registration with Woodbury. (Tr. 533:13-23; Cohen Invest. Tr. 15:5-9).

Cohen knew upfront that Morgan Stanley no longer allowed Horowitz to sell the stranger-owned annuities. *See* Resp. Pre-Hearing Br. at 15. Nevertheless, in late December 2007, Cohen emailed his Woodbury Customer Account Package (which included Woodbury's variable annuity point of sale form) to Horowitz using the personal

email address of Horowitz's wife. Cohen later testified that he "doesn't know why" he sent these Woodbury new account forms to Horowitz. (Cohen Invest. Tr. 155:13-25; 157:9-14). Cohen also traveled to Las Vegas to meet with Horowitz to learn more about the investment strategy that Morgan Stanley prohibited. (Cohen Invest. Tr. 226-229).

According to Cohen, he learned that the strategy involved designating individuals with short life expectancies (principally, hospice patients) as the annuitants in contracts purchased by third-party investors. (Cohen Invest. Tr. 29; 37-38; 40-41). He previously testified that he understood that the concept offered investors an opportunity to receive accelerated payouts on their annuity investments:

> 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.

(Cohen Invest. Tr. 37:11-15; *see also* Resp. Pre-Hearing Br. at 3).

Cohen also learned that Horowitz had a "hedge fund" client. (Cohen Invest. Tr. 61-62). Cohen understood that Horowitz or his associates would supply Cohen with the customers and the hospice patient annuitants, while Cohen would serve as the registered representative on the sales of stranger-owned variable annuities. (Cohen Invest. Tr. 82-83).

Cohen understood that he would be executing a short-term investment strategy on behalf of the hedge funds. *See* Resp. Pre-Hearing Br. at 3. He was well aware of BDL's investment strategy, which 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 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 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. (Tr. 23:2-25-24:1-7; 26:9-22; 232:6-24). Indeed, in his Pre-Hearing Brief, Cohen acknowledged that the "**waiving of the surrender charge by the Annuity companies when a Death Benefit is paid on the death of an annuitant, was the determining factor that the investors chose to invest in these annuity contracts**." Resp. Pre-Hearing Br. at 7-8 (emphasis in original). Cohen also understood that the bonus provisions of the various annuity products were essential to implementing the short-term investment strategy: "This sign-on bonus was amongst other benefits offered that was the appealing feature to the investors related to this proceeding." Resp. Pre-Hearing Br. at 6; *see also* Div. Ex. 397.

As Mr. Feder testified, in order to maximize the hedge funds' profits, BDL intended to purchase and exit its annuities investments as quickly as the terminally-ill annuitants would die:

Q. [A]gain, with your clarification, you weren't wishing [the annuitants] to die quickly but the expectation and understanding was that it likely would occur given their status as terminally ill patients?

A. Yes.

Q. And so with that in mind was it your expectation that the annuity investments that BDL made would be short term investments?

A. Yes.

Q. [W]as it more profitable the shorter the duration that you held the

variable annuity contract?

A. I guess so, yes.

Q. Why do you say that?

A. Because if you can make 5 percent on your money in two months rather than over a year it is worth more money.

* * *

Q. Did BDL want to remain in any investment for ten years or more?

A. Probably not.

Q. Why not?

A. Like you discussed earlier we are trying to roll the money over quickly, the quicker you rolled over the money the more money you make.

(Tr. 252:6-25; 253:18-25).

Cohen also freely admits that the intention of the hedge funds was "to use these variable annuities as a strategy to invest within these contracts with the possibility of <u>short-term gains with little risk</u> at the demise of the annuitant." Resp. Pre-Hearing Br. at 3 (emphasis added). Cohen even takes credit for recommending to BDL that it only purchase annuities that were "annuitant driven"[3] and also advised Mr. Feder to use trusts so that short-term strategy functioned as intended:

> In order to assure himself that this strategy really existed, Cohen reviewed each of the Insurance Company's prospectuses, brochures and marketing material in order to better understand all the features and benefits to each company's variable annuity. What he discovered was that some companies were Annuitant-driven while others were Owner-driven. <u>This was disturbing to Cohen, as it meant that the contracts that were designed as Owner-driven would not payout a Death benefit at the death of the annuitant; rather it would pay out at the death of the Owner. In essence, what the fund thought they were buying was not the case.</u> As disturbing as this news was, the solution was spelled out right within the prospectuses as

[3] 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). Cohen fully understood that this distinction was critical to the operation of his scheme. Resp. Pre-Hearing Br. at 4-5.

> well. Each of the Company's prospectuses stated that where a non-natural owner was designated as an owner of the annuity, the contract would either stay or become an Annuitant-driven contract. This meant that all the companies that the fund was planning on purchasing, would now pay the Death Benefits upon the Death of the Annuitants and not the Owners.
>
> Cohen called Horowitz and Gottesman with the owner-driven problem and solution to convey his recommendation for the use of trusts. Gottesman, then set up a conference call with Howard Feder on January 12, 2008 (to the best of Cohen's knowledge, that was the first communication between Cohen and Feder) of which he described his findings of the problem together with the solution of using Trusts as the direct owner of the annuities. Cohen reviewed the list of carriers and explained the difference between the owner-driven vs annuitant driven issues but made no recommendations or suggestions to specific companies.

Resp. Pre-Hearing Br. at 18 (emphasis added).

In an effort to support his dubious proposition that his annuity sales were not subject to suitability review, Cohen nonsensically states that "he made no recommendations." *See, e.g.*, Resp. Pre-Hearing Br. at 18, 24, n.53. Notwithstanding Cohen's statements to the contrary, Brian Jedwab testified that Cohen did in fact recommend which annuities the hedge funds should buy:

> Q. Mr. Jedwab, you have answered a number of questions about selecting, recommending, exactly what the agents like Mr. Cohen and Mr. Horowitz were doing in this transaction. And I just want to simplify that a little bit.
> Could you walk us through what your understanding was of what Mr. Horowitz, Mr. Cohen[, and] the other agents were doing?
>
> A. My understanding was that they would be identifying the short-lived annuitants or the terminally ill annuitants. They would be selecting the specific annuities to be purchased.

(Tr. 79:23-25-80:1-12) (emphasis added). Moreover, when Cohen cross-examined Mr. Feder, Cohen admitted that he made recommendations when he asked the following

question about the hedge funds' annuity purchases: "Q. At the end of the day, I am just shooting forward, did [the hedge funds] have any qualms or issues with any recommendations that respondent Marc Cohen made. Any complaints on the annuities." (Tr. 362:15-18 (emphasis added)). As his own words make clear, Cohen did recommend that the hedge funds purchase certain annuities because of their features, including their "annuitant-driven" structure, bonuses, and claw-back provisions. *See* Resp. Pre-Hearing Br. at 3-10; Div. Ex 397. But whether Cohen made recommendations or not is simply irrelevant because Woodbury did not allow unsolicited annuity sales. (Tr. 722:3-5). As such, all of Cohen's annuity sales were subject to Woodbury's suitability review. (Tr. 807:19-24). Accordingly, all of the point of sale forms and other suitability-review related documents submitted by Cohen (Div. Ex. 621) were mandatory and none were "optional." (Tr. 631:19-23).

3. BDL Creates "Family Trusts" To Purchase Annuities From Cohen.

In anticipation of purchasing stranger-owned annuities through Cohen, Mr. Feder arranged to have purported family trusts established for several of the nominees. (Tr. 356:2-5; 383:13-14). These included the "[redacted] Trust," (created on February 4, 2008), the [redacted] Trust" (created on February 4, 2008), the "[redacted] Trust" (created on January 15, 2008), the "[redacted] Trust" (created on January 15, 2008), and the "[redacted] Trust" (created on January 18, 2008).[4] The family trusts were the ostensible purchasers of all of the annuities Cohen sold. (Tr. 331:20-25-332:1; *see also* Div. Ex. 621). In reality, they functioned as mere conduits for BDL's funding of,

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[4] [redacted]

and receipt of proceeds from, the variable annuities. None of the trusts had any independent assets not belonging to BDL (and ultimately the hedge funds). (Tr. 291:24-25-292:1-16; 318:3-16). Bank accounts were established for the trusts, and as soon as Mr. Feder wired funds from BDL into a trust bank account, the trustee (a BDL nominee) wired out the funds again to purchase the annuities. (Tr. 242:6-24). When the annuities paid out upon the death of the annuitant, the money was returned to the hedge fund and a fee paid to the nominee for his or her service:

> Q. In that same vein the nominees were not entitled to receive any money back when payouts were received from the variable annuity contracts?
> A. Other than the fee, no.

(Tr. 244:19-23). Beyond signing blank forms, the nominees had no involvement in the hedge fund's short-term annuity strategy (Tr. 350:3-8) as evidenced by Bina Levy's testimony:

> Q. When you were signing these documents for your brother in this transaction did you have any interactions with anyone other than Mr. Feder?
> A. No.
> Q. At any point did you set up a family trust in connection with signing the documents for Mr. Feder?
> A. Yes.
> Q. Tell me how that came about.
> A. I was asked to go to a bank and sign a paper that was going to be a trust account.
> Q. Who told you to do that?
> A. Howie [Feder].
> Q. What, if anything, did you learn from Mr. Feder about why you need[ed] to set up a trust account?
> A. Nothing.

(Tr. 117:18-25-118:1-12). As noted above, Cohen takes credit for advising the hedge funds to use nominee trusts to purchase "annuitant-driven" annuities to ensure that the annuity strategy would operate in a way that would achieve the short-term gains expected by the hedge funds. *See* Resp. Pre-Hearing Br. at 18.

4. Cohen Investigates Insurer "Red Flag" Limits For Annuities.

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. (Cohen Invest. Tr. 211:1-226:10; Div. Ex. 396[5]). Among other things, Cohen wanted to know: (i) how much could be invested in an annuity before the insurer would subject the application to heightened scrutiny or inquire into the annuitants' health; (ii) whether the commissions Cohen anticipated earning could be clawed back by the insurer if the annuitant died within one year of the annuity's issuance; (iii) the length of the surrender charge period; (iv) and how to use trusts to convert "owner driven" annuities into "annuitant driven" annuities. *Id.*

One of the companies that Cohen contacted was Penn Mutual Life Insurance Company ("Penn Mutual"). Cohen called Penn Mutual in January 2008 and "asked a series of very pointed questions to the [annuity] wholesaler, asked specifically what would raise a red flag with the underwriting department, what the maximum amount of an annuity that the Penn Mutual would issue, what that dollar value would be." (Tr. 457:17-22, 458:17-19; *see also* Div. Ex. 609). The wholesaler who spoke with Cohen was suspicious enough about Cohen's intentions that she called Jay Baker, the manager of Market Conduct and Compliance for Penn Mutual. (Tr. 445:24-446:3; 457:23-

[5] The spreadsheet identified in Cohen's Investigative Testimony as Exhibit 288 was re-marked as Division Exhibits 396 and 397 and were introduced at the hearing.

458:458:3; *see also* Div. Ex. 609). Mr. Baker testified at the hearing that "never in [his] 25-year career . . . had a rep call[ed] in and ask[ed] those types of questions." (Tr. 458:12-14). Because Cohen's questions were so "unusual," "bells went off" for Mr. Baker, and he worked to confirm that Cohen was not doing business with Penn Mutual at that time. (Tr. 458:11-12, 459:6-18).

5. Cohen's January 12, 2008 Conference Call With The Hedge Funds.

Based on his insurer research, Cohen prepared a spreadsheet identifying which insurers' variable annuities could be exploited using the stranger-owned annuities strategy. (Cohen Invest. Tr. 215:6-14; Div. Exs. 396 & 397). The spreadsheet identified the terms of the annuities Cohen had selected to research, including their surrender charges and whether they provided for a commission rollback. Significantly, Cohen included in the spreadsheet a column entitled "$1 million investment and Death in 60 Days," which detailed the hypothetical returns the hedge funds could expect under differing market conditions if the annuitants died within 60 days. (Div. Ex. 397). According to Cohen, the contemplated "death" referred to in this column is the death of the hospice patient-annuitant. (Cohen Invest. Tr. 218:14-219:3). As Mr. Feder testified, the sooner the annuitant died, the more profitable the investment was for the hedge fund. (Tr. 253:18-25).

On January 12, 2008, Cohen participated in a conference call with Horowitz, Mr. Feder and Mark Nordlicht (who headed the Platinum fund—one of the two hedge funds engaging in the short-term variable annuities strategy). (Tr. 260:1-25-261:1-8; Div. Exs. 396, 397). The purpose of the call was to discuss the different investment choices, as set forth in Cohen's spreadsheet, that were available to the hedge funds. (Tr. 260:1-25-261:1-

8). According to Mr. Feder, Mr. Nordlicht was on the call because he had authority to determine which of the proposed annuities BDL should buy. (Tr. 265:1-23).

6. Woodbury's Variable Annuities Sales Procedures.

Cohen could not sell the hedge funds variable annuities on his own without any oversight by his broker-dealer. As was the case for 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.

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. (Tr. 622:5-25-623:1-21; 634:17-23). 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). (Tr. 634:10-16; Div. Ex. 621). Woodbury furthermore required the signature of both the purchasing customer and the selling representative on its New Account and Point of Sale-Annuity forms. In his Answer to the Order Instituting Proceedings ("OIP"), Cohen admitted 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. Likewise, if Cohen chose not to submit to Woodbury the suitability-related

documents contained in Division Exhibit 621 then none of his annuity business would have resulted in the issuance of an annuity contract. (Tr. 636:21-25-638:1-2).

Woodbury's supervisory review was a process with teeth. It would have prevented Cohen from selling any variable annuities to the hedge funds had he provided truthful information. Mr. Timothy Stone, who was Woodbury's Regulatory Compliance Specialist,[6] confirmed this at the hearing:

> Q. So during principal review, if Woodbury determined that the product was being used in a way that it wasn't intended to be used, would that be a reason that it wouldn't pass a suitability review?
> A. Yes.
> Q And is that regardless of whether the client wanted to use the product in that way?
> A. Yes.
> Q. [A] client couldn't decide to convert what is supposed to be a long-term investment into a short-term investment?
> A. That would have been looked upon as an abusive use of the product.
> Q. So if at any time Mr. Cohen would have revealed to Woodbury either through the point-of-sale forms, through conversations, through e-mails, that his clients intended to use the variable annuity product as a short-term investment, what, if anything, would Woodbury have done with those applications?
> A. Woodbury would have rejected them and sent back to the customer the application back.
> THE COURT: And is it your position that if he knew that, he was bound to reveal it to the company?
> THE WITNESS: Yes.

(Tr. 657:15-25-658:1-18).

[6] Mr. Stone described his responsibilities as follows: "we actually created a regulatory response team that reported up to the legal department, and we specifically focused on three things: One was customer [complaints], one was regulatory issues and any type of investigations, and then the other function was audits . . . ." (Tr. 621:11-18).

The ethical and professional requirements that Woodbury demanded of all of its registered representatives were robust. Specifically, Woodbury disseminated a Representative Procedures Manual ("Procedures Manual") that all registered representatives associated with Woodbury were obliged to follow. (Tr. 643:7-25; 638:8-22). Cohen also signed a certificate attesting that he had reviewed Woodbury's Procedures Manual and agreed to be bound by its requirements. (Div. Ex. 612 ("I acknowledge that I have read, understood, and agree to abide by its requirements.")). Mr. Stone's testimony similarly made clear that Woodbury's "rules of the road" were not optional:

> Q. And what was your expectation of Mr. Cohen in light of the fact that he agreed abide by the requirements that are set forth in Woodbury's Procedures Manual.
>
> A. The expectation would be that he had reviewed the manual and was familiar with what he could and couldn't do, and that he would follow Woodbury's procedures.
>
> Q. So if he wanted to remain a [broker] associated with Woodbury Financial, he needed to follow the rules of the road set forth by Woodbury?
>
> A. That's correct.
>
> Q. Was it his option to disregard some of the requirements of the Procedures Manual?
>
> A. No.
>
> Q. At any point in time, did Mr. Cohen tell you or anybody else at Woodbury that he was not going to follow the procedures set forth in the Procedures Manual?
>
> A. He never said anything to me, and, to my knowledge, he didn't tell anybody else at Woodbury.
>
> Q. And if a registered representative refused to sign the document that we're looking at, Exhibit 612, could he or she be associated with Woodbury [as a] registered representative?
>
> A. No.

Q. And why not?

A. Because we want -- Woodbury wanted representatives that were going to follow their rules and do things the way they're supposed to be done in the industry.

(Tr. 643:13-25-644:1-21).

Woodbury's Procedures 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 Procedures 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.

(Div. Ex. 618 at bates page WFS-SEC(MHO10840) 001605) (emphasis added).[7]

An overarching requirement for Woodbury's registered representatives was that they act honestly and ethically. (Tr. 647:16-25-649:1-25; Div. Ex 618 at 8). As such, all

[7] 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 wholly owned Woodbury, and business submitted directly to Hartford from Woodbury representatives was routed back to Woodbury for suitability review. (Tr. 636:2-19).

the forms that Cohen submitted to Woodbury in connection with his annuity sales (Div. Ex. 621) needed to be completed accurately:

> Q. [D]oes the standard of candor and honesty that is set forth in the manual apply to the paperwork that a registered representative submits to have his business processed?
> A. Absolutely.
> Q. So all the forms that are contained in Exhibit 621, Woodbury's expectation was that those forms would be answered with candor and completeness?
> A. Correct.

(Tr. 650:12-22).

Furthermore, Woodbury's Procedures Manual (Div. Ex. 618) required Cohen to provide complete and accurate information in all his interactions with Woodbury:

> Q. And if a registered representative were to withhold or misrepresent information on point-of-sale forms, for example, why is that a problem?
> A. You can't make an accurate assessment of the suitability of the sale because you don't know the true and correct facts, or you don't know all of the facts.
> Q. And does that requirement extend to e-mail interactions that a registered representative would have with a representative from Woodbury?
> A. Yes
> Q. And telephone calls?
> A. Yes.
> Q. So if a Woodbury representative would reach out to Mr. Cohen and ask specific questions, was it Woodbury's expectation that his responses would be accurate and correct?
> A. Yes.
> Q. And [that] he wouldn't be withholding or misrepresent[ing] information?
> A. Yes.
> Q. In other words, he would be acting with candor towards his broker-dealer; is that

correct?
A. That's correct.

(Tr. 665:23-25-666:1-25); see also Div. Ex. 618 at 55).

Moreover, as Mr. Stone testified, Cohen had to provide Woodbury with the point of sale forms if Cohen wanted to sell variable annuities:

Q. And none of these documents [contained in Div. Ex. 621] were optional . . . if Mr. Cohen wanted to sell a variable annuity; is that correct?
A. Correct.
Q. And based upon your review of Exhibit 621, can you tell us who submitted these forms to Woodbury?
A. Mr. Cohen did.

(Tr. 631:19-25-632:1-4). Further, insurers would not issue an annuity contract if a registered representative's business did not pass Woodbury's suitability review. (Tr. 634:24-25-635:1-25).

Cohen's recent assertion that the documents contained in Div. Ex. 621 were "optional" is simply not credible. When he was asked about the point of sale forms (Div. Ex. 621) in early 2011, Cohen acknowledged 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.

(Cohen Invest. Tr. at 162:17-23; 163:5-18; 164:15-19).

7. **Woodbury's Annuity Investment Access Questions.**

Consistent with his obligations set forth in the Procedures Manual, Woodbury's Annuity Point of Sale form required Cohen to provide a variety of information concerning all proposed annuity sales to assist Woodbury in conducting its principal review. Section 4 of the "Point of Sale—Annuity" form addresses the customer's anticipated investment access requirements and 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 ______.

(Div. Ex. 621.) Mr. Stone testified as follows about the purpose of the Investment Access question on the Annuity Point of Sale form:

Q. What information is that question

designed to [elicit] . . . from the registered representative?

A. The time frame that the client is going to be holding that particular product.

Q And is one of the reasons that question is asked [is] because if an individual intended to hold an annuity for two years, but the surrender charge period was eight years, that would not be a suitable investment for that person?

A. That's correct.

(Tr. 698:4-21). As part of its suitability review, Woodbury home office principals closely scrutinized the investment access information that their registered representatives provided:

Q. I'll represent to [you] my knowledge that each of those forms, the box that's checked by Mr. Cohen, is "11 to 15 years." Now, Woodbury relied on the accuracy and completeness of this answer when it did its suitability review; correct?

A. That's correct.

Q. Now, what, if anything, would have happened using the form we're looking at, as an example, if Mr. Cohen would have checked "zero to five years" on that box?

A. We would have definitely stopped processing it until we asked Mr. Cohen for a rationale as to why he put "zero to five years." But more than likely, we would have failed it on the suitability. Especially in this particular case, we would have failed it because it's got an eight-year -- nine-year surrender charge.

(Tr. 699:6-24; *see also* Div. Ex. 621).

8. Cohen's Understanding 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 in 2011. He also understood that his responses to the investment access questions (Section 4 of Exhibit 621) would be scrutinized by Woodbury's home office principals in determining whether to approve the sales as suitable or not:

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 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 seve[n] 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 is....

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.

(Cohen Invest. Tr. 166:17-169:11) (emphasis added).

B. COHEN FALSIFIES TWENTY-EIGHT ANNUITY POINT OF SALE FORMS TO OBTAIN WOODBURY PRINCIPAL APPROVAL OF HIS STRANGER-OWNED ANNUITIES SALES.

Between late January 2008 and mid-February 2008, Cohen, while a registered representative associated with Woodbury (Tr. 638:15-18), sold at least twenty-eight variable annuities contracts to nominees of BDL, utilizing the variable annuity products of at least seven different insurance companies.[8] Collectively, these nominees purchased approximately $40 million in variable annuities. (Div. Exs. 621, 628-634). In each of the annuities he sold, Cohen and BDL designated a hospice or nursing home patient as the contract annuitant—the person whose death would trigger the annuity's payout

[8] The issuers were Hartford, Met Life, SunLife, ING, AIG SunAmerica, Security Benefit and Genworth. (*See* Div. Exs. 621, 628-634).

provisions. (Div. Exs. 621, 628-634). Cohen, moreover, has admitted that he understood that the hedge funds were purchasing annuities as a short-term investment using terminally ill persons as annuitants or measuring lives:

> With no questions regarding the health of the annuitant and the absence of any insurable interest requirement, the application forms for the variable annuities asked for very little information. Thus, an investor can buy a variable annuity, choose a complete stranger as the annuitant, regardless of their health or even with a short-life expectancy; and expect that the beneficiary collect on the proceeds of the "Death Benefit" which not only guaranteed their premiums but perhaps even a nice return no matter how long the annuitant lived.

Resp. Pre-Hearing Br. at 10 (emphasis added). The beneficiaries on all twenty-eight annuity contracts brokered by Cohen were not the estates of the terminally-ill annuitants but rather the two hedge funds behind the strategy. (Tr. 178:22-25-179:1-2; Div. Exs. 334, 628.)

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.[9] Knowing that Woodbury would not approve his variable annuity sales if he provided truthful investment access information for BDL and its nominees (*see supra* at Section II.A.8), Cohen provided false investment access information on each of the twenty-eight Woodbury "Annuity-Point of Sale" forms that he completed. (Div. Ex. 621).

By way of example, a portion of Div. Ex. 621 is excerpted below. This excerpt reflects the investment access information that Cohen provided to Woodbury for the ██ ██ Trust in connection with the trust's purchase of a Hartford variable annuity with a

[9] 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.

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_.

(Div Ex. 621.)

Cohen provided identical responses to the Section 4 "Investment Access" questions on each of the twenty-eight Annuity Point of Sale forms that he submitted to Woodbury for principal review. Put otherwise, for each point of sale form (Div. Ex 621) he completed, signed and submitted to Woodbury, Cohen:

- Represented that his customers did not intend to begin accessing their annuities before "11 to 15 years" (which was outside the surrender charge period of all of the annuities purchased); and
- Provided no response to the second question within Section 4—whether the customer anticipated accessing the investment during the surrender charge period—representing that his customers did not intend to access the annuity within the surrender charge period.

As the Division proved at the hearing, the annuity sales at issue were unquestionably intended to be short-term investments by the hedge funds and Cohen was fully aware of the hedge funds' investment strategy. (Tr. 44:25-45:1-17; 57:13-16; 79:5-8; 79:23-25-81:1-22; 252:13-17; *see also* Resp. Pre-Hearing Br. at 3). Cohen's responses, therefore, were knowingly false. This was the conclusion Mr. Stone reached when he reviewed Cohen's answers to Section 4 on the point of sale form:

Q. You testified earlier that based upon your investigation, you learned certain things about the nature of Mr. Cohen's annuity practice; correct?

A. Correct.
Q. Based on what you learned, do you believe that Mr. Cohen's response to this question on this form and the other forms [in Exhibit 621] is correct?
A. No.
Q. Why is that?
A. Because the annuitant that was used was terminally ill in all cases, so they would have basically passed away before the 11 to 15 years.

(Tr. 699:25-700:1-15) That conclusion is bolstered by Mr. Feder's testimony at the hearing:

Q. Understanding that you had no involvement in the preparation of the answer to this question do you think that answer is accurate that they intend to access the investment in 11 to 15 years?
A. No.
Q. Why do you think that is not accurate?
A. Because we thought we were going to have it within zero to five years.

(Tr. 316:16-25) (emphasis added).

Further, Cohen had the option to check the "Other" box and accurately explain that the hedge funds intended to liquidate their investments through death benefit payouts within months after purchasing the annuities using terminally ill persons as the annuitants or measuring lives. Cohen, of course, did not use the "Other" option to explain the short-term annuity strategy because he knew if he explained the strategy that all of his sales would have failed Woodbury's suitability review. Mr. Stone testified as follows on this point:

Q. If Mr. Cohen had checked that box and put something to the effect . . . that they anticipated that they would access the

investment upon the death of the terminally ill
annuitant that they selected, what, if anything,
would that have done?

A. We definitely would have rejected the business and then looked at Mr. Cohen and asked him what he was doing.

Q. Why is that?

A. Well, it's a misuse of the product and it's unethical as well.

(Tr. 701:14-25-702:1-2).

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."

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: ______	

(Div. Ex. 621.) 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:

Q. Was BDL involved in [an] investment strategy designed for tax deferral purposes?

A. No.

Q. Did you ever tell Mr. Cohen that is what the intent of the BDL investment was?

A. No.

(Tr. 331:10-16).

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. 621). In twenty-eight separate responses 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. 621 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:

(Div. Ex. 621) Cohen knew, however, that the two hedge funds were the source of the money for the short-term annuity investments and that the trusts—which he recommended using—were simply shell entities with no assets. (Resp. Pre-Hearing Br. at 18; Tr. 33:9-25-34:1-24; 38:12-25; 91:15-25-92:1-24; 325:12-17; 330:13-19). Mr. Feder testified as follows:

Q. And those trusts that were recently created they didn't have their own [independent] trust res or their own capital?

A. I don't know what that first part --

Q. Skip the first part. They didn't have any money?

A. No.

Q. Any money that these trusts, newly created trusts ultimately received came indirectly from the hedge fund funneled through or passed through BDL to the trust?

A. Yes.

Q. [N]one of these trusts were long-standing family trusts, for example, that had been set up ten years ago to take care of somebody's kids or family?
A. No.
Q. They were set up exclusively for the purpose of the BDL business, correct?
A. Correct.

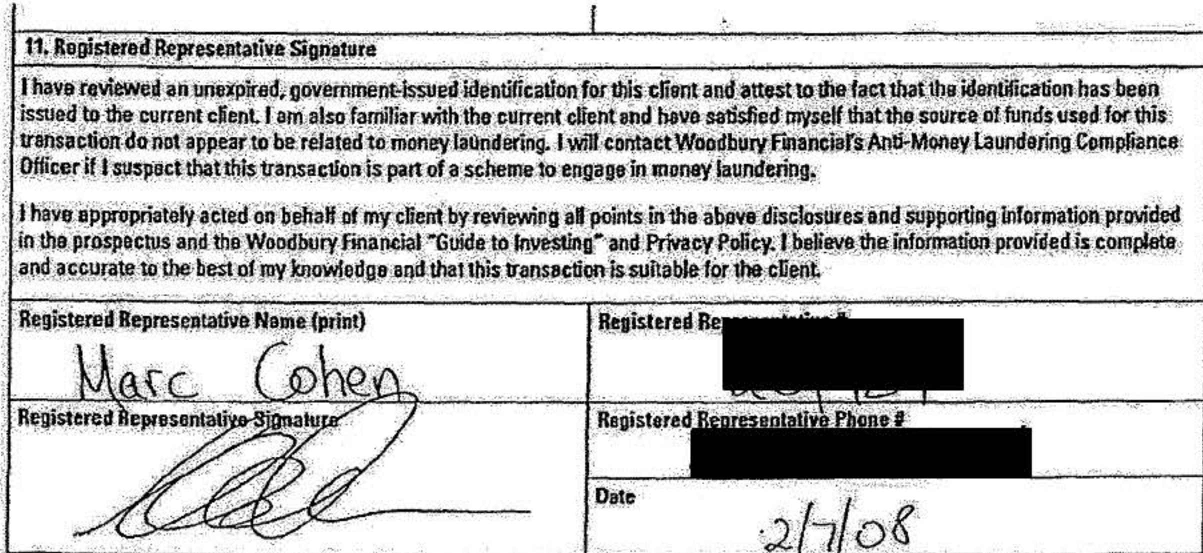
(Tr. 291:11-25-292:1-8). Mr. Stone concluded that Cohen's answer to the source of funds question was not accurate:

Q. And the box that's checked here on the form that's signed and submitted to Woodbury by Mr. Cohen is "Trust."
Do you see that?
A. Yes.
Q. Based on what you learned during the course of your investigation, do you believe that that is a complete, accurate and correct answer to that question?
A. No.
Q. Why is that?
A. Because the funds didn't actually come from the trust. They were introduced into the account of the trust by a third party.
Q. So these funds were flowing from a hedge fund into a trust account used to purchase annuities; is that correct?
A. Yes.
Q. And, again, when Mr. Cohen was given an opportunity by Woodbury to explain what was going on with selling these annuities, he never mentioned funding by a hedge fund, did he?
A. No.
Q. He never mentioned funding by an intermediary called BDL, did he?
A. No.

(Tr. 702:17-25-703:1-9).

4. **Cohen Falsely Certifies That He Is Familiar With His Purported Clients And That All Of The Information He Provided 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 Re[redacted]
Marc Cohen	
Registered Representative Signature	Registered Representative Phone # [redacted]
	Date 2/7/08

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(Div. Ex. 621.) Mr. Stone testified as follows regarding the above certification signed by Cohen:

Q. Could you read that into the record.
A. "I believe the information provided is complete and accurate to the best of my knowledge and that this transaction is suitable for the client."
Q. Let's break that in two.
The first part of that, does that tie into all the other aspects that are reflected in the Compliance Manual about providing truthful, accurate, complete, pertinent information to Woodbury so that it could conduct a suitability review?
A. Yes.
Q. And when you [see] a registered representative signature under that box, what expectation do you have regarding the information that's above it?

A. That they've provided complete and
accurate information

(Tr. 705:24-25-706:1-18).

Cohen's certifications, however, were false because: (i) he had not met with the trustees of the purported family trusts and therefore was not familiar with his supposed clients; and (ii) because Cohen knew that the investment access and source of funds information he was providing was false, and that 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 did not even know who he was. For example, [redacted], a BDL nominee and purported trustee of the [redacted] Trust (which ostensibly purchased eight variable annuities through Cohen), testified as follows:

Q. You testified, [redacted], that
you didn't know or communicate with
Mr. Cohen to your knowledge. Is that
correct?

A. Yes.

Q. So is it fair to say that at no
point in time did you have Mr. Cohen provide
you any sales materials about annuities to
you?

A. Not at all.

(Tr. 104:6-15). [redacted] a BDL nominee and purported trustee of the [redacted] [redacted] Trust (which ostensibly purchased three annuities through Cohen) offered similar testimony:

Q. Did you ever have any
conversations with anyone who identified
himself as a securities broker in connection
with variable annuities?

A. No.

Q. Did you ever meet Marc Cohen?

A. No.
Q. Did you ever speak with Marc
Cohen?
A. No.

(Tr. 179:18-25-180:1-3).

5. Woodbury Would Have Rejected Cohen's Annuities Sales If Cohen Had Provided Truthful Responses On The Point Of Sale Forms.

Cohen was able to fraudulently obtain principal approval of his stranger-owned annuities sales by: (i) providing false investment access information about BDL's nominees; (ii) failing to disclose that BDL's nominees intended to access their annuities well within the surrender charge periods; (iii) failing to properly disclose that BDL was the source of funds for each of the annuities being purchased; and (iv) falsely attesting that he was familiar with his purported clients (who have separately testified they never met or spoke with Cohen). If Cohen had provided truthful 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 these sales. (Tr. 691:10-19, 805:23-25-806:1-9). Woodbury also would have rejected the variable annuity sales if it had known that hedge funds were the ultimate investors. This is made plain by Mr. Stone's testimony:

Q. Did Mr. Cohen ever mention to you that
he was working with any hedge funds in the sale
of these annuities that we're here on today?
A. No.
Q. What, if anything, would you have done
had he told you that?
A. We wouldn't have done the business
even if the client, the hedge fund wanted to buy
and use annuities as short-term investment
vehicles. Even in that case.

(Tr. 691:10-19).

C. COHEN REPEATEDLY LIES TO WOODBURY ABOUT THE NATURE OF HIS ANNUITIES SALES.

1. The Call From Penn Mutual.

On February 12, 2008, Mr. Baker—Manager of Market Conduct and Compliance at Penn Mutual—contacted Mr. Stone. (Tr. 466:14-467:16; Div. Ex. 609). Mr. Baker reached out to Mr. Stone because Mr. Baker understood Mr. Stone to be Cohen's supervisor at Woodbury. (Tr. 444:16-21). Cohen first came to Mr. Baker's attention a month earlier when Cohen asked a Penn Mutual annuity wholesaler about "red flag limits" (*see supra* Section II.A.4). When Cohen went on to submit two annuity applications to Penn Mutual that resembled "stranger-owned life insurance," Mr. Baker investigated Cohen's annuities business and rejected the applications. (Tr. 464:20-466:2). Mr. Baker called and emailed Mr. Stone to alert him about Cohen's conduct and the findings of Penn Mutual's investigation. (Div. Ex. 609).

The investigation began when Cohen faxed, late on a Friday afternoon, two annuity applications to the same Penn Mutual wholesaler whom he asked about "red flag limits." (Div. Ex. 609). One application was on behalf of the [redacted] Trust, and the other was on behalf of the [redacted] Trust. (Div. Ex. 609). The applications were each for $4.9 million annuities and were accompanied at 5:45 pm by wire transfers for the same amounts. *Id.* As Mr. Baker testified, "$5 million is the maximum amount that the Penn Mutual would issue an annuity for" and "$5 million is a lot of money for a person to put into an annuity . . . so it was unusual, it was unusual to get an annuity for that large." (Tr. 475:12-21). Further, in Mr. Baker's experience, "Fridays, late in the week, was when paperwork tended to come in that was out of the ordinary." (Tr. 476:6-

10). Because of these circumstances and Cohen's suspicious questions about "red flag limits," Mr. Baker reviewed the paperwork Cohen submitted. (Tr. 464:20-2).

Although Cohen certified that the answers in the annuity applications were true and correct to the best of his knowledge, (Tr. 487:11-488:10, 498:10-499:8; Div. Ex. 609), Mr. Baker found that "there were characteristics of the paperwork that were very problematic." (Tr. 465:9-14). Specifically,

- The applications identified Florida trusts as the purported annuity owners, while the annuitants lived in Illinois and the purchase money was wired from a bank in New York. (Tr. 479:17-480:22; Div. Ex. 609).
- The annuity applications were not signed by the owners or the annuitants. (Tr. 477:12-22, 486:6-21, 497:5-20; Div. Ex. 609).
- The trusts identified as the owners of the annuities had been created only days before the applications were submitted. (Tr. 480:24-481:12, 482:19-483:21; Div. Ex. 609).
- One of the annuitants was a young woman residing in a nursing home. (Tr. 491:8-23, 493:19-494:12; Div. Ex. 609).
- Money was wired to purchase the annuities, and "[w]ires were not the typical way people funded annuities." (Tr. 495:16-496:13; Div. Ex. 609).
- The applications claimed that gifts and inheritances were being used to purchase the annuities; yet no relationship between the owner and the annuitant could be established. (Tr. 483:22-484:16, 492:12-493:3; Div. Ex. 609).
- No Woodbury suitability review had been conducted for either annuity application. (Div. Ex. 609; Tr. 477:23-478:11, 486:22-25, 495:3-7, 497:21-25; Div. Ex. 609).[10]

"Because of the characteristics [of the annuity applications] being what they were, [Mr. Baker] made a business decision to return the $10 million . . . that [Cohen's] client

[10] The annuity applications were also notable because they specifically required Cohen to provide the "anticipated holding period" for the annuity being purchased. Cohen falsely represented that the Daniel Zeidman Trust and Esther Zeidman Trust intended to hold the annuities for "10+" years, which was greater than the surrender charge period and was the answer necessary for the annuities to be deemed suitable. (Div. Ex. 609; Tr. 484:24-485:14).

had sent and [Penn Mutual] didn't issue the business . . . didn't want the business." (Tr. 465:3-8). Mr. Baker also notified Mr. Stone and asked him to investigate Cohen's annuities business. (Div. Ex. 609).

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 had been diagnosed with terminal medical conditions. (Div. Ex. 374; Tr. 686-693). 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; Tr. 684:2-6, 744:9-20, Cohen Invest. Tr. 321:12-15).

3. Cohen Misleads Woodbury And Refuses To Provide Information When Asked About The Variable Annuities Sales.

On February 13, 2008, Steve Smallidge, who was the National Sales Director of Independent Marketing Organizations at Woodbury, spoke with Cohen and attempted to obtain an explanation from him about the variable annuity transactions. (Div. Ex. 335; Div. Ex. 374). Cohen told Mr. Smallidge that the annuities sales did not involve "market timing and the intent is tax deferral and wealth preservation," and further, that the annuities were purchased for "estate planning purposes." (Div. Ex. 335). When Mr. Smallidge asked Cohen directly how he knew the clients who were purchasing the

annuities, Cohen told Mr. Smallidge that the clients were referred by an attorney and a CPA. (Div. Ex. 335.) But Cohen never provided Mr. Smallidge with the names of the attorney and CPA. (Tr. 582:18-20.) Nor did he provide Mr. Smallidge with complete copies of the family trusts that had purchased the annuities. (Div. Ex. 335.) Instead, Cohen emailed Mr. Smallidge, claiming that the attorney refused to provide complete copies of the trusts because the customers were "[w]ealthy individuals" who "set up trusts as an added layer of privacy." Cohen emphasized that "[t]hese are legitimate clients and law abiding citizens with nothing to hide but their right to properly plan their estate." His full email to Mr. 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" [redacted]
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).

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. Mr. Feder's testimony at the hearing directly refuted all of

Cohen's claims that the variable annuities transactions involved an attorney working on estate planning for wealthy individuals:

> Q. Did you have an attorney associated with BDL that Mr. Cohen interfaced with to get questions answered?
>
> A. No.
>
> Q. Mr. Cohen writes, "I have spoken to the attorney that referred us to these very wealthy and influential clients and he is adamant in not sending us the complete trust documents that you requested."
> Do you have any idea what attorney he is talking about there?
>
> A. No.
>
> ***
>
> Q. So to the extent that Mr. Cohen is claiming there is a reluctance by an attorney to provide the trust documents that are being requested by . . .Woodbury Financial you had nothing to do with that, correct?
>
> A. I don't believe so, no.
>
> ***
>
> Q. [H]e refers to "wealthy individuals set up trusts as an added layer of privacy." And he goes on to say some other things. Were the trusts set up to add a layer of privacy to wealthy individuals?
>
> A. Not in my opinion.
>
> Q. The trusts were set up so BDL could execute the short term annuity strategy, correct?
>
> A. Yes.

(Tr. 355:3-6, 355:10-18, 356:6-12, 355:19-25, 3561-5.) Despite its falsity, Cohen maintained the attorney and wealthy family story in all of his communications with Mr. Smallidge. At no point, did Cohen ever disclose the true nature of the annuity sales, as evidenced by Mr. Smallidge's testimony at the hearing:

> Q. During any of these communications with Mr. Cohen, did he mention an individual named Michael Horowitz?

A. No.
Q. What about an individual named
Howard Feder?
A. No.
Q. What about an entity named BDL Group?
A. No.
Q. During any of these communications
with Mr. Cohen, did he provide a particular
strategy his particular clients were using
with respect to variable annuities?
A. No, other than they were doing estate planning.
Q. Did Mr. Cohen ever disclose that they
were using variable annuities for short-term gains
instead of long-term investments?
A. No.
Q. Did Mr. Cohen ever indicate to you in
any way that a hedge fund was involved in
these variable annuities transactions he was
submitting to Woodbury?
A. No.
Q. Did Mr. Cohen use the term "hedge fund"
at all in any communication with you?
A. No.

(Tr. 583:19-584:21).[11]

4. Cohen Abandons His Office During Woodbury's Investigation.

On February 20, 2008, Cohen emailed Woodbury's President, Walter White, along with Smallidge, indicating he was resigning his registration with Woodbury. (Div. Ex. 374)[12] On February 21, 2008, Stone and an investigator from the Hartford travelled to U.S. Planning's offices in Manhattan to meet with Cohen. When they arrived, they were notified by Cohen's business partners (Mike Frieda and Fredda Elzwig), that Cohen had cleaned out his office, submitted his resignation, and left the office with his assistant. (Tr. 687:7-14; Div. Ex. 374). Another call to Cohen was attempted; Cohen indicated he

[11] *See also* Tr. 795:5-18 (Mr. Stone reading an excerpt of a fax cover sheet sent to the Hartford by Cohen's office (Resp. Ex. 609) that states, "Per Marc Cohen, these are annuities for very wealthy families.").

[12] As Mr. Novak testified at the hearing, he advised Cohen to quit before he was terminated: "[I]t's always better for a registered rep to resign and not be terminated, because if it's terminated, it gets a hit on your U-5. [S]o I probably said to you: I think you should quit now before you're terminated." (Tr. 949:7-9; 15-16).

had resigned and would not talk further, unless his remaining sales commissions were released by Woodbury. (Tr. 703:25-704:17; Div. Ex. 374). Woodbury terminated Cohen's registration on February 25, 2008. (Div. Ex. 374).

D. COHEN'S ILL-GOTTEN GAINS.

Cohen was paid at least $766,958.00 in sales commissions for the stranger-owned annuities he sold to BDL's nominees. (Tr. 844:6-9; Div. Ex. 304, 305; Answer, ¶103). Cohen actually contends that he deserves even more commissions for selling the variable annuities at issue in this case. Cohen initiated arbitration against Woodbury, claiming that Woodbury improperly withheld at least an additional $1,300,000 in sales commissions to which he is entitled. (Tr. 843:5-16; Div. Ex. 304, 305).

III. LEGAL ARGUMENT

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

Section 17(a) of the Securities Act of 1933 ("Securities Act") prohibits fraud "in the offer or sale" of securities, and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder prohibit fraud "in connection with the purchase or sale" of any security.[13] 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.*

[13] After the close of the evidence in this case, Cohen filed three motions for summary disposition: (i) Respondent Moshe Marc Cohen's Motion Of Summary Disposition As To 10b-5(a) and 10b-5(c) Alleged Violations In OIP; (ii) Respondent Moshe Marc Cohen's Summary Disposition As To 17(a)(1) Of The Securities Act Of 1933 Alleged Violations In The OIP; and (iii) Respondent Moshe Marc Cohen's Motion Of Summary Disposition Aided And Abetted 17(a) and 17a-3(a)(6) Of The Exchange Act In The OIP. Each of these motions duplicates motions for summary disposition Cohen filed before the hearing and raised again orally at the hearing. The written and oral motions were denied on the record by Chief Judge Murray. (Tr. 9:7-25-10:1-12; 11:4-16; 908:12-24). These denials apply to the identical motions for summary disposition Cohen filed after the hearing. But to the extent Cohen's new motions remain pending, the Division opposes them as meritless for the reasons set forth in this brief.

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) 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 proof of 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).

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 for "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, Woodbury's reviewing principals would have rejected the sales as unsuitable or, at a minimum, subjected the sales to heightened scrutiny. As a result of his fraudulent conduct, Cohen deceived Woodbury into approving his annuity sales and earned over $2 million dollars in sales commissions.

1. Cohen Acted With A High Degree Of Scienter.

Cohen acted with a high degree of scienter because he knew the hedge funds' investment strategy was one Woodbury never would permit. The hedge funds sought to convert long-term annuity investments into short-term investments. Cohen knew, however, that this strategy would be rejected by Woodbury because he specifically received training on this subject:

Q. Would you read that sentence and the sentence that follows it, please.
A. "As you are well aware, annuities are not as liquid as other investments and include substantial surrender charges.
"This is not the right investment for someone with short-term cash needs or short-term investment objectives."
Q. [If] Mr. Cohen advised Woodbury that [he] had clients that wanted to use the variable

annuity product as a short-term investment product, would that have violated what's stated here?

A. Yes.

Q. And why is that?

A. Because as it says, they're not the right objective -- right investment for someone with short-term cash needs or a short-term investment objective.

Q. So Mr. Cohen can't substitute his judgement [sic] for Woodbury's judgement [sic] regarding how an annuity product should be marketed and used?

A. That's correct.

(Tr. 660:9-25-661:1-9; Div. Ex. 616 at 32).

Cohen also knew that if he provided truthful investment access information that his business would have been flagged by Woodbury during its 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 seven year, are you 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.

(Cohen Invest. Tr. 167:1-20) (emphasis added). As such, Cohen knew he had to lie on the point of sale forms (Div. Ex. 621) if he wanted Woodbury to approve his sales and receive millions of dollars in sales commissions.

2. Cohen Has Offered Conflicting And Changing Explanations For The Answers He Gave To The Investment Access Question.

a. Cohen Initially Claims He Does Not Know The Basis For His Investment Access Responses.

When first confronted by Division staff, in 2011, 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.

(Cohen Invest. Tr. 173:20-174:25) (emphasis added).

b. Cohen Then Claims That His Purported Customers—The Trustees—Provided The Investment Access Information.

At another point in his investigative testimony, Cohen contended that his trust customers (Cohen Invest. Tr. 189:20-21) 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.

(Cohen Invest. Tr. 177:16-24, 189:20-21). Likewise, all of the nominees testified that they never spoke to Cohen— let alone advised him on how he should complete the forms required by Woodbury. (*See supra* at II.B.4).

Furthermore, Mr. Feder—whom Cohen identified as his client for the first time at the hearing (Tr. 841:4-7) —was unequivocal in his testimony that he never told Cohen how to complete any forms whatsoever:

> Q. Did you ever tell him how he should answer any questions on any Woodbury Financial form?
> A. No.
> Q. Any individual annuity contract applications?
> A. Just to make it simple I didn't tell him how to fill out any forms.
> Q. So to summarize, Mr. Cohen gave you blank forms from Woodbury, the various insurance companies, right?
> A. Yes.
> Q. You took them to the nominees for the trust and the trustees when necessary and you asked them to sign them in blank, correct?
> A. Correct.
> Q. And then once you had those documents signed in blank you returned them Mr. Cohen?
> A. Correct.

(Tr. 249:8-25 -250:1-4).

c. Cohen Next Contends That The Investment Access Question Applied Only To "Withdrawals" Of Money From Annuities.

After being sued by the Division for falsifying his annuity point of sale forms, Cohen contended that the investment access questions in Section 4 pertain only to access through "withdrawals" from the annuity. Cohen Answer, ¶ 98. Even assuming arguendo that the investment access questions in Section 4 were qualified in the way that

Cohen contends, his responses were still false because the hedge funds did not intend for their nominees to annuitize the contracts or otherwise take withdrawals from the annuities beginning in "11 to 15 years." As he has admitted (*see supra* Sections II.A.2, II.B.1), Cohen knew that the hedge funds intended to only use the annuities as short-term investment vehicles and had no intention of locking up their money for more than a few months. (*See, e.g.*, Tr. 45:6-17).

d. Cohen Changes His Story Again Before The Hearing And Claims That The Point of Sale Forms Were "Not Required" And "Optional."

Cohen contended in his Pre-Hearing Brief and during the hearing that the point of sale forms that he submitted to Woodbury were "optional," leading to the untenable conclusion that it was therefore acceptable to lie on those forms. This argument, moreover, is contradicted by the record evidence: the forms Cohen submitted to Woodbury were mandatory, and Cohen, as a licensed registered representative, was obligated to complete them accurately. (*See supra* Sections II.A.6, II.A.7 and II.A.8).

Finally, Cohen's intent to deceive Woodbury is best evidenced by his interactions with Mr. Smallidge after Woodbury became suspicious about the variable annuity sales. When asked directly by his broker-dealer about the variable annuities transactions and given multiple opportunities to provide detailed and fulsome explanations, Cohen spun a cover story about working with an attorney and CPA to help "wealthy families" with "estate planning." Cohen never once mentioned hedge funds using variable annuities to achieve short-term gains. Nor did he identify any of the individuals or entities he actually was working with on the annuities sales, such as Mr. Horowitz, Mr. Feder, or BDL. (*See supra* Section II.C.3).

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

Exchange Act Section 17(a) and the rules thereunder require a registered broker-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-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. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Exchange Act Rel. No. 33367, 55 SEC Docket 1970 (Dec. 22, 1993). This requirement applies regardless of whether the information entered itself is mandated. *See Sinclair v. SEC*, 444 F.2d 399, 401 (2d Cir. 1971); *James F. Novak*, Exchange Act Rel. No. 19660, 83 SEC Docket 1078 (Apr. 8, 1983).

To establish aiding and abetting liability, it is necessary to show (i) a securities law violation by a primary wrongdoer; (ii) "substantial assistance" to the primary violator; and (iii) that the accused provided the requisite assistance with knowledge of the securities law violation. *See Howard v SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004) (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. (Div. Ex. 621). Accordingly, Cohen aided and abetted, and caused Woodbury's violations of Exchange Act Section 17(a) and Rule 17a-3(a)(6) thereunder because the forms contained multiple inaccuracies.

C. THE COURT SHOULD ORDER COHEN TO PAY DISGORGEMENT AND PENALTIES, AS WELL AS IMPOSE 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 gains. 15 U.S.C. § 77h-1(e); 15 U.S.C. § 78u-3(e). Thus, Cohen should disgorge the entirety of the sales commissions he received as a result of his fraud, which totaled $766,958, plus $210,204 in prejudgment interest as of the start of the hearing. (Div. Ex. 304; prejudgment interest calculation is attached as Exhibit A.) In addition, Cohen has a pending FINRA arbitration in which he is seeking in excess of $1,300,000 in sales commissions Woodbury withheld after it discovered his fraud. (Tr. 843:24-25-844:1-14). To the extent that Cohen prevails in his arbitration, he should be compelled to disgorge any portion of the award that consists of withheld sales commissions because that money also would constitute ill-gotten gains derived from fraud.

2. **Cohen Should Be Ordered To Pay Civil Monetary Penalties.**

Exchange Act Section 21B(a) authorizes the Commission to assess a civil monetary 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 penalty system tied to the egregiousness of the securities law violation. 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 statutory factors: (i) fraud; (ii) harm to others; (iii) unjust enrichment; (iv) prior violations; (v) need for deterrence; and (vi) such other matters as justice requires. *See* Exchange Act Section 21B(c) ("Determination of Public Interest").

A third-tier penalty is warranted against Cohen due to his egregious misconduct (as established by the evidence introduced at the hearing) and the substantial amount of his unjust enrichment he received in the form of sales commissions, as well as the need to deter other market participants from engaging in similar conduct. This third-tier penalty, furthermore, should be imposed for each of his twenty-eight fraudulent annuity sales.

3. Cohen Should Be Ordered To Cease-And-Desist From Violating The Federal Securities Laws.

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 (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. *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 relation to 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 misconduct violated the securities laws and poses a substantial, continuing risk of harm to investors and the marketplace.

4. Cohen Should Be Barred From The Securities Industry.

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 a bar 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: (i) the degree of scienter involved; (ii) the isolated or recurrent nature of the violations; (iii) the sincerity of assurances against future violations; and (iv) the likelihood that a respondent's occupation will present opportunities for future violations. *Id.*

As the hearing evidence demonstrated, Cohen's violations of the federal securities laws were egregious, numerous, and repeated. Without an industry bar, Cohen, who is thirty-eight-years-old, will have ample opportunities to commit future 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 also should 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.

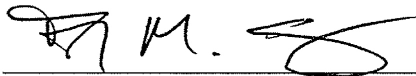
IV. CONCLUSION

As demonstrated by the foregoing as well as the full evidentiary record presented at the hearing, Cohen falsified his broker-dealer's point of sale forms twenty-eight separate times to ensure that his stranger-owned variable annuities sales would pass

suitability review and he would receive lucrative sales commissions. Thereby, Cohen committed primary violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rules 10b-5 thereunder. He also and aided and abetted Woodbury's violations of Section 17(a) of the Exchange Act and Exchange Act Rule 17a-3(a)(6) thereunder. For these egregious violations, the Court should: (i) order Cohen to pay disgorgement, plus prejudgment interest; (ii) order Cohen to pay third-tier civil penalties for each of his twenty-eight separate securities law violation; (iii) order Cohen to cease-and-desist from violating the federal securities laws; and (iv) permanently bar Cohen from participating in the securities industry.

Dated: September 29, 2014

Respectfully submitted,



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