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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15790

In the Matter of

MICHAEL A. HOROWITZ

and

MOSHE MARC COHEN,

Respondents.

DIVISION OF ENFORCEMENT'S POST-HEARING REPLY BRIEF IN SUPPORT OF ITS CASE AGAINST RESPONDENT MOSCHE MARC COHEN

Cohen filed his Post-Hearing Brief late and exceeded the page limit; yet, his opposition consists of nothing more than exposition on FINRA rules and unpersuasive, disjointed arguments about why the Court should excuse his misconduct.

First, Cohen attempts to convince the Court that the federal securities laws do not reach his misstatements and scheme to deceive his broker-dealer, Woodbury Financial Services, Inc. ("Woodbury"), because no investor was harmed. He could not be more wrong. As the United States Supreme Court made clear, "neither this Court nor Congress has ever suggested that investor protection was the *sole* purpose of the Securities Act." *U.S. v. Naftalin*, 441 US 768, 775 (1979). In fact, the federal securities laws were designed to prevent unethical business practices including frauds upon intermediaries such as Woodbury: "[T]he welfare of investors and financial intermediaries are inextricably linked — frauds perpetrated upon either business or investors can redound to the detriment of the other and to the economy as a whole." *Id.* at 776.

Second, as the Division fully set forth in its Post-Hearing Brief, Cohen intentionally misled

Woodbury so that it would approve his variable annuities business and pay him millions of dollars in illicit sales commissions. The uncontroverted evidence presented at the hearing proved that, if Cohen had told the truth about the nature of his variable annuities sales, then none of his business would have passed Woodbury's principal review (and correspondingly not a single annuity would have been issued by the various insurers). Cohen indisputably understood the materiality of his misconduct and that is why he concealed the truth about his sales from Woodbury.

Finally, Cohen falsely accuses the Division of "tricking" him and thereby preventing him from calling two California witnesses — Michael Horowitz and Abe Gottesman. In truth, the Division never made any representations to Cohen about the length of the hearing and specifically directed him to the Court to obtain answers to his scheduling questions. Further, the absurdity of Cohen's claim that the Division prevented him from calling his "key" California witnesses is demonstrated by his own actions. Specifically, after the Division served its witness list on June 27, 2014, Cohen filed a motion in which he represented, among other things, that all of his witnesses resided in the New York metropolitan area. Incredibly, in the same motion, Cohen objected to the Division's inclusion of Horowitz and Gottesman on its witness list, but now Cohen expects the Court to conclude that these men were Cohen's vital witnesses.

As set forth more fully below and in the Division's Post-Hearing Brief, Cohen should be found liable for violating the anti-fraud provisions of the federal securities laws, as well as aiding and abetting books-and-records violations by his broker-dealer. For these violations, Cohen should be ordered to cease and desist, disgorge his ill-gotten gains, pay a civil monetary penalty, and be permanently barred from the securities industry.

ARGUMENT

I. COHEN COMMITTED FRAUD IN VIOLATION OF THE FEDERAL SECURITIES LAWS.

Despite Cohen's many attempts to confuse the issues at the hearing and in his Post-Hearing Brief, he was not charged with violating any FINRA rule. He was charged with securities fraud for deceiving Woodbury into approving twenty-eight variable annuity sales he made to two New York-based hedge funds. Cohen made misrepresentations and engaged in deceptive conduct so his annuity sales would pass Woodbury's mandatory principal review and he could collect millions of dollars in sales commissions. Accordingly, the Commission charged Cohen in the alternative with violating the misrepresentation and scheme liability provisions in Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5.[1] Although the Division was required to prove only that Cohen committed a misrepresentation or engaged in a fraudulent scheme, the Division conclusively proved at the hearing that Cohen did both. Cohen's arguments to the contrary are misplaced and unavailing.

A. Cohen's Misrepresentations Were Actionable, Material, and Intentional.

A major theme of Cohen's opposition is that his misconduct did not violate the federal securities laws because no investors were harmed: "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 [sic] Laws." Cohen Opposition ("Cohen Opp.") at 4. Cohen, however, misapprehends the scope of the federal securities laws, which Congress enacted to ensure high ethics in every facet of the securities industry:

> The fact that Czarnik's statements were not disseminated directly to investors does not foreclose liability under section 10(b), Rule 10b–5 and section 17(a).

[1] The Commission also charged Cohen with primary violations of Section 17(a) of the Securities Act and aiding and abetting Woodbury Financial Services' violations of Section 17(a) of the Exchange Act and Exchange Act Rule 17a-3(a)(6).

> In *United States v. Naftalin*[,] . . . the Supreme Court held that the fraud need not have been perpetrated on an actual or potential investor to constitute a violation of section 17(a)(1). Beginning with the text of the statute, the Court held that 'the statutory language does not require that the victim of the fraud be an investor-only that the fraud occur 'in' an offer or sale.' Specifically, the Court held that the statutory phrase, 'in the offer or sale of any securities,' was intended to be 'define[d] broadly' and is 'expansive enough to encompass the entire selling process, including the seller/agent transaction.' 'The language does not require that the fraud occur in any particular phase of the selling transaction . . . . Thus, *nothing in subsection (1) or § 17(a) creates a requirement that injury occur to a purchaser*.'
>
> Additionally, focusing on the statutory purpose, the Court highlighted that 'neither this Court nor Congress has ever suggested that investor protection was the *sole* purpose of the Securities Act.' 'Prevention of frauds against investors was surely a key part of that program, but so was the effort to achieve a high standard of business ethics . . . in every facet of the securities industry.' Specifically, the Court emphasized that 'the welfare of investors and financial intermediaries are inextricably linked—*frauds perpetrated upon either business or investors can redound to the detriment of the other and to the economy as a whole*.'

SEC v. Czarnik, 2010 WL 4860678, at *4 (S.D.N.Y. November 29, 2010) (*quoting Naftalin*, 441 U.S. at 773 (internal citations omitted) (original emphasis omitted)). *See also Graham v. SEC*, 222 F.3d 994, 1001-02 (D.C. Cir. 2000) (rejecting petitioner's argument that he did not violate Section 10(b) because "fraud on a broker is not fraud 'in connection with the purchase or sale of [a] security' as required by the statutory language.''). Accordingly, Cohen's misrepresentations and scheme to deceive Woodbury (during its mandatory principal review) are actionable under both Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act.

Cohen also argues that his misrepresentations to Woodbury during its principal review were "immaterial" because "**'[s]uitability questions'** in the 'annuity point of sale' forms of the annuity sales of the Trusts were not mandatory and **'immaterial'** to the sale." Cohen Opp. at 4 (emphasis in original). The record evidence, however, is that Woodbury's principal review was mandatory for all variable annuity sales. *See* SEC's Post-Hearing Brief Against Respondent Cohen ("SEC Post-Hearing Br.") at 14-21.[2] Furthermore, Cohen's misstatements were material because — but for his deception — none of his variable annuity business would have passed Woodbury's mandatory review and consequently not a single annuity would have been issued. *See id.* at 14-15.

Cohen next argues that the Division did not prove that he acted with scienter. The evidentiary record, however, is replete with illustrations of his knowing and intentional deceit. For example, when Woodbury's Mr. Smallidge inquired about the variable annuity sales, Cohen manufactured a story about wealthy clients engaged in family estate planning, which of course was not true. *See* SEC Post-Hearing Br. at 35-38. Even assuming *arguendo* that Cohen honestly was confused about the meaning of the questions on the point-of-sales forms, he certainly was not confused when he lied to Mr. Smallidge about the identities of his clients. The only plausible explanation for Cohen's lying to Mr. Smallidge is that Cohen knew Woodbury would reject the business if he told the truth—*i.e.,* that hedge funds were seeking short term gains by using nominees to buy variable annuities with terminally ill strangers named as annuitants.

In his opposition, Cohen tries to dull the impact of this evidence by incongruently arguing that 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." Cohen Opp. at 28. In other words, Cohen argues that it was permissible to lie to Mr. Smallidge because he was not Cohen's "supervisor." Notwithstanding his specious argument, Cohen, a registered representative, had a duty to act with candor in all of his interactions with his broker-dealer. *See* SEC Post-Hearing Br. at 15.

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2 Cohen repeatedly argues that his belief is that Woodbury's review was not necessary because of FINRA "notices and Rules." *See, e.g.,* Cohen Opp. at 4. This argument is meritless because, among other reasons, this not a case about FINRA suitability requirements. More importantly, Woodbury mandated that all of Cohen's sales undergo principal review and he agreed to abide by this requirement. *See* SEC Post-Hearing Br. at 16-17.

B. Cohen Engaged In A Fraudulent Scheme.

Cohen devotes pages of his Post-Hearing Brief (as well as multiple pre-trial motions for summary disposition) to accusing the Division of trying to "bypass the elements necessary to impose 'misstatement' liability under subsection (b) [of Rule 10b-5] by labeling the alleged misconduct a 'scheme' rather than a 'misstatement.'" Cohen Opp. at 57. The Division has made no effort to bypass any element of its misrepresentation claim against Cohen. Indeed, as detailed in the Division's Post-Hearing Brief and Section I.A *supra*, the evidence presented at the hearing conclusively proved that Cohen made fraudulent misstatements in violation of Rule 10b-5(b).

Not only is Cohen's scheme liability argument unsupported by the evidence, it is incorrect as a matter of law. The proposition that misrepresentation liability cannot be "back-doored" through a scheme claim relates to two legal issues that are in no way implicated by the Division's enforcement action against Cohen. The first is where to draw the line between primary and secondary liability for alleged wrongdoers who are not the "makers" of any alleged misstatements. *See In re Global Crossing, Ltd. Sec. Litig.*, 322 F.Supp.2d 319, 336, 337 n.17 (S.D.N.Y.2004) ("Subsection (a) and (c) may only be used to state a claim against a defendant for the underlying deceptive devices or frauds themselves, and not as a short cut to circumvent *Central Bank's* [511 U.S. 164 (1994)] limitations on liability for a secondary actor's involvement in making misleading statements" [but] "that same defendant may be held liable for the fraudulent scheme behind the misstatements.").

The second is the heightened pleading requirements that private litigants must meet under the Private Securities Litigation Reform Act ("PSLRA") when bringing misrepresentation claims under Rule 10b-5(b).[3] *See In re Alstom SA Securities Litigation*, 406 F. Supp. 2d 433, 474-75 (S.D.N.Y. 2005) ("Thus, a claim of liability for violations of Rule 10b–5(a) or (c) does not require an allegation that the defendant made a statement, as liability is premised on a course of deceptive conduct undertaken by the defendant, rather than on misrepresentations or omissions. Because of this standard, claims of liability under subsection (a) and (c) of Rule 10b–5 need not comport with Subsection (b)(1) of the PSLRA, which requires that a plaintiff set forth each statement alleged to have been misleading, and facts giving rise to this belief."). Neither of these legal issues has any applicability here where Cohen is charged as a primary violator in an SEC enforcement action for statements that he indisputably made to his broker-dealer.

Without question, the Division properly pled and definitively proved at the hearing that Cohen engaged in a fraudulent scheme that went beyond the misrepresentations he made on the Woodbury point-of-sale forms. Cohen undertook a series of deceptive actions to execute the hedge funds' short-term variable annuities strategy — a strategy that he knew Woodbury would refuse to participate in because of its policies against selling variable annuities to short-term investors and hedge funds. *See, e.g.,* Tr. 700:6-21; 803:13-20. For example, by Cohen's own admission, he recommended that the hedge funds purchase the variable annuities through trusts to ensure that the hedge funds would receive a return on their investment when the terminally ill annuitants died. *See* SEC Post-Hearing Br. at 28. The trusts also concealed the identity of the variable annuities' actual purchasers and beneficiaries. Cohen also researched which variable annuity products the hedge funds could best exploit for short-term gains, including calling Penn Mutual to inquire about its "red flag limits." *See* SEC Post-Hearing Br. at 33-35. Additionally, Cohen repeatedly lied to his broker-dealer about the true nature of the variable annuities

[3] By its express terms, moreover, the requirements of the PSLRA, including its requirement that a plaintiff allege facts giving rise to a "strong inference" of scienter, apply only to "private actions" and not SEC enforcement proceedings. *See* Section 21D of the Exchange Act.

transactions, going so far as to tell Mr. Smallidge that the variable annuities were purchased by wealthy clients engaged in family estate planning. *See* SEC Post-Hearing Br. at 35-38. These actions establish that Cohen engaged in a fraudulent scheme in furtherance of the misrepresentations he made on Woodbury's point-of-sale forms.[4] *See SEC v. Pentagon Capital Management PLC*, 725 F.3d 279 (2d. Cir. 2013) (finding scheme liability requirements satisfied where the defendants sought out brokers who would engage in late trading; the defendants knowingly had trade sheets time-stamped before 4 p.m., even though the defendants had no intention of trading before that time; and the defendants made false assurances that they were not engaging in late trading); *VanCook v. SEC*, 653 F.3d 130 (2d Cir.2011) (same).[5]

II. COHEN'S ACCUSATIONS AGAINST THE DIVISION ARE FALSE.

Cohen claims that he did not receive a fair trial because the Division purportedly prevented him from calling two "key" California witnesses: Michael Horowitz and Abe Gottesman. Cohen Opp. at 63. First, the Division bears no responsibility for Cohen's claimed inability to call these witnesses. The Division never made any representations to Cohen about the length of the trial or when he should be prepared to call his witnesses. In fact, the Division told Cohen to contact the Court (which he did numerous times during the pendency of this proceeding) if he had any scheduling questions. *See* Tr. 828:19-25 - 829:1-4.

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4 Cohen's argument that he did not create a false impression through these actions stretches credulity. Indeed, Mr. Smallidge testified that Cohen gave Mr. Smallidge a false impression: Mr. Smallidge believed that Cohen was working with family trusts set up by wealthy families to achieve estate planning goals. Tr. 567:13-24. Further, the case Cohen relies on for the false impression requirement, *United States v. Finnerty*, 533 F.3d, 143 (2d Cir. 2008), may not be good law. The Second Circuit gave *Chevron* deference to the Commission's post-*Finnerty* adjudicatory decision finding Finnerty's conduct to be deceptive, which the Second Circuit held "'trumps' [the Second Circuit's] prior interpretation in *Finnerty*." *Van Cook v. SEC*, 653 F.3d 130, 141 (2d Cir. 2011) (citing David A. Finnerty, Exchange Act Rel. No. 59998, 95 SEC Docket No. 2534, 2009 WL 1490212, at *3 (May 28, 2009)).

5 Cohen cites *SEC v. Pentagon Capital Management PLC* in his Post-Hearing Brief, but he cites a district court order that is no longer good law. *See* Cohen Opp. at 61 (*discussing SEC v. Pentagon Capital Management* PLC, 844 F. Supp. 2d 377 (S.D.N.Y. 2012). Cohen claims that the court held that the SEC's scheme liability claim against the defendants was insufficient, but the Second Circuit actually reached the opposite conclusion in *SEC v. Pentagon Capital Management PLC*, 725 F.3d 279 (2d. Cir. 2013).

Second, Cohen's hollow charge is amplified by the fact that he filed a pretrial motion to change the hearing venue from California to New York on the grounds that he "intended to call between ten (10) and fifteen (15) witnesses who are domiciled in the New York Metropolitan area." Cohen Motion to Transfer Venue, Motion to Clarify Stay, & Motion for Adjournment & Extension of Time at 2 (filed June 30, 2014). Cohen made no mention of two California witnesses. Incredibly, in the same motion, Cohen objected to the Division's inclusion of Horowitz and Gottesman on its witness list, even though he presently calls these men "key" witnesses. *Id.* ("I received an email from the Division, wherein it identified no less than four to five (4-5) potential California witnesses. Such chicanery on the part of the Division should not be countenanced."). When it suited him, Cohen represented to this Court that the hearing should be in New York because that was where all of his witnesses resided. Now he disingenuously claims that he did not receive a fair trial because — through no one's fault but his own — he could not call Horowitz and Gottesman.

Notwithstanding Cohen's dissembling concerning the appearances of Horowitz and Gottesman, neither of these witnesses' testimony would have changed the established fact that Cohen was obligated to provide accurate and complete information to Woodbury regarding his variable annuities sales, and he did not.[6] As Cohen elaborately detailed in his pre-hearing brief (which contrary to Cohen's belief is an admission), he intimately understood the hedge funds' short-term investment strategy. As such, Cohen, as a registered representative affiliated with Woodbury, was responsible for providing complete and accurate information to his broker-dealer

[6] Indeed, in contravention of SEC Rule of Practice 321(b), Cohen made no offer of proof regarding what relevant evidence either of these two witnesses would have presented at the hearing. Furthermore, by Cohen's own admission, it is wholly irrelevant what Horowitz and Gottesman purportedly told him because "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." Cohen Opp. at 6. In other words, Cohen admits that the answers on the point-of sale forms were ultimately his own, which the Division has proven were intentionally falsified by him.

about his variable annuities sales. No one else bore this responsibility. As a result, Cohen's unending attempts to blame others for his own misconduct only underscore his unfitness to be in the securities industry.

III. THE COURT SHOULD ORDER DISGORGMENT AND BAR COHEN FROM THE SECURITIES INDUSTRY.

Cohen argues that he should not pay disgorgement because he purportedly "has spent more than the earning[s] he earned in legal and advisory fees since 2008." Cohen Opp. at 69. It goes without saying that the manner in which Cohen chose to spend his illicit gains is not relevant to whether he should be ordered to pay disgorgement. *See, e.g., SEC v. Benson*, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987) ("The manner in which [the defendant] chose to spend his misappropriations is irrelevant as to his objection to disgorge. Whether he chose to use this money to enhance his social standing through charitable contributions, to travel around the world, or to keep his co-conspirators happy is his own business."); *SEC v. Rosenfeld*, 2001 WL 118612 at *2 (S.D.N.Y. Jan. 9, 2001) ("Court may order disgorgement in the amount of the wrongdoer's total gross profits, without giving consideration to whether or not the defendant may have squandered and/or hidden the ill-gotten profits."). Similarly, Cohen cannot avoid disgorgement simply because repaying his illicit gains may be difficult. *See, e.g., SEC v. Grossman*, 1997 WL 231167 at *10 (S.D.N.Y. May 6, 1997) ("[T]here is no legal support for [defendant's] assertion that his financial hardship precludes the imposition of an order of disgorgement."). Additionally, disgorgement is properly ordered "despite a defendant's inability to pay, given that the defendant may subsequently acquire the means to satisfy the judgment." *Id.*

Finally, Cohen continuously minimizes the severity of his misconduct and consistently blames others for his misdeeds. *See, e.g.,* Cohen Opp. at 70. He refuses to accept any responsibility for his misconduct, which caused insurers to issue tens of millions of dollars' worth of variable annuity contracts that they otherwise would not have issued. This shirking behavior highlights the need for an industry bar, as well as substantial penalties and disgorgement. For all the reasons set forth here and in the SEC's Post-Hearing Brief, the Court should award the remedies sought by the Division.

CONCLUSION

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

Dated: November 14, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing document were served on the following on this 14th day of November, 2014 in the manner indicated below:

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