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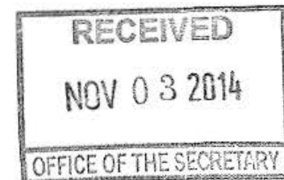
UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION

IN THE MATTER OF:

MICHAEL A. HOROWITZ and
MOSHE MARC COHEN

RESPONDENTS.



ADMINISTRATIVE PROCEEDING
FILE NO: 3-15790

RESPONDENT MOSHE MARC COHEN'S POST-HEARING BRIEF

I. **Introduction**

At the hearing held on August 25th, 2014 the Division of Enforcement ("Division") failed to conclusively prove that Respondent Marc Cohen ("Cohen") knowingly misrepresented the true nature of twenty-eight variable annuity sales to his broker-dealer, Woodbury Financial Services Inc. ("Woodbury" or "WFS"). Contrary to the claims of the Division, Cohen did not violate any federal securities laws. The Division's claim that Cohen abdicated his industry's gatekeeper responsibilities is not only false, but an unprecedented creation of what a "gatekeeper" is. A Gatekeeper in the Securities Industry World is limited to Insiders, Public Companies, and their advisors (Underwriters, Officers, Executives, Accountants, Lawyers and alike) and financial advisors to their clients - with a duty to disseminate truthful pertinent information to **Investors** and the **Public**. This case does not belong within a Securities Law forum but rather within a Common Law Courtroom, if any.

The Division's underhanded and unethical tactics of knowingly obscuring the truth throughout the proceedings in order to back into their claim that Cohen knowingly violated federal securities laws is unequivocally apparent. Dean Conway and his team are not only attempting to try a case that does not belong in an SEC Court, they are attempting to expand the law beyond which are beyond the powers of the SEC.

The claim that Cohen's alleged misrepresentation to his Broker Dealer violated Federal Securities law is in itself flawed. The role of the Securities and Exchange Commission is to protect the Public and Investors **"in connection with"** sales and purchases of securities. It does not extend to the SEC mingling in the disagreements of a registered representative with their broker dealer, nor any other non-security matters. The Division's attempt to state that the "in" (of "in connection" and "in offer or sale") would include any type of alleged fraud is wrong. Not every alleged fraud or misstatement that might involve the sale or purchase of securities are actionable by the SEC under 17(a) and 10(b). The alleged Fraud might be connected to securities, but they have no relation or "nexus" to the purchaser or seller of a security; nor were any purchasers or sellers misinformed, frauded, misled or harmed. The Division's argument that a Federal Securities violation is actionable under 17(a) or 10(b) in this case is wrong.

The Division has attempted to mislead the court throughout the proceedings that the use of variable annuities utilizing terminally ill annuitants was a fraud and a scheme. **It is not a fraud and a scheme, nor has the Division argued or proved that that the use of terminally ill annuitants was illegal by either the securities or insurance industry.** Contrary to the Division's portrayal that such strategy was a scheme, the annuity concept was perfectly legal and not scheme in any such way. The Division interestingly failed to call on even one witness from any of the 8 annuity companies that issued 28 annuity contracts knowing that their truthful testimony pertaining to the Annuity Strategy would undermine the Division's case against Cohen.

The Division's attempts to portray that the use of annuities for short-term gains - is in itself illegal is wrong. Nowhere does the SEC prove that such is illegal based on Finra, insurance company standards, SEC, or even industry standards. The SEC's own website during 2008 did not state that such is illegal, but rather a suggestion to investors to be aware of surrender charges if they chose to cancel their annuity through an early cancellation or surrender.

Since the death of an annuitant triggers the waiving of all surrender charges (even within days of a contract's issue), the investors were clearly not concerned with the surrender charges involved in any of the contracts. No purchaser or seller were ever misled, harmed, defrauded or even unhappy with Cohen's executing of the trades on their behalf; nor have they stated such during the hearing. Neither investor nor the public were ever misled or defrauded in any way by Cohen which would preclude the SEC's action in this matter.

Cohen did not willingly attempt to deceive his broker dealer through his response of 11-15 years on the **"Investment Access"** question on Woodbury's "Annuity Point of sale" suitability form. Cohen believed that the answer was truthfully answered given the facts on hand at the time. Cohen testified that he felt that the Investment access question referred to an **"actual withdrawal"** or "**access of the investment" only**—and not to the payout or death benefit maturity of the annuity contract. Such argument is not only logical but every annuity companies' brochure & prospectus clearly define the distinction between investment and death benefit. Cohen believes that the interpretation of such, is the reason the Division did not call upon any of the annuity companies that issued any of the 28 annuity contracts to testify.

Suitability forms are designed for the protection of investors in order to assure that the product purchased or sold fit the "needs" of an investor. Any ancillary benefits that a completed suitability form offer a Broker or Broker Dealer; is secondary to the suitability protections of an investor. They are not designed for the protection of Broker Dealers but rather for the protection of investors. This would be similar to a prospectus which is clearly designed to "protect investors" and not product manufacturers or public companies.

Under SEC & Finra Rules (during January and February of 2008), Suitability and principal review requirements were not needed under certain circumstances. One such exemption was where an **institutional investor** purchased a product like an annuity or stock from a registered representative. A second such exemption, was where a registered representative fulfils an order without a recommendation as to the purchased product. Such is called an **"Order Taker".**

Cohen believed that both these exemptions independently applied to his annuity sales in 2008.

Feder and Brian Jedwab both testified that the Funds, and/or BDL had assets in excess of $50 million thus qualifying them as **"Institutional Investors"** and exempting them from the suitability requirements under SEC and FINRA rules in early 2008[1]. Secondly, although Cohen participated on a conference call on January 12th, 2008, (where the Division introduced Exhibits 396 and 397), Cohen made no any product or investment recommendations. This was Cohen's first introduction to Feder and the Fund. The Division's attempt to make the Court believe that Cohen made product recommendations through their introduction of the comparison spreadsheets in Exhibits 396 and 397 to the Court is false. Feder already had these spreadsheets in his possession from January 2, 2008[2]; this was prior to Cohen fully understanding the annuity Concept or Cohen's January 4th, 2008 Vegas meeting with Horowitz to learn more about the strategy.

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[1] See Finra Rules 2821 and 2310 later in this brief

[2] See later in the brief where the Division claims to have remarket exhibit 288 to exhibits 396 and 397. The unethically covered the facts by not including the 1st page of Exhibit 288 which showed Feder receiving the spreadsheet on January 2,2008 over 10 days prior to Cohen's introduction to Feder or the Fund.

Cohen's only recommendation, was to utilize "trusts" in order to assure that the contracts they were buying would retain an Annuitant- Driven status[3]. Cohen's recommendation "of using trusts" would have applied to "ALL" of the companies on the spreadsheet which clearly included many more than the 8 companies Cohen used in his eventual sale to the Investors.

Any product or investment "recommendations" were made by others prior to Cohen's introduction to Feder or the Fund. This is confirmed by the SEC's OIP at paragraph 94 and the Division's Post Hearing Brief at 20. It could have been Marc Firestone, Richard Horowitz, Michael Horowitz, Abe Gottesman or others but it was not Cohen.

Marc Firestone and Richard Horowitz (both from CA) are two Brokers that Dean Conway and the Division purposely and unethically failed to bring up during the hearing while repeatedly objecting to Cohen's showing of evidence that Firestone and Horowitz already made prior annuity sales to these same nominees, Feder and BDL. Conway purposely deceived the court by failing to state that Richard Horowitz, Marc Firestone or their assistants were the ones that sent the Annuity Applications for MetLife, Sunlife, Genworth and others to BDL group. Both these Brokers sold contracts to these same nominees and BDL prior to Cohen even knowing the annuity concept existed. (Evidence in the OIP for Feder and also Finestone OIP and link is elaborated to later on). This claim corroborates Cohen's claim that he made "**no product recommendations**" to BDL, the Funds, Feder or the Nominees and clearly acted as an **"order taker"** only in his sale of annuities to the investors.

After the January 12, 2008 conference call, Cohen's direct contact person was Abe Gottesman who was the liaison between Cohen and the Fund. Cohen had no direct contact with Feder until February 1, 2008. All information and applications that Cohen received, was through either Horowitz or Abe Gottesman. The first set of annuities were sold on January 28, 2008 prior to dealing direct with Feder. On February 1, 2008, another call was set up between Cohen and Feder of which contact information was exchanged between the two and Cohen now directly dealt with Feder. This led to the second set of annuities sold on February 7, 2008. This is the why Feder testified that he never told "Cohen" any of the information. It was all given to Horowitz and or Gottesman who forwarded and conveyed the responses to Cohen.

Although the Trusts were the legal owners of the annuities, the suitability requirements or any exemptions that would apply thereof, followed the beneficial owners. This is common practice in the Securities world where half of all trades are fulfilled through nominees. Cohen's disclosure of the Owners being the trusts were fulfilled as he had no duty to disclose the "beneficial owners" of the trusts. The duty to disclose the beneficial owners of a trust were recently decided upon in the 2nd Circuit that involved the more stringent cousin to annuities – "Life Insurance" Under *Kramer v. Lockwood Pension Services, Inc.*[4] [5] the non-disclosure of a

[3] The determination of whether the Death Benefit was triggered by the Owner or Annuitant, is whether the contracts were Annuitant-Driven or Owner-Driven. In all cases where Trusts were designated as Owners- the contracts would automatically be designated as Annuitant-Driven and would pay at the demise of the Annuitant

[4] 653 F. Supp. 2d 354 (S.D.N.Y. 2009

[5] These "implicit" representations are just that, implicit, and do not appear on the face of the application for life insurance. *Kramer never represented, nor omitted to disclose who the eventual beneficiary of his insurance trust would be, as that question was never asked of him. . . . If Phoenix needed to know the beneficiaries of the Arthur Kramer Insurance Trust prior to determining whether to issue the policy it could have asked for that documentation or conducted an investigation. They cannot now claim that failure to disclose the identity of the beneficiaries of the Trust is fraud*

beneficial owner is perfectly legal unless specifically asked for by the company.

Neither FINRA, the SEC nor Woodbury, restricted the purchase of variable annuities to Hedge Funds in 2008. In 2008, Woodbury Financial Services did not have any "written policies" or restrictions that Cohen was aware of against selling securities or variable annuities to Hedge Funds or Institutional Clients.

The Division's claim that Woodbury restricted Hedge Funds or even Short-term annuity sales in 2008 is a claim that even the Broker Dealer themselves have never previously made in the past 6.5 years since Cohen resigned from Woodbury. As alluded to by Mr. Conway, and in the Division's brief; - Cohen has a pending Finra Arbitration against Woodbury, of which during the past 6.5 years, neither of these restrictions, alleged violations or an alleged fraud to Woodbury, was ever brought up by Woodbury or their legal counsel. A review of Cohen's Finra's Broker check which include Woodbury's maliciously reported false allegations on Cohen's Finra U5; never allege a fraud to the broker dealer or an alleged misrepresentation to the answers of the "Investment Access" questions. Woodbury even amended Cohen's Finra U5 Disclosure 8 months after their initial disclosure but still never made any allegations that a fraud to the broker dealer occurred. How could the Division, whose role is to protect the public and investors make allegations 6 years later of a fraud to the broker dealer – while even Woodbury (which is neither an investor nor the public),- as part of their defensive posture and counterclaim to Cohen's lawsuit - never made any allegation of "fraud to the Broker Dealer" themselves?

The SEC is not only over stepping their boundaries of their charter and power given to them by Congress (as this is clearly not in the realm of Securities Law), but has now spearheaded a case that is clearly a private litigation matter. This case does not relate to the public or any investors being harmed or misled in any such way and is outside the scope of Federal Security Laws.

In any case, Cohen did not purposely attempt to skirt any of Woodbury's principal or suitability review procedures. He clearly believed that not only were his answers to the "Investment Access" questions correct, but that the **"Suitability questions"** in the "annuity point of sale" forms of the annuity sales of the Trusts were not mandatory and **"immaterial"** to the sale. Cohen's belief was justified by the fact that "Suitability" questions are **not a sales tickets or Order tickets**. They are separate and distinct documents designed to assure that the product sold to investors are suitable. Before any of the Annuity sales were processed, Cohen reviewed various Finra notices including Finra Regulatory Notice (NTM 07-53 effective date of May 5, 2008) as well as the then in place Finra Rule 2130.

These Finra notices and Rules not only clearly defined the determinations as to **"when suitability"** was required, but it also defined "**what factors and facts were necessary**" (what questions were needed to be asked) to comply with the suitability requirements when suitability was necessary. An understanding of the differences between Finra Rule 2130 (rule in effect in early 2008) and the newly implemented Finra 2821 (effective date of May 5, 2008) – is necessary to understand Cohen's defense and ultimately why there were no federal security violations.

The 2 primary differences between the FINRA rules, is not only "**when**" a suitability review was necessary, but also **"what questions"** were necessary as part of the suitability requirement when suitability was needed. This understanding is crucial in order to understand why Cohen did not violate any securities rules nor

why Cohen's answers were either correct or in case it is deemed that they were wrong by the Court- why the responses would be considered to be "immaterial". The Finra rule 2130 which was in effect in early 2008, clearly show that **no "suitability or principal review requirements were needed based on securities and Finra requirements in early 2008.**

Although Cohen submitted the Annuity point of sale forms to the broker dealer, his understating at the time was that the **"suitability questions were immaterial"** to the annuity sales as they were not required based on Finra regulations during January and February of 2008, making any suitability responses on the "annuity point of sale" form "**immaterial**". It is well established under Finra rules that **where a suitability review is not required by a registered representative, but the registered representative chooses to complete the information or forms anyways - does not change the information to material information.** This is specifically addressed in Finra NTM 01-23 Footnote 7[6].[7] Finra considers such suitability responses, as a mere voluntary gathering of information thus making any incorrect responses, if they are deemed as such - **"immaterial";** thus no federal securities misrepresentation charges could survive.

Cohen did not attempt to deceive Woodbury as he clearly understood and believed that Annuity sales to institutional investors or sales that were non-recommended did not require any principal or suitability review. (Although the Division attempts to distinguish between a suitability and principal review, no such distinction was in place prior to the implementation of Rule 2821 (effective date of May 5, 2008). Cohen knew that under Finra rules in early 2008, **"no suitability or principal review was needed".** Cohen was also not aware of any Woodbury rules at the time that either restricted hedge funds in purchasing annuities or that restricted the sale of annuities to sophisticated institutional investors. In fact there are no such rules in the Division's Exhibit 618 (Woodbury's Compliance Manual). Another fact is that the Division presented a training Power Point given by Woodbury 10/31/07 (Exhibit 616 at that 49). This power included the following: (Exhibit 616 at 32)

> Suitability really boils down to is this product right for the customer and does the customer understand why and how this product will address their needs. I

The Division quote the manual stating that Annuities are not as liquid as other investments and include substantial charges. "This is not the right investment for someone with short-term cash needs or short-term investment objectives". The Division's evidence fail on 3 points.

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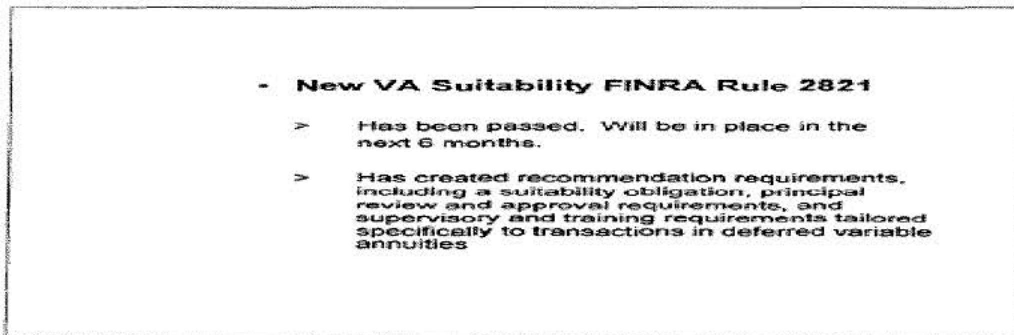
[6] https://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p003887.pdf

[7] A member or associated person who simply effects a trade initiated by a customer without a related "recommendation" from the member or associated person is not required to perform a suitability analysis, although members may elect to determine whether a security is suitable under such circumstances for their own business reasons. *See In re Thomas E. Warren, III*, 51 S.E.C. 1015, 1019 n.19, 1994 SEC LEXIS 508, *11 n.19 (1994) ("We do not believe the suitability claims brought against the Applicant are supported by the record. There is no evidence that Warren recommended the transactions that were effected in these accounts."), *aff'd*, 69 F.3d 549 (10th Cir. 1995) (table format); SEC Announcement of Final Rule on Sales Practice Requirements for Certain Low-Priced Securities, Release No. 34-27160, 54 Fed. Reg. 35468, 1989 SEC LEXIS 1603, at *52 (Aug. 22, 1989) ("[T]he NASD and other suitability rules have long applied only to 'recommended' transactions."); Clarification of Notice to Members ("NtM") 96-60, 1997 NASD LEXIS 20 (FYI, Mar. 1997) (stating that a member's suitability obligation under Rule 2310 applies only to securities that have been recommended by the member). Similarly, the suitability rule does not apply where a member merely gathers information on a particular customer, but does not make any "recommendations." This is true even if the information is the type of information generally gathered to satisfy a suitability obligation.

- This is a Point Point – when presented the script was not on the PowerPoint, nor has the Division proven that it was. Powerpoints do not have the scripts on the presentation, and although Cohen signed that he was present – there is no evidence that Cohen saw this verbatim.
- This clearly referred to a case where suitability was required and for a <u>recommended</u> sale of annuities.
- Short-term statement was a <u>suggestion NOT a restriction.</u>

Just the next screen at 33 has the following: (Exhibit 616 at 33)



Variable Annuities are on the regulators front burner. Here is the new proposed VA Suitability FINRA Rule 2821. With proposed rules like this out there it gives you the idea that the regulators will continue to monitor VA activity for a long time to come.

<u>**If Woodbury really had or even intended that their suitability requirements were more stringent than Finra and Industry standards- then these two PowerPoints (only months prior to Cohen's sales) were deceiving. Woodbury would have had an affirmative action to clearly state that they did they require suitability in unsolicited/non-recommended sales or that their forms were mandatory. This clearly confirms Cohen's testimony and defense.**</u>

<u>Any confusion as to what the requirements, were if at all required (with no written policies corroborating Stone's claim) - were clearly caused by Woodbury and should not be construed as either intentional, as scienter, or even recklessness.</u>

The Division's claim that Cohen willfully deceived Woodbury by misrepresenting material suitability questions on the point of sale forms is incorrect. All of Cohen's responses were given to him by Feder, Abe Gottesman and/or Michael Horowitz after receiving the information from Howard Feder the principal of BDL. Feder testified that he didn't give any information to Cohen, - what he did fail to state is that he gave all the information and responses to either Gottesman or Horowitz. Abe was the liaison between Cohen and the Fund. Feder would provide the information to Gottesman who passed on the documents and information to Cohen. (Cohen Tr. 247-248) Horowitz and Gottesman, who the Division tricked in order to avoid their testimony at the hearing– were prepared to testify information that would have squashed and undermined the Division's case. They would have also testified that Feder did provide all of the information including the "Investment Access" questions. Cohen made sure that the responses Horowitz and Gottesman provided to Cohen were correct and completed the applications to the best of his knowledge and understanding.

Both Horowitz and Gottesman were scheduled to testify on the Tuesday after Labor Day which the Division purposely tricked Cohen as well as Robert Rose Esq. (the attorney representing Michael Horowitz) by stating that the Division would present their case for 5 days, while Cohen would have 5 days (starting after Labor Day) as the hearing would last for last 10 days. Conway clearly stated that the first 5 days would consist of the Division presenting their case, while the second five days would be for Cohen to present his defense and witnesses. Based on Dean Conway's deceitful lies, Cohen arranged for Mike Horowitz and his attorney together with other defense witnesses to fly into NY on Labor Day to testify in Cohen's defense the following day. The sleazy and unethical tricks of Dean Conway and the Division; together with the previous statements by Judge Murray during a pretrial conference of a 10 day hearing, as well as her signing of the Respondent's Witness subpoenas that documented a 10 day hearing tricked Cohen in believing that a 10 day hearing was scheduled thus denying him the presentation of key elements to his defense. The chicanery of Mr. Conway whom affirmatively stated that Cohen's witnesses would testify during the second 5 days of the hearings; together with Judge Murray's demand in cutting the entire trial to 2.5 days, is against every right Cohen has for a fair hearing under the U.S. Constitution. Michael Horowitz, and Abe Gottesman were scheduled to testify that not only did Cohen not solicit the funds or make investment recommendations, but that all the responses and information submitted on any of the annuity applications or "annuity point of sale" forms were directed from Horowitz, Gottesman and/or Feder. The Court's order of disallowing Cohen to present his CA witnesses for his defense (unless they were present within the next day) is a complete deprivation of his rights to a fair-hearing. The bias of the Court against Cohen while heavily favoring the SEC, was apparent throughout the proceedings before, during and after the hearing. It has denied Cohen of a fair hearing and should be noted as being objected to by Cohen.

The Division's attempts to expand on Cohen's OIP beyond the **"investment access"** response, to justify their scheme theory, is against any right Cohen has to a fair hearing. Unfettered by the Court, the Division has clearly crossed the line of a variance and constructive amendment to the OIP through their briefs and hearing presentation. Any attempt to muddle the hearing through their litany of lies and allegations that expand on the OIP – should be denied. Their attempt to create a scheme impression through their expansion of misrepresentations and/or actions is disallowed under Federal Law. Any attempt by the Division's justification of such, through the OIP's "among other information" in OIP paragraph 98 should still be denied as being too broad. A "catch-all" provision that would include non-spelled out charges in any charging documents or an OIP - is against the constitution and must be denied.

The Division wrongly alleged that

(i) concealed that the hedge funds were the ultimate purchasers of the annuities- the Division failed to prove that Cohen attempted to conceal that the ultimate purchasers of the annuities were the Hedge Funds. The ultimate decision to utilize Trusts were by Feder, the Funds and their counsel. Cohen only apprised Feder that use of Trusts would cause all annuity contracts to become Annuitant Driven. In 2008, neither Woodbury, the SEC, nor Finra had any written restrictions of sales of variable annuities to Hedge funds. If they had non-written restrictions, Cohen was not aware of them. Regardless, of this fact, the Division's attempt to broaden the charges would clearly be **a constructive amendment and/or a variance to the OIP.**

(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 in only months, not years.- the Division's claim that this question referred to the **"investment Strategy"** is wrong. The question specifically states the following "I anticipate that I will begin to access this investment". This question is clearly designed to address a "Need for liquidity" by the Investor and not an investment strategy, or Time Horizon question. This question does not address the "Time Horizon" but rather the time period before liquidity is needed by the investor. The Division's new interpretation is not only wrong, but once again a **constructive amendment and/or a variance to the OIP.**

(iii) falsely claimed that the annuities were purchased for reasons other than short-term gains, such as "tax deferred treatment of earnings" - regardless of the time horizon chosen, non-qualified variable annuities offer a tax advantage of deferred growth until either a Death Benefit or withdrawal. Regardless, of this fact, the Division's attempt to broaden the charges would clearly be **a constructive amendment and/or a variance to the OIP.**

(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 - The response of "Trust" is the correct answer as the funds directly came from the Trust accounts to the annuities regardless of where the money ultimately originated from. The Division's statement on page 2 of their brief incorrectly states Cohen stated these were "family trusts"[8]. Regardless of this response, the Division's attempt to broaden the charges would clearly be **a constructive amendment and/or a variance to the OIP.**

(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. - Cohen never stated that he met any of the trustees that testified at the hearing but he did receive copies of their ID's and 1st and last page of the trusts to identify the owners and the trustees. Not meeting in person or trustee in person, does not indicate a false statement or wrong doing. All the information and documents received were given to Cohen by Horowitz, Gottesman, and Feder. Regardless of this response, the Division's attempt to broaden the charges would clearly be **a constructive amendment and/or a variance to the OIP.**

The Division's claim that Cohen attempted to deceive and defraud Woodbury is false. Cohen had no reason to believe that the annuity contracts would not be approved by Woodbury and clearly believed and knew that Finra Suitability and principal review requirements did not apply to these annuity sales. Cohen also believed that Woodbury's own manual was aligned with industry standards and Finra regulations. Woodbury's decision to withhold commissions were in no way connected to Woodbury's belief that they were defrauded in any way. Woodbury wrongly claimed other allegations in order to withhold Cohen's commissions which are the basis for Cohen's arbitration claims against Woodbury amongst other things. Only after 6 1/2 years - through the

[8] The Division presented the Hartford Enhanced Due Diligence form of Exhibit 286 at 23 as evidence and harp on the "Family Business Trust" as allegedly being incorrect- that response was correct as Bina Levy was a Sister of Huberfield the- Managing Partner of the hedge funds. This particular form was not part of the annuity application which were all sent to Woodbury– rather it was a form Hartford directly requested from Cohen and of which Cohen directly sent back to the Hartford as indicated on the Fax line on top of page. Any statement of reliance of this form by Woodbury, or an attempt to obscure such facts should be noted. As this form was not part of the application, no requirement of sending a copy to Woodbury existed.

deceptive tactics of the Division convincing former Woodbury employees that a fraud to the Broker Dealer allegedly occur, did the former Woodbury employees make any such allegations. The fact that the Division, did not call upon even one current employee or officer of Woodbury in order to corroborate the Division's claim that a fraud against the Broker Dealer occurred – make the Division's allegation suspect to fabricating Cohen's alleged Fraud to the Broker Dealer.

Tim Stone admitted on the Stand that Woodbury and his bosses knowingly made comical, non-sensical allegations in order to discredit and destroy Cohen while he was there.[9] If Woodbury really believed that they were defrauded in any way, they could have or should have made these allegations years ago. They also could have also easily used the Division's preposterous allegations against Cohen in their defense against Cohen's claim.

This case boils down to one thing and one thing only as per the OIP- That is, Cohen's response on the Woodbury Annuity Point of Sale question #4 titled "**Investment Access**".

The question states the following:

I anticipate that I will begin to access this investment:

A- Never B- 0-5 Years C- 6-10 Years D- 11-15 Years E- 15+ Years F- after age 59.5

Cohen believed at the time that this question was answered correctly. Contrary to the Division's claim and to Stone's incorrect characterization of this question that it was a "Time Horizon" question, this question strictly pertains to the **"liquidity needs"** and not to "Time Horizon". For a better understanding of these two terms Finra offers the following guidelines between the two terms in Finra Regulatory Notice 11-25 in Q4.

Q4. How does FINRA define the terms "liquidity needs," "time horizon" and "risk tolerance" for purposes of the suitability rule?

A4. FINRA Rule 2111 does not define the terms. As a general matter, these terms are to be understood commensurate with their meaning in financial analysis. FINRA, however, offers the following guidelines:

- **Liquidity Needs:** The extent to which a customer desires the ability or has financial obligations that dictate the need to quickly and easily convert to cash all or a portion of an investment or investments without experiencing significant loss in value from, for example, the lack of a ready market, or incurring significant costs or penalties.[11]
- **Time Horizon:** "[T]he expected number of months, years, or decades [a customer plans to invest] to achieve a particular financial goal."[12]

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[9] Stone testified at cross examination and admitted that he and or his supervisor Mark Sides from Woodbury made allegation to AIG and others that were knowingly wrong. Allegations were made that Cohen was a member of a terrorist organization while Cohen's attorney was indicted as a co-conspirator of the WTC bombing. Many other allegations including that documents were forged by the annuitants and other known false allegations were made and all proven wrong. Stone's and Woodbury's credibility is suspect as they have previously lied numerous times in order to defame Cohen. (Tr. 749-756)

The same memo continues with the following

> FINRA recognizes that there can be an inverse relationship between an investment time horizon and liquidity needs in that the longer a customer's time horizon, the less the need for liquidity. However, a customer may have a long time horizon, but also may need or want to invest all or a portion of his or her portfolio in liquid assets to pay for unexpected expenses or take advantage of unforeseen opportunities. Furthermore, although customers with a long time horizon generally may be in a position to seek greater returns by taking on greater risk because they "can wait out slow economic cycles and the inevitable ups and downs of" the markets,[14] that is not always the case. Some customers with long time horizons may not desire to take on such risk and others, because of considerations outside their time horizons, are unable to do so.

The SEC at http://www.sec.gov/investor/pubs/assetallocation.htm only defines Time Horizon but seems to not define what Liquidity needs are.

- **Time Horizon** - Your time horizon is the expected number of months, years, or decades you will be investing to achieve a particular financial goal. An investor with a longer time horizon may feel more comfortable taking on a riskier, or more volatile, investment because he or she can wait out slow economic cycles and the inevitable ups and downs of our markets. By contrast, an investor saving up for a teenager's college education would likely take on less risk because he or she has a shorter time horizon.

Cohen correctly understood the above question to refer to "liquidity needs" which is synonymous with "Investment Access". This is what Feder testified to when he said he didn't care about the Surrender charges and they never planned to withdraw or surrender the contracts (Tr. 276:18-277:1-10). Feder testified that they only planned on collecting through the Death Benefits triggered by the Death of the annuitants "**even if it meant holding the annuities for 10 years".** (Tr.253:10-14). Even if the Division's unlikely interpretation of this question is proven right, – the question itself would only be considered a "forecast"; which as case law supports - are not actionable in security fraud cases.

Based on Cohen's interpretation to the "Investment Access" which was in line to Finra's guidance on the matter; not only would have the 10-15 years response would be correct but the **"never"** could have been justified as well. Either of these choices would be correct as Feder and the Investors clearly had "**No Liquidity Needs"** nor an anticipation of accessing their Investments during the annuitant's lifetime.

Considering that this "Investment Access" question **did not** refer to "Time Horizon" and or "Investment Objectives", the Division's entire argument fail thereby defeating all charges the Division has conjectured in this proceeding.

Another Proof that the "Investment Access" question refers to "Liquidity needs" and not to "Time Horizon" or "Investment Objectives" is the fact that the word **"begin" is in question #4.**- One can begin to access their "Investment" but if it referred to a "Time Horizon" how does one begin to access their time horizon? The stated time horizon would end- not begin?

Based on the above, Cohen's response of 11-15 years to the "Investment Access" question was not only justified, but the best answer to the question asked. Even if Cohen is unlikely proven wrong in his understanding of question #4, his reliance on industry standards together with FINRA guidance would negate any negligence or scienter by the Division.

The Division falsely claims that Cohen argued that he felt that he was permitted to make material misrepresentations on the Woodbury forms because the forms were "not required" and considered "optional". The statement is a complete fabrication and a twist of words through the blurry spectacles of the Division. What Cohen argued was, that he believed that any suitability information gathered on the "annuity point of sale" forms became immaterial (as per the suitability exemptions that applied). Such being said, even if information was deemed to be wrong and mistakenly answered - any such mistake should been deemed immaterial. (This is based on the fact that Finra did not require the suitability and principal review on these annuities). Cohen believed that every suitability question within the "annuity point of sale" form, would be considered to be an immaterial statement.

The Division's argument that Cohen violated Federal Security laws fail, on all fronts. Not only has the Division failed to show that a willful "securities" material misrepresentation occurred through Cohen's response to the "Investment Access" question; their attempt in creating a scheme through their back door approach of adding many irrelevant and additional allegations never alleged in Cohen's OIP; should be dismissed on the grounds of being a constructive amendment and a variance to his OIP of March 13, 2014.

As the evidence and law will prove, all of the Division's allegations that a willful federal securities violation occurred are false; thus requiring the dismissal of all charges made by the Division.

II. Evidentiary Record

A. COHEN'S VARIABLE ANNUITIES BUSINESS

1. The Division references the annuity strategy as a scheme which is not only deceiving and unethical, but the Division has failed to ever demonstrate throughout the Hearing as to why or how it would be considered a scheme. As Cohen's pre-brief stated, as well as the SEC Wells Submissions of Centurion, Platinum and BDL stated, many well-known law firms have reviewed the annuity strategy and have offered opinion letters to its legality. The Video submission which was included as part of the Wells Submission has the funds counsel stating that even in 2013 they would allow their clients to utilize the strategy. The fact that the annuitants are not related, or even the fact that the annuitants were terminally ill do not create an illegal scheme. As the NJ Attorney General's office certified days before the hearing that the NJ Division of Insurance's stance is that no relationship must exist between an owner and an annuitant. In 2008, no insurance company, SEC or Finra regulations restricted the use of annuities in such way. The Court agreed and stated that the Division has never proved that the annuity strategy was illegal. (Tr. 825:6-13)

The SEC contends that in early fall of 2007, Horowitz sold over $20 million of the annuities strategy. In October of 2007, Horowitz lined Murray Huberfield & Marc Nordlicht's funds called Platinum and Centurion to invest in his annuity strategy. Nordlicht and Huberfield established BDL and hired Howard Feder to manage BDL for their purchase of the annuities.

The SEC contends that the by mid November 2007, several nominees signed nominees agreements and would be compensated by BDL. Cohen not only had no knowledge of this at the time, but he was only introduced to Horowitz in late December of 2007.

Conway and his team purposely misled the court to believe that once Horowitz could no longer sell annuities through Morgan Stanley, Cohen stepped in his place. Nothing could be further from the truth. There were two additional registered representatives that sold annuities to Feder and BDL, prior to Cohen knowing that such concept even existed. Their names were Marc Firestone and Richard Horowitz both affiliated with NFP securities. Conway and his team suppressed this information as it undermined their case against Cohen. Conway and the Division were also aware that annuity applications for 8 annuity companies were sent to Feder prior to Cohen ever speaking to Feder. Michael Horowitz who was supposed to be Cohen's key witness and was tricked to believe that his testimony would be taken the following week; would have testified that the BDL was already purchasing annuities and were ready to purchase the 8 different companies products prior to Cohen's involvement. Regardless of what Horowitz would have testified to, the following corroborates Cohen facts.

A quick glance of both Feder and BDL's OIP Admin proceeding File 3-15788 (paragraphs 1,7,22,26,27,28,32,36),as well as Marc Firestone & Richard Horowitz Admin proceeding file 3-15789 (paragraph 1,5-7) will clearly show that there were other brokers that BDL and Feder bought annuities from prior to Cohen's arrival.

Firestone and Richard Horowitz sold 12 variable annuities between November and December of 2007. BDL and Feder purchased almost $20 million dollars in annuities that were not related to Cohen between the periods of November and December of 2007.

The Division purposely deceived the court through their trickery in not allowing Cohen's witnesses to testify in order to cover up this fact. When Cohen brought up the fact that BDL and the funds were already purchasing annuities prior to Cohen's arrival as well as Cohen presenting exhibits showing such facts - the Court granted the objections of the Division thus silencing Cohen's defense with crucial facts.

2. The Division falsely makes it seem that Horowitz never sold the Fund any variable annuities. Not only did he sell the fund annuities but he also had two other Brokers involved from NFP solicit the fund and sell the fund annuities as discussed in section 1 above.

The Division's claim that Cohen knew that Morgan Stanley shut down Horowitz due to not approving of the concept is false. Cohen never addressed the reason in his Pre-Hearing Br. at 15.

```
11        Q     Did you understand that Morgan Stanley had
12   approved this strategy, the use of this strategy?
13        A     I was told that -- I was told that they did
14   and one -- I don't recall who mentioned this to me,
15   maybe Abe or Mike, that being that Morgan Stanley had
16   relationships with insurance companies, they said,
17   look, we're comfortable with the strategy, but we just
18   don't want to piss off insurance companies as far as
19   hedging -- hedging against insurance companies
20   utilizing these products.  We don't want to make
21   them --
22        Q     Who told you that Morgan Stanley was aware
23   of the strategy?
24        A     I don't recall who.
25        Q     Was it Mr. Horowitz?
```

Cohen Inv. Transcript 52: 11-25

MR. BUCK: Well, did you ever learn that
Mr. Horowitz or Mr. Gottesman had run into any road
blocks or obstacles in pursuing this business
themselves?
THE WITNESS: I believe a while -- I say --
I don't know when. A while after we had the annuities
in question, he made me aware that he sat down with the
SEC and said, oh, there was no issue. That's --
that's -- I don't know -- or not that there was no
issue. That everything went smoothly. Again, I don't
know if this is a long time ago -- roughly -- perhaps
maybe a month or two after I left Woodbury, but my
understanding was there was nothing wrong with it and

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my understanding was that Morgan Stanley did due
diligence on this concept and it was perfectly okay.

Cohen Inve. Trans 51:13-25, and 52:1-2

Cohen was told that Morgan Stanley felt uncomfortable based on the fact that the Insurance Companies were their Investment Banking clients so did not want to "piss off the insurance companies". Any statement that Cohen was aware that Morgan Stanley shut Horowitz down due to their issue with the strategy is and not proven by the Division.

Cohen stated he "doesn't know why" he sent the Woodbury Acct forms to Horowitz was in response to question posed 3 years after any events occurred. At the time he did not know or remember why-- there is no admission of guilt or anything wrong stating he didn't know why when asked 3 years later.

The Division purposely rephrases Cohen's statements and have taken his words out of context to try and Change the facts to fit their arguments.

Contrary to how the Division portrays the investment strategy- the annuity is a long term vehicle with a short term parachute that <u>allows</u> it to mature at the death of the short term annuitant. Emphasis "allows" because Owner can choose another annuitant even after death.

Nothing in the last paragraph of page 6 of the Division's brief was illegal or against any Federal Securities or Finra Rules in 2008.

The Division then quotes verbatim the sentence of "waiving of the surrender charge by the annuity companies when a death benefit is paid ...." An Owner of an annuity **<u>DOES NOT NEED TO CASH OUT OF their annuity at the death of the annuitant, in order to capitalize on the waiving of the surrender charge.</u>** They could choose to switch the annuitant and still have the waiving of the surrender charges applied to their account after the death of the annuitant.

<u>Jedwabs Testimony - (Division Post-Hearing Br. at 9)</u>

It is evidently clear that Cohen made no investment or product recommendations to the Funds, Feder, Trustees or their Owners.

The Division's make the argument that Brian Jedwab singled Cohen out as making recommendations.

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 by Division)

The last line of the Division's question includes Cohen, [and] the other agents were doing? Jedwab's response is "They" which is inconclusive as to who **"they"** refers to. An additional proof that "they" included others besides Cohen is the first half of Jedwab's response-- "they" would be identifying short-lived annuitants. The Division's OIP and Pre-Hearing Br. clearly state that Cohen had no involvement in identifying short-lived annuitants. This clearly shows that the Division and Jedwab both attempted to deceive the Court that Cohen made no product or investment recommendations to Feder or the Fund. Jedwab's testimony is inconclusive as to the Division's claim.

The Division then tries to claim that Cohen's examination question to Jedwab was an admission of a recommendation of the securities to the fund? This dubious desperate attempt by the Division should be noted. Firstly, Cohen wasn't under oath, secondly what recommendations was Cohen referring too? Was it the use of Trusts? There is no conclusive evidence that it referred to the recommendations of specific annuity products? Even if Cohen made a recommendation of the use of Trusts that would turn every annuity companies product into an annuitant-driven contract. So once again there is no evidence that Cohen made any specific annuity products.

The Division then makes the baseless argument that whether Cohen made a recommendation or not, is simply irrelevant as they claim that Woodbury did not allow unsolicited annuity sales. This is in total disregard to what the industry norm is, and what Cohen believed was the case based on his understanding of Finra Regulations. Even if Cohen did err on this fact, his error was caused by the inconsistencies of Woodbury's policies to Finra's well publicized policies which Woodbury's rules are modeled after.

Based on the Cohen's reading of Finra Rule 2821 that he sent to Horowitz in December 2008 - together with other Finra notices, he clearly believed that Woodbury's rules were in line with Finra regulations in regards to Suitability requirements and principal review. Even if Cohen erred in that regard, his due diligence and reliance upon the Industry norm should be noted. Based on this fact alone, the charges should be dismissed as there was definitely no scienter nor any recklessness by relying on the industry norm and Finra's regulations.

So to summarize, Cohen believed that

- Suitability review was not needed based on his understanding of 2 separate Finra Rules that exempt a) Institutional Investors b) Unsolicited or Non-recommended sales (aka Order-taker sales).
- He also understood and believed that the annuity contracts allowed the change of annuitants after death thus allowing the continuation through the choosing of another annuitant that was terminally ill as well. (Based on this, the Annuity Holding Period of the annuity is not always correlated to the Short-term lived annuitants' life, as they could be **changed even after death**. Regardless of this fact, the surrender period schedule would be waived.
- Cohen also believed that his response of the "Investment Access" question did not relate to the Time Horizon or Investment Strategy but rather to the Client needing to access their investment during lifetime of the annuitant.
- Cohen also believed that any suitability questions asked on the "annuity point of sale" forms were deemed **"immaterial"** as they were not needed based on Finra regulations. Any suitability information gathered was for gathering purposes only and thus deemed immaterial information even if mistakenly misrepresented. (see footnote 24)

3. The use of trusts by the Owners of annuities is in no way illegal, unethical, or a way to skirt any obligations by the owners or registered representatives. The Division seems to be troubled by the use of trusts in annuities. Federal Laws as well as First circuit court cases have rules that the beneficial owners have no obligation to disclose their beneficial owners as per *Kramer*. The Kramer case dealt with a life Insurance policies owned by a Trust having beneficial owners that were not disclosed to the Insurance companies were deemed to be legal regardless of not disclosing the Beneficial Owners to the company that restricted stranger-owned life insurance. Such would surely apply to annuities where no underwriting or need for insurable interest applies. Regardless of the Trustees' level of involvement in the annuity strategy, the trustees had signing authority and there was no duty by Cohen to follow and disclose the beneficial owners of the trusts to the insurance company and/or the Broker Dealer.

The Division's last paragraph in part 3 of their Post Hearing Brief is laughable. The Division is chiding Cohen in trying to help an investor achieve their goals. Has the SEC totally lost touch with what their mission is all about? They are more concerned with meddling in a dispute between two private parties with no business belonging in an SEC courtroom, than they are concerned about protecting the public and investors.

The Trusts purchasing the Variable Annuities were Revocable Trusts and therefore offered the best of all words, as it allowed the annuities to become Annuitant Owned, (Payment at the death of the annuitants). But since the trusts were Revocable Trusts they were considered natural owners - thus allowing the change of an annuitants before and even after death. (Cohen Inv. Tr.95:12-23).

The Redacted trust as part of Exhibit 347 at 1 states the following:

> **WHEREAS**, the Settlor desires to create a revocable trust of (a) the property described in Schedule "A" annexed hereto and made a part hereof as well as (b) all additional property hereinafter added hereto which shall be deemed part of Schedule "A", all for the purposes hereinafter more fully set forth;

This means that even if the Annuitant dies, the owner could capitalize on their principal guarantees that were triggered by the death of the annuitants, and then choose another annuitant with the same annuity contract. This is contrary to the Division's argument that the annuities would cease to exist once the annuitants died. This would be like anteing up with no additional risk on the same hand in poker.

This fact alone defeats the Division's argument of the "Investment Access" question. The clients did not need to cash out at the death of annuitants, they could choose to change the annuitant to another terminally ill annuitant while locking in their gains each time and continue the annuities for as long as they choose. The Division's error in wrongly correlating the "investment access" responses to the death of the annuitants, was the basis for their claim that the investment access answers were misrepresented. The argument fails if the owners can add or change annuitants even after death. Cohen's response of 11-15 years was to make sure that the Owners understood that if an annuitant didn't die as they hoped, the surrender charges of 7-9 years would apply. Cohen chose the 11-15 years as the best answer since the shorter answer started at 6 years (6-10 years) and knew that the shortest surrender period of any of the contracts were 7 years.

Below are examples of some of the companies:

MetLife's Policy allows the changing of Annuitant before and after Death. Now although the policies were owned by a Trust, these were revocable trusts which would allow the annuitants to be added. Using a revocable trust offered the best of both worlds within the annuity as it would still be considered a "natural owner" allowing the change of the annuitant even after death.

> DEATH OF ANNUITANT — Upon the death of an Annuitant, who is not the Owner or Joint Owner, during the Accumulation Period, the Owner automatically becomes the Annuitant. The Owner may select a new Annuitant if the Owner does not want to be the Annuitant. The new Annuitant must be less than 81 years old on the effective date of the change. However, if the Owner is a non-natural person, the death of the primary Annuitant will be treated as the death of the Owner.

(Div. Exhibit 629 page 35 Excerpt from MetLife's Issued Policy)

ING Life's Policy allows the changing of the annuitants within 60 days after death of the annuitant. Unlike the MetLife policy it does not allow the changing of an annuitant during the annuitant's lifetime only after the death of the Annuitant. See excerpt from ING Policy.

The Annuitant

The Annuitant is the measuring life of the Annuity Benefits provided under this Certificate. You may name a Contingent Annuitant. The Annuitant may not be changed during the Annuitant's lifetime.

If the Annuitant dies before the Annuity Commencement Date, the Contingent Annuitant becomes the Annuitant. You will be the Contingent Annuitant unless you name someone else. The Annuitant must be a natural person. If the Annuitant dies and no Contingent Annuitant has been named, we will allow you sixty days to designate someone other than yourself as an Annuitant. If all Owners are not individuals and, through the operation of this provision, an Owner becomes Annuitant, we will pay the death proceeds to the Beneficiary. If there are joint Owners, we will treat the youngest of the Owners as the Contingent Annuitant designated, unless you elect otherwise.

(Div. Exhibit 631 Pg. 53. Excerpt from ING Issued Policy)

Security Benefit Life's Policy allows the changing of the annuitant before death and even after 30 days after the death of the annuitant to another terminally ill annuitant, thereby allowing the contract to continue and similar to MetLife's Policy.

ANNUITANT

The Annuitant is named on page 3. The Owner may change the Annuitant prior to the Annuity Start Date. The request for this change must be made in writing and Received by SBL at least 30 days prior to the Annuity Start Date. No Annuitant may be named who is more than 90 years old on the Contract Date. When the Annuitant dies prior to the Annuity Start Date, the Owner must name a new Annuitant within 30 days or, if sooner, by the Annuity Start Date, except where the Owner is a Nonnatural Person. If a new Annuitant is not named, the Owner becomes the Annuitant.

(Div. Exhibit 633 page 34) Excerpt from Security Benefit Life's Policy.

Genworth Life's Policy does not restrict the change of annuitants and the Division has not proved otherwise.

(Div. Exhibit 634)

Sunlife's Policy allows the annuitant to be changed before and after death of the annuitant similar to the way MetLife's contract works. Since the trusts were revocable, once again the annuities would be treated as a natural owner. The Division has failed to prove otherwise with Sunlife.

(See Div. Exhibit 630 pages 309-336 which include a copy of a Sunlife Life Policy).

During the investigative transcript Cohen was asked why he did not consult with Woodbury about the Annuity Strategy and here is the Division's question and Cohen's response.

11 BY MR. HAGGERTY:
12 Q Did you consult with anyone at Woodbury
13 Financial before you undertook these transactions,
14 describe to them the annuity strategy that you intended
15 to employ, and who was being designated as the contract
16 annuitants?
17 A I did not.
18 Q Is there a reason why you did not?

Cohen Inv. Transcript 146: 11-18

6 But to answer your question, I had to do my
7 own due diligence and I was in the process of leaving
8 my broker-dealer, Woodbury Financial, and through the
9 concept at the new broker-dealer and they did their due
10 diligence and they were comfortable with it.
11 Q What new broker-dealer was that?
12 A World Equity Group. I was planning on
13 switching to them.

Cohen Inv. Transcript 147: 6-13

This clearly shows why Cohen did not feel that anything was wrong with the annuity strategy nor was he violating any Federal Security Laws.

9 BY MR. HAGGERTY:
10 Q Why do you think Woodbury was on a mission
11 to discredit you?
12 A Because they're clearly owned by the
13 Hartford. They're owned by an insurance company. You
14 come up with a concept that's going to help them --
15 make them lose money -- insurance companies make their
16 own rules. It's clearly in this situation they
17 violated their obligations to the investors by not
18 following their prospectives, and by not following
19 their prospectives, that's a big issue.
20 Incontestability, that's in the prospectives. Why
21 cancel a contract? Woodbury made AIG cancel a
22 contract.
23 That's a big issue. So -- and at the end of
24 the day, other obligation -- if they didn't write that
25 they need to have medical records obtained, they can't

1 go and skirt their obligation to the investors, and
2 that's what they clearly did. Now, they used me as a
3 scapegoat, but the bottom line is they skirted, they
4 didn't follow the laws.

Cohen Inv. Transcript 148:9-149:1-4 (17-20 is supposed to be prospectus)

The above clearly shows motive as to why Woodbury was intent in lying and defaming Cohen- at all costs. A review of Woodbury's FINRA's Broker check will show that Woodbury was a fully owned subsidiary of the Hartford in 2008-2013. Woodbury is now owned by AIG another insurance company that Cohen utilized.

6 MR. BUCK: If that's the case, what should
7 the answer here have been on this form?
8 THE WITNESS: I don't know. Again, I told
9 you. Just because a person dies does not mean -- you
10 don't get a check the next day. It's not like life
11 insurance. Annuities are an investment. Rhode Island
12 Federal Court said annuities are not insurance. They
13 have an insurance element to them, but they're an
14 investment. So at the end of the day, you could still
15 hold your annuity. And if I run an annuity and I
16 passed on, my wife would can keep it in my annuity
17 account the same way you keep your 401(k) plan in your
18 401(k) plan or IRA, sorry.

Cohen Inv. Transcript 185:6-18

Cohen Inv. Transcript at 215-216 discusses Exhibit 288. The **Division's Post-Hearing Br. footnote 5 at 12** makes claim that Exhibit 288 was remarked as Exhibits 396 and 397. The Division re-marked Exhibit 288 but unethically left out page 1 of Exhibit 288 which is the actual body of the email showing the date and the parties of the email exchange of January 2, 2008. Exhibit 288 is an email exchange between Gottesman and Feder with the attached spreadsheet proving that Feder received the research spreadsheet of most companies on January 2nd, 2008. **This was not only prior to the January 12, 2008 conference call - where Cohen was introduced to Feder and the Fund, but even prior to Cohen meeting Horowitz and Gottesman to learn more about the annuity strategy which was held on January 4, 2008. (Division Pre-Hearing Brief at 20 and OIP paragraph 94)** This proves that Cohen was introduced to Feder and the Fund after recommendations were made by others. This is a direct unarguable fact that directly refutes the claims of the Division and the testimony and creditability of both Feder and Jedwab's testimony.

22 Q And the spreadsheet appears to have been
23 provided by Abe Gottesman to Howard Feder based on the
24 e-mail in the front of Exhibit 288?
25 A I provided this to Abe Gottesman.

Cohen Inv. Transcript 216:22-25

From: Abe Gottesman. Sent 1/2/2008 3:30 PM
To: [-] Redacted
Cc: [-]
Bcc: [-]
Subject: update

Excerpt of page 1 of Exhibit 288 that included the spreadsheet showing the date of 1/2/08.

```
11            (SEC Exhibit No. 289 was marked
12            for identification.)
13            BY MR. HAGGERTY:
14        Q     Mr. Cohen, you've been handed what's been
15  marked as Exhibit 289. For purposes of identification,
16  Exhibit 289 bears the Bates number ABG000027. It
17  appears to be an e-mail to you with the date of January
18  4th, 2008. Appears to be from Abe Gottesman. Do you
19  recognize Exhibit 289?
20        A     I do. I mean --
21        Q     The e-mail from Mr. Gottesman reads, Marc
22  and David, it was a pleasure meeting you guys this
23  morning. Here's my e-mail. My cell again is, and he
24  gives his cell phone number. He says, have a great
25  time in Vegas. Does this Exhibit 289 help you place in

 1  time when you met with Mr. Gottesman?
 2        A     Yes, it was, I guess, January 4th. I
 3  assume that's a Friday because I remember it was a
 4  Friday.
 5        Q     And so was Mr. Zakheim present for the
 6  meeting as well?
 7        A     Yes.
 8        Q     And was Mr. Horowitz present for this
 9  meeting?
10        A     Yes.
11        Q     Anyone else present that we haven't already
12  discussed?
13        A     No.
```

Cohen Inv. Transcript 226:11-227:13

This clearly proves Cohen's claim that he did not solicit or make any investment or product recommendations to the funds or Mr. Feder at any time which would include the conference call of January 12, 2008. Feder already possessed the research spreadsheet of most companies prior to Cohen's introduction to the Fund or Feder. How could Cohen solicit or make recommendations to someone he never knew existed nor ever spoke to on January 2nd, 2008? Even further, the meeting between Cohen and Horowitz only took place on January 4, 2008 where Cohen learned more about the annuity strategy himself?

Timeline

January 2nd, 2008- Gottesman who had previous dealings with Feder sends Feder research spreadsheet of many insurance companies. Cohen did not have any dealings what so ever with Gottesman or Feder at this point. This clearly shows that Cohen did not solicit the funds and made no recommendations as the fund had a spreadsheet before Cohen even knew he would be introduced to the Fund and Feder. (Cohen Inv. Transcript 216:22-25)

January 4th, 2008 - Cohen, Horowitz, Gottesman and Zakheim meet in Las Vegas to learn more about the Annuity Concept (Cohen Inv. Transcript 226:11-227:13)

January 12th, 2008 Conference call with Horowitz, Gottesman, Cohen, Zakheim, Nordlicht and Feder. Review of spreadsheet and introducing Cohen as the order taker broker.

January 13th, 2008 Gottesman forwards an email from Feder stating which company they wanted to purchase (Cohen Inv. Transcript 231:13-233:6).

This directly refutes the Division's claim and directly refutes Jedwab's false testimony who Cohen never spoke to nor had any contact at any point in time prior to the hearing.

As such, the testimony of Jedwab and Feder are both clearly inadmissible as the facts clearly refute their testimony in the matter.

4. Cohen Investigates Insurer "Red Flag" limits for Annuities.

Baker testified that Cohen – spoke to Sandy Chu in January 2008. Cohen denies ever speaking to Chu or ever using the term "Red-flag" with any Annuity carrier. Baker not only failed to prove that it was Cohen that spoke to Chu in January of 2008, but he failed to prove that the term of "Red flag" was used at all. His testimony is inadmissible hearsay.

Baker used the term 'red flag" in his testimony in six different contexts and over a dozen times. He also testified that the maximum amount that Penn Mutual would allow a single annuity was $5,000,000. (Tr.475:6-13) Baker also testified that he believed that the term "Red Flags" meant the following:

1 Q. Okay.
2 A. What I believe he was looking for is
3 the maximum amount that the company would issue
4 under the variable annuity contract. (Tr. 472:1-4)

Asking what the limit is per annuity contract or the limit that an annuity company would allow without underwriting is in no way illegal or unethical. The Division has failed to prove that it was.

Even structuring transactions to avoid limits is a common and legal practice. The Supreme Court has held that there are "'many occasions' on which persons, without violating any law, may structure transactions 'in order to avoid the impact of some regulation or tax.'"[10]

Examples include giving a gift on December 31 and an identical gift the next day, "thereby legitimately avoiding the gifts reporting required by 26 U.S.C. 2503(b)," and withdrawing two checks for ten dollars each to avoid the Stamp Act's tax on bank checks drawn for twenty dollars or more.[11] As the Court explained, structuring is not so "obviously 'evil' or inherently 'bad'" as to constitute fraud.

Even if Hearsay might be admissible in an ALJ proceeding, **not** all hearsay is allowed. Baker's testimony quoting Chu's understanding of a conversation Cohen denies is hearsay at the lowest level and should not be admissible.

Irrespective of the admissibility of the testimony by Baker's interpretation of Chu's conversation with another unknown, Baker's entire testimony is irrelevant to the Division's case as Penn Mutual Life did not issue any policies nor has the Division made any claim in their OIP against Cohen in regards to Penn Mutual. Not only did the Division fail to prove that any of the other insurance companies involved in this proceedings had the similar process' and regulations as Penn Mutual, the Division specifically made note that Penn Mutual was different than all other companies as they asked suitability questions on their applications.

[10] *Ratzlaf v. United States*, 510 U.S. 135, 145 (1994) (citations omitted).

[11] *Id.* at 145-146 (citing *United States v. Isham*, 84 U.S. (17 Wall.) 496, 506 (1873)).

The testimony of one insurance company should not be applied to another especially when they are irrelevant to this hearing. Any evidence in regards to Baker's testimony in support of the Division should be regarded as irrelevant and non-admissible to this hearing. Applying the testimony of one insurance company to another is not only irrelevant but an inadmissible hearsay too.

Any allegations that the Division contends in relation to Penn Mutual needs to be dismissed as it is clearly irrelevant, and a constructive amendment and a variance to the OIP.

5. Cohen's January 12, 2008 Conference Call with the Hedge Funds.

The Division failed to prove that Cohen prepared and provided exhibit 396 and 397 as discussed earlier to Feder. Although Cohen admitted to preparing parts of Exhibit 288, exhibits 397 and 398 are not the same as Exhibit 288. The Division has failed to prove that Exhibits 288 is the same as Exhibits 396 and 397. Furthermore, even if they were the same, the Division unethically and purposely left the 1st page of exhibit 288 out which undermines their claim against Cohen. As discussed earlier, Exhibit 288 clearly shows that Feder received a spreadsheet of various companies on January 2, 2008. That date was prior to January 4, 2008, the date Cohen met with Horowitz in Las Vegas to learn more about the annuity strategy and prior to Cohen even knowing the existence of the Fund and Feder.

As the Division failed to prove that Exhibit 288 from Cohen Invest Tr. and exhibit 396 and 397 were one and the same—their effort to tie the two should be disallowed as inadmissible hearsay or irrelevant.

Although Feder testified that the sooner the annuitant died, the more profitable the investment was for the hedge fund; the death of the annuitant did not have to end the annuity as portrayed by the Division. Since the Owners were **revocable trusts**, the annuities would be considered to be looked upon as natural owners as per IRS regulations[12] (and insurance companies) allowing the fund to choose another terminally ill annuitant when the original annuitant dies. **The owners could start again within the same Annuity contract all while the Owners would lock in their gains, and/or recover any losses by the death of an annuitant**. One other benefit was that all the annuity contracts would waive the Surrender charge going forward thus making the contract a completely liquid investment going forward. This fact alone defeats the Division's argument that the Owners were forced to collect the Death Benefit at the death of the annuitants and therefore pegged the "Investment access" question to the death of the annuitants. The Division has failed to prove otherwise and as described earlier through the Exhibits moved into evidence by the Division, this is another reason Cohen believed that the life expectancy of the annuitants have no connection to the "Investment Access" question.

Feder also testifies that they did not care about the surrender charge as they never planned on surrendering the contract rather only collecting on the Death Benefits which the surrender charges would be waived. (Tr. 276:18-277:1-10)

[12] http://www.irs.gov/instructions/i1041/ch01.html under Revocable trusts.

Feder testified that BDL understood that if the Annuitants didn't die as hoped for, the fund was prepared to wait 10 or more years.

```
10    Q. Now, did BDL have any intention of
11    remaining in any of the annuity investments
12    for ten or more years?
13      A. I guess if the annuitants lived
14    that long.
```

(Tr. 253:10-14)

Based on the flawed argument and understanding of the Division; that the "Investment Access" question would include the Death Benefit payout -- had Cohen responded with a shorter time period of 0-5 years he would have been creating an exposure to himself if an annuitant did not die as hoped for by the fund. The more conservative approach is always to make a client aware of their exposure and risks and to remind them about the surrender charges regardless of whether they cared about them or not.

Feder clearly testified that Cohen made no investment recommendations to Feder or to the Fund. (Transcript 392-395) Here is just one excerpt of Feder clearly stating that no recommendations were made by Cohen.

```
                                                Page 392
 1    Q. Okay. Did Marc Cohen make any
 2    recommendations to specific products that
 3    you should buy this or consider this or is
 4    it what was -- did he just go down a topic
 5    and say here is a resource report, go figure
 6    out what you guys want?
 7      A. I don't think you told us what to
 8    invest in. You gave us the facts, best
 9    bonuses and I don't know if you said invest
10    in this one, invest in this one, we probably
11    decided which ones were best for us. But
12    all the information came from you.
```

Transcript 392:1-12

Mr. Feder admits that he did receive applications to Sun and other Companies prior to Cohen even knowing abou the concept. This corroborates Cohen's claim as to the recommendations never made.

In Cross examination Feder was asked who reccomended Sunlife and at first stated it was Cohen but then retracted and stated he did not know. Lee Ann King worked for Marc Finestone and Richard Horowitz. She sent applications of Sunlife and others to Feder on December 20, 2008.

```
13    Q. The question is, who recommended
14    Sun Life to the group?
15      A. If I had to guess it was you
16    probably but I don't know. I don't know.
17    Q. Since we are limited to time.
18         THE COURT: Just get the
19      question.
20    BY MR. COHEN:
21    Q. The question is there is an e-mail
22    here from Lee Ann King to Howie Feder,
23    subject is "Sun Life."
24              Feder - cross
25         "Attached please find a generic
                                          Page 420
 1    Sun Life application wiring instructions and
 2    require replacement forms dated 12/20/2007."
 3      A. Okay.
 4    Q. Marc Cohen was not even in
 5    existence, was Marc Cohen in existence on
 6    that date?
 7      A. No.
```

(Tr. 419:22-420:7)

Contrary to the Division's claim this reaffirms Cohen's testimony that Cohen did not make any investment reccomendations to Feder or the Funds.

6. Woodbury's Variable Annuities Sales Procedures.

Cohen needed to be affiliated with a Broker Dealer in order to process and sell any variable annuities. The Broker Dealer he was affiliated at the time was Woodbury. Prior to writing any Variable annuity, Cohen was already in process of switching his broker dealer to World Equity Group based out Chicago. (Cohen Invest. Tr.147).

World Equity was fully apprised and aware of the full details of the annuity strategy and approved its use. A witness from World Equity was scheduled to testify the following as to the annuities approval.

It is quite obvious to the Court that the Woodbury witnesses were highly biased against Cohen. First, Woodbury Financial Services was owned and managed by the Hartford- one of the annuity companies sold by Cohen. (Tr. 534:21-23,553:11-16, 588-589). It is not disputable that the strategy was a perfectly legal strategy that realized ways to capitalize on the legal loopholes of the annuity companies. Hartford, realizing, that the strategy could potentially harm their profitability- spearheaded Woodbury's defamatory and malicious attempts to destroy Cohen's reputation and stellar standing in the financial and insurance industries.

Secondly, The Division made it a point to state that Cohen had a pending arbitration against Woodbury. The pending arbitration to recover damages inflicted upon him by Woodbury's false Finra U5 reporting together with their maliciously defaming, lying and blatantly false statements made to his clients, insurance companies, and others; is scheduled to go to trial within the year. The Arbitration case against Woodbury was filed prior to any SEC proceedings or known SEC investigation. Cohen also seeks damages for compensation and other damages as well.

Note that out of all the false accusations and lies made by Woodbury's Staff (of which include Smallidge and Stone) over the past 6 years, never has Woodbury prior to this proceeding ever made a claim of an alleged fraud to the Broker Dealer. That includes many letters, emails and correspondence together with Woodbury's defense in the arbitration. Although they are not admissible at this point, a cursory look at what Woodbury disclosed under Finra's U5[13], is admissible as public record[14]. Woodbury made two separate reportings on Cohen's U5, but has never accused Cohen of Fraud to the Broker Dealer until recently when prompted by the Division. Woodbury has a substantial financial interest in Cohen being wrongly convicted as they stand to keep millions owed to Cohen as well as million's in damages owed to Cohen. These two reasons alone, should caution the court as to the biasness of the Woodbury witnesses.

Although the Division led the Woodbury Witnesses to testify otherwise- the Woodbury's own written manuals presented as part of **Exhibit 618,** Do Not support the claims of either the Division their Woodbury witnesses.

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[13] http://brokercheck.finra.org/Individual/2949399 see footnote 5 for language of U5

[14]

REPRESENTATIVE FAILED TO COOPERATE WITH AN INTERNAL REVIEW REGARDING HIS SALE OF SEVERAL ANNUITY CONTRACTS. IT APPEARS THAT THE ANNUITY OWNERS HAVE NO RELATION TO THE ANNUITANTS AND THE ANNUITANTS ARE UNAWARE THEY ARE NAMED AS ANNUITANTS. WE HAVE INFORMATION SUGGESTING THAT SOME OF THE ANNUITANTS MAY BE VICTIMS OF IDENTITY THEFT. WE ALSO HAVE INFORMATION SUGGESTING THAT ANNUITANT SIGNATURES HAVE BEEN FORGED OR PROCURED BY FALSE STATEMENTS.

- Nowhere do their manuals restrict the sale of annuities to **Hedge Funds or institutional investors. (Exhibit 618 and Tr. 585:9-15)**
- Nowhere do their manuals state that unsolicited sales of variable annuities are prohibited.
- Nowhere do their manuals make an affirmative statement that requires suitability and/or principal review on either institutional sales or even unsolicited sales.
- Nowhere do their manuals state that all sales of variable annuities require the annuity point of sale documents or all sales of annuities require a suitability review.

It wouldn't be in the manual, as Finra as well as the industry standards did not have these above restrictions, nor demanded suitability review of all variable annuity sales in early 2008..

The Woodbury manual is not only non-supportive of what Stone and Smallidge testified to during the hearing. - It actually contradicts Stone's and the Division's claim.

In Exhibit 618 Woodbury's Manual **Section 10.4 Recommendations/Product Offerings** discusses some requirements of making a recommendation.

It states the following "if a recommendation is made, you must demonstrate a reasonable basis for making the recommendation or soliciting an order in connection with the securities product." (Exhibit 618 at 51, section 10.4)

It then continues and states some additional requirements for a recommended/solicited order. Directly following the section of recommendation etc. the next section related to Variable Annuities begins as follows:

Section 10.5 Variable Life and Annuity Products- General Information This next section deals with variable annuity life and variable annuity sales. As Woodbury does not create any distinction from the previous section, it is quite clear that this section **is referring to recommended [variable] annuity sales too.**

Although the last paragraph at Exhibit 618 at 51 states the following: **"Variable products should not be represented as short-term or liquid investments because of the charges and/or tax penalties for early withdrawals which can be involved"**. This too clearly refers to recommended sales of annuities. **Had Woodbury intended Section 10.5 to apply to all annuity sales i.e. recommended and non-recommended sales, Woodbury would have had an affirmative duty to state such.**

Another direct refute to the Division's and the Woodbury Witnesses claim that Cohen abdicated his duty to Woodbury is as follows: under the General Don'ts section is says the following:

- Do not imply that Variable life insurance is "liquid" or appropriate for short-term investment. (Exhibit 618 at 52)

This clearly lists only Variable Life and not Variable Annuities. Also note that either case, Woodbury doesn't prohibit the "short-term" sale of purchase of variable products- it only prohibits "representing" or implying". Had Woodbury intended to restrict their sale completely- they should have stated so.

Another critical point to section 10.6 is the following: Whether it is deemed that Cohen's sales were considered recommended or non-recommended, his response to the "Investment Access" question as long term, – was actually the best answer as per the manual that states- **"Variable products should not be represented as short-term or liquid investments because of the charges and/or tax penalties for early withdrawals which can be involved".** His response of 10-15 years, reinforced the fact that had the annuitants did not die as hoped for, there would be surrender charges if they choose to withdraw their funds etc.

Cohen was actually following what the manual said should be done. Had he stated a shorter time frame for the "investment access", the Division would have reversed their arguments stating he now potentially violated his duty to inform his clients and abdicated his gatekeeper duties in protecting his client's interest and not disclosing all facts like "the possibility of being stuck within a short-term annuity that had longer surrender periods. The Division's case would be a fraud to an Investor and not to the broker Dealer. Once again the SEC's claim fail on logic and are against what their own charter is supposed to protect. **"Investors"**

Section 12.4 Unsolicited Order (Exhibit 618 at 60) this section clearly discusses unsolicited orders- it discusses "Low Priced Securities" which these annuities clearly are different. Had Woodbury choose to disallow unsolicited orders of variable annuities, they should have clearly made an affirmative statement disallowing non-recommended/unsolicited variable annuity sales.

To summarize, the claims of the Division fail – as we clearly see that Tim Stone's testimony about the suitability and the use of annuities was wrong. His testimony was not only wrong in regards to Finra Regulations and Material facts of suitability, he was clearly wrong even to Woodbury's own manual and industry standards. Through Examination, it was clearly apparent that Stone contradicted himself with his understanding of FINRA and Industry Standards. This is after he claimed he was an expert in compliance and suitability. Could it be that 7 years passed and that he had to recall 3 different broker dealers laws and rules? One thing for sure was apparent "the bad blood between Stone and Cohen was obvious".

Stone testified as to "Intended Use". Cohen had no duty to disclose an intended use of a product in early 2008. "Intended use" requirements only went into effect in Finra rule 2821 on May 8th, 2008.

The Division quotes Stone's testimony of why Woodbury wouldn't allow a product to be used as a short-term investment". (Tr. 657:14-658:1-18). They try to make the case of intended use limitations and its reasoning. The Division purposely left out context that was previously responded in the question before- where Stone admits that "Woodbury was concerned about their parent the Hartford Insurance Company- showing motive in retaliating against Cohen for selling a product that legally outsmarted Hartford's actuaries.

1 **Q. Why would that be?**
2 A. Variable annuities are not appropriate
3 as short-term investments, mainly due to the
4 level of fees that the clients would pay.
5 And then additionally, it's sort of
6 like akin to card counting, if you will, in that
7 it basically takes the odds away from the house
8 of making any money.
9 So there's potential there where it
10 would damage the insurance company, and it's
11 clear that that's not the purpose that insurance
12 companies designed variable annuities to begin
13 with.

(Tr. 657:1-13)

Stone clearly sums up what this case is really about- It's not about suitability, it's not about an alleged fraud to the Broker- Dealer but it's about the profitability of Woodbury's parent company the Hartford- of which Cohen had no duty to disclose any facts outside of the what the applications and Broker Dealer forms asked. The Court's reading of Tr. 655:19-658:18 in conjunction to Exhibits 618 at 51 Section 10.5 will show how far off base Stone really was in his understanding and testimony to this issue.

As such, Cohen not only followed the requirements as per the manual, he went above the call of duty by answering the information to the best of his knowledge.

Given the above facts, Stone wrongly testified that at his own understanding- Cohen did not follow the manual guidelines and "rules and do things the way they're supposed to be in done in the industry"- **It is evidently clear that Stone is not only confused as to Woodbury's own manual, he has a total misunderstanding of industry standards and Finra Rules.**

Based on the above facts, and Stone's obviously wrong understanding of Woodbury's manual and procedures; – we respectfully ask upon the court to treat as suspect any of Stone's none credible testimony.

Contrary to the Division's statements, Cohen was never made aware of any of Morgan Stanley requirements nor has the Division proved such throughout the hearing as discussed earlier.

The Division's Post-Hearing brief at 17 quotes Section 11 of Div. Exhibit 618- processing and Submitting Business- Once again considering this clearly addresses where a suitability review is necessary as it says "we can effectively perform our suitability functions"- this section would not apply to the sales in question as they were non-recommended and a institutional investors. Secondly, this would fall under a constructive amendment and variance of the OIP.

The Division's Post-Hearing brief at 17 quotes Section 11.5 of Div. Exhibit 618).

Sales Transactions- This section of the manual states that applications must be sent out directly to Woodbury and not to product manufacturer in order to conduct its suitability review. But it is quite obvious that Woodbury did not practice what they preached as Stone testified (Tr. 636:1-19)

1 THE COURT: But mechanically, how
2 would the insurance company even get it? Didn't
3 it have to go to the home office first?
4 THE WITNESS: Well, at Woodbury, the
5 way it worked at the time, it was supposed to go
6 to the home office first.
7 There were some times with some of the
8 carriers where it would allow a representative
9 to fax a copy of the paperwork, so they could
10 start working on it.
11 But in those cases, we knew that the
12 company would call us first, so there would --
13 and then in one case there was a shared system
14 with Hartford, so Hartford -- it was an
15 electronic notification that it was approved,
16 but the carriers would actually check with us
17 first and make sure that it was approved before
18 they would place the business.

(Tr. 636: 1-18)

Cohen was given permission by Woodbury to fax or send the annuity applications directly to the carrier and Woodbury clearly approved all the sales after they received copies of all applications. **This fact is not disputed.** Stone also testified that Cohen spoke to Woodbury marketing desk on atleast one occasion but did not know what was discussed. **Cohen did in fact get verbal permission from Woodbury and sent either the originals or copies to Woodbury for their files prior to sending any applications to the product manufacturers.** The Division failed to prove that Cohen was not given permission to submit business directly to the product manufacturers so not only is there no fraud in this regard, but to the extent there were unintentional mistakes in this regard, no scienter or recklessness could be deduced from this fact.

For the Division to state that Cohen violated Woodbury's Section 11.5, when Woodbury's Stone stated that there were exceptions made is a violation of Cohen's due process rights. Accordingly, even if the Division's claim had any teeth, their claim is full of cavities as this would be a constructive amendement and variance from Cohen's OIP.

Cohen does not dispute that Woodbury required a registered representative to act honestly and ethically in their dealings with customers and the broker dealer. **(Exhibit 618 at 8)**. Cohen did abide and follow Woodbury's Code of Conduct. Cohen's responses in the annuity point of sale form, and specifically to the "Investment access" response were correct to the best of his ability and understanding. Anything to the contrary, are just fabrications made by Conway and the Division in their attempt to somehow back into fraud charges that are just not true. Another note is that the Code of Conduct's various list of principles clearly relate to Customers. Finally, this would fall under a constructive amendment and variance of the OIP.

The Division attempts at 18 in their Post hearing Brief to state that Cohen had an affirmative duty to notify Woodbury of the "intent of use" of a product - is wrong. "Intent of Use" was not a requirement under Finra's regulations at the time- nor does the Woodbury manual requirement state such. Although Stone has testified that was a requirement, he was clearly mistaken as to his understanding to the rules that were in effect at the time in January and February of 2008. He was outright wrong as to Finra's suitability requirements and exemptions were at the time.

The Division has also failed to prove that Smallidge, was Cohen's supervisor at Woodbury and that Cohen had an obligation to respond to Smallidge. On the contrary, Smallidge testified that he wasn't Cohen's Supervisor- rather Mike Frieda was "Marc's Supervisor" (Tr.554:12 and 598) .Even if Cohen did have a duty to talk to Smallidge (which Cohen denies), the conversations and emails with Smallidge were clearly from over a week of the annuities sold and as such are not within "in connection to a sale or purchase" so that scienter could not be deduced after the fact. Secondly, this would fall under a constructive amendment and variance of the OIP.

Even if the "point of sale forms" were required as Stone testified, Cohen did not believe that the suitability questions in the forms were material, since no suitability requirements were necessary as per Finra and industry regulations in early 2008 due to their suitability exemptions of being non-recommended sales as well as an additional exemption of being institutional investors. As stated earlier, Woodbury's own manual never stated that they required a suitability review that was above and beyond Finra and industry norm standards.

The requirement for investment's intended use in general was not a Finra requirement in early 2008. Finra Rule 2821 implemented the requirement of "intended use" but only went to in effect on May 8th, 2008. This was months after the sale of any annuities by Cohen.

The Division statement (Post-Hearing at 19) states that insurers would not issue an annuity contract if a registered representative business did not pass Woodbury's suitability review is wrong- The SEC in their Joint 2004 report clearly stated that the NAIC as well as Finra regulate the sales of variable annuities.[15] It states the following:

> In addition to existing securities laws and rules governing suitability, the National Association of Insurance Commissioners ("NAIC") has expressed concern regarding the sale of variable annuities to seniors. As a result of these concerns, on September 14, 2003 the NAIC adopted a Model Regulation entitled Senior Protection in Annuity Transactions. The model regulation, which was adopted as a model for state legislation, requires insurers and producers to use standards similar to those required by the NASD for variable products to evaluate the suitability of recommendations.

(SEC/Finra Joint report at 8.)

The NAIC [16] like Finra clearly exempt suitability requirements, where no recommendations are made. It also specifically states the following which was in effect at 2008.

Exemptions To The Annuity Suitability Model

- Direct response solicitations where there is no recommendation based on information collected from the consumer.

(NAIC link in footnote 7 below at screen 18)

Insurance companies did not rely on a Broker-Dealer's suitability review as they themselves do not require suitability in situations where no recommendations are made. Cohen clearly knew this rule.

Stone's statement at Tr. 635:8-25 which claims that insurance company rely on the broker dealer to pass suitability [in all cases] is wrong. They clearly do not rely on the Broker Dealer to do suitability when no requirement is necessary as per Finra, NAIC, and industry standards.

[15] http://www.sec.gov/news/studies/secnasdvip.pdf

[16] http://www.naic.org/documents/committees_a_contingent_deferred_annuity_wg_120811_overview.pdf

Another important point is that the NAIC clearly modeled its rules based on FINRA's regulations. In 2003 NAIC had the following requirement (in effect in 2008) which were similar to Finra's suitability's rule.

> "In recommending the purchase or exchange of an annuity, insurer or insurance producer had to have reasonable grounds for believing the recommendation was suitable based on he facts disclosed by the consumer and consumer's financial situation and needs" (NAIC link in Footnote 7 at 4.)

This once again proves that Stone was wrong in claiming that insurance companies rely on the broker-dealer in all cases. They only rely on Broker-Dealers suitability review- when Finra and NAIC require such as in "Recommended Sales".

The Division's comical attempt to Misinterpret Cohen's Statement from Cohen's Invest. Tr. at Div. Post Br. At 19-20 should be noted. The Division wrongly claims that Cohen's previous statement contradict his "Recent Assertion" Claim that the Suitability Form's questions were 'optional". They quote Cohen Invest Tr. 162:17-23; 163:5-18; 164:15-19). The Division once again takes Cohen's words out of context and leave the preceding question and statements that clearly define what Cohen clearly meant in his responses. This asinine attempt by the Division was clearly designed to deceive the Court. In their quoting of Cohen (Cohen Invest Tr. 162:17-23) they purposely leave out (Cohen Inv. Tr. 160:23-25;161:1-25 and 162) which clearly shows that Cohen's response was not a statement of Woodbury's policy but rather a response as to <u>whether he submitted</u> the "annuity point of sale" to Woodbury in his annuity sales related to this proceeding. (Another example of the dubious pattern of Conway, Haggerty and the Division in their lack of ethics to prove their case.)

The Division then quotes, Cohen (Cohen Tr. 163:5-18), their question then switched to a general purpose of the form and Cohen answered with the word "typically" meaning that suitability purposes is the general purpose of this form. Finally the Division quotes Cohen stating that: (Cohen Inv. Tr. 164:15-23)

```
15      Q    And with respect to the annuity application
16   itself, a copy of that was also sent to Woodbury along
17   with the point of sale form and the account opening
18   form?
19      A    In every case.
20      Q    And the annuity application was also sent
21   directly to the vendor, in this case the annuity
22   company issuing the annuity product?
23      A    Correct.
```

Once again the Division distorts the statement and claims Cohen claimed that the form and its suitability were mandatory—that clearly is a LIE on the part of the Division- he was giving a history statement of whether he sent the forms to other Broker Dealer- but even more so the emphasis is on the **<u>"annuity application"</u>** and not the point of sale and account opening statement.

Woodbury had 3 sets of documents that related to the sale of annuities 1) the Company Specific Annuity applications (these are considered the order tickets for Books and record purposes) 2) the New Account form (for new customers) and 3) the "Point of Sale form" – this is the form Cohen felt contained suitability questions that become immaterial in the investor's annuity sale due to the fact that Finra, NAIC and even the Woodbury manual exempted the suitability requirements.

Cohen believed that the Suitability questions on the "Annuity Point of Sale" forms that he sold to the Investors, were voluntary on the grounds that the Investors were clearly considered to be an institutional investor with an excess of $50 million in assets, and secondly as Cohen proves earlier that he did not Solicit or make any Investment recommendations to the Investors, Feder, the nominees, the Trusts or Funds. Finra clearly exempted both sales from both principal review and suitability review in January and February of 2008 thus making any suitability questions **"immaterial"**.

There is no doubt that these Finra exemptions applied to the annuity sales of Cohen to the Investors in early 2008. The question arises if Woodbury's rules were clearly in sync with Finra rules, and whether Woodbury's rules were clearly differentiated from Finra and the Industry standards.

Holding Cohen accountable for an ambiguous, non-spelled out, above the norm rule that Woodbury chose upon themselves that turn-out to be above Finra and industry standards does not equate to a Federal Security Violation. Regardless of the outcome of whether Suitability or Principal Review is deemed required or not; the claim of scienter or even recklessness on Cohen's part is non-actionable and must be defeated. Reliance upon Finra memos and industry standards is due diligence of the highest regard.

Although Cohen did not believe that these forms were needed based on Finra regulations, he completed them anyways to the best of his knowledge, as to his understanding of the questions at hand, and through the information given to him by Gottesman or Feder. If in hindsight, it turns out that the all the suitability questions on the "annuity point of sale" forms were needed by Woodbury, Cohen in no way intended to intentionally misrepresent the "Investment Access" questions or any other responses on the Broker Dealer forms.

Sales Orders and or memorandums need to be saved as part of the Exchange Act 17(a) and Exchange Act 17a-3(a) (6). The decision of a Broker Dealer to save other documents that are not required as part of their Books and records; does not in itself become the Books and Records nor cause a violation under Federal Securities Laws of Books and Records.

Although Cohen admitted in the OIP at Paragraph 98 the following, "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." he did not believe that the suitability questions were necessary as specifically exempted by Finra regulations.

Even if the "Annuity Point of Sale" is required - the questions boils down to whether the suitability questions within the form are required under Woodbury rules. If no suitability or Principal review is required under Finra and industry standards, then the suitability questions within that form would be deemed **"immaterial"** even if misrepresented.

7. **<u>Woodbury's Annuity Investment Access</u>**- As per Judge Murray statement in a pre-hearing conference on July 7, 2014, Cohen's part of the OIP is paragraph 90-101. The only allegation against Cohen in his OIP, was the alleged misrepresentation of his responses to the **<u>"Investment Access"</u>** question.

Cohen has always believed and still believes that his answers to the "Investment Access" questions were the correct answers. It is apparent from Mr. Stone's testimony that he is completely wrong as to his interpretation as to what "investment Access" means. Stone's understanding was "The time frame that the client is going to be holding that particular product" (Tr.698:4-21). **Stone's response is what is called "Time Horizon"** – At cross examination of Stone – states it was the following "To establish when a person is going to begin to access his investment". Later on Stone says the following:

> **Q. Is time horizon the same as investment access needs, in your understanding?**
> A. Generally, yes.
> **Q. So you're saying time horizon equals investment access?**
> A. Generally speaking.
> **Q. Okay. Generally speaking.**
> **When would it not? Give us an example in your understanding, please.**
> A. It could be if there was a case of access rider of some sort on a contract.
> **Q. I'm talking about on a general basis. Not just -- I'm not just --**
> A. The only time where it wouldn't equal accessing the investment is when there's a legitimate rider placed on the contract that allows you to access your investment without being subject to the surrender schedule.
> **Q. For the record, you're stating that investment access question is the same as time horizon needs, or time horizon?**
> A. Generally, yes.

(Tr. 737:1-22)

In cross examination, Stone defeats the entire argument of the Division when says- **<u>"The only time where it [time horizon] wouldn't equal accessing the investment is when there's a legitimate rider placed on the contract that allows you to access your investment without being subject to the surrender schedule"</u>** – **<u>Every Annuity sold by Cohen had the "a legitimate rider" that waived the surrender charges at Death.</u>** (Tr. 737:1-22)

Feder testified that BDL, the investors and the funds did not plan to access funds during the life of the annuitants and rather planned on collecting on the death of the annuitants only.

Feder also testifies that they did not care about the surrender charge as they never planned on surrendering the contract rather only collecting on the Death Benefits which the surrender charges would be waived. (Tr. 276:18-277:1-10

Feder testified that BDL understood that if the Annuitants didn't die as hoped for, the fund was prepared to wait 10 or more years.

> 10 **Q. Now, did BDL have any intention of**
> 11 **remaining in any of the annuity investments**
> 12 **for ten or more years?**
> 13 A. I guess if the annuitants lived
> 14 that long.

(Tr. 253:10-14)

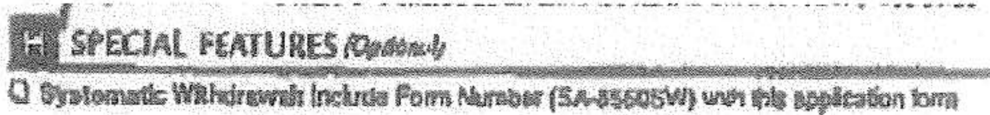
Both the Division's question to Stone, and the response by Stone are clearly evident to the fact that their understanding of the 'Investment Access" question is wrong.

"Time Horizon"—expected holding period of investment.

"Liquidity Needs"—is akin to "investment access" time frame before the **needs** for liquidity might occur. Cohen's response of 11-15 years is correct- as Feder testified that they did not intend to access the investments if the annuitants didn't die.

Another important factor that the Division and Stone- failed to address is evident in Exhibit 621. Every Variable Annuity Contract immediately allows "**withdrawals or "access"** from their investment value of the annuity penalty each year.[17]

Some companies even ask if an owner would like an **"automatic withdrawal"** set up effective immediately (or on a later date) on the annuity applications themselves. Other applications have separate forms to request a systematic withdrawal. Regardless of how a withdrawal question on the annuity is asked, we see that annuity companies allow an immediate withdrawal from an annuity even days from the purchase date through questions on their applications. This defeats the Division's argument against such- and that the Broker would not allow an immediate access from annuities. Here are some annuity applications provided courtesy of the Division in Exhibit 621.


H SPECIAL FEATURES (Optional)

☐ Systematic Withdrawals Include Form Number (SA-85605W) with this application form

Exhibit 621 at 13 (AIG Variable Annuity Application Part H)

4. Systematic Withdrawal Program (optional)

A. Source: I authorize Systematic Withdrawals (minimum $100) from my Account Value to commence as indicated below (check one).

Important: Please review your contract and/or prospectus for detailed information regarding early withdrawal penalties and other withdrawal provisions. If you have elected Guaranteed Withdrawal Benefit (GWB) or Lifetime Withdrawal Guarantee (LWG), cumulative withdrawals that exceed the Annual Benefit Payment in any contract year may significantly reduce the value of the GWB or LWG benefit. If you elect the LWG and you make any withdrawals prior to age 59½, we will not make payments to you over your lifetime.

☐ $________ Pro-rata from active investment portfolios and the Fixed Account. A maximum of an amount equal to 10% of purchase payments may be withdrawn annually under this program.

☐ 100% of the current Annual Benefit Payment amount allowed under the GWB or LWG riders, if elected. (This withdrawal option will only increase as a result of optional or automatic step-ups under the terms of the selected rider and not as a result of increases due to added purchase payments or interest adjustments*).

☐ _____.0% (max 6.0%) of the Annual Increase Amount ("6% Compounding Income base") of the GMIB Plus rider, if elected, determined as of the issue date**. (This withdrawal option will only increase as a result of optional or automatic step-ups under the terms of the rider and not as a result of increases due to added purchase payments or interest adjustments *).

*Optional/Automatic step-ups are elected by separate election forms.

** For these purposes any additional purchase payments made in the first 120 days of the contract issuance will be considered as if they were received on the issue date.

B. Frequency: ☐ Monthly ☐ Quarterly

☐ Start at Issue ☐ Start Date: ________ (Please pick a day, 1-28.) (If no day is chosen, default date will be monthly contract date.)

C. Important Tax Information -- Withdrawals will not be taxed under special exclusion ratio rules applicable to annuity payments. A 10% Federal tax penalty may be assessed against distributions if the Owner is under age 59½. You should consult your tax advisor regarding your personal situation. *If no selection is made below, the Company will withhold the minimum amount required by the IRS.* If applicable, a State Income Tax election will be made as elected below for Federal Income Tax withholding.

Choose one: ☐ Do not withhold Federal Income Taxes ☐ Withhold $______ or _____%

D. Payments: Payments will be made to the owner. When completed below I wish to utilize Electronic Funds Transfer in the processing of my Systematic Withdrawal. When receiving funds via Electronic Funds Transfer, it may take up to three business days for the funds to appear in your bank account.

Bank/Brokerage Name: ________

Bank/Brokerage Street Address: ________ City, ST ZIP: ________

Account Number: ________ ABA Routing Number: ________ ☐ Checking (please attach a voided check) ☐ Savings

Exhibit 621 at 313. (Metlife Variable Annuity Application at 313 Part 4)

[17] Every Annuity company involved in these proceedings allow up to a 10% penalty-free annual withdrawal per year.

5 **Systematic Withdrawal Program**

This program allows you to determine the amount and frequency of a Systematic Withdrawal. It may be altered or stopped at any time. Withdrawals may be treated as income and may be subject to a 10% federal tax penalty. Please consult your tax adviser.

If you have elected a Living Benefit Rider, a systematic withdrawal in excess of the maximum annual withdrawal amount will have an adverse effect on the remaining guaranteed amount.

Systematic Withdrawal Amount: $ ______________ (withdrawals will occur on the 15th day of the month).

When: ______________ Month ______________ Year

Frequency: ☐ Monthly ☐ Quarterly ☐ Semi-annually ☐ Annually

Note: If no frequency is elected, your systematic withdrawal will be forwarded on a monthly basis.

Federal Income Tax Withholding:

If you elect "Yes" below or, if you do not make any election, we will withhold at a rate of 10%. Some qualified plans are subject to different withholding requirements.

☐ Yes - Do withhold ☐ No - Do Not withhold

Amount: ______ % *Must be between 10% and 50%*

Where: ☐ Directly to my address of record

Via electronic fund transfers to my bank account:
☐ Checking Account *(include a non-starter, voided check)* or ☐ Savings Account

Bank Information: Bank Name ______________ Account Number ______________

Bank Telephone Number ______________ Bank Address ______________

9-Digit ABA Routing Number ______________

Exhibit 621 at 13 (Sunlife Variable Annuity Application Part 5)

Regardless of which company chosen; had an investor chosen to take an immediate withdrawal or systematic withdrawal from their annuity- they would have had to respond to 0-5 years; <u>and that would still pass suitability.</u> The **<u>"Investment Access"</u>** was designed to address this exact scenario where the Client has a Long Time Horizon" but would like access to their investment immediately. Stone's interpretation and understanding of the Investment Access question (Tr. 699:6-24) is thus wrong- as these systematic questions would be rejected based on his testimony (Tr. 699:19-24).

Given the above facts – the Division's case against Cohen must be dismissed.

<u>8. Cohen's understanding Of the Investment Access Questions-</u> the Division's attempts to corner Cohen in his understanding of "investment access" question fails. The Division's line of questions were not to any specific sale but rather a general understanding to the question at the time "when asked" in 2011. That was 3 years after the sales of the annuities and the first time that he looked at the question since the sale. Any conclusion as to what Cohen believed "investment access to mean in 2011 in the transcript is **<u>inconclusive.</u>** Cohen's response in 2011 is not in any way a contradiction to his understanding of the suitability forms in their general use. To the contrary, Cohen's response in 2011 in the Division's Post-Hearing brief – justify his interpretation and reasoning for answering a time period that extended beyond the surrender charge period.

Although <u>not necessary and mandatory based in Finra, NAIC, industry standards, and Woodbury manuals and rules;</u> – Cohen clearly felt that he wanted to go above the call of duty to assure that the investors understood the surrender charges **<u>if</u>** they choose to cancel their annuities. Cohen felt that he went beyond the call of duty. The Division's attempt at leading the witnesses to state that Cohen should have answered <u>0-5 years ;</u> is not only ridiculous, defeats the Charter of what the SEC is always about- as a shorter time period response would clearly have had added exposure to Cohen's misrepresenting the surrender charges to his clients. **<u>The SEC has clearly attempted to pit a registered representative's duty to the broker dealer over an investor</u>**. How low could the SEC go?

<u>The SEC seems to disregard Cohen's desire (or duty as the Division seems to claim, that suitability might have been required) to apprise an investor of the surrender periods within their purchased annuities, over their new and unchartered role to protect one's broker-dealer over Investors and the Public.</u>

"Suitability" in its entirety is designed to protect the Investor. It needs to be looked at from the perspective of the investor and not the "Broker Dealer". This is where the Division's claim fails. They are attempting to redefine who "Suitability" is for and have schemed their arguments in the OIP in a way that is just illogical.

This is not what Congress desired through the passage of the Federal Securities Laws of 10b of the Exchange Act and 17(a) of the Securities Act.

B. DIVISION'S CLAIM THAT COHEN FALSIFIES TWENTY-EIGHT ANNUITY POINT OF SALE FORMS TO OBTAIN WOODBURY PRINCIPAL APPROVAL OF HIS STRANGER-OWNED ANNUITIES SALES IS FALSE

There is no legal restriction using nominees in the financial or insurance world. Nor has the Division proved such throughout the proceeding. Feder and the Division clearly contend that the use of Nominees was clearly used by the investors prior to Cohen's knowledge of the annuity strategy. As per the OIP, Cohen did not designate, choose or have any knowledge as to the selection of the annuitants. The OIP clearly states that Horowitz and others including BDL were involved in the procurement of annuitants. Contrary to how the Division has portrayed this case- the use of non-related short lived annuitants was not illegal.

The Division attempts to state that Cohen 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 fails on a minimum of two basic principles. (Division Post Hearing at 24)

1- A pre-hearing brief is not an admission or evidence in a hearing.

2- Cohen did not admit such- he clearly was creating an understanding for the Court of the concept and not an admittance that he was aware of such facts.

The Division falsely claims that the "beneficiaries on all 28 annuity contracts brokered by Cohen were not the estates of the terminally-ill annuitants but rather the two hedge funds behind the strategy- is an outright lie by Conway and his posse. The beneficiaries were the trusts that correspond to each Owner's purchase of their annuities. This matter has been addressed in Federal Court as to who is considered to be the rightful owner.

The second circuit in *Kramer* stated that a beneficial owner does not need to be disclosed. The Division's attempt to deceive the court by stating that Cohen covered up the beneficial owners and thereby abdicated his duty to disclose to the broker-dealer is false. The Division's exhibit 334 and 628 are irrelevant to this section.

1. Division's Claim that Cohen Provides False Investment Access Information On Each Point of Sale Form He Submits to Woodbury is Factually Wrong.

As discussed earlier, Cohen believed that his responses were correct. This was based on his understanding and his due diligence of both Finra and Industry Standards. Unlike "Time Horizon"- "Investment Access" refers to "Liquidity Needs". The investors clearly had no intentions to access their

annuities during the life of the annuitants as testified by Feder. Secondly, Cohen believed that this question clearly referred to the actual "need to access the investment"- Feder clearly testified that they had no intentions to access the investment during the lifetime. This question did not refer to the Death Benefit- but rather to the actual investments account within the annuity.

Interesting observation at 25 in Post Hearing brief is that the division now switches their interpretation to this question. They now agree with Cohen that this question is an "Investment access" question – meaning a "Liquidity Needs" question and not a "Time Horizon" question. This now directly disputes Stone's testimony that testified multiple times in both Direct and Cross examination that this question is a "Time Horizon" question.

Tim Stone clearly erred in his understanding of the question 4 and now is in direct conflict as to the way the Division's new understanding that pertains to **"Liquidity Needs".** Just to drill upon his lack of understanding of both terms- Stone stated multiple times that "Investment Access is the same as time Horizon" (Tr. at 737:1-23). This should raise a major issue with Stone's credibility of his testimony - as both the Division and Cohen now agree as to what **"Investment Access"** means- they just differ as to whether the term included just the Investment during life- or would also include a Payout under the Death Benefit feature of the annuity. Stone's interpretation is completely different and **wrong**.

Stone's credibility once against is suspect, as he perjured his testimony between the direct and cross examinations. At Tr. 669:21-25 he claims that he and Woodbury learned that "it was not long-term" but at cross examination he clearly states otherwise that **"I don't believe we brought up the time horizon." (Tr. 746:1-7 and emphasis at 6-7).** Which statement is true? Remember Stone equates Time Horizon to Investment Access- which is clearly wrong? The Division's key witness is not only not credible – but it is evident he does not understand the difference of what this entire case is about.

As discussed earlier, Cohen did not believe that this question included the Death Benefit Payout as a means of **"access".** This is what was confirmed by Feder they would have held the funds 10 years if the annuitants didn't die. Cohen also did not believe this question was **"material"** or necessary as this clearly was a suitability question that wasn't necessary under Finra regulations.

Moreover, based on the new interpretation of the Division- even if suitability were deemed to be needed for these sales, - the "Investment Access" question was not a necessary part of Finra and SEC requirements in early 2008. The "Investment Access" requirement as part of a suitability review, only became law when Finra Rule 2821 came into effect on May 5, 2008.

Respondent Cohen correctly chose 11-15 years to this question. **His reasoning at the time, was that this question clearly referred to the "Investment within in the Annuity" and not the "Death Benefit" to the annuity.** Cohen's Reasoning for choosing 11-15 years was as follows: Although he was comfortable that the Fund was well aware of the surrender period which ranged from 7-9 years in the annuities purchased by the Fund, the Fund never expected the "need" to withdraw any investments at all. Feder's testimony clearly stated that their expectations were to collect the "Death Benefits" within a short period of time not the surrender or investment value within the annuity. This question in essence became obsolete or at best a "Never" which could have been used too.

Cohen was left weighing whether the "Never" or the "11-15 years" would be the more conservative response to this question. In a case where "Suitability" was required, Cohen felt that the "Never" response was less conservative of an answer vs. the answered "11-15 years". His

reasoning was that in case an annuitant did not die as expected by the Fund, the 11-15 years was the best answer that clearly wouldn't overlap to the 9 years surrender period of some of the annuities sold. Cohen basically pegged the answer to the surrender period of 6-9 years within the annuities sold and felt that since some of the contracts had 9 year surrender periods choosing the answer that starts with 6 years would perhaps cause liability. Through the above analysis, the best answer, was the chosen of "11-15 years".

Note that even under the wrong premise that Suitability was needed in the variable sales related to this proceedings, the question clearly **related to the "Investment" and not the "Death Benefit" thus making the "11-15 years" answer the most suitable answer based on the same analysis.**

As described earlier in the description of annuities, the annuity value is called Investment" only during the lifetime of the annuitant; while that same value converts or transforms to a Payout" or "Death Benefit" at the death of the annuitant. Anything contrary to this view would make every Annuity company's brochures false advertisement and deceiving. The Division intentionally designed their questions in a dubious and deceiving way in order to induce the response of a "short-term intent" to the "Death Benefits" too; but seemingly caused the witnesses to imply that such intent was for the "Investment" itself. Cohen has displayed, that the unethical trickery by the Division, of entrapping the witnesses' response to support their position, is quite evident.

Knowing that the fund managed a large pool of variable annuities already on their books while also carrying a substantial amount of life insurance policies within their portfolio, Cohen felt that the due diligence he took for his "own records and knowledge" of assuring that the Fund and their managers understood the surrender charges within the annuity products was sufficient.

The Division keeps on insisting that Cohen knew of the Time Horizon of the Sold annuities – As per the Division's brief – Time Horizon was not asked- nor was it misrepresented on the annuity point of sale. So question 4 clearly does not relate to Time horizon- but rather "investment Access' – that being said, Cohen did not feel the question pertained to the Death benefit.

The Division quotes both Feder and Stone's testimony at the hearing at 25-26, –it is apparent from their questions and answers that they are both responding to a time horizon question and not an **"Investment access/liquidity needs"** question deeming their responses irrelevant to this part.

As to Part B of question 4 at 26– the Division claims that Cohen should have checked other with a response of **"Death Benefit"-** their argument fails since no surrender charge would apply in such cases deeming this question better being left blank. At Death there is no surrender charge period in existence so the Division's claim is obviously wrong.

Stone's response to the matter once again is off base- he seems to be talking like an insurance company personal (he was an employee of the Hartford too) when he says it was a "misuse of the product and unethical." That is a factually wrong statement. Cohen's filed Motion in Limine, included Brady material within the exhibits from various insurance companies that clearly show that no 'intended use" or restrictions to the use of use of short-lived annuitants existed.

Once again the Division's attempt to add Part B of Question 4 to the OIP, is a constructive amendment and variance to the OIP.

2. Division's claim that Cohen Makes False Statements Concerning the Intended Use Of The Annuities is factually Wrong

First, the Division's claim that Cohen's checking of the Tax deferred treatment of earnings was incorrect is wrong. Annuities that are owned by individuals or Revocable Trusts allow the tax deferral of earnings until either withdrawals or death. Even if the client purchased the annuities for other purposes, or for the short-term, these same tax benefit would still apply deeming this response correct.

This part is irrelevant to the hearing as well clearly immaterial as "intended use" was not a requirement of suitability in early 2008 based on Finra, SEC and even Woodbury's written manual.

Once again, this is a constructive amendment and variance to the OIP and must be struck from the Division's case.

3. Division's Claim that Cohen Makes False Statements Concerning the Source of Funds Used to Purchase The Annuities is factually Wrong

Cohen's response of Trust in question was 7 is correct to best of his knowledge. Cohen has previously stated that he did not know inner workings of the funds and or BDL nor the mechanics of how money was transferred to the trusts.

4 Q Did the hedge fund fund the annuities
5 investments?
6 A. I don't know because -- I don't know
7 directly. I don't know the chain of money, how, what,
8 where, when, you know. I do know that they put -- I
9 don't know -- they -- that money was put into each of
10 the annuity applications, but I don't know where the
11 actual money came from. I can't vouch for that. (Cohen Inv. Tr. 4-11)

The Division's claims that the response should have been BDL is ludicrous. Why not stop at the Hedge Fund? The owners of the Fund? The investors of the fund? And perhaps the US Mint? Where would the Division draw the line? Cohen's response was most logical as it was where the monies to fund the annuities directly came from. If Cohen responded a checking account – would you ask who deposited it into to the checking account? Even if it is deemed to be incorrect, it would still be an **"immaterial statement"**.

Lastly, this allegation once again is an extreme departure from the OIP and a constructive amendment or Variance to the OIP.

4. The Division's Claim that Cohen Falsely Certifies That He Is Familiar with His Purported Clients and That All of the Information He Provided Was true And Accurate is Factually Wrong.

Cohen did believe that all the information was correct and accurate. He answered all the questions accurately with his interpretation of what Finra and the Industry standards requested. Not one of the Division's claim were ever made by Woodbury prior to the Six plus years since Cohen resigned from Woodbury. Once again Cohen did not believe that the suitability questions were needed as per previously discussed. This question clearly states that the information is complete and accurate to the

"best of my knowledge" – it was to Cohen's best of his knowledge. He believed that all his responses were correct given the information that was provided to him.

The point of the sentence was that **"this transaction is suitable for the client".** At Cohen's Direct Questioning by the Division- Conway tries to cut off Cohen before completing the complete sentence.

```
 6          I believe it's the last sentence
 7    there. Why don't you read that last sentence
 8    into the record.
 9        A. The last sentence is: "I believe the
10    information provided is complete and accurate to
11    the best of my knowledge."
12        Q. That's it.
13        A. "And this transaction is suitable for
14    my client."
15        Q. Mr. Cohen, I didn't ask you to read
16    that.
17        A. I have the right to answer the
18    question --
19        Q. What you do on your own time --
20        A. I was reading the whole sentence.
21    Don't cut me halfway.
```

(Tr. 834:9-21)

This sneaky tactic by Conway and the Division has been the pattern throughout this proceeding in order to deceive the Court in this matter. Conway tried to cut Cohen as a way to create a new meaning to not only this sentence, but to the entire purpose of the entire form. **This sentence read in its entirety clearly supports Cohen's theory that it was designed for Suitability purposes only.**

The Division has never questioned whether the sale was suitable for the client. It was. Feder testified that he and the Investors were happy with their purchases. A Broker Dealer has no right to decide whether a product is suitable for a client when the "Client themselves" want to make a purchase without a recommendation. If Suitability was not needed, Cohen testified that to the best of his knowledge it was suitable. If Suitability was needed, the same would apply- as Cohen believed that all his questions were answered correctly.

Cohen never testified that he met with any of the trustees or nominees- his contact was through Abe Gottesman and/or Howard Feder who was the individual responsible for all the annuity purchases. The fact that Zeidman and Jedwab claim to have not spoken to Cohen is irrelevant to the certification signature or this proceeding.

The Division's claim that Cohen's certification was false (i) due to not meeting the trustees is absurd and nonsensical. This form doesn't ask if Cohen met or knew the Nominees. Cohen was made familiar with the trust through Feder and Gottesman. Nowhere do Woodbury, Finra or SEC policies demand that a face to face meeting is required. (ii) Cohen believe that the Investment Access question was properly responded to and the source of funds should have been the "trust". Stranger-owned annuities were an unknown concept in 2008. There were no federal, state, industry nor Woodbury policies that forbade its use. To state that Cohen tried to actively and fraudulently hide and avoid detection of a concept or strategy that was perfectly **legal** at the time – as of which was totally unforeseen or known in the industry; is not only a derisory theory, but ***ex post facto law*** and against the US Constitution Article 1 Section 9 Clause 3.

Lastly, this allegation once again is an extreme departure from the OIP and a constructive amendment or Variance to the OIP.

5. Division's Claim That Woodbury Would Have Rejected Cohen's Annuities If Cohen had provided Truthful Responses On the Point Of Sale Forms "*Is Ex Post facto law*".

As previously proven, Woodbury had no restrictions as to the purchase of annuities by Hedge Funds or "Institutional Investors". Once again this entire case is ***ex post facto law.***

Cohen did not believe they Suitability and Principal review were a requirement of Woodbury for the sales of the annuities to the Investors. This was based on his knowledge and understanding of Industry Standards, FINRA & SEC regulations at the time. Stone's testimony to the unwritten rules in place at the time DO not coincide with Woodbury's manual. Had Woodbury intended to take a stricter position from Industry Standards and FINRA requirements – they would have needed to affirmatively state such through explicit text in their manuals. The testimony of Stone's memory and understanding to Woodbury's unwritten rules from seven years ago, do not corroborate to Woodbury's written manual. (Exhibit 618)

- Woodbury's Manual does not restrict sales to Hedge Funds.
- Woodbury's Manual does not state restrict non-recommended sales of annuities.
- Woodbury's Manual do not affirmatively state that suitability is required in all situations
- Woodbury's Manual do not "limit" the "intended use" of a product.
- Woodbury's Manual **do not** restrict the sale of Variables Annuities for short-term basis. (Section 10.5 only says VA's **cannot be "represented"** as such. Cohen made no representation that they were short-term)

The Division's attempt of backing into charges by making allegations that even Woodbury themselves have never raised prior to this hearing together with their *ex post facto* description of the rules of Woodbury is against any US Constitutional rights afforded Cohen.

Lastly, this allegation once again is an extreme departure from the OIP and a constructive amendment or Variance to the OIP.

C. DIVISION'S CLAIM THAT COHEN REPEATEDLY LIES TO WOODBURY ABOUT THE NATURE OF HIS ANNUITIES SALES IS UNFOUNDED.

1. The Call from Penn Mutual

It should be noted that the OIP did not list Penn Mutual within the OIP. Anything to do with Penn Mutual and Baker's testimony is outside of the four corners of the OIP.

The Division called upon Baker as their only Insurance Company witness in order to testify as to the "intended use" design of annuities. First it should be noted that Penn Mutual did not issue any Annuities as Baker's primary concern about these annuities were that they "screamed" of "STOLI" (Stranger-Owned life Insurance) and it wasn't something that the Penn Mutual wanted to be part of"(465:21-466:1). He testified that when discovered that these annuities were stranger-owned he made a business decision to not approve these annuities. (463:11-465:7). When asked if annuities needed an Insurable Interest? Baker responded "I don't know. I don't – I don't want to—"(Tr. 462:14-17).

The Court then asked Baker "What's an insurable interest? ....." Baker then gave an example of insurable interest in the context of life insurance (462:18-463:9). Annuities, clearly do not need an insurable interest in the State of NJ or most other states, nor has the Division proved otherwise.[18] (Cohen Pre-Hearing Br. At 9).

Baker testified multiple times about his concern about stranger-owned annuities but states:

3 With respect to annuities, when I talk
4 about stranger-owned life insurance, even though
5 this is a stranger-owned annuity, this is really
6 the first case I saw from an annuity
7 perspective.
8 What I was looking at and what our
9 group went through and investigated was
10 stranger-owned life insurance on the life
11 insurance side, the characteristics were very
12 much the same in terms of the beneficiary and
13 the owner and the payer being not necessarily
14 the same individual.

(Excerpt from Tr. 463:11- 464:14)

Baker clearly called Woodbury with a primary concern that these annuities were stranger owned annuities:

13 **Q. And after you undertook this**
14 **investigation and concluded this was not**
15 **business Penn Mutual wanted to be involved with,**
16 **what did you do?**
17 A. I reached out to the -- I reached out
18 to one of the supervisors at Woodbury Financial,
19 and basically just had a brief telephone
20 conversation with him and I told him what my
21 concerns were, that the paperwork had come in
22 and it looked like it was very much going to be
23 -- fit into that category of stranger-originated
24 life insurance. Even though it was an annuity,
25 DIRECT - BAKER

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1 it's still considered an insurance product.

(Tr. 466:13-467:1)

Until prompted by the Division for this proceedings, neither Woodbury nor Penn Mutual had an issue with the responses of the Penn Mutual applications rather they both had an issue as to Stranger-Owned Annuities. Baker clearly testified that Penn Mutual rejected the applications due to the fact that they did not want to issue an annuity that would be "Stranger-Owned" and nothing to do with Suitability at the time. In six plus years, neither Penn Mutual, nor Woodbury previously ever made claim to a suitability violation – the only objection they both had after the fact was they didn't like or want "Stranger-Owned" Annuities. Once again *ex post facto.*

Baker was asked in cross if he believed annuities needed "insurable interest" he responded that his belief was "it did" but responded that he didn't know if Penn Mutual required an insurable interest or

[18] During the Hearing the court brought up a letter from the NJ Attorney General's office certifying the authenticity of emails from the NJ Dept. of Insurance that no insurable interest is needed for annuities in the State of NJ. (Tr.442-443)

not. (Tr.519:18-520:3) He admits previously that he called Woodbury with the stranger-owned concern – but now can't recall if Penn Mutual required an Insurable Interest?

The Court asked Baker if "Insurable Interest" requirements carried over to variable annuities. – Baker responded with a long winded answer but ultimately said there is **<u>no "prohibition"</u>** existed. (Tr. 481:20-482:17)

Baker clearly stated that Suitability is designed for the benefit of the purchaser (Tr. 450:22-451:2; 452:18-21; 514:18-515:16). He clearly testified that it was designed for the purchaser and not the company.

Through Baker's testimony, the Division attempts to create Cohen's mind-set by stating Sandy Chu's use of the term "red flag" was an indication that Cohen attempted to deceive his Broker Dealer – that is nonsensical. Cohen denies ever using such term. Secondly if that term was used by him or others- Baker testified that his understanding to the term was the following:

1 **Q. Okay.**
2 A. What I believe he was looking for is
3 the maximum amount that the company would issue
4 under the variable annuity contract.

(Tr. 472:1-4)

Another note is that Baker used the term "Red Flag" at least 6 different times in a different context and clearly not related to his initial "Red Flag" statement. (Perhaps a Redskin Fan).

Baker clearly stated that Penn Mutual's suitability questions on their applications were immaterial through the following: (Tr. 518:10-13)

10 **Q. Did Penn Mutual rely on the**
11 **broker-dealer, or did they rely on their own**
12 **suitability questions within their application?**
13 A. Broker-dealer.

Secondly, the applications, were never signed by the Owners and Annuitants, and contrary to the Division's claim – Cohen never certified to the suitability questions on the annuity applications. The form that Cohen did sign was not part of the application. Once again Division's dubious act of blending separate documents to make claim that Cohen signed a certification to another document should be noted. The document that contained the certification and that was signed clearly says <u>Pages 1 of 2</u> and clearly not part of the Penn Mutual Annuity application. The Penn Mutual Application which says <u>Pages 6 of 6</u> and contain the suitability questions has no certification statement. (Exhibit 609)

The Division's claim that the Penn Mutual's application was never sent to Woodbury is false. They quote Baker four times in making such statement but that in itself is Extreme Hearsay. Baker's statement does not prove that Woodbury never received the documents. Woodbury has not claimed that they didn't receive the documents too.

As such Baker's testimony is irrelevant to this case. None of the allegations that the Division have made in regards to Penn Mutual were on the OIP. Their attempt to expand on the OIP is a constructive amendment and variance which deprive Cohen of his rights to a fair trial.

2. Woodbury Pulls Cohen's Business And Takes Steps to Stop Any Additional Annuity Sales

The Division presented Woodbury's **signed detailed statement of events and Findings** to Finra on **4/25/08**. This was over 2.5 months after Cohen submitted his last annuity application through Woodbury, and 2 months after Cohen resigned his resignation (on 2-20-2008). Granted this is Woodbury's version of the events which are disputed by Cohen (and will be presented at a pending arbitration against them). **Woodbury lists seven distinct bullets as to their "Findings of the Investigation" but they clearly fail to make any mention of any alleged fraud to the broker dealer or a violation to their suitability policies in place at the time. More importantly, Woodbury never mentioned anything about the "Investment Access" questions being misrepresented.**

Note the following- the Division never proved that annuitants need a relationship to the trusts (insurable interest do not apply to annuities); that a duty to disclose the health of the annuitants exist to either the broker Dealer or insurance company- as no duty does exists.

This section clearly proves that Woodbury's concerns were not to the "Investment Access" questions.

Woodbury and Cohen are bound to arbitrate their differences through Finra as per a signed agreement between them. Woodbury had every opportunity to make claims that a Fraud on the Broker Dealer occurred. Even more so, Woodbury never hesitated to make many other falsely-proved allegations on Cohen's U5. If Woodbury believed that a Fraud upon them did occur- **why wouldn't they have made such claim in any of the following?**

- Woodbury's detailed Finra statement of events and findings dated 4-20-08 (Exhibit 374)
- Woodbury's disclosure statement on Cohen's U5 on 2/25/08.
- Woodbury's amended disclosure statement on Cohen's U5 on 10/6/08. Eight months later.
- Woodbury's Reply to Cohen's Complaint against Woodbury in their Finra Arbitration.
- Woodbury as a Company did not testify at the hearing – the Division only had former employees of Cohen whom had personal issues against Cohen testify to corroborate the Division's story.
- Woodbury never sued Cohen for any of the commissions that were paid him in regards to any of the annuities.
- Smallidge summary of issues in exhibit 335 never talk about **"Investment Access"**

These facts alone prove that the Division's claim is not only about meddling within "**<u>Private Matters"</u>** that don't belong in an SEC proceedings- but the Division has coerced former Woodbury employees to testify in order to go after Cohen.

The Division in section III-C-2 attempts to create a scheme theory against Cohen- not only are their facts false – the Division has never proved that any of their allegation were actions in order to create a scheme theory. The Division has only alleged "material misrepresentations" which is false as per the evidence. Cohen did not make any material misrepresentations on any of the forms.

The Division's attempt to now state that Cohen misrepresented the <u>"Investment Access"</u> question when Woodbury themselves never made such statements is evidence that this case of the Division is not about a <u>"fraud on the broker dealer"</u> but more of a retaliatory agenda by the Division for Litany of reasons that have all been proven false.

The Division has clearly embarked on a mission of prejudice and selective enforcement that has clearly been designed to harass Cohen.

Once again any facts or allegations in this section would clearly be deemed a constructive amendment and variance to the OIP.

3. Division's Claim that Cohen Misleads Woodbury.

Cohen's sales of his annuities to the investors were either completed by January 28, 2008, or on February 8, 2008. Prior to this date – Cohen did not have contact with Smallidge in relationship to any of his annuities sales. Interestingly, Cohen received a congratulatory phone message from Steve Smallidge – IMO National Sales Director at Woodbury on 2-8-08 for the amount of commissions that Cohen earned the previous week. - That prompted Cohen to send an email to Smallidge. (Division Exhibit 333)

"Marc Y Cohen" Redacted Redac
02/08/2008 02:59 PM

To <steve.smallidge@woodburyfinancial.com>, "Marc Y Cohen"' Redacted
cc "Michael V Frieda"' < Redacted
bcc
Subject Interest in Talking

Steve,

Hope all is well. Its about time we get some attention here in NY. Well I hear you would like to discuss some great success stories that I have and will have for 2008. I have been privileged to meet some great people over the past few months and would love to share with you some of the sweat stories and long days that have finally paid off. I will be on the road tomorrow all day, so if you would like to chat for a few minutes, feel free to call me on my cell at Redacted Red I might just be a little punch drunk as I am still at the office going through paperwork at 3am in the morning. Should be here another 30 minutes or so if you would like to talk now.

Best Rgds,

Marc

This email clearly shows that Cohen had **<u>no negative state of mind</u>** and was clearly willing to talk with Steve Smallidge who was not even Cohen's Supervisor at the time – nor did he feel a need or obligation to talk to him. Cohen's response in Division exhibit 333 – does not corroborate the Division's

theory and to the contrary- **<u>Cohen offers to "chat" with him about how he achieved his sales on February 8, 2008.</u>**

Mr. Smallidge was a Marketing Director- his role was to recruit reps and increase sales which did not include the role of Cohen's Supervisor, Compliance Officer, Manager or anyone with control over him. Smallidge described his function and role within Woodbury and it did not include being a Supervisor or Compliance Officer-

```
1    Q. What were your duties and
2    responsibilities in that position?
3       A. I would be involved with helping
4    recruit, attract and retain new IMO groups, help
5    those IMO principals recruit individual
6    registered reps to their organization. Helped
7    do some transitioning of their registration and
8    their business from their prior firm to Woodbury
9    Financial.
10         Resolve problems in the home office.
11   A lot of relationship management and training.
12   Those types of duties.
```

(Tr. 536:1-12)

On the contrary, at Cross Examination - Smallidge testified that Cohen's Supervisor was Michael Frieda and not Steve Smallidge whom the Division led the Court to believe.

```
10      A. I guess, looking back six and-a-half
11   years ago and even longer, with the
12   relationship, I always dealt with Mike as the
13   principal -- Mike was the manager in the office.
14   It seemed like on a more regular basis, you
15   know, Fredda helped, Fredda Elzweig helped, and
16   you were more the sales guy in the office, but
17   Mike was always the person I would go to if
18   there were questions or issues, who was also a 7
19   and 24 and who we identified as the supervisor
20   of your branch.
```

(Tr. 598:10-20)

The attempt by the Division to make it appear that Cohen <u>had a duty to speak to a Marketing Guy; who had no Supervisory jurisdiction over Cohen; nor a person Cohen had a duty to answer or a duty to disclose any facts to - is ludicrious.</u> The Division has failed to prove otherwise. Cohen did not feel an obligation to talk to Smallidge –who was stepping out of his marketing role. Cohen did not need to respond to any of Smallidge's questions- and even if he did- Cohen answered the questions truthfully as all annuities – have a tax deferral advantage as well the annuities sold absolutely offered a <u>wealth preservation</u> feature through its principal guarrantees.

Baker's testified that Penn Mutual did not like the Variable Annuities strategy- as Baker felt that that its concept **<u>"screamed of being an "Investor Owned Life Insurance"</u>** (although Legal)– that prompted Baker's call to Stone of which he explained his reservations to the "Annuity Strategy"(Div.Exhibit 374 at 1, Tr.465:22-466:1; 494:8-11). Smallidge's first conversation with Cohen on was on February 13th, 2008 was a week after the last annuities were sold, and more than 2 weeks after the first set of annuities sales were completed. Any evidence that is after the sales of the annuities are not evidence to prove scienter, plus not within the confines of "in connection with" of securities laws.

Cohen was annoyed that Smallidge – a marketing guy as he was known at Woodbury and as his title confirms; - a week after any annuities were sold- started to ask many questions that had nothing to do with the suitability of the sales but rather seemed to be out of place and out of norm for Smallidge. As Smallidge was not Cohen's supervisor, Cohen did not have a duty to speak to him or provide any information to him of any

previous sales. As such, any statements Cohen made to Smallidge would be deemed "**immaterial and irrelevant"** to this case as Smallidge did not have control over Cohen nor was Cohen obliged to comply in regards to his sales in 2008. Tim Stone, on the other hand, was a compliance supervisor at Woodbury. Stone testified that he never spoke to Cohen or sent any emails to Cohen at anytime in 2008. The Division has not proven otherwise and nor have any witnesses disputed this fact.

When Smallidge stated to Cohen during a brief conversation on February 20,2008 at 11:35am that he wanted a compliance officer on the line, Cohen as a measure of caution said he would call back shortly with a witness to listen in to the conversation. This was the "first indication" that Cohen learned that Woodbury had an issue with the annuities. Cohen reasonably wanted a second person in the room for when if he spoke to a compliance Officer. As Novak testified, Cohen already had Novak coming in to discuss the disolution of Cohen's partnership at US Planning Group -so Cohen asked Novak to sit in on the call to Smallidge and the compliance officer.

Tim Stone was never patched onto the line as Smallidge refused to talk with an attorney present and the conversation's tone got heated and Smallidge abruptly hung the phone. Cohen never had the opportunity to finish his conversation with Smallidge as smallidge insisted on not speaking in the presence of an attorney.

After hearing the the short but tense exchange, together with Smallidge refusing to continue the conversation with Novak in Cohen's presence and Smallidge abruptly hanging up; Cohen gave Novak some background information and history as to Woodbury. (Tr. 945) Novak, knowing that Cohen had a lease signed weeks prior as he planned to move both his offices and his registrations to a new Broker Dealer within days; reccomended that Cohen should just resign immediately. Cohen was planning on resigning weeks before, prior to any of the annuities being sold (Tr. 920-922), but due to Cohen's son's birth on January 17,2008- followed by a Bris (circumcision) a week later on January 24, 2008- Cohen's move was delayed. (Tr. 933). Cohen immediately sent a letter to Michael Frieda- Cohen's Woodbury Supervisor as well as Walter White- Woodbury's President and others that he immediately resigns. Intrestingly, Smallidge sent Cohen and email to reconsider his resignation of which Cohen said thanks but no thanks.

As testified by Cohen- and of which Exhibit 1114 was read into the record- Howie Feder on January 19, 2008 sent over Saul Feder's contact info- in order to obtain the full trusts for presenting to Woodbury. With Smallidge's insistence on not talking Cohen never had a chance to provide the info. (Tr. 940-941)

4. Division's Allegation that Cohen Abandons His Office during Woodbury's Investigation is False.

On February 20, 2008, Cohen emailed Woodbury's President Walter White that he resigned effective immediately. Prior to his resignation, Cohen did not believe there was an investigation pending but rather in the words of Smallidge "An understanding of the business". Smallidge replied that he wanted Cohen to reconsider his resignation of which Cohen responded thanks but no thanks. (Cohen Tr. 323:13-325:18)

As soon as Cohen resigned, he immediately moved his personal effects to his new office which was set up weeks prior. Both the Division and Woodbury attempt to distort the order and facts to make it seem that Cohen disappeared and abandoned Woodbury and US Planning Group due some wrong-doing. That is completely false, as Cohen's departure was planned even prior to any Annuities even being sold through Woodbury. As testified earlier, the New Broker Dealer– "World Equity Group Inc." ("WEG") already approved and reviewed the entire strategy in its entirety and approved its use within their broker dealer. Cohen planned on having a witness from WEG to testify to these details but was

denied by the Court's decision to complete the Hearing early. (Woodbury claimed that Cohen only attempted to resign but didn't actually resign, was in order to state that Woodbury terminated his registration 5 days after his resignation. Cohen's sale contract stated that a "termination for cause" would allow Woodbury to keep Cohen's rightfully earned commissions. Secondly, Woodbury stated that they terminated Cohen on the February 25th, 2008 in order to incorrectly state that Cohen refused to cooperate with their investigation which started after Cohen's resignation." (Exhibit 374 at 4 bottom bullet)

Unbeknownst to Cohen, on February 21st, 2008 and a day after Cohen resigned Woodbury sent Stone and a "Hartford" investigator to Cohen's former office. They attempted to call Cohen but as he was no longer with Woodbury – there was no duty to speak to them. Woodbury's ploy of stating Cohen only attempted to resign was in order to state that Cohen failed to cooperate with their investigation. Quite Far from the Truth. **Once again this is irrelevant, a constructive amendment and variance from the OIP.**

D. DIVISION'S CLAIM OF ILL GOTTEN GAINS IS FALSE

Cohen doesn't dispute he got paid on the annuities he sold to the Investors. Cohen's gains were rightfully and legally earned. The Division's attempt to try and back door in to the commissions that are rightfully owed Cohen that were not on the OIP are restricted as being an amendment and variance to the OIP. The Division through their voluntary issuance of the OIP would forfeit any right to any amount not requested by the OIP in paragraph 103. Anything different would be an amendment and variance to the OIP.

Out of the $766,958 received by Cohen, Cohen paid David Zakheim the person who introduced Cohen to Horowitz- $125,000 as a sign-on bonus to join Cohen's new firm as Chief Marketing Officer. (Cohen Invest Tr. 256:25-257:15).

III. LEGAL ARGUEMENT

A. COHEN DID NOT VIOLATE THE ANTI-FRAUD PROVISIONS OF THE SECURITIES LAWS.

Cohen did not violate any Federal Security Laws based on numerous reasons.
The Division fails to prove that the (i) omission or misrepresentation was material; (ii) that Cohen acted with scienter or even recklessness; and (iii) that the nexus of "in connection" properly apply to this case (iv) that the fiduciary relationship of a registered representative to an investor (securities law) is applied to a registered representative to his broker dealer (common law); (v) that this case even belongs in a Securities Law Court vs. a Common Law Court.

(1) Division's case does not belong in an SEC forum. Although securities might be involved- the necessary element of an alleged securities fraud to the public or to an investor is not alleged nor occurred in this case.

The US Supreme Court observed in *Marine Bank v. Weaver* and ruled the following **"Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud".** [19] All three cases that the Supreme Court have ruled on that relate to "in connection with" refer to misappropriation of funds cases[20]. The Division's case against Cohen is not about a "misappropriation" of monies, and such the "in connection" or nexus fail to connect the purchase of securities to the alleged fraud to the broker-dealer. As such, the nexus requirement to allow the Division to use Zandford or any other case should be denied. The "in connection with" nexus fails as a stricter 'transaction nexus" will apply. Banker's Life 404 U.S. at 12-13 states "the crux of the present case is that Manhattan suffered an injury as a result of deceptive touching its "sale as an investor" (emphasis added). SEC v. Pirate investor, LLC [21]the 4th circuit had 4 relevant factors to be considered: the 4th element required was "whether material misrepresentations were disseminated to the "public" in a medium upon which a reasonable investor would rely" (emphasis added). " it clearly said the following "We do not presume to exclude other factors that could help distinguish between fraud in the securities industry and common law fraud that happens to involve securities." (emphasis added). - This case would preclude the Division in even trying this case under Securities Law.

The lack of requisite connection goes to the question of SEC jurisdiction. Thus even though there may be a security involved, the alleged misrepresentation or misconduct may not have occurred in a securities transaction. The Division's allegations consist only of common law fraud claims involving breach of fiduciary duty or commercial fraud and, hence, are outside the scope of federal securities fraud jurisdiction. In Cohen's situation, the "in connection with" requirement is necessary to limit 10b-5 (and 17a) jurisdiction so that the rule **does not encompass all of common-law fraud.**

Also, the end of Rule 10b states "Commission may proscribe as necessary or appropriate in the public interest or for the protection of investors". This would exclude any action by the SEC to bring action where **"public interest or investors don't apply"** Woodbury is neither the public nor the investor so all charges must be dropped.

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[19] Marine Bank v. Weaver, 455 U.S 551, 556 (1982)

[20] *See generally* S.E.C. v. Zandford 535 U.S. 813, 820 (2002) (addressing a misappropriation of cash); United States v. O'Hagan, 521 U.S. 642, 656 (1997) (considering the "misappropriation theory" of insider trading); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 8 (1971) (addressing a Misappropriation of cash).

[21] SEC v. Pirate Investor LLC 580F.3d 233,244 (4th Cir. 2009).

It is axiomatic that the SEC's administrative mandate may not exceed the power which Congress has given the agency in the relevant statute. Ernst & Ernst v Hochfelder, 425 U.S. 185, 212-14 (1976).[22] Trying a common law case in a securities law form is not within the SEC's administrative mandate.

Some districts court in the Second Circuit require a misrepresentation that relate to the security's value in order to satisfy the "in connection with" requirement which is clearly not relevant in Cohen's case as no securities value is in question thus making securities law irrelevant as well out of the SEC's mandate or non-chargeable in regards to 10(b) or 17(a). *SEC v Drysdale Sec. Corp.*, 606 F. Supp. 295, 297 (S.D.N.Y. 1985) rev'd 785 F2.d 38 (2d Cir. 1986); *Crummere v. Smith Barney*, 646 F. Supp. 751,755 (S.D.N.Y. 1985); *Kimmco Energy Corp. vs Jones*, 603 F. Supp. 763 (S.D.N.Y. 1984).

Crummere requires that misstatements relate to specific securities. Here the alleged misstatement was related to the Broker Dealer as part of the suitability process and not related to any specific securities.); *Crummere v. Smith Barney*, 646 F. Supp. 751,755 (S.D.N.Y. 1985).

A fraud "in connection with" in a securities transaction should only be brought when the perpetrator of the fraud intends to influence, or knows, or is reckless in not knowing that his or her action could influence, an "investment decision". No "investment decision" was made by the alleged misrepresentation- as the Woodbury's suitability requirements is not an "investment decision".

Even if the Division's would have cited *Zandford* in order to expand on "in the connection" in this case would be wrong. This case is about a fraud by Zandford to an investor and is clearly a misappropriation case. The court concluded that "in connection" of *Zandford's* actions coincided by him selling the securities in order to misappropriate the proceeds. Once again the Division's "in connection" nexus fails.

Secondly, Zandford states that "the securities sales and respondent's fraudulent practices were not independent events" (Zandford, 535 U.S. at 825.) Clearly in Cohen's case the suitability form was distinct and independent of the application. The sale of annuities to the investors, have no "in connection" nexus to the alleged fraud to Woodbury (whom are neither investors or public) on their suitability forms.

Thirdly, Zandford states the following: that the fraud and the securities transaction are independent when "a thief simply invest[s] the proceeds of a routine conversion in the stock market" (Zandford at 820). "if a broker told his client he was stealing the client's assets, that breach fiduciary duty might be in connection with a sale of securities, but it would not involve a deceptive device or fraud". (Zandford 825 n.4). Clearly, just the fact that a securities sale occurs- does not give the Division the right to claim Securities Fraud.

Last point on Zandford, there must be a securities financial duty to either purchaser or seller of securities. Woodbury was neither a seller or purchaser. Division has not only proven that there was a

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[22] Rule 1ob-5 was adopted pursuant to authority granted the Commission under 10b. The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law..... Thus, despite the broad view of the Rule advanced by the commission in this case, its scope cannot exceed the power granted the Commission by Congress under 10(b).

fiduciary duty by Cohen to Woodbury, they failed to prove that such fiduciary duty would even be defined under Securities Law and not Common Law.

Santa Fe states that rule 10b-5 should not be extended to cover corporate traditionally regulated by State law. (Or even common law). Thus being said, an SRO would be compared to a State. Regardless, a duty to an employer or broker dealer clearly comes under a states or an SRO's jurisdiction which would come under common law and not securities law.

SEC v Jakubowsky, 150 F.3d 675, 680 (7th Cir, 1998) states that only investment decision come within Rule 10b-5. "Many of this court's cases say that a misrepresentation can be 'in connection with' the purchase or sale of securities only if it influences an investment decision". As per the Division's Brief at 39 – 10(b) and 17(a) "in" and "in connection" are interchangeable by both Courts and Congress. United States v. Naftalin, 441 U.S. 768, 773 n.4 (1979). This case had no influence to an investment decision as Woodbury's suitability was not an investment decision.

SEC v. Texas Gulf Sulpher Co., 401 F.2d 833, 862 (2d Cir. 1968) states "Accordingly, we hold that rule 10b-5 is violated whenever assertions are made, as here, in a manner reasonably calculated to influence the investing public……" (emphasis added). The Investing public requirement is not fulfilled and thus the "in connection with" requirement fails – thus requiring the dismissal of all securities charges.

Suitability violations of SRO rules or company policy may be relevant to prove a statutory or common law fraud not a Federal Securities Law violation.

Broker becomes an agent of the customer and a duty to execute a trade for client. (L.F Rothschild & Co., 259 N.Y.S. 2d 239,240 (1965)). This same rule does not relate to a broker Dealer under Securities Law.

Agency Law dictates that Brokers duties arise from the principal-agent relationship. See Robinson v, Merril Lynch, Pierce Fenner & Smith Inc. 337 F. Supp. 107 (N.D. Ala 1971), aff'd, 453 F. 2d 417 (5th Cir.1972) these duties include (1) the duty to recommend a security only after studying it sufficiently to become informed as to its nature, price and financial prognosis. (2) the duty to carry out the customer's orders promptly in a manner best suited to serve the customer's interests: (3) the duty to inform the customer of the risks involved in purchasing or selling a particular security; (4) the duty to refrain from self-dealing; (5) the duty to disclose any personal interest the broker may have in a particular recommended security (6) the duty not to misrepresent any fact material to the transaction; and (7) the duty to transact business only after receiving prior authorization from the customer. Leib v. Merrill Lynch, Pierce Fenner & Smith., 461 F. Supp 951 (E.D) Mich 1978), Add, 647 F. 2d 165 (6th Cir.1981).

A Broker's Duty that arise from the principal-agent relationship in regards to Investors are under Securities Laws. When the Broker's duty to his Broker Dealer arise – that would be under Common Law or Statutory Law – but clearly not Securities Law- regardless of whether an "in connection" applies.

(2) Cohen did not believe that his response to the "investment Access" question was wrong. – Nor did he believe that such question was deemed "material" a necessary element of a securities violation.

To be deemed a securities violation, a false or misleading statement or omission is material- that is, when there is "substantial likelihood that the [statement or omission] … would have been viewed by the reasonable investor as having significantly altered the mix of information available" *Basic Inc. v. Levinson,* 485 U.S. 224,321-32 (1988). (emphasis added).

There is no reasonable investor applicable here as this case is about an alleged fraud to the Broker Dealer (Woodbury) whom is neither an "Investor" nor "public". The Division quotes the same citation but purposely leaves out the punchline of Levinson.

The Division's attempts to use Levinson to state the following "the false entries were material because if accurate investment access entries had been provided, Woodbury's reviewing principals would have rejected the sales…….." (Division post-Hearing Br. At 41) is not within the confines of the law. The Division is rewriting case law to fit their theory. **This case DOES NOT fall under securities law but rather under common law based on their own citation of Levinson.**

Finra

It is well established that the SEC has jurisdiction over SRO's like FINRA whom regulate and create securities law together with assuring its compliance of Broker Dealers (Woodbury) and advisors (Cohen). The SEC clearly approves all of FINRA's regulatory laws and approves all changes of such as well. All members are bound to follow all rules and regulations set by FINRA. Cohen together with his broker-dealer Woodbury were under the Finra's jurisdiction in regards to compliance and suitability.

During the time period of January and February of 2008. Finra had a series of Suitability Rules that applied to sales of securities. All sales of recommended or solicited sales were regulated by Rule 2310. Rule 2310, spelled out the suitability requirements of solicited or recommended sales. It consisted of 4 basic facts needed in order to properly determine if a recommendation of a specific product would be suitable for the investor. None of these factors included "Investment Access" – which are "Liquidity Needs".

NASD Rule 2310 required broker-dealers and associated persons to gather information about a customer's financial status, tax status and investment objectives. Under the new proposed rule that went into effect after Cohen's sale of the Annuities-, a broker-dealer or associated person also must make reasonable efforts to gather additional information concerning a customer's age, investment experience, investment time horizon, liquidity needs and risk tolerance. A firm must determine the suitability of the investment for the customer based on all information (not just the required data) that is known to the firm or associated person. Interpretative material attached to the proposed rule also indicates that for products involving a continuing financial commitment, a firm must have a reasonable expectation that the customer will have the financial ability to meet that commitment.

One of the Finra regulations that expanded the above – is Finra Rule 2821 with an effective date of May 5, 2008.

The Suitability question of "investment access" was not a FINRA required suitability question in early 2008; thus clearly deeming the question on the Woodbury's "Annuity Point of Sale" – **"immaterial"** during January and February of 2008. As the "Investment Access" question was deemed "immaterial" in even solicited or recommended sales; it would certainly apply to non-recommended or unsolicited sales where no suitability is required at all.

Finra regulations, as well as Industry Standards (as well as the Woodbury Manual (Division Exhibit 618)), would thus exempt the suitability requirement for the sales of unsolicited/non-recommended securities which would apply to variable annuities too.

The same Rule 2310 also exempted suitability requirements for either solicited or unsolicited sales with Institutional Investors.

FINRA Rule 2821 with an effective date of May, 5, 2008 expanded the suitability requirements to solicited/recommended sales of variable Annuities. Rule 2821, also added the need for Principal review for both solicited/recommended and non-solicited/non-recommended variable annuities sales.[23] This was not the case during the time period of Cohen's Annuities.

It is well established under Finra rules that **where a suitability review is not required by a registered representative, but the registered representative chooses to complete the information or forms anyways does not change the information to material information.** This is specifically addressed in Finra NTM 01-23 Footnote 7[24].[25] Finra considers such suitability responses, as a mere voluntary gathering of information thus making incorrect responses, if they are deemed as such - "immaterial"

Whether Cohen's annuities sales were deemed to be recommended or non-recommended, the "Investment Access" question would be deemed "immaterial' and non-chargeable under Federal Security Laws. Cohen testified and the evidence show that his sales were non- recommended, and since the suitability requirements were exempted due to the Institutional Investor factor.- No suitability was needed and all question- whether correctly answered or mistakenly responded would be deemed to be **"immaterial"**.

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[23] In 2010, Finra dialed back the Suitability Requirement for non-recommended annuities and retroactively reapplied that Suitability review was no longer needed for non-recommended variable annuity.

[24] https://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p003887.pdf

[25] A member or associated person who simply effects a trade initiated by a customer without a related "recommendation" from the member or associated person is not required to perform a suitability analysis, although members may elect to determine whether a security is suitable under such circumstances for their own business reasons. *See In re Thomas E. Warren, III*, 51 S.E.C. 1015, 1019 n.19, 1994 SEC LEXIS 508, *11 n.19 (1994) ("We do not believe the suitability claims brought against the Applicant are supported by the record. There is no evidence that Warren recommended the transactions that were effected in these accounts."), *aff'd*, 69 F.3d 549 (10th Cir. 1995) (table format); SEC Announcement of Final Rule on Sales Practice Requirements for Certain Low-Priced Securities, Release No. 34-27160, 54 Fed. Reg. 35468, 1989 SEC LEXIS 1603, at *52 (Aug. 22, 1989) ("[T]he NASD and other suitability rules have long applied only to 'recommended' transactions."); Clarification of Notice to Members ("NtM") 96-60, 1997 NASD LEXIS 20 (FYI, Mar. 1997) (stating that a member's suitability obligation under Rule 2310 applies only to securities that have been recommended by the member). Similarly, the suitability rule does not apply where a member merely gathers information on a particular customer, but does not make any "recommendations." This is true even if the information is the type of information generally gathered to satisfy a suitability obligation.

Cohen testified he was aware that on November 6, 2007, Finra published the new suitability **memo for variable annuities** **with an effective date of May 5, 2008**. (Finra Regulatory Notice 07-53) which outlined the new provisions of Rule 2821.[26]

Here is a screen shot of FINRA's definitions to suitability Terms[27]

FINRA's suitability rule states that firms and their associated persons "must have a reasonable basis to believe" that a transaction or investment strategy involving securities that they recommend is suitable for the customer. This reasonable belief must be based on the information obtained through the reasonable diligence of the firm or associated person to ascertain the customer's investment profile. The rule requires firms and associated persons to seek to obtain information about the customer's

- age;
- other investments;
- financial situation and needs, which might include questions about annual income and liquid net worth;
- tax status, such as marginal tax rate;
- investment objectives, which might include generating income, funding retirement, buying a home, preserving wealth or market speculation;
- investment experience;
- investment time horizon, such as the expected time available to achieve a particular financial goal;
- liquidity needs, which is the customer's need to convert investments to cash without incurring significant loss in value; and

Here is an excerpt from Finra's website.

Registered Representative Requirements for Recommended Transactions

When recommending a deferred annuity transaction, a registered representative must:

- Make a reasonable effort to obtain and consider various types of customer-specific information, including age, income, financial situation and needs, investment experience and objectives, intended use of the deferred variable annuity, investment time horizon, existing assets, liquidity needs, liquid net worth, risk tolerance and tax status.

- Have a reasonable basis to believe the customer has been informed of the material features of a deferred variable annuity, such as a surrender charge, potential tax penalty, various fees and costs, and market risk.

Two points to this variable annuity memo that confirms Cohen's arguments

1- The new ruling makes a point of stating **"recommended"** and **"recommending"** annuity sales.

2- It states that the material features of a deferred annuity are the **"surrender charges".**

[26] The News release by Finra together with a link to the complete Notice from November 6, 2007 is located at: http://www.finra.org/newsroom/newsreleases/2007/P037404

[27] http://www.finra.org/investors/protectyourself/beforeyouinvest/p197434

SEC's Own Webpage on Suitability[28]

Investor Information

Investor Alerts and Bulletins

Fast Answers

Investor Reports/Publications

Tools and Calculators

Education Resources

Suitability

When your broker recommends that you buy or sell a particular security, your broker must have a reasonable basis for believing that the recommendation is suitable for you. In making this assessment, your broker must consider your income and net worth, investment objectives, risk tolerance, and other security holdings.

The major securities industry self-regulatory organizations have suitability rules. You'll find FINRA's suitability rule and links to other FINRA materials concerning suitability in the FINRA Manual on FINRA's website. If you believe your broker made unsuitable recommendations or engaged in another sales practice abuse, please send us your complaint using our online complaint form.

Finra Recommendations Determinations

"The term recommendation is not defined in the FINRA rules, but FINRA has indicated that whether a recommendation has been made is an objective inquiry of whether a communication reasonably would be viewed as a suggestion that a customer take or refrain from taking an action.[29] The SEC has indicated that any communication that is a "'call to action' and 'reasonably could influence' the customer to enter into a particular transaction or engage in a particular trading strategy" is deemed a recommendation for the purpose of suitability.[30] There is a directly proportionate relationship between the amount communications are tailored toward particular customers with regard to particular securities or strategies and the likelihood of a finding the communication constitutes a recommendation.[31] <u>In contrast, impersonal, generalized statements about a security are not recommendations</u>.[32] Likewise, "a broker-dealer's general solicitation...through the use or distribution of marketing or offering materials ordinarily [does] not, by itself, constitute a recommendation...."[33] Moreover, suitability obligations do ot apply in situations where a broker acts solely as an order-taker without solicitation and provides only a trade execution service.[34]

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[28] www.sec.gov/answers/suitability.htm

[29] FINRA Regulatory Notice 11-02, *supra* note 127, at 3.

[30] SEC STUDY REPORT, *supra* note 4, at 60 (citation omitted).

[31] *Id.*

[32] *Id.* at 61 n.274.

[33] FINRA Regulatory Notice 12-25, *supra* note 129, at 5.

[34] *See* NASD Notice to Members 01-23, *Online Suitability* 2–3 (Apr. 2001), *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p003887.pdf

In a June 2004, the SEC and NASD (now called Finra) completed a Joint Report[35] which ultimately led to Finra Rule 2821.

JOINT SEC/NASD REPORT

ON EXAMINATION FINDINGS REGARDING BROKER-DEALER SALES OF VARIABLE INSURANCE PRODUCTS

This Joint SEC/NASD report completed in June of 2004 led to the framework of Finra rule 2821 (which became effective on of May 5, 2008). This report is what Cohen also relied upon in regards to his annuities. Below is an excerpt showing the proposed rules that both SEC/NASD sought.

Here is an Excerpt from the joint SEC/FINRA report summarizing the Suitability requirements of recommended or solicited Variable Annuities Sales. This SEC document clearly shows the Finra regulations that applied to recommended sales in January and February of 2008.

III. Examination Findings

A. Suitability, Sales Practices, and Conflicts of Interests

A broker-dealer recommending a variable product to an investor must assess the investor's financial status, investment objectives, and other relevant information to determine if the product is suitable. The obligation to recommend only securities that are suitable for the customer arises from the antifraud provisions of the federal securities laws, and from rules of the self-regulatory organizations ("SROs"). A broker-dealer, by hanging out its "shingle" and conducting a public securities business, impliedly represents that it will deal fairly with customers.[5] As part of this obligation of fair dealing, broker-dealers must have a reasonable basis for believing that their securities recommendations are suitable for the customer in light of the customer's financial needs, objectives and circumstances. In addition, broker-dealers must have a reasonable basis for believing that the particular security being recommended is appropriate. Under NASD Rule 2310 and IM 2310-2, when a broker-dealer recommends a security to a customer, it must determine that the security is suitable for that customer in light of that customer's particular age, financial situation, risk tolerance, and investment objectives. Because variable annuities and variable life insurance are complex products, the NASD has issued additional guidance in assessing the suitability of recommendations of variable products in Notices to Members ("NTM") 96-86, 99-35, and 00-44.

(Joint SEC/Finra Report at 8.) The Joint Report made key proposal that led to Finra's Rule 2821 that became effective in May 2008- Months after Cohen's sales of annuities.

[35] http://www.sec.gov/news/studies/secnasdvip.pdf

Elements of NASD Rule Proposal

⇒ *Suitability*

In recommending the purchase of a deferred variable annuity, a registered representative would be required to determine that:

- the customer has been informed of the unique features of the variable annuity;
- the customer has a long-term investment objective; and
- the deferred variable annuity as a whole, and its underlying sub accounts, are suitable for the customer, particularly with regard to risk and liquidity.

The registered representative would be required to document these determinations.

⇒ *Principal Review*

Before a registered representative could effect any transaction in a deferred variable annuity, a registered principal would be required to review and approve the transaction. The registered principal would be required to consider specific factors (for instance, whether the customer's age or liquidity needs made a long-term investment inappropriate). Before a registered representative could complete a recommended transaction, the registered principal would be required to review and approve, in writing, the suitability analysis document and a separate exchange or replacement document, if the transaction involved an exchange or replacement of an existing variable annuity.

⇒ *Supervisory Procedures*

The rule proposal would require registered firms to establish and maintain specific, written supervisory procedures reasonably designed to achieve compliance with the rule's standards.

(SEC Joint Report at 4)

Based on the Joint report finding, the NASD proposed Rule 2821 to regulate the purchase and exchange of deferred variable annuities. On September 7, 2007, **the SEC approved** FINRA Rule 2821. Rule 2821 had an effective date of May 8, 2008. Rule 2821 was issued on November 6, 2007 in a Finra issued Regulatory Notice 7-53, titled **Deferred Variable Annuities.**

Prior to Rule 2821, Variable Annuity Sales were governed by Rule 2310. Finra Rule 2310 was titled **"Recommendations to Customers (suitability)"**, required that the advisor have reasonable grounds for believing the investment is suitable for the customer based on (1) the customer's other investment holdings; (2) the customer's financial situation and needs; (3) the customer's tax status; and

(4) other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

This clearly shows that during 2004 and prior to Rule 2821 which went into effect on May 8, 2008, there were no requirement for a customer to have a Long-term investment objective in regards to annuities. Note this statement was discussing a case where there was a recommendation to the annuity. It would obviously apply to where NO recommendations are made since no suitability requirements under Finra and SEC rules would apply.

(3) No Scheme existed – as the Court clearly stated that the division has failed to state that the use of the Annuity Strategy was illegal (The Court Tr.825:9-13)

There were no deceptive devices or schemes to defraud the Broker Dealer to create an alleged violation under 10(b)-5(a) nor would 10(b)-5(c) apply.

By the Division's own admission of the allegations against Cohen, it is clearly a case of an alleged "misrepresentation" case which would fall under the 10b-5(b) and not 10b-5(a) or 10b-S(c).Any effort to rely on misrepresentations, but then "back doors" them into subsection (a) and (c) claims in order to avoid requirements in (b) is barred by the case-law. Misrepresentation cases must be brought under section (b). To bring a case under subsection (a) and (c) the Staff must demonstrate that the alleged scheme went beyond any misrepresentation or omission to encompass conduct that could not be charged under (b).

Courts have routinely rejected the SEC's attempt to bypass the elements necessary to impose 'misstatement' liability under subsection (b) by labeling the alleged misconduct a 'scheme' rather than a misstatement'. Allegations of scheme liability cannot be used as a back door into liability for those who make a false statement or omission in violation of subsection (b) of rule l0b-5.Where the SEC alleges a misrepresentation *and* a scheme, courts reject the scheme counts when they merely reiterate the conduct that allegedly caused the misrepresentation. See e.g. *SEC v Lucent Technologies,* 610 F. Supp. 2d 342, 361 (D.N.J. 2009) ("[t]he alleged deception in this case arose from the failure to disclose 'the real terms of the deal,' which is nothing The Division Cannot Establish a Fraudulent "Scheme" Under Subsection (a) and (c) of Rule 10b-5

The Division has attempted to expand their case from the OIP as they were concerned that even in the absence of a misrepresentation or omission actionable under subsection (b) of Rule 10b-5, they wanted to attempt to make Cohen's action as whole constitute a fraudulent "scheme" that could be established under subsections (a) and (c).[36] The Division has articulated the position that scheme

[36] Subsection (b) of the rule, the subsection most generally relied on, makes it unlawful for any person to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading." 17 C.F.R. § 240.10b-5(b). Subsections (a) and (c) of Rule 10b-5 make it "unlawful for any person, directly or indirectly . . .
(a) [t]o employ any device, scheme, or artifice to defraud, [or] . . . (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(a), (c). Subsection (c) uses the phrase "course of business" rather than scheme, but we still refer to both
(a) and (c) as the scheme subsections.

liability under subsections (a) and (c) would not require proof that the statements amounted to misrepresentations or proof that any omissions were tied to any duty to disclose.

Such an attempt to contort what is fundamentally a case involving statements and omissions into a scheme liability theory would be unfruitful. Any effort by the Division to rely on omissions or statements, then "back door" them into the scheme subsections in order to avoid requirements inherent in subsection (b), is barred by the case law. ***Misrepresentation and omission cases must be brought under that provision.*** Only in cases where the alleged fraud was perpetrated through conduct rather than statements or omissions could the Staff invoke subsections (a) or (c). Because this case is a statements or omissions case, it must be brought under subsection (b), and the Staff cannot circumvent its burden of proving that the statements amount to misrepresentations, or that the omissions are tied to a duty to disclose.

Furthermore, to the limited extent that the Division's allegations go beyond statements and omissions and rely also on conduct, and the conduct component is then used as a vehicle to invoke the scheme subsections for everything, including the statements and omissions, the result would still be the same. The Staff will still have to demonstrate that the statements were false, and if it relies on omissions, it must prove there was a duty to disclose.

Finally, insofar as the Division relies on conduct, it must show that the conduct was the equivalent of a misrepresentation, in that the defendant affirmatively gave the victim a false impression. Courts have universally rejected scheme liability in cases where the defendant did not *create* the misimpression through its conduct, but rather only did not *correct* a mistaken *assumption* in the mind of the counterparty or in the marketplace.

Any efforts by the Staff to lighten the SEC's burden by invoking scheme liability under (a) and (c) should not be allowed since case law makes it clear that the SEC cannot back door statements and omissions cases through (a) and (c) by dressing them up as scheme liability. The SEC must only try such cases under subsection (b).

a. The SEC Must Bring Misrepresentation or Omission Cases Under Subsection (b) and Cannot Backdoor Such Cases Through Subsections (a) and (c)

Courts have repeatedly held that "where the primary purpose and effect of a purported scheme is to make a public misrepresentation or omission," subsection (b) is the exclusive source of primary liability under the securities laws.[37] In fact, "courts have routinely rejected the SEC's attempt to bypass

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[37] *SEC v. Kelly*, 817 F. Supp. 2d 340, 343 (S.D.N.Y. 2011) (citing, *inter alia, Janus Capital Grp. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (holding that only the "maker" of the statement could be liable under Rule 10b-5(b))); *accord SEC v. KPMG*, 412 F. Supp. 2d 349 (S.D.N.Y. 2006)

the elements necessary to impose 'misstatement' liability under subsection (b) by labeling the alleged misconduct a 'scheme' rather than a 'misstatement.'"[38]

Allegations of scheme liability cannot be used as a "back door into liability for those who help others make a false statement or omission in violation of subsection (b) of Rule 10b-5."[39]

Where, as here, the SEC alleges a misrepresentation *and* a scheme, courts reject the scheme claims when the "conduct" is essentially a reiteration of the misrepresentation.[40]

Because the SEC's allegations of "scheme" liability here — the use of short-lived annuitants and the use of nominees — are the same as the facts that allegedly should have been volunteered to the broker dealer, the Clients cannot be liable under subsections (a) or (c). The "scheme" claims are merely a "reiteration" of the misstatement and omission claims,[41] and therefore all the burdens that the Division seeks to avoid — the burden of proving that the statements amounted to misrepresentations, and the burden of proving that the omissions were tied to a duty to disclose — remain squarely on the Division.

b. A Violation of Any Subsection of Rule 10b-5, Including the Scheme Subsections, Requires Proof of "Deceptive" Conduct

Even if the Division could avoid bringing this case under subsection (b) covering statements and omissions, and instead found a way to bring this case under (a) and (c) covering schemes, it would still not avoid the burdens they seek to avoid. That is because it would bear the very same burdens even if it could bring this as a scheme case.

All three subsections are promulgated pursuant to the same statutory section. Section 10(b) of the Exchange Act — from which all three subsections of Rule 10b-5 derive their authority — states that "[i]t shall be unlawful for any person . . . [t]o use or employ . . . any . . . *deceptive* device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." (emphasis added). Pursuant to the authority granted in the statute, the SEC promulgated Rule 10b-5. "Rule 10b-5 encompasses only conduct already prohibited by § 10(b)."[42] Thus, all three prongs of Rule 10b-5, even (a) and (c), must satisfy the statutory "deceptive" requirement.[43]

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[38] *Kelly*, 817 F. Supp. 2d at 343 (collecting cases)

[39] *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 503 (S.D.N.Y. 2005).

[40] *See, e.g., SEC v. Lucent Technologies,* 610 F. Supp. 2d 342, 361 (D.N.J. 2009) ("The alleged 'deception in this case arose from the failure to disclose the real terms of the deal,' which is 'nothing more than a reiteration of the misrepresentations and omissions that underlie plaintiffs [sic] disclosure claim.'").

[41] *See id.*

[42] *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 157 (2008).

[43] *See United States v. Finnerty*, 533 F.3d 143, 148 (2d Cir. 2008); *SEC v. Alternative Green Techs., Inc.*, No. 11 Civ. 9056 (SAS), 2012 WL 4763094, at *5 (S.D.N.Y. Sept. 24, 2012) (holding that conduct must be "inherently deceptive when performed") (internal quotation marks omitted); *SEC v. Simpson Capital Mgmt.*, 586 F. Supp. 2d 196, 201 (S.D.N.Y. 2008) (stating that a claim under subsections (a) or (c) must include an allegation that the defendant "committed a. . . deceptive act").

c. Statements Are Not "Deceptive" Under Section 10(b) Unless They Amount to Misrepresentations, and Omissions Are Not "Deceptive" Unless They Involve a Breach of Duty

In *SEC v. Dorozhko*,[44] the Second Circuit addressed the question of what the statutory term "deceptive" in Section 10(b) of the Exchange Act means as applied to omissions and misrepresentations. Of course, any interpretation of the word "deceptive" as used in the statute would apply to all three subdivisions — including the scheme provisions — of the Rule 10b-5, promulgated pursuant to that statute.

The Court of Appeals determined that for a statement to be deceptive, it must amount to a misrepresentation; for an omission to be deceptive, it must involve a breach of duty.[45] In so doing, it relied on the presence of the word "deceptive" in Section 10(b). Because the Court of Appeals' conclusion rested on the *statute's* use of the term "deceptive," its determination necessarily applies to all sections of the Rule that were promulgated pursuant to that statutory provision. Any action under the Rule, no matter which subsection, must therefore prove that the statements amounted to misrepresentations and the omissions were tied to a duty to disclose.

d. Conduct Is Not "Deceptive" Unless the Defendant Creates a Misimpression in the Mind of the Alleged Victim

In this case, the Division has asserted that it will rely not only on omissions and misrepresentations, but also on conduct on the part of the Cohen. However, as demonstrated below, for conduct to be "deceptive" under any of the subsections of Rule 10b-5, it must amount to the equivalent of an affirmative misrepresentation, and it must be a misrepresentation created by the defendant. If the alleged victim enters the marketplace with its own mistaken assumptions — as the broker dealer did, — scheme liability cannot be established on the basis that the non-fiduciary defendant has failed to correct those assumptions. This is true even where the defendant has deliberately exploited the mistaken assumption, has breached accepted rules of conduct, and has taken steps to avoid detection.

In *U.S. v. Finnerty*, [46141] the Second Circuit held that Finnerty did not convey "an

impression that was misleading, whether or not it could have a bearing on a victim's investment decision in connection with a security."[47] Even though some customers "may have expected that

[44] 574 F.3d 42 (2d Cir. 2009).

[45] *Id.* at 50. In making the latter determination, the court adopted the position urged upon it by the SEC: "silence is fraudulent only if there is a duty to disclose." *Id*

[46] 533 F.3d 143 (2d Cir. 2008).

[47] *Id.* at 149.

Finnerty would not engage in [interpositioning,] . . . *unless their understanding was based on a statement or conduct by Finnerty*, he did not commit a primary violation of § 10(b)."[48]

Like the investors in *Finnerty*, who mistakenly *assumed* compliance with a NYSE rule that prohibited interpositioning, the broker dealer here at most may have incorrectly *assumed* that the applicants were not acting as nominees for anyone, were paying the premiums with their own assets, and that the annuitants were free of serious medical conditions and that the annuitants were expected to live a regular life expectancy. Cohen did not voluntarily correct those assumptions (which were unknown to them), but the **Cohen had no duty to do so under Securities law**. Therefore, Cohen's conduct does not amount to fraud under subsections (a) or (c).

Similarly, in *SEC v. Pentagon Capital Management*,[49] Judge Sweet found that the

defendant hedge fund managers had engaged in multiple practices to avoid detection by the mutual fund police, including breaking up their investments into small tranches "with the intention of not drawing too much attention to the size of the overall purchase" and "to avoid detection."[50] The court held that the "evidence established that Defendants acted with the intent to deceive any fund that might have rejected their market timed trades into accepting those trades by 'staying below the radar.'"[51]

Notwithstanding these findings, the court rejected the SEC's assertion that the defendants' conduct amounted to a "scheme" in violation of Rule 10b-5. Judge Sweet recognized that the defendants did not affirmatively *create* any misimpression in the minds of the funds that were allegedly victimized.[52] Rather, the mutual funds (like the broker dealer in our case) entered the marketplace with their own mistaken *assumption* that no applicant would seek lawfully to exploit the loopholes in the investment structure that they designed.[148]

In sum, the Division cannot avoid the requirement that it prove that any allegedly fraudulent statements amounted to misrepresentations, and that any allegedly fraudulent omissions amounted to a breach of a duty to disclose.

(4) Material Fact and Projections – "Investment Access" questions would be considered projections as per theory of the Division and not chargeable.

The Division has attempted to peg the response required to the "Investment Access" to the expected life expectancy of the annuitants. Their unfounded and desperate theory tried to interpret that the "Investment Access" question as more of a "Time Horizon" question as opposed to a "Liquidity

[48] *Id.* at 150 (emphasis added).

[49] 844 F. Supp. 2d 377 (S.D.N.Y. 2012).

[50] *Id.* at 393, 414.

[51] *Id.* at 414.

[52] In another market timing case, the court granted summary judgment in part in favor of the SEC, but only after finding that the "SEC has demonstrated that [the defendant] made misrepresentations to the various mutual funds," and, in addition, that the defendants engaged in schemes to evade clear prohibitions on market timing that mutual funds sought to enforce. *SEC v. Ehrenkrantz King Nussbaum, Inc.*, No. 05 CV 4643 (DRH) (GRB), 2012 WL 893917, at *11- 12 (E.D.N.Y. Mar. 15, 2012). Here, however, there were no misrepresentations, and no explicit prohibition or enforcement effort by the broker dealer or insurance companies

Needs" question. The Division in their Post Hearing Br. flipped back to "Investment Access" as an expectation of the investment being liquidated- this is still wrong as "Liquidity Needs" – is clearly when the investor has a **"need"** for the funds. The investors did not concern themselves with the liquidity or surrender charge issues of annuity as testified by Feder.

Regardless of the definition taken by the Division– this question would clearly be defined as mere "forecasts", "projections" or "optimistic proclamations" as the Division choose to peg the responses to an unknown life expectancy.[53] As Cohen had no health information on any of the annuitants, nor has the Division proved otherwise the life expectancy of the annuitants would therefore create the responses of "Investment Access" as mere forecasts and or projections and not chargeable under securities laws.

In the Ninth Circuit, projections and general statements of optimism are not actionable unless: (1) the statement was not genuinely believed; (2) the statement did not have any reasonable basis; (3) the speaker was aware of undisclosed facts tending to "seriously undermine the accuracy of the statement." In re Apple Computer Sec. Litig 886 F.2d 1109, 1113 (9th Cir. 1989). The proper focus is on the facts available at the time the prediction was made. Evidence that a prediction turned out to be wrong does not prove that the prediction was false when made. In re VeriFon Sec. Litig. 11F.3d 865,871 (9th Cir. 1993).

If the Division chooses to peg the investment access response to the life expectancies of the annuitants – the Division's must drop the charges as all three requirements are needed and one on their own fail. (1) Cohen believed his response was correct; (2) this entire brief discusses Cohen's reasonable basis; and (3) Cohen was apprised to specific details of any of the annuitants nor had specific knowledge to their procurement as annuitants.

(5) Constructive Amendment and Variance to OIP

A constructive amendment occurs when the essential elements of the offense as alleged in the indictment are altered to broaden the potential bases for conviction beyond what the indictment contains." United States v. Tampas, 493 F.3d 1291 (11th Cir. 2007) (citing United States v. Narog, 372 F.3d 1243, 1247 (11th Cir. 2004); United States v. Keller, 916 F.2d 628, 634 (11th Cir. 1990)); see also United States v. Ward, 486 F.3d 1212, 1227 (11th Cir. 2007). A constructive amendment of the indictment constitutes per se reversible error because it violates a defendant's Fifth Amendment right to be tried on charges presented to the grand jury. See United States v. Tampas, 493 F.3d 1291 (11th Cir. 2007) (citing United States v. Weissman, 899 F.2d 1111, 1114 (11th Cir. 1990)). Under the Fifth Amendment, "a defendant can only be convicted for a crime charged in the indictment. It would be

[53] Cohen has been told that one of the annuitants was still alive almost 7 years later. The Division has never proved that all annuitants passed on already or how long they actually lived.

fundamentally unfair to convict a defendant on charges of which he had no notice." Ward, at 1227 (citing Keller, at 632-33). The mere presentation of evidence not referenced in the indictment, such as pursuant to Federal Rule of Evidence 404(b), does not constitute an amendment or variance. See United States v. Lavigne, 282 Fed.Appx. 790, 793 (11th Cir. 2008) (unpublished).

In contrast, "a variance occurs when the facts proved at trial deviate from the facts contained in the indictment but the essential elements of the offense are the same." Ward, 486 F.3d at 1227 (citing Keller, at 634; United States v. Flynt, 15 F.3d 1002, 1005-06 (11th Cir. 1994)). A variance only requires reversal where the defendant can establish that his or her rights were substantially prejudiced. Id. (citing Keller, at 633).

As, the Division has attempted to expand on the OIP through various unfounded claims of additional facts that were wrong. As they violate Cohen's right to a fair trial, they must be either dismissed, ignored or deemed irrelevant.

(6) Affirmative Defenses Never Ruled Upon

Cohen's Reply to the OIP dated April 10th, 2014 listed Twenty-Nine affirmative defenses that have not been ruled upon and are still pending in this court. Cohen would like to assert each of his 29 affirmative defenses within this brief.

(7) Lack of Scienter or Recklessness

The Division sells a great story- but like the Wizard of Oz- where Dorothy saw the Wizard as a giant head..... Scarecrow saw the Wizard as a beautiful woman. The Division has tried to peg dozens of ever moving fraud theories on Cohen –and knowing that Cohen and Woodbury had "bad blood" between them – called upon the former Woodbury employees to testify against Cohen (Woodbury's manuals that don't conclusively concur with Stone's version of the rules) to create a new unprecedented securities violation of fraud against his broker dealer. The Division has painted a story through their own version of the restructuring of the events with many relevant factors favorable to Cohen being obscured. The Division and the Court denied Cohen the right to a fair trial by not allowing him to have his key witnesses whom would have testified to Cohen's Defense with the absolute truth of the events. They would have clearly proved and testified that many of the factors the Division chose to try Cohen – were factually wrong and unfounded.

Regardless of such factors, Cohen's reliance on Finra, SEC, Industry Standards and his understanding of what Woodbury's rules were in 2008 clearly justified Cohen's response to the "investment access" questions. Although the Division, through press releases, media and other means have attempted to create a perception that the Strategy was illegal- it was not in illegal in 2008. Both Feder and Brian Jedwab both testified that they were happy with the service Cohen provided and that they had no complaints on Cohen's action as the selling broker. Cohen knew that these sales were exempt from the suitability requirements of Finra, and still insists that Stone's testimony was prodded by

the Division's coaching and leading before and during the hearing. The manual does not conclusively support Stone's testimony and to the contrary the manual was misleading. Cohen clearly believed that his response of the "investment access" was the best response, but even if they are deemed to be wrong he had no intentions in defrauding his broker dealer at any point in time. Most of the exhibits and Smallidge's testimony occurred over a week or two after any sales were completed. Any evidence presented to the court should be denied as it clearly could not create a state of mind for scienter which is the state of mind prior and during the sale.

Had Cohen known that his responses were mandatory or that they would have been deemed materially wrong, he would have waited to submit the applications to his new broker dealer- World Equity Group Inc. Cohen was approved by World Equity Group from around January 2nd, 2008 but waited to move due to the birth of a son on January 17, 2008. WEG not only approved Cohen's registrations for when he was ready, they approved every aspect of the annuity strategy and felt comfortable with its use through their Broker Dealer.

The Division quotes Stone's understanding and reading of exhibit 616-32. As described earlier at 5-6 in this brief- Cohen did not believe that this section applied to his sales of non-recommend and institutional investors.

The Division quotes Cohen in his Investigative transcript- (Div. Post-Hearing Br. 42-43) but the question asked of him was a general question as to the purpose of that "point of sale form" and "Investment Access" question. He was asked a general question about the forms in general not about the forms that were completed for the annuities he sold. Cohen's answer did not create the need to lie- or even create proof to a mindset of scienter. Cohen's answer to the Division is inconclusive and does not support the Division's claim of scienter. Also as testified Cohen could have easily waited and sold all the annuities at his new Broker Dealer who was excited to accept use of the annuity strategy through their broker-dealer.

A. Cohen Did Not Offer Conflicting And Changing Explanations for the Answers He Gave to The Investment Access Questions.

1. Cohen Says he doesn't know basis during 2011

Stating that one who doesn't know the basis to a response of a question from over 3 years of last seeing or reviewing that specific form or question – does not create an inconsistency in one's testimony.

2. Division's Claim that Trustees provided the Investment Access Info.

In close review to this response- "they is inconclusive to who told Cohen to sign, they could mean Horowitz, Gottesman, Feder- Evidence to this is that Cohen said "I can rely on what you said".

Regardless of whether Cohen ever spoke to the nominees- or not; he did speak to Horowitz and Gottesman on behalf of Feder and then Feder himself- Cohen did have discussions as to the "investment Access" question.

The Division's excitement as to Cohen mistakenly answering Feder was the client- should be muted. (At Tr. 841:4-7) First the question **asks Mr. Feder or Mr. Gottesman.** - it does not state "and". Secondly Cohen never previously "stated that "Feder" was his client, and as such if it was construed as such – he misunderstood the question and retracts. In the past seven years – neither his transcripts, briefs, nor any statements would state that Feder was Cohen's client- Feder was never Cohen's client.

Cohen read into the record that at (Tr. 133:14-134:20) - Bina levy clearly confirmed that Howie sent her an email that the investments would be locked in for 9 years. This directly refutes Howard Feder's testimony that he never knew or spoke about not having access for 9+ years to the annuities. This confirms he did discuss access of funds for the annuities.

3. Cohen's understanding of "Investment Access" applied to withdrawals and not Death Benefit Payouts.

Cohen never changed his position in his understanding to "Investment Access", he had one understanding at the time of sale and has the same understanding now. The Division and Stone, as discussed earlier have flipped flopped to their understanding in order to best try their case. The Division's take in their Brief vs. the OIP are not similar. The Division also seems to confuse "Investment Access" with "Investment Objectives" – throughout the hearing "Financial Objectives" were used instead of "Investment Access" which changes the entire meaning of the question or answer. See Baker (Tr.451:18; 452:17; 516:19, 20, 21); Smallidge (Tr. 540:10); Stone (Tr. 660:15; 661:2, 4; 720:6; 738:13) (Exhibit 616 at 32). See Previous Finra Screen Shot (supra at footnote 26) as to terms and differences between all suitability terms. This point is relevant and material as the time period of January & February of 2008 had different requirements as to what was needed on that list. The Division and witnesses either intentionally or unintentionally swapped between the words but careful attention is needed to apply the proper requirements at a specific era's suitability rules in place.

4. Section 17(a) prohibits only the sale of securities not the Purchase.

Besides the previous grounds for dismissal of all SEC charges against Cohen, the Division's attempts to charge Cohen with 17(a) violation fails. This rule only prohibits only the fraudulent "sale" of securities not "purchases" of securities. In the case of the annuities sold, no sale was made. Birnbaum v. Newport Steel Corp. 193 F2d 461, 463 (2d Cir. 1952), cert denied, 343 U.S. 956 (1952); Barnet v. Anaconda co. 238 F. Supp. 766, 774 (S.D.N.Y. 1965). As such, the Division charges against Cohen relating to 17(a) must be dismissed.

5. **Point of Sale Form's Questions were optional based on FINRA, SEC, Industry Standards as well as Woodbury's Manual & Procedures.**

Cohen, never stated that when a forms questions were optional he could lie. If anyone is guilty of playing the "catch the meaning of the day game" it would be Dean Conway and the Division through their ever-moving fraud theories together with their different interpretations of "Investment Access". The Division's context of "Investment Access" – has changed from "Time Horizon- to Investment Objectives- to Surrender Charges and finally to Investment Access- liquidity Needs." Whatever context best fits the Division's needs at each specific situation – has determined what definition – they use. Stone on the other hand was at least consistent in his wrong understanding that "Investment Access" is equal to "Time Horizon".

Cohen's has stayed consistent to stance throughout. Cohen answered the Investment Access questions correctly to his understanding, he never stated he felt he could lie; – rather what he stated was that since the suitability questions (especially the investment access/liquidity needs) were deemed to be "immaterial" as suitability requirements were exempt for these annuities per FINRA, Industry Standards and even a simple read of Woodbury's manuals- even if they were deemed to be wrongly completed- they would not be chargeable under security laws.

Division has failed to prove that Smallidge was Cohen's supervisor and a duty to speak to him existed, secondly any interaction occurred over a week after (and two weeks) the annuities were sold and fail as to creating scienter. Cohen's Duty to disclose specific facts did not exist under federal securities laws.

Furthermore, in most situations, after the customer makes a purchase, a broker has no continuing duty to disclose facts it later learns, or to render subsequent investment advice regarding the security. Caravan Mobile Home Sales, Inc. v. Lehman Bros. Kuhn Loeb, Inc., supra 769 F.2d 561,567 99ty Cir. 1985); Robinson v. Merrill Lynch, Pierce Fenner & Smith, Inc., Supra, 337 F. Supp 107 (N.D. Ala. 1971)

Below is a chart to better understand the Suitability requirements of Finra based on FINRA 2310.

Cohen's FINRA Suitability Exemptions as to "Annuity Point of Sale" Forms Jan. 08

A) Exempt on the basis of non-recommended sale
B) Exempt on the basis of Institutional Investor.

Cohen's FINRA Suitability Exemption as to "Investment Access" Question Jan. 08

A) Exempt on the basis of non-recommended sale
B) Exempt on the basis of Institutional Investor.
C) Exempt based on being "Liquidity Needs" (until FINRA-2821 in 5/08)

NASD Conduct Rule 2310 (the rule in place in 2008) states that a Broker has no "reasonable grounds" duties when a customer places an unsolicited order. *Pachter v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 444 F. Supp. 417,421-22 (E.D.N.Y. 1978). Parson v. Hornblower & Weeks-Hamphill, Noyes, 447 F. Supp 482, 495 (N.D.N.C. 1971), aff'd per curiam, 571 F.2d 203 (5th Cir. 1978); Rolf v. Blyth, Eastman Dillion & Co., [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96, 525, n 16 (2nd Cir. 1978) (simply executing orders cannot create liability for "unsuitable" transactions); Associated Randall Bank v. Griffin, Kubik, Stepehns & Thompson, Inc Inc., 3F.3d 208, 215 (7th Cir. 1993) ("Customer-directed transactions fall outside the 'suitability' requirement….."); Loss & Seligman, fundamentals of Securities' regulation, 902 93rd Ed. 1990) ("Only time a broker-dealer is clearly relieved of a suitability duty is when his or her only relationship with the customer is that of an order clerk…")

What Constitutes a recommendation or a solicitation: The SEC & Finra have declined to define the term "recommendation". They have chosen a case by case approach. See SEC Release no 34-7588, 60 FR. 54530 (Aug 20, 1996). In re National Committee of Discount Securities Brokers, 1980 WL 15131 (June 25, 1980) (SEC has not identified each act or practice that could constitute a recommendation); and NASD Clarification of notice to members, 96-60 (March 1997). Notwithstanding this position, Finra and the SEC appear to concede that a recommendation involves more than simply a general solicitation or giving a research report. Generally, a recommendation that creates a suitability obligation is one which an individualized statement is tailored and addressed to a specific investor regarding a specific security. Moreover, merely providing access to research, proprietary or otherwise, does not constitute making a recommendation.

Case law states that securities law demands a material misstatement to alter the mix for a **reasonable investor.** Finding the reasonable investor in such case is not possible so charges must be dropped under Securities law as a matter of law. ***Basic, Inc. v. Levinson***, 108 S. Ct 978, 983 (1998) First only "material" misstatements permit recovery under securities laws [footnote omitted] and to be material a statement must significantly alter the mix of information available to a reasonable investor.

Estoppel and Laches - Woodbury never made the claims that the SEC is making on their behalf so any action by the Division should be dismissed.

Ninth Circuit stated long ago in Royal Air Properties, Inc. v. Smith, 312 F.2d 210, 214 (9th Cir. 1962), the purpose of the securities laws "is to protect the innocent investor, not one who loses his innocence and then waits to see how his investment turns out before he decides to invoke the provisions of the securities laws. (emphasis added). There are no investors in this case so all charges must fail.

Statute of Limitations has expired in Common Law cases for a fraud on the broker dealer charge.

The Securities Act of 1933 was enacted to prohibit various forms of securities fraud requiring that all essential (material) information be made to the investing public. Nowhere does it state that it include a broker to his broker dealer- which would fall under common law fraud and not subject to an SEC forum.

B. COHEN DID NOT CAUSE AND WILLFULLY AIDED AND ABETTED WOODBURY FINANCIAL'S BROKER DEALER BOOKS AND RECORDS VIOLATION

The Division contends that Cohen violated Exchange Act 17(a) and Exchange Act 17a-3(a) (6) which is better known as a Books and Records regulation. The Rule states the following:

(6)(i) A memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities, whether executed or unexecuted. The memorandum shall show the terms and conditions of the order or instructions and of any modification or cancellation thereof; the account for which entered; the time the order was received; the time of entry; the price at which executed; the identity of each associated person, if any, responsible for the account; the identity of any other person who entered or accepted the order on behalf of the customer or, if a customer entered the order on an electronic system, a notation of that entry; and, to the extent feasible, the time of execution or cancellation.

The Division's claim fail on the fact that

- The "Annuity Point of Sale" is not part of the Order ticket nor an order instruction document. It is rather a separate document that is designed for suitability purposes and not part of the Order ticket. Nowhere in Rule 17(a)-3(a) (6) does it refer to or allude to Suitability form as part of the record keeping rule. A Suitability question or document is not part of this statute as they are not defined as part of "an order" or "as an instruction". The Division's failure to prove otherwise defeats their claim of a violation of Rule 17(a)-3(a) (6).

- The Division quotes the following in their Post Hearing brief at 46: "To establish aiding and abetting liability, it is necessary to show (1) a securities law violation by primary wrongdoer; (2) "substantial assistance" to primary violator; and (3) that the accused provided the requisite assistance with knowledge of the securities law violation. *See Howard,* 376 F3d at 1143 (holding that extreme recklessness is sufficient).

  The Division quotes the 3 requirements above, but have seemingly failed to practice what they preach on the first rule alone. The Division failed to prove that Woodbury as the primary wrongdoer" was charged with any violation. With no primary wrongdoer, this alleged violation must be dropped as a matter of law.

  As such, the above the allegations of 17(a) and 17(a)-3(a) (6) must be dismissed.

C. DIVISIONS PENALTIES, DISGORGEMENT & EQUITABLE RELIEF IS NOT WARRANTED

- **The Relief Sought is Excessive Because There has Been No Wrongdoing Since The Alleged Infractions.**

The transactions at issue in this proceeding are old and isolated. They occurred close to seven years ago and it has had a negative impact on Cohen's life in every way possible. Although there were 28 Annuities sold in January and February of 2008, they were all sold on 2 separate days, to a related group investors. No Investor or the public was harmed in any way. Feder, the Funds and all investors testified that they were satisfied with Cohen's Service. Cohen had a Steller background in the Financial and Insurance Industry prior to this matter destroying his career.

The alleged Fraud to the Broker- Dealer together with SEC have practically caused Cohen to basically go broke.

Cohen has not been in the Financial Industry in over 6 years and the likelihood for any recurrence is impossible. The Financial, physical and mental toll this proceeding has taken on Cohen has been immense.

The publicity surrounding the investigation and the proceedings has taken a deep financial and health is something that Cohen has had to deal with for almost seven years. Many in the small insurance industry as well as the financial world have been made aware by the already brutal punishments of the SEC and the Division.

Cohen has spent more than the earnings he earned in legal and advisory fees since the 2008. Out of the $766,000 earned, Cohen Paid David Zakheim a sign-on bonus of $125,000 while paying over $225,000 for moving and new offices of which Cohen shut down shortly after.

Had Cohen known that these sales would have caused as much coverage, and headaches to the parties involved he would have walked away and enjoyed the Seven figure income he was earning prior to this whole debacle.

Regardless of whether Cohen prevails or not, a lesson learned for life has been taught. Cohen had no intentions to cause such issue with any of his sales of annuities.

In addition to failing to prove that Cohen made a material omission, the Division has failed to show that Cohen acted with scienter or negligently. First, Cohen certainly did not act with any intent to deceive, manipulate, or defraud Woodbury. The Division's theory that an attempt to avoid scrutiny of Cohen's Annuity sales through Woodbury's suitability requirements indicates scienter. should carry no weight. That the annuities sales through Woodbury could even implicate any financial violation, did not cross Cohen's mind. For all these reasons, the Division's claims under 10b and 17(a) must fail.

B. The requested relief is either barred by the statute of limitations or excessive.

Even assuming, *arguendo,* that the Division has proven that Cohen violated the Federal Securities Laws, the relief the Division seeks is inappropriate and should not be imposed here. Namely, as your Honor has recognized, censures, bars, and suspensions are barred by the statute of limitations. In addition, the *Steadman* factors weigh against the imposition of a cease-and desist order, and disgorgement is improper because the Respondents hold little or no "ill-gotten gains."

Each of these points will be discussed in turn.

1. Censures, bars, and suspensions are barred by the statute of limitations.

Under both the Exchange Act & the Securities Act the Division seeks: (1) Disgorgements (2) Civil Penalties (3) Cease & Desist and (4) bar from the Securities Industry.

a. Respondents' conduct was not egregious.

Respondents' conduct was not egregious in either of the 2 sets of annuities sales to the investor's alleged violations of the "investment access questions.

First, Respondents' conduct was not egregious with respect to Woodbury's "Investment Access" question. Cohen truly believed that he followed Finra regulations as well as followed Woodbury's compliance rules. If he thought that any impropriety would occur in answering the forms within Woodbury – he would have resigned weeks before to place the same annuity sales through his new broker dealer. The Investor was pressured Cohen to invest immediately and Cohen fulfilled their requests promptly. The investors at all points were happy with Cohen's role in processing their Annuity Orders. Cohen's truly processed the annuity he sold to the investors in good faith and had he know any issues would arise – he would have refused the sales. Cohen was earning a comfortable 7 figure income prior to the processing of any annuities and perhaps even if Cohen had some poor judgment (if anything was done wrong) doesn't equate to recklessness or scienter. Cohen truly processed these annuities in Good Faith and never foresaw any repercussions between him and his broker dealer.

The use of Nominees, or the use of annuitants, or a concept that might not be judged favorably by annuity companies doesn't make this egregious. Cohen had options but truly processed the annuity point of sale forms to the best of his knowledge.

Because Respondents' conduct was not egregious with respect to Woodbury and the Investment Access this factor weighs against the imposition of a cease-and desist order.

b. The alleged infractions were isolated.

This factor, too, weighs against a C&D order. The sales occurred on only 2 days , It was not reoccurring.

The circumstances that led to Cohen selling these annuities, will never be repeated because Cohen's good name is tarnished in the securities industry. In almost 7 years since Cohen, sold these annuities, no similar infractions have occurred.

Both set of annuities sales were isolated transactions and were isolated incidents and were not part of some nefarious scheme to defraud the broker dealer. Woodbury is just a broker dealer, they have don't hpld the risk or product. They were in no way harmed. This factor therefore militates against imposing a cease-and-desist order.

c. Respondents did not act with scienter.

As discussed above, the evidence shows that Cohen did not act with scienter with respect to his annuities sales and the answering of the "investment access" questions. First, Cohen did not act with an intent to deceive, harm, or defraud Woodbury Financial Services. Inc. Further, there is no evidence that Cohen intended to harm, deceive, or defraud Woodbury in respect to the variable annuity sales.

Because Cohen did not act with scienter, a cease-and-desist order would be inappropriate.

d. There is no risk of future violations.

An important factor in considering the remedy to impose is the "the sincerity of the defendant's assurances against future violations." *Steadman,* 603 F.2d at 1140. Here, there is no risk of future violations. The Division has neither alleged nor proven any wrongdoing or improper conduct except that which allegedly occurred nearly seven years ago. Had there been other incidents even suggesting a possible violation, the Division surely would have found them during its thorough investigation of the Cohen. *Jones,* 476 F. Supp. 2d at 381 (finding against an injunction because, apart from defendants' past alleged wrongdoing, there was no cognizable danger of recurrent violations, nor any proof that the defendants engaged in a pattern of securities law violations).
Cohenalso can assure that there will be no future violations. The Staff's investigation and the Division's initiation of proceedings against Cohen has brought severe consequences to Cohen and his Family. The ramifications of this investigation and these proceedings have been so severe that there is little chance that Cohen would take the risk of repeating any allegedly improper conduct. Under these circumstances, a cease-and-desist order is inappropriate.

e. The alleged violations are not recent.

The alleged violations are not recent. They all took place in isolated incidents nearly seven years ago. The statute of limitations has run. Indeed, this case is so dated that nearly all the witnesses had difficulty recalling the relevant transactions and conversations without the prodding of the Division. Respondents have faced insurmountable hurdles in defending themselves because of how long ago the alleged violations took place? This factor clearly weighs against a cease-and-desist order.

f. There was no harm to Cohen's investors or the Public.

No Investors or the Public got hurt. Financially, Woodbury did not lose by the "investment Access" question being responded the way it was.

g. **A cease-and-desist would not serve a remedial function.**

The final factor to consider in determining whether to impose a cease-and-desist order is "the remedial function to be served by the C&D order in the context of any other sanctions being sought in the same proceedings." *In re KPMG Peat Marwick LLP,* 554 S.E.C. 1135, 1192 (2001). Here, there is no remedial function to be served by a cease-and-desist order. A cease and-desist order is wholly unnecessary. The alleged misconduct is not ongoing, and there is no likelihood of future misconduct. Because all the relevant factors weigh in favor of Cohen, a cease-and-desist order would not be in the public interest. It is an improper remedy that should not be granted.

3. Disgorgement is inappropriate because all "ill-gotten gains" have been returned.

Disgorgement is also an inappropriate remedy in this case. "Disgorgement is an equitable remedy designed to deprive [respondents] of all gains flowing from their wrong." *SEC v. AMX, Int'l, Inc.*, 872 F. Supp. 1541, 1544 (N.D. Tex. 1994) (citations omitted). Essentially, violators are returned to the position in which they "would have been absent the misconduct." *In the Matter of OptionsXpress, Inc., Thomas E. Stern & Jonathan I Feldman,* SEC Release No. 490, 2013 WL 2471113, at *82 (June 7, 2013).

Cohen spent more than the amount earned on legal fees. He also Gave Zakheim $125,000 and $225,000 that went towards a new office- Cohen has no means to pay a Disgorgement nor did he keep most of the funds for his enjoyment. There is, therefore, nothing to disgorge, and this remedy should not be imposed. *See SEC v. Berry,* 2008 WL 4065865, at* 10 (N.D. Cal. Aug. 27, 2008) (striking prayer for disgorgement when the "defendant has not been unjustly enriched and there is nothing for her to disgorge.").The disposition fee did not flow from any alleged wrongdoing, so it is not subject to disgorgement.*See Johnson,* 87 F.3d at 488 (disgorgement cannot go beyond "remedying the harm caused to theharmed parties"); *SEC v. Blatt,* 583 F.2d 1325, 1335 (5th Cir. 1978) ("The court's power to orderdisgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing."); *SEC v. Bard,* 2011 WL 5509500, *3 (E.D. Pa. Nov. 10, 2011) (finding that SEC's request for all fees earned by investment adviser "was not a reasonable approximation of profits causally connected to the violation").

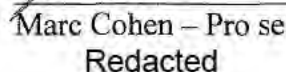
IV. **Conclusion**

This Court should find for Respondents on each of the Division's claims. The Division has failed to prove that the Respondents violated any Securities Law. There were no material omissions or misstatements made negligently or with an intent to deceive in connection with either the of the annuities sales. On top of that, the remedies the Division seeks are barred by the statute of limitations.

We ask of the court to drop all the securities charges that the Division seeks and find leniency in the Courts Ruling.

Dated: October 29th, 2014

Respectfully Submitted,



Marc Cohen – Pro se
Redacted

EXHIBIT A

From: Abe Gottesman Sent:1/2/2008 3:00 PM
To: [-] Redacted
Cc: [-]
Bcc: [-]
Subject: update

This is for illustration purposes only. All questions should refer back to the prospectus. This does not represent a guarantee of returns on our part. All guarantees are made by the issuing company as per prospectus. Your lawyer should review all relevant material before making any investment choices.

Best regards,

Abe Gottesman

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EXHIBIT Div 288

EXHIBIT 1/19 288 HO-10840

Annuity Comparison

Annuity Company	Product	Bonus %	Bonus Charge	Surrender Charge
Jackson National	Perspective 2	5%	0.69%	7 Yrs
GE Capital	Reg NY Annuity	4%	1.6	8 Yrs
	Extra Variable	5%	1.55	8 Yrs.
Nationwide				
Axa	Accum National 07 Plus	5%	1.55%	8 Yrs
AIG Sunamerica	Pollaris Plat 2	5%	None	9 yrs
Sunlife Financial	The Masters Extra	5%	1.70%	7 Yrs

BDL0008752

Death Benefit Riders		Comm. Rollback	Bonus Rollback	Annuitant/ Owner Driven
Earnings Max 40% of contract till 69 then 25% BASED ON ISSUE AGE 30BPS	40%	6 months	4.75% then goes down	Owner
Earnings Protector Rider 30BPS 0-75 is 40%	40%	None	None	Annuitant
Earnings Protector Rider 30BPS 0-75% is 40%		None	None	Annuitant
Earning Enhancements Rider 0-71 40% 71-75 is 25% max 75 Caps rate at age 80 35BPS	40%	6 months	1 Year	Owner Driven
Estate plus max age is 70 Can get 70-81 all yrs is 25% cost 25BPS	25%	None	None	Owner
Earnings rider 1-69 is 75% 70-78- 40% 45BPS h & w ANNUITANTS CAN DOUBLE DIP	75%	NONE	NONE	Owner

BDL0008753

Prospectus	Application	Max Amt.	$1 million Investment and Death in 60 Days Down 20% -20%	Down 10% -10%	At 0% 0%
Received	Received CA	$2,499,999	$1,000,000	$1,000,000	$1,003,500
Ordered	Ordered	$1,999,999	$1,000,000	$1,000,000	$1,056,000
Ordered	Ordered	$1,999,999	$1,000,000	$1,000,000	$1,070,000
Ordered	Ordered	3 mil as per last week	$1,000,000	$1,000,000	$1,000,000
ordered	ordered	$1,500,000	$1,000,000	$1,000,000	$1,062,500
ordered	ordered	$1,999,999	$1,000,000	$1,000,000	$1,087,500

BDL0008754

		$1,000,000
Plus 10%	**Plus 20%**	
10%	20%	
$1,140,350	$1,284,200	
$1,201,600	$1,764,000	
$1,217,000	$1,364,000	
$1,147,000	$1,294,000	
$1,193,750	$1,325,000	
$1,271,250	$1,455,000	

BDL0008755

Hartford Directors	Directors Plus	over 50k 4% under 50k 3%		1.60%	8 Yrs
Hartford Leaders	Leaders Plus	over 50k 4% under 50k 3%		1.70%	8 Yrs
Principal	Investmet Plus	5%	60bps		8 Yrs
Pacific Life	Pacific Value	Over 250k 5% under 250k 4%		1.40%	7 Yrs
ING	Golden Select Premium Plus	0-70 5% 70+ 4%		1.55%	9 Yrs
Jefferson National	Advantage Plus	4%		1.40%	10 Yrs Rolling
Ameritas	Overture Medley + Rider	4% no longer avail	42 BPS		9 Yrs
American Skandia - Prudential	X-tra Credit	7%		1.65%	10 Yrs.

BDL0008756

MAV+ Rider Max anniversary or % of gains upto 200% Premium age 69 40% to 70 to 75 25% 30BPS	40%	None	None	Either or can cash out Annuitant
MAV+ Rider Max anniversary or % of gains upto 200% Premium age 69 40% to 70 to 75 25% 30BPS	40%	None	None	Either or can cash out
Enhanced DB is 5% a yr. higest Anniv or pymt 25BPS	5%	None	None	Annuitant
Earnings Enhancement Guarantee 0-69 EEG 40% lessor of earnings or purchase 70-75 25% lessor of earnings or purchase NA in NJ and FL	40%	0-3 mos 100% 3+ None none on Accident	1 Yr Takeback bonus but not earnings	Annuitant
Earnings Multiplier upto 150% of earnings under 70 55% over 70 33% issue age based 30BPS	55%	None at Death	None at Death	Owner
Guar Income Benefit largest CV	0%	None at Death	None at Death	Owner
Estate Enhanecment Rider 40% of gain upto 40% of premiums if a loss no benefit .2 till age 70 .6 71-80	40%	None at Death	Graded QTR 1 100 QTR 2 75% QTR 3 50% If non accidental	Owner
No enhanced only 5% rollup	5%	12 months	12 month	Owner

BDL0008757

ordered	ordered	$999,999	$1,000,000	$1,000,000	$1,056,000
ordered	ordered	$999,999	$1,000,000	$1,000,000	$1,056,000
ordered	ordered	$2,000,000			
ordered	ordered	$1,000,000			
ordered	ordered	$2,000,000	$1,000,000	$1,000,000	$1,093,000
N/O	N/O	$1,000,000			
Ordered	Ordered	$1,000,000			
Ordered	Ordered	$2,999,999			

BDL0008758

$1,201,600	$1,347,200
$1,201,600	$1,347,200
$1,257,300	$1,421,600

BDL0008759

Security Benefit Life	Secure Design	5%	70 BPS		7 YR Rolling
Phoenix Life	Premium Edge	5%		1.60%	8 Yrs
Ohio National	Oncore Xtra	4%		1.4	8 Yrs
Lincoln National	American Legacy 3 Plus	below 100 3% below 1 mil 4% over 1 mil 5%		1.55%	9 Yrs.
John Hancock	Venture Vantage	5%		1.55%	9 Yrs
Lincoln National	Choice Plus Assurance Bonus	below 100 3% below 1 mil 4% over 1 mil 5%		1.55%	9 Yrs.
Metlife	Investors Series XC	Check with Co.		1.55%	9 Yrs.
Integrity Life	Pinnacle Plus	5%		1.67%	9 Yrs

BDL0008760

Enhanced DB 0-70 lessor of 50% of gain or Pymt 70+ 25% lessor of 50% or pymt 25BPS	50%		[illegible]	Owner
No enhanced DB	0%	None	None	Annuitant
Enhancement Rider 25% or 40% 25% -50% of prem 40% of prem 100% 15BPS or 30 BPS	40%	100% 1st 6 mos 50% 2nd 6 Mos	12 mos	Annuitant
Estate Enhancer 50BPS 40% of 1st 200% of earnings plus CV	40%			
Estate Enhancer 50BPS 40% of 1st 2005 of earnings plus CV	40%			
Earnings Preservation 0-70 40% and 71-79 at 25% 25BPS based on Issue	40%			
NO Enhanced DB	0%	None	12 months	Annuitant

Ordered	Ordered	$2,000,000
Received	Received	$5,000,000
Not Ordered	Not Ordered	$999,999

BDL0008762