UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION

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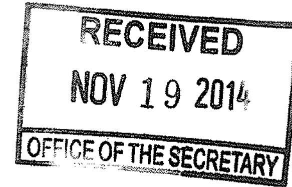

IN THE MATTER OF:
MICHAEL A. HOROWITZ and MOSHE MARC COHEN
RESPONDENTS.

ADMINISTRATIVE PROCEEDING
FILE NO: 3-15790

RESPONDENTS MOSHE MARC COHEN'S SUR-REPLY TO DIVISION'S REPLY OF RESPONDENT'S POST-HEARING BRIEF

This Sur-Reply addresses four legal issues central to this matter, namely, whether the use of short-lived annuitants or the use of nominees in connection with annuity purchases can amount to fraud on insurance companies or the Broker Dealer under securities laws.

I. THE USE OF SHORT-LIVED ANNUITANTS DID NOT AMOUNT TO lOb-5 FRAUD ON THE INSURANCE COMPANIES OR THE BROKER DEALER.

The Division argued that the failure of Cohen to volunteer unasked for health information of the annuitants constituted a fraud on the Broker Dealer. While the SEC's fraud-by-omission theory of liability appears to be unprecedented in the securities law context, it has been repeatedly litigated under insurance and other state fraud laws. Under those cases, the result has always been the same: non-disclosure of health information, including information regarding terminal illnesses, which an insurance company could have but failed to request, is not fraudulent. Courts have reached this conclusion based on one or the other of two equally dispositive grounds: 1) Applicants and Brokers have no duty disclose unrequested health information to insurance companies and or

Broker Dealers; and 2) even if applicants and Brokers had a duty to disclose, unrequested health information is not material. The fact that an annuitant's life expectancy might be short-lived is still not material. The support for these basic and well-reasoned propositions extends across the country, in state and federal court, and is grounded even in observations of the United States Supreme Court.

The very same elements that have proved fatal to such state fraud claims in the past -- the absence of a duty to disclose and the absence of materiality -- are equally fatal to any fraudulent omission claim under § 1O(b) and Rule 1Ob-5 of the securities laws. Indeed, if anything, these elements are harder to satisfy under the securities laws. A § 1O(b) and Rule 1Ob-5 claim premised on the non-disclosure of unrequested health information (or life expectancy) will therefore fail for the same reasons that it has previously and repeatedly failed under insurance and other state laws. Such a claim will also fail for the independent reason that the SEC will not be able to establish the requisite scienter as to Cohen.

A. Cohen Had No Relationship of Trust or Confidence With the Insurers or Broker Dealer That Could Give Rise to a Duty to Disclose Unrequested Health Information or Life Expectancy Regarding Short-Lived Annuitants

Rule 1Ob-5 contemplates the possibility of fraud by omission. In the language of the Rule, "[i]t shall be unlawful for any person . . . to omit to state a material fact necessary in order to make the statements made . . . not misleading." But not every omission is necessarily actionable. "[A]n omission is actionable under the securities laws only when the buyer is subject to a duty to disclose the omitted fact[]." *VacoldLLC v. Cerami,* 545 F.3d 114, 121 (2d

Cir. 2008). Absent the existence of such a duty, the failure of a buyer to disclose any fact, even a material fact, is simply not actionable. *See, e.g., San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Cos.,* 75 F.3d 801, 810 (2d Cir. 1996) (affirming dismissal of Rule 1Ob-5 claim against company for non-disclosure of marketing plans because it had no duty to disclose, "[e]ven . . . assum[ing] . . . that the . . . marketing plans constituted material information"); *Glazer v. Formica Corp.,* 964 F.2d 149, 157 (2d Cir. 1992) (affirming dismissal of Rule 1Ob-5 claim because the plaintiff "failed to show any duty to disclose," even though the "exploration of merger or LBO possibilities may have reached a stage where that information may be considered material"); *Alexandra Global Master Fund, Ltd. v. Ikon Office Solutions, Inc.,* No. 06 Civ. 5383, 2007 WL 2077153, at *4

(S.D.N.Y. July 20, 2007) ("Where a complaint does not allege any basis for a duty to disclose, a claim based upon nondisclosure of material information cannot be sustained.") (collecting cases). As shown below, there was no duty to disclose the fact that the annuitants had a short life expectancy in this case.

1. There was no duty to disclose under securities law principles

The simplest circumstance in which a duty to disclose arises is when a party is subject to an "independent statutory or regulatory disclosure obligation," *Dodona I, LLC v. Goldman, Sachs & Co.,* 847 F. Supp. 2d 624, 646 (S.D.N.Y. 2012), such as an SEC rule governing required disclosure on a securities filing. *See In re Bank ofAm. Corp. Sec., Derivative, & Employee Retirement Income Sec. Act (ER/SA) Litig.*, 757 F. Supp. 2d 260, 315-16 (S.D.N.Y. 201()) (finding defendant had disclosure obligation under SEC rules of Form 8-K, which require disclosure of "material definitive agreement[s] not made in the ordinary course of business").

There is no such express statutory or regulatory disclosure obligation that would apply in this case.

In the absence of an express disclosure requirement, Second Circuit precedent has made clear that a duty to disclose arises only when either 1) "disclosure is necessary to make prior statements not misleading," *e.g., In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 268 (2d Cir. 1993), or 2) a party owes an "affirmative duty to disclose," *Castellano v. Young & Rubicam, Inc.,* 257 F.3d 171, 179 (2d Cir. 2001). *See also, e.g., In re Sanofi-Aventis Sec. Litig.,* 774 F. Supp. 2d 549, 561 (S.D.N.Y. 2011) (describing "two types of disclosure obligations").

With respect to short-lived annuitants, the first of these possible bases for a duty to disclose -- preventing an existing disclosure from being misleading -- is clearly inapplicable. Where the questions posed on the annuity applications were answered completely and no additional information was volunteered, Cohen cannot be found to have rendered an existing disclosure misleading. *See In re Morgan Stanley Information Fund Sec. Litig.,* 592 F.3d 347, 366 (2d Cir. 2010) (in securities case under Sections 11, 12 and 15 alleging fraudulent omission "declin[ing] to hold that defendants' disclosure of the information called for by [the] Form . . . gave rise to a duty to make disclosures about 'related subjects' not called for by the Form.").

Nor did Cohen owe an "affirmative duty to disclose." The Supreme Court's decision in *Chiarella v. United States*, 445 U.S. 222 (1980), instructs that such an affirmative "duty . . . arises only from a fiduciary or other similar relationship of trust and confidence between the parties to the transaction." *In re MRU Holdings Sec. Litig.*, 769 F. Supp. 2d 500, 512-13 (S.D.N.Y. 2011) (quoting *United States v. Chestman*, 947 F.2d 551, 565 (2d Cir. 1991)). Cohen owed no such fiduciary-type duty to the insurance companies or Broker Dealer, because "[n]o special relationship of trust or confidence arises out of an insurance contract between the insured and the insurer; the relationship is legal rather than equitable." *Fed. Ins. Co. v. Distinguished Properties Umbrella Mgrs. Inc.*, 721 F. Supp. 2d 293, 301 (S.D.N.Y. 2010) (quoting *Batas v. Prudential Ins. Co. of Am.*, 281 A.D.2d 260, 264 (N.Y. 2001)); *see generally* 44 C.J.S. Insurance § 296 ("[T]here is no general fiduciary duty between an insurer and its insured."). Following the Supreme Court's guidance, the absence of this fiduciary relationship conclusively demonstrates that Cohen had no duty to disclose, and therefore could not have committed a fraudulent omission that would give rise to an action under Rule 10b-5. *See, e.g., Lorenz v. CSX Corp.*, 1 F.3d 1406, 1418 (3d Cir. 1993) (holding fraudulent omission claim failed because there was no fiduciary duty to disclose and "section 10(b) imposes no additional duties"); *Fortson v. Winstead, McGuire, Sechrest & Minick*, 961 F.2d 469, 472-75 (4th Cir. 1992) (holding fraudulent omission claim failed because there was no "duty of disclosure . . . arising out of a fiduciary or other relationship of trust"). Woodbury was clearly not a party to the annuity transaction.

2. <u>There was No Duty to Disclose Under state or Federal law principles, even if Applicable</u>

Beyond the *Chiarella* framework, certain lower courts have suggested that an affirmative duty to disclose can exist even absent a fiduciary duty or similar relationship of trust and confidence.[1] In well-reasoned opinions, several circuit courts have squarely confronted and rejected this suggestion. *See S.E.C. v. Tambone*, 597 F.3d 436, 448 (1st Cir. 2010) (*Chiarella* "instructs that a party's nondisclosure of information to another is actionable , . . *only* when there is an independent

[1] For example, relying on *dicta* in *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189 (2d Cir. 1995), repeated in *S.E.C. v. DiBella*, 587 F.3d 553, 563 (2d Cir. 2009), Judge Kaplan has reasoned that "unique access to information" can trigger a duty to disclose in certain circumstances. *Nemec v. Shrader*, No. 09 Civ. 7466, 2010 WL 3958655, at *2 & n.4 (S.D.N.Y. Sept. 27, 2010) (internal quotation marks omitted). Whatever value that *dicta* may have, the case law set forth in this section makes clear that, where insurance companies have the option to ask applicants about health information but choose not to, there is no unique access that would trigger a duty to disclose.

duty to disclose the information arising from 'a fiduciary or other similar relation of trust and confidence' between the parties.") (quoting *Chiarella,* 445 U.S. at 228)) (emphasis altered); *Fortson,* 961 F.2d at 472 ("[T]he duty to disclose material facts arises *only* when there is some basis outside the securities laws, such as state law, for finding a fiduciary or other confidential relationship.") (emphasis added). Thus, the analysis should end right here: since there was no fiduciary relationship with the insurance companies and or the Broker Dealer to disclose that the annuitants might have had a short life expectancy, there was no duty to disclose and therefore no fraud. But in this case, even if we were to look beyond
fiduciary-type relationships to other state law sources for an obligation to disclose, the result would still be the same, namely, that there was no duty to disclose unrequested health information and or life expectancy to the insurance companies and or the Broker Dealer.

It is a well-established insurance law principle that, generally, "[a]n applicant and a Broker for insurance is under no duty to volunteer information where no question plainly and directly requires it to be furnished." *Vella v. Equitable Life Assur. Soc. of US.,* 887 F.2d 388, 393 (2d Cir. 1989) (New York law). While an insured or a broker may have a duty to disclose certain extremely basic information even if not asked, such as that the insured risk has already occurred (e.g., even if the insurance company fails to ask the applicant for life insurance if the insured is alive, the applicant should not be applying for life insurance for someone who is already dead)[2], courts have repeatedly held that adverse health information, including terminal illnesses, does not fall within this narrow category compelling disclosure. "[A]pplicants for insurance have no duty to disclose ... medical history not specifically requested by an insurance company." *Metropolitan Life Ins. Co. v. Conger,* 474 F.3d 258, 267 (6th Cir. 2007) (holding applicant for long-term care insurance had no duty to disclose undiagnosed balance problems and

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[2] *E.g., Affiliated FM Ins. Co. v. Kushner Cos.,* 627 A.2d 710, 717 (N.J. Super. 1993) (holding under New Jersey law partnership had "duty to disclose a known fire loss to the prospective [property] insurer" offering backdated policy); *Sun Ins. Co. of N Y. v. Hercules Sec. Unlimited, Inc.,* 195 A.D.2d 24, 26, 30 (N.Y. App. Div. 1993) (holding under New York law applicants had duty to disclose to theft insurer that "they had already entered into [a] conspiracy to commit the theft").

This approach is also consistent with the position of the Restatement (Second) of Torts § 551(2)(e), which holds that a party to a transaction only has to disclose "facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts." A "basic" fact "is a fact that is assumed by the parties as a basis for the transaction itself. It is a fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction, but not go to its essence. These facts may be material, but they are not basic" *Id.* cmt (j).

medical history concerning same, since application did not specifically request such information); *accord, e.g., Southard v. Occidental Life Ins. Co. of Cal.*, 142 N.W.2d 844, 847-48 (Wis. 1966) (Under Wisconsin law, insured applicant for group-life insurance had no duty to disclose his quadriplegia because application only asked whether he had a "serious illness"). And the great weight of state authority has expressly rejected the suggestion that an insurance applicant has a duty to disclose a terminal illness if not asked about it. *See, e.g., Block v. Voyager Life Ins. Co.*, 303 S.E.2d 742, 744-45 (Ga. 1983) (insured applicant for credit life insurance had no duty to disclose his terminal cancer because "no health questions were ever asked of' him and "the policy . . . had no disqualification or exclusion for pre-existing health problems"); *Mulvihill v. Am. Annuity Life Ins. Co.*, 328 N.W.2d 402, 402-03 (Mich. App. 1982) (applicant for credit life insurance had no duty to disclose insured's terminal cancer because "[t]he insurance company did not request the information, and plaintiff did not have the duty to volunteer it"); *Uslife Credit Life Ins. Co. v. McAfee*, 630 P.2d 450, 453-55 (Wash. App.1981) (applicant for credit life insurance had no duty to disclose insured's terminal cancer "absent a request for health information or a statement of good health by an insurer"); *see also Comm.. Bankers Life Ins. Co. v. Kirk*, 675 P.2d 1069, 1071- 73 (Or. App. 1984) (insured applicant for credit life insurance and bank had no duty to disclose his terminal cancer where state regulations prevented insurer from asking health questions on application). Simply put, "[i]f [an insurer] wishe[s] to make a duty to disclose knowledge of terminal illnesses a condition of the policy, it should . . . include[] such a provision in the policy." *Mulvihill*, 328 N.W.2d at 403.

Furthermore, the one court to have considered the precise circumstance at issue here -- disclosure of the involvement of short-lived annuitants to insurers -- issued an opinion that fully supports the conclusion that Cohen in this case did not have a duty to disclose unasked for health information or the fact that the annuitants were terminally ill to either the insurance company or the broker dealer . In *Western Reserve Life Assurance Co. of Ohio v. Caramadre*, 847 F. Supp. 2d 329 (D.R.I. *2012)("Western Reserve II")* (on reconsideration of *Western Reserve Life Assurance Co. of Ohio v. Conreal LLC*, 715 F. Supp. 2d 270 (D.R.I. 2010) *("Western Reserve* I")), the court addressed a fraudulent inducement claim brought by insurers under Rhode Island law, premised in part upon

a failure to disclose the involvement of short-lived annuitants.

Looking to the Restatement (Second) of Torts, the court held that to state a claim for fraudulent inducement under Rhode Island law the defendant must owe a duty to disclose, which arises when the other party, "because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts." 847 F. Supp. 2d at 337-38 (quoting Restatement (Second) of Torts § 551(2)(e)). "If the parties expressly or impliedly place the risk as to the existence of a fact on one party or if the law places it there by custom or otherwise the other party has no duty of disclosure." Restatement (Second) of Torts § 551 cmt. (j). This narrow scope of required disclosure "reflects the traditional ethics of bargaining between adversaries" whereby "superior information and better business acumen are legitimate advantages, which lead to no liability." *Id.* cmt (k).

Applying the Restatement standard, the court in *Western Reserve II* concluded that the "sponsors," who orchestrated the annuity purchases and benefited from them financially, could not, as a matter of law, be found to have acted fraudulently because they owed no duty to disclose the involvement of short-lived annuitants to the insurers. *Id* at 340-41. By contrast, the court held that agents of the brokerage companies might have such a duty to disclose, based upon their status as "independent contractors" of the insurers who signed the annuity applications as "Licensed Agents." *Id* at 337-39 (internal quotation marks omitted). But here, Cohen is comparable not to the agents in *Western Reserve II,* but rather to the sponsors, in that Cohen had no relationship with the insurers that would justify imposing upon him a duty to disclose information that insurers and or the broker dealer could have, but chose not to, ask of him.[3]

In sum, there was nothing in the relationship between Cohen and the Broker Dealer or insurance companies that created an obligation on the part of Cohen to disclose to the Broker Dealer or the insurance companies that the annuities involved short-lived annuitants. Absent the duty to disclose, there is no viable fraud-by-omission case that the SEC could maintain against Cohen.

The Division's argument that a Scheme existed as Cohen willfully deceived the Broker Dealer that short-lived annuitants existed should fail as a matter of law. There were no Woodbury or insurance company restrictions

[3] There is clearly a distinction between a Broker and agent in the context of Insurance and duty between the two and an insurance company. The same would apply in the securities industry between a registered representative ("RR") and an investor. This same fiduciary duty between a RR and an investor does not extend to a RR and his Broker Dealer under securities law.

on the use of short-lived annuitants – so to state that Cohen schemed to deceive the Broker dealer to issue such annuitants contracts is creating a restriction that didn't exist at the time in 2008. The fact that Cohen answered 11-15 years on the Annuity Point of sale forms had nothing to do with the life expectancy of the annuitants- it rather was a response as to whether the owners intended to access the investments within the annuities which Feder clearly testified that they "did not plan on surrendering the contracts".

B. Because the Broker Dealer Decided to Forego Any Questions Regarding, and Otherwise Disclaimed Any Interest in, Annuitant Health Information, That Information Was Not Material.

To be actionable under the securities laws, an omitted fact must also be "material." *Basic Inc. v. Levinson,* 485 U.S. 224, 231, 238 (1988). The obligation to disclose and the materiality of the information are two distinct elements of a securities violation. For example, someone in a fiduciary relationship with a broker dealer or insurance company may have an obligation to disclose, but that obligation will not be triggered unless the information at issue is material; conversely, someone may be in possession of material information, but because of the absence of a fiduciary relationship with the broker dealer or insurance company, may well have no obligation to disclose.

In this case, not only was there no obligation to disclose the fact that the annuitants had a short-life expectancy, but in addition, the information was not material. "[W]hether an alleged . . . omission is material necessarily depends on all relevant circumstances of the particular case." *Novak v. Kasaks,* 216 F.3d 300, 315 (2d Cir. 2000). Here, the broker dealer's and insurance companies' own conduct demonstrates that the involvement of short- lived annuitants was not material.

Since insurance companies and the broker Dealer can require applicants to provide any information material to a risk, "information not asked for is presumably deemed immaterial." *Stipcich v. Metropolitan Life Ins. Co.,* 277 U.S. 311, 316 (1928). As the Supreme Court of Appeals of Virginia observed in affirming a verdict for an insurance applicant who did not disclose his wife's cancer:

> had [the insurance company] considered the health of the insured was material to the risk assumed, under the type of policy . . . issued, it could have required evidence of insurability, or a medical examination of the person to be insured, or a written application setting forth the physical condition of such person, or, at the least, it could have made an oral inquiry as to such fact.

Greensboro Nat. Life Ins. Co. v. Southside Bank, 142 S.E.2d 551, 555 (Va. 1965).

Nothing prevents Broker Dealers or insurers from posing health questions on annuity applications. To the contrary, insurers regularly ask extensive health-related questions before issuing products. As just one example, the life and/or critical illness insurance application for Sun Life Financial, one of the insurers involved in this case, contains five pages of questions exclusively devoted to the topic of "[p]ersonal medical history." (This follows four previous pages on topics that might affect health, such as drug and alcohol use, family medical history, and height and weight. *Id* at 23-26.) The application asks about possible health conditions affecting all parts of the human body, ranging from "[s]kin and connective tissue," to "[m]ental health," to "[a]bnormal growths or malignancies." *Id.* at 27-30. Just in case some obscure condition might slip through, it also includes catch-all questions such as "In the last 5 years, have you had an illness or injury which prevented you from performing your usual activities or the regular duties of your occupation for a period exceeding 2 weeks?" and "Do you have any symptoms for which you have not yet consulted a physician or received treatment?" *Id.* at 31. A person who answers "Yes" to any of these questions must then provided additional details about "each condition along with all related treatments, dates, durations, results, [and] names and addresses of all doctors, hospitals and clinics consulted." *Id.* Needless to say, all of the annuitants [including the broker Cohen] involved in this case would have been required to disclose the details of their health conditions had they been asked to complete a similar form.

Moreover, in the context of annuities, the insurance companies were on notice that they should ask these sorts of questions if they want to weed out short-lived annuitants. In an April 2007 Wall Street Journal Article, "How to Exploit Your Annuities," the author commented on the fact that variable annuities are best-suited for people in poor health:

> if you're in poor health or you're a retiree looking for income, here's an intriguing alternative: Buy variable annuities with part of your nest egg – and then wring maximum advantage out of the guarantees. . . . a variable annuity might pay your heirs either the account's current value or some guaranteed minimum, such as the dollars you invested plus 6% aruuial growth. This sort of souped- up death benefit might bring an annuity's total annual expenses to 3% of more. If you have more than five years to invest, it isn't worth paying that cost • • . . But suppose your health is deteriorating and your thoughts are turning to your heirs. Mr. Daughtrey recently had one such client. He atTanged for the client to buy five separate variable annuities, investing $100,000 in each.

> . . . Sound risky? It wasn't. The client's heirs profited handsomely from those funds that took off. What if a fund flopped? The heirs instead pocketed the annuity's guaranteed minimum death benefit. "It allows you to take more risk than you usually would," Mr. Daughtrey says. "It's one of the few opportunities to take advantage of an insurance company."[4]

Despite being aware that variable annuity products are the most attractive to individuals in poor health, and despite being highly experienced in eliciting health information, the insurers and or the broker dealer in this case did not ask for health information on the relevant annuity applications in late 2007 and 2008. As in *Greensboro,* the straightforward conclusion to be drawn from these facts is that the insurers and broker dealer (Woodbury) do not consider the involvement of short-lived annuitants to be material.

This conclusion is further supported in this case by the fact that the Woodbury and the insurance companies affirmatively disclaimed the existence of any material information not included among the questions asked on their applications or forms. For example, in email correspondence between Horowitz and a Lincoln representative, the Lincoln representative explained that the company did not engage in "underwriting" for these annuity products, but rather "aggregat[ed] the risk [associated with a given policy holder] with all the other policies holders." BDLO1108 (Lincoln). Other insurance companies similarly stated in writing that they did not engage in underwriting for these annuity products. *See* FNDO107341 (AIG representative "confirm[ing] . . . there is no underwriting required"); BDLO1117 (Nationwide representative confirming no "underwriting of either the annuitant or the owner").

Underwriting is the process by which insurers identify and classify the degree of risk represented by a proposed purchaser. *See* NAIC Glossary of Insurance Terms, *http://www.naic.org/consumer_glossary.htm#U*. Because underwriting practices reflect the impact that certain information would have on an insurer's assessment of risk (and hence the coverage it would be willing to offer), they are the standard means by which an insurance company demonstrates that information was material to its decision to issue a policy. *See, e.g.,* 6 Couch on Ins. § 82:15 ("Testimony of an insurer's soliciting agent as to its underwriting procedure for accepting or rejecting applications is admissible on the issue of materiality, and may, in fact, be necessary."); *Botway v. Am. Int'l Assur. Co. of N. Y.,* 151 A.D.2d 288, 290 (N.Y.A.D. 1989) (holding that because "the insure[r] does not adequately describe

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[4] **WSJ article titled "Investing with a Safety Net: How to exploit your Annuities"11 (April18, 2007)**

exactly what its underwriting practices are with respect to (specific information], it remains unclear to what degree (that information], had it been divulged, would have influenced the insurer's decision"). Since Woodbury and the insurance companies here expressly stated that they were not engaging in underwriting, it was clear from the outset that their failure to ask for health information or life expectancy was not a mistake or oversight, but rather a conscious decision that the information was not material in that it was not going to impact the insurers' or Woodbury's decision to sell the annuity products.

As further confirmation that health information was not material, none of the applications or broker dealer forms ask health questions or even ask as far as what the life expectancy of the annuitant is- in any of the exhibits the Division has brought forth within the hearing. The broker Dealer does not identify any health information, or any other unasked for information, as "material."

In light of this evidence, while the court in *Western Reserve I* held that the involvement of short-lived annuitants ***"could*** be found material by ajury," 715 F. Supp. 2d at 283 (emphasis added), that finding -- even assuming it is correct as a matter of law -- is not applicable here. At the motion to dismiss phase, the *Western Reserve I* court simply accepted the proposition that certain information could conceivably be material to insurers, even though the insurers did not ask about it. *Id.* at 284-85. In this case, the broker dealers and insurers' own conduct excludes the possibility that information could have been material to them but not asked about, the very premise on which the *Western Reserve I* decision rests. *See, e.g., Puritan Ins. Co. v. Eagle* S.S. *Co. SA.,* 779 F.2d 866, 871 (2d Cir. 1985) (finding fact that insurer "had been alerted to the . . . loss but had chosen not to seek further information as to its amount support[ed] . . . refusal to credit the testimony that [insurer] would have declined the risk had it known the amount of the . . . loss); *Home Ins. Co. of Ill. (N.H) v. Spectrum Information Techs., Inc.,* 930 F. Supp. 825, 842-43 (E.D.N.Y. 1996) (claim of materiality was "affirmatively undercut" by "contrary course of dealing between" the insurance company and insured under prior policy).

In sum, as a matter of law, unasked for health information or life expectancy is not material. That is especially so when the Woodbury or the insurance companies decided to forego asking health questions, questions that they, better than anyone else, know how to ask.

C. **Cohen Did Not Act With Scienter**

A Rule 1Ob-5 claim would fail in this case for yet another reason: because Cohen did not act with scienter. The weaknesses in the SEC's theory that Cohen's conduct was misleading, both with respect to duty to disclose and materiality, are only magnified in the context of scienter.

When bringing a case under Rule 1Ob-5, the SEC must prove that the defendant acted with scienter. *S.E.C. v. First Jersey Securities, Inc.,* 101 F.3d 1450, 1467 (2d Cir. 1996)(citing *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 n.12 (U.S. 1976)). In particular, the SEC must prove that the defendant acted with the "intent to deceive manipulate, or defraud," or engaged in "an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to [him] or so obvious that [he] must have been aware of it," *ECA, Local 134 IBEW Joint Pension Trust v. JP Morgan Chase Co.,* 553 F.3d 187, 198 (2d Cir. 2009) (internal quotation marks omitted), a standard frequently referred to as "extreme" or "severe" recklessness. *E.g., City of Dearborn Heights Act 345 Police & Fire Retirement Sys. v. Waters Corp.,* 632 F.3d 751, 758 (1st Cir. 2011); *Thompson v. Relation Serve Media, Inc.,* 610 F.3d 628, 634 (11th Cir. 2010); *S.E.C. v. Steadman,* 967 F.2d 636, 641-2 (D.C. 1992).

In a situation involving a failure to disclose information, absent direct evidence of an intent to mislead, scienter can only be inferred if the **defendant either knew of his duty to disclose and of the materiality of the omitted information, or those facts were so "clear" or "obvious" that he should have known them**. The Second Circuit has explained that when, for example, the duty to disclose is "not so clear," "defendants' recklessness cannot be inferred from the failure to disclose." *Kalnit v. Eichler,* 264 F.3d 131, 143-44 (2d Cir. 2001); *see also In re GeoPharma, Inc. Sec. Litig.,* 411 F. Supp. 2d 434, 446 (S.D.N.Y.2006) ("[A] failure to disclose particular information, by itself, can only constitute recklessness if there was an obvious duty to disclose that information."). Similarly, "[i]n a case . . . where the materiality of the [information] is highly debatable at best . . . the failure to disclose that [information] simply cannot lead to a finding of recklessness." *Kalnit v. Eichler,* 99 F.Supp.2d 327, 343 n. 15 (S.D.N.Y. 2000); *see also LL. Capital Partners, L.P. v. Rockefeller Center Properties, Inc.,* 921 F. Supp. 1174, 1183 (S.D.N.Y. 1996) ("The materiality of the . . . alleged nondisclosure . . . is highly debatable, which indicates that the nondisclosure in itself is not a sufficient basis from which to infer conscious

misbehavior.").

The conclusions that I) Cohen owed a duty to disclose unrequested annuitant health information, and 2) this information was material despite the broker dealer's or insurers lack of underwriting or asking about the health of the annuitants, are both, at a minimum, "highly debatable" and far from "clear" or "obvious." Indeed, as detailed above, both conclusions would be contrary to a substantial amount of prior authority. Simply looking at the concepts in the abstract, there is no way for a court to infer that Cohen knew or should have known that they were violating a duty to disclose material information. It would be nearly impossible to say that Cohen should have known that he had an obligation to disclose, when court after court, both before and after they made these investments, has concluded otherwise.

Moreover, the available evidence as to Cohen's state of mind in this case confirms that they he was not acting with the requisite scienter. Cohen first learned of the strategy of purchasing annuities with short-lived annuitants through Horowitz, a Morgan Stanley broker indicating that the strategy was not fraudulent.

Cohen also reviewed written materials from Woodbury indicating that he would not be committing a fraud on the insurance companies or Woodbury. Cohen also reviewed the Woodbury forms to confirm that the "investment access" questions and other questions were answer answered truthfully because no health information and no life expectancy was asked. Cohen also received the Wall Street Journal article from Horowitz openly discussing the fact that variable annuities are best-suited for people in poor health. This article was consistent with Cohen's general knowledge that investing in risk products tied to the deaths of short-lived individuals was already common in the variable annuities market.

Finally, Cohen was also aware that the strategy, including the involvement of short-lived annuitants, was reviewed by both in-house and outside counsel of Horowitz and the fund. None of the lawyers that Feder and Horowitz consulted suggested that the Cohen or the clients had a duty to disclose unrequested health information or life expectancy, or that such information would be material. And any lawyer who had looked into the question would have discovered that the case law holds there is no duty to disclose, and the information is not material, under the circumstances of this case.

To confirm the above- Cohen sent and reviewed FINRA Reg. 2821 before any annuities were written. No

written Woodbury or Finra regulations restricted the use of short –lived annuitants so Cohen had no reason to believe that such use would not be allowed by Woodbury. Any claim by the Division that Cohen purposely answered the "Investment Access" question to cover up a restriction that he did not know existed is ludicrous.

In sum, all of the information available to Cohen in this case, indicated that the involvement of short-lived annuitants was not fraudulent; none of the available information would have caused Cohen to even suspect - much less know - that he owed a duty to volunteer unrequested health information to Woodbury or insurance companies he brokered and sold their contracts, or that the information would be material to Woodbury or the insurance companies even though the companies did not ask about it and did not engage in underwriting. The SEC's claim therefore fails for the additional reason that Cohen did not act with scienter.

I. THE USE OF NOMINEES DID NOT AMOUNT TO IOb-5 FRAUD ON THE BROKER DEALER OR INSURANCE COMPANIES

The Division argued that it was both a material misrepresentation to list nominees as the owners and beneficiaries of the variable annuity contracts, as well as a material omission. Insofar as the Division pursued an omission theory, the exact same analysis applies to the use of nominees that applies to the use of short-lived annuitants; just as Cohen had no obligation to disclose the use of short-lived annuitants, so he had no obligation to disclose the use of nominees. Even if the Division argues a misrepresentation theory, as shown below listing nominees as the owners and beneficiaries on annuity applications or Woodbury's forms does not constitute an affirmative misrepresentation. Multiple courts have held that listing a nominee as an owner or beneficiary on an insurance application or even a broker dealer is not a misrepresentation. Moreover, nominees are legally used in a variety of different contexts. Finally, even if listing a nominee as an owner or beneficiary were a misrepresentation, it was not material.

A. Listing Nominees as the Owners and Beneficiaries on Annuity Applications Was Not a Misstatement

In *Kramer v. Lockwood Pension Servs.*, 653 F. Supp. 2d 354 (S.D.N.Y. 2009), Judge Batts held that listing nominees as the owners and beneficiaries on applications for life insurance policies did not constitute misrepresentations, despite the fact that the nominees were not the intended or actual beneficiaries of the policies in

question. *Kramer* involved stranger-originated life insurance transactions. The insured, Kramer, agreed to allow outside investors to create trusts to purchase life insurance policies on himself. Based on an understanding he reached with the outside investors before purchasing the insurance policies, Kramer named his children as the beneficiaries of the trusts, and then they immediately assigned their beneficial interests in the trusts to the outside investors who had no relationship to the insured. While Kramer appeared to be the purchaser and his children appeared to be the beneficiaries, in reality they were mere strawmen; the outside investors put up all the funds and stood to reap the benefits upon the death of the insured. After Kramer passed away, the insurance company refused to pay any death benefits and asserted claims against the insured and the investors for fraud.

Judge Batts granted the motion to dismiss the insurance company's claims, noting that the company failed to articulate an actual misrepresentation. Judge Batts explained:

> The closest Phoenix [Life Insurance Company] comes to pleading fraud at any point in their counterclaims is their allegation that ". . . Mr. Kramer, Lockwood and the Trustee implicitly represented that (a) the Kramer August Trust would be the true owner and beneficiary of the requested Phoenix Policies (i.e. not just a strawman) and (b) the Kramer August Trust and its intended beneficiary had an insurable interest in Mr. Kramer's life. "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 in the application..... 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.

Id. at 379. Judge Batts thus held that it is not a misrepresentation -- let alone a material misrepresentation -- to list an individual or entity as the owner or beneficiary on an application for a life insurance policy even if the individual or entity is a strawman (i.e., a nominee) that has assigned its beneficial interests to a third party stranger. That holding undermines any fraud theory in this case based on an allegation that the use of nominees constituted a misrepresentation. Moreover, *Kramer* was decided in the context of life insurance, where insurable interest is required and the relationship between the beneficiary and the owner is thus potentially relevant. If using nominees does not amount to fraud in the life insurance context, it should certainly not be fraudulent in the variable annuity context, where insurable interest is generally not required and the relationship between the beneficiary and owner is much less relevant, if not completely irrelevant.

An opinion by the New York Court of Appeals in the same case provides further support that, at least under New York law, the use of nominees is permitted in the insurance context. On appeal from the decision described above, the Second Circuit certified to the New York Court of Appeals the following question: "Does New York Insurance Law . . . prohibit an insured from procuring a policy on his own life and immediately transferring the policy to a person without an insurable interest in the insured's life, if the insured did not ever intend to provide insurance protection for a person with an insurable interest in the insured's life?" *Kramer v. Phoenix Life Ins. Co.*, 940 N.E.2d 535, 545 (N.Y. 2010). The court held that New York law permits an insured to immediately assign the proceeds of a life insurance policy to a stranger, despite the lack of an insurable interest. *Id.* at 551. By immediately assigning a beneficiary's interest in a life insurance policy to a stranger third party, the beneficiary is functionally acting as a nominee.The fact that the New York Court of Appeals explicitly permitted this practice can be viewed as an implicit endorsement of the use of nominees to purchase life insurance policies and, by extension, annuities.[5]

B. Nominees Are Legally Used in a Variety of Contexts

The fact that using a nominee is permissible is not surprising given the widespread use of nominees in a variety of contexts, including the securities context. In general, securities are often purchased in through nominee accounts, which refers to when the security is registered under a different name than the beneficial owner of the security. Often the nominee is a brokerage firm (referred to as "street name registration"). Securities laws and regulations distinguish between "legal ownership" and "beneficial ownership" of a security. Shareholders that have beneficial ownership of at least 5% of the outstanding shares of a company are subject to SEC reporting requirements. 17 C.F.R. § 240.13d-l. Shareholders that own less than 5% of shares are allowed to keep their identities secret. One treatise notes that one of the primary -- and legitimate -- purposes of using nominee accounts is to preserve the anonymity of the purchaser. James Robert Brown, *The Regulation of Corporate Disclosure* §15.02 (2012).

Securities law thus recognizes nominee arrangements as legitimate, and using a nominee to purchase a security is not

[5] In so holding, *Phoenix Life* rejects the contrary interpretation of New York law that Judge Scheindlin had previously advocated in *Penn. Mutual Life Ins. Co. v. Wolk,* 739 F. Supp. 2d 387 (S.D.N.Y. 2010), regarding the use of nominees in the life insurance context, and Judge Scheindlin's opinion is therefore no longer good law.

illegal in and of itself.

The Division failed to state any case that holds that the use of nominees by itself constitutes fraud. While some courts have found that using nominees may be fraudulent, these cases have generally involved scenarios where nominees were used to violate or circumvent a law, regulation, or contractual provision. For example, if there were a regulation or contractual provision limiting the number of shares that could be purchased by a single investor, and an investor used nominees to purchase more shares than was allowed, that would constitute fraud.

S.E.C. v. Jakubowski, 150 F.3d 675 (7th Cir. 1998). In such a case, the identity of the beneficial owner is material to the transaction, and using a nominee is misleading. *Id.* One court also found fraud when two people held the vast majority of shares in a company but used nominee accounts to make it appear as if there were many different shareholders. *See United States v. Jenkins,* 633 F.3d 788 (9th Cir. 2011). The company was required to disclose any shareholders owning or controlling a 5% or greater beneficial interest in the company in its SEC filings, but the two individuals used nominees to circumvent that requirement. The two individuals then proceeded to falsely promote the company's prospects to increase the share price. *Id.* at 794-96. The court held that the scheme was fraudulent because a reasonable investor would have wanted to know that the company's allegedly lucrative transactions were shams and were in fact being orchestrated by two individuals who controlled millions of shares of the company's stock. Using nominees to circumvent the SEC's reporting requirements and hide the fact that these individuals were conducting sham transactions to artificially inflate the company's stock price was fraudulent. *Id.* at 802.

There is no specific law, regulation, or contractual provision that Cohen violated through the use of nominees. If, for example, an annuity company prohibited institutional investors from owning an annuity, but the Funds used nominees to circumvent that provision and purchase the annuity, then the use of nominees could potentially be fraudulent. Nationwide Financial did have such a prohibition, and Cohen opted not to sell annuities from Nationwide as a direct result. None of the annuity companies Cohen sold annuities from had any such prohibition or any similar prohibition on nominees serving as owners of annuity contracts. Woodbury clearly had no WRITTEN restrictions or restrictions known to Cohen at the time that restricted the use of nominees.

C. The Fact that the Owners and Beneficiaries Were Nominees Was Not Material to the Insurance Companies

Moreover, the fact that the owners and beneficiaries listed on the annuity applications were serving as nominees was not material. Notably, none of the annuity companies or even Woodbury asked any questions that might attempt to elicit whether the owners or beneficiaries were in fact serving as nominees, nor did the Woodbury

forms or compliance manuals, annuity applications or prospectuses anywhere indicate that nominees were prohibited. Furthermore, Woodbury owned by the Hartford and the other insurance companies know how to ask such questions. For example, Nationwide Financial's annuity application required the owner to affirm that he did "not represent a corporate entity or institutional investor" and did not plan to assign any benefits under the contract to a corporate entity or institutional investor.

Importantly, Baker from Penn Mutual testified that insurance companies are all intimately familiar with stranger-originated life insurance transactions, and many of them include questions on their life insurance applications designed to determine whether the listed beneficiary on a life insurance application is in fact the true beneficial owner. For example, a 2009 District of New Jersey case noted that Lincoln's life insurance application inquired "whether the applicant had engaged in any discussions regarding possible sale or assignment of the policy to 'a life settlement, viatical or other secondary market provider.'" *Lincoln Nat. Life Ins. Co. v. Calhoun,* 596 F. Supp. 2d 882 (D.N.J. 2009). Thus insurance companies know how to design an application that prohibits an individual from serving as the owner or beneficiary of a contract if that individual has no beneficial interest in the contract -- in other words, they know how to ask and routinely do ask the questions necessary to determine if the owner or beneficiary is a nominee. The fact that the companies omitted any such questions on their variable annuity applications indicated that they did not care whether the owners or beneficiaries were nominees. The use of nominees or the use of short-lived annuitants was therefore not material to the broker dealer or the insurance companies and was therefore not fraudulent.

D. <u>Cohen Did Not Act with Scienter</u>

A Rule 1Ob-5 and 17(a) claim would also fail in this case because Cohen did not act with scienter. As in the context of short-lived annuitants, the weaknesses in the SEC's theory of a material misrepresentation are only magnified in the context of scienter.

The Division failed to prove that Cohen acted with intent to deceive or extreme recklessness. *See supra* at 14. Setting aside a defense based on consultation with Woodbury's manual as well as the industry standard as well as Cohen's understanding of the "investment Access" question when an individual or entity is alleged to have made a material misstatement, the Second Circuit has stated that

"securities fraud claims typically have sufficed to state a claim based on recklessness when they have specifically alleged defendants' knowledge of facts or access to information contradicting their public statements. Under such circumstances, defendants knew or, more importantly, should have known that they were misrepresenting material facts . . . ," *Novak v. Kasaks,* 216 F.3d 300, 308 (2d Cir. 2000). Thus, in order to show that Cohen acted with scienter, the Division must show that Cohen knew or should have known that listing nominees as the owners and the beneficiaries, and answering the 'investment access" question with his understanding on Woodbury's form constituted a misrepresentation of material facts.

There is no evidence that Cohen acted with the requisite scienter. First of all, as the discussion above amply demonstrates, it was, at a minimum, a reasonable position for Cohen to conclude that he was not making any misstatements, and that the involvement of nominees was not material as well as his response to the "Investment Access" question was correct. Indeed, this is precisely the conclusion that Judge Batts reached in 2009. It would be quite striking to say that the Cohen should have reached a conclusion on their own that was flatly contrary to the position that Judge Batts would endorse shortly afterwards.

Moreover, there is significant affirmative evidence demonstrating Cohen's good faith. As with the involvement of short-lived annuitants, Cohen first learned of the potential use of nominees and short-lived annuitants through Horowitz while he was at Morgan Stanley, suggesting that it had previously been approved from a legal perspective by Morgan Stanley. Cohen was also aware of the common and entirely legal use of undisclosed nominees in business transactions, including securities transactions. Cohen reviewed annuity applications, the Woodbury Annuity Forms, together with Woodbury's manuals as well as FINRA Suitability requirements and confirmed that his answers were correct and that no restrictions as to the use of the annuities with short-lived annuitants existed.

Finally, as testified to by Feder, Cohen was aware that the Investors and funds disclosed the strategy, including the use of nominees and the annuity applications and Woodbury forms that would be completed, to four attorneys, both in-house and outside counsel, and none of them suggested that any of the questions would be filled out incorrectly, and that any material misrepresentations to the insurance companies or broker dealer would exist as a result; to the

contrary, counsel specifically advised them that using nominees was both legally and contractually permitted.

All of the available evidence thus confirms that the Cohen did not know and had no reason to know that he would be misrepresenting material facts to Woodbury by using nominees and or short-lived annuitants. Cohen, also believed that his response to the "Investment Access" question was answered correctly and that even if he his understanding was wrong- that question is deemed immaterial as to the requirement of securities law. The SEC will therefore not be able to show the requisite scienter.

I. The Division's Attempt to Charge Cohen with Scheme Liability by Expanding on the OIP from the "Investment Access" is a mere back-up strategy by the Division to counteract Cohen's plausible and reasonable response to the "Investment Access" question.

The Division only states one of many defenses that Cohen listed in his brief. Clearly, the Division fails to argue the fact that this case does not belong in a securities courtroom and rather in a Common Law forum. The fact that securities are involved do not necessarily make an alleged fraud into a securities fraud case.

Secondly, the Division attempts to create a new criteria for "material" requirement that clearly expands that which congress intended. Stating that the alleged misrepresentation was material since "none of his variable annuity business would have passed….." is not what congress intended when it created the "reasonable investor" criteria.

Thirdly, the Division's attempt to discard Cohen's argument that he did not act with scienter by bringing Smallidge into the picture fails. Any conversations Cohen had with Smallidge occurred over a week after any annuities were sold- and cannot be used to create scienter. Cohen – knowing that his compensation was on hold for reasons other than what the Division claimed- was attempting to retrieve his commissions that were owed- before he left to his already approved new Broker Dealer – World Equity Group. The Division's claim that there could be no other plausible reason to Cohen's statements over a week after the sales occurred is an example how the Division has attempted to recreate the their own version of the facts to try their case against Cohen. Smallidge only attempted to Call Cohen over a week after any annuities occurred. Judge Murray even commented that he called the other guy for over three weeks of which no message was relayed to Cohen.

Smallidge was clearly not Cohen's supervisor- nor has the Division proved that Cohen had a Duty to speak to Smallidge. To the Contrary, Smallidge admits that he wasn't Cohen's supervisor and rather Mr. Frieda (Cohen's

partner was Cohen's supervisor).

Even if Cohen erred in his understanding of principal review as detailed by the Division in footnote 2 of the Division Reply brief; - Cohen still had a reasonable basis to believe that principal wasn't necessary by Woodbury as he was aware of the industry standard, FINRA rules and even a review of Woodbury's manual at the time – which in no way conclusive to the Division's claim.

III. Cohen Did Not Engage in a Fraudulent Scheme

The Division's attempt to ambush Cohen and expand on the OIP in order to justify their argument of a scheme is in violation of Cohen's Fair Trial rights. The only allegation the OIP covered was the alleged misrepresentation of the "Investment Access" question, any other allegation cannot be used to justify the Division's scheme theory.

a. COHEN DID NOT RECEIVE A FAIR TRIAL AND ACCUSATIONS AGAINST THE DIVISION ARE CREDIBLE AND TRUE

Cohen did not receive a fair trial due to the outright lies that Dean Conway and the Division made about the length of the hearing. Conway clearly stated that the Division was going to put on their witness the first 5 days while Cohen would have up to 5 days after Labor Day. Robert Rose Esq. – Michael Horowitz's attorney will testify to such under oath if needed.

Howard Feder testified that he never told Cohen about the responses for the Broker Dealer forms including the "Investment Access" questions. The fact is and the record will show that after the January 13th, 2008 conference call that Cohen was on- no identities or contact info were exchanged between Cohen and Feder. All info as the record will show was through Abe Gottesman and Michael Horowitz. Both Horowitz and Gottesman would have testified that Feder stated the responses to all the questions on the Broker Dealer forms. This is confirmed by Exhibit 1176 that clearly shows that all the information went to both Horowitz and Gottesman. Cohen never received the information straight from Feder or the fund until February 1st 2008. Cohen was told all the responses by Horowitz and/or Gottesman and he did review the responses to make sure that they were correct. The testimony of Gottesman and Horowitz would have confirmed Cohen's position.

Even though Feder clearly testified that he did never reviewed the "Holding Period", the "Surrender Charge" or

even the "Investment Access" question- Exhibit 1601 which was also read into the record when both Feder and Bina Levy were on the stand showed the opposite. **Feder himself stated that "Are you ok that the money you are using to buy the annuities might be locked up to 9 years and you might not have access to the money during that time (answer is yes)." Feder not only asked Bina Levy the question – he answered it for her.**

The same was true with Judah Perlstein who was a nominee as well. Feder wrote "Is she ok that the money she is using to buy the annuities might be locked up for up to 9 years and she might not have access to the money (answer is yes)." Once again Feder not only asks the question but tells Perlstein to respond "yes".

This alone makes Feder's testimony suspect- as both Horowitz and Gottesman would have testified that their counsel reviewed the Broker Dealer forms with Michael Wolf Esq. (their counsel) and made Cohen aware that all answers would be answered correctly. See Exhibit 119 that Cohen emailed the Woodbury Forms to Horowitz to be reviewed by counsel before proceeding with any sales etc.

Horowitz's testimony was not only relevant but it would have undermined the Division's entire case. - Knowing this the Division choose to collude and sabotage Cohen's key defense witnesses from California.

The Division's attempt to state that Cohen had no witnesses from CA is an outright lie- at the time of Cohen's filing of a Motion in Limine as well as motion to move venue to NY- the Division's case was much broader- but as the hearing date progressed Cohen's need for Horowitz and Gottesman together with some other witnesses to testify on Cohen's behalf became more necessary.

See Exhibit A for flight reservations of both Michael Horowitz and Robert Rose Esq. (Horowitz attorney).

Cohen clearly did not receive a Fair Trial by the Honorable Judge Murray.

1. Judge Murray's First Pro Se Hearing as admitted to during the Hearing.
2. SEC Treachery and Biasness and pushing complex cases through a SEC proceeding instead of an impartial Court.
3. Judge Murray's haste to finish the hearing simply to accommodate her new schedule which was not shared until it was too late to adjust and have Cohen's witnesses attend.
4. The Court allowed the ambushing of Cohen by not allowing him to have a voice during the hearing with constant rushing and abrupt orders to end any questions within minutes of

questioning.

5. Judge Murray did clearly state that the trial would be held for 10 days on March 21st, 2014 and even signed subponeas for 10 days for the witnesses to attend.

Canon 3 of the New York Code of Judicial conduct requires judges to perform their duties impartially and diligently. The American Bar Association's (ABA) Model Code of Judicial Conduct contains a similar Canon 3. Title 18 NYCRR §358-5.6(b) requires ALJs to ensure a complete record and to provide non-attorney litigants with certain basic information about the hearing process amongst other things:

- Elicit documents and testimony, including questioning of parties and witnesses, if necessary, particularly where the litigant demonstrates difficulty or inability to question a witness,
- Adjourn the hearing when in the ALJ's judgment it would be prejudicial to due process rights of the parties to go forward with the hearing, and,
- Where necessary to develop a complete record, issue subpoenas, and or require the attendance of witnesses and the production of books and records.

Several courts have invalidated fair hearing decisions in which ALJ's failed to follow the above regulatory requirements, *Blackman v. Perales*, 188 A.D. 2d 399 (1st Dept. 1992), *Schurr v. Perales*, 115 A/d2d 740 (2nd Dept. 1985), *Echevarria v. Secretary of Health and Human Services*, 685 F. 2d 751 (2nd cir. 1982). *In Felix v. Wing*, 2/1/2000 N.Y.L.J. 27, col. 1 (Sup.Ct. N.Y. Co., Schlesinger, J) the Court ruled that due process under the Federal and State Constitutions require that a fair hearing provide a pro se petitioner a meaningful opportunity to understand and participate in a proceeding and to be adequately heard. (Cohen was clearly not heard due to the Biasness of the Court against him).

In *Haines v. Kerner*, 404 U.S. 519 (1972), the US Supreme Court held that a self-represented litigant's complaint must be held to less stringent standards than the formal pleadings that attorneys would draft. The court was clearly not only not passive in its posture against Cohen during the hearing it affirmatively denied Cohen – a pro-se litigant due process by the constant silencing of Cohen's defense throughout the hearing.

Due Process Violation Examples during the Hearing

Cohen would like to point out how lopsided and biased the Court was to respondent Cohen.

- Tr. 667 – Court biased and leading comments
- Tr. 608:18 Cohen warned that he has only 3 minutes to cross examine Division's witness
- Tr. 610:6 Court states Cohen has 1 more question.
- Tr. 651:16-653:25 Court seems to have pre-judged Cohen by mention of Sanction and Public interest.
- Tr. 462:14-463:19 - Court was unaware of what insurable interest was – where the prehearing brief explicitly and easily explained such.
- Tr. 473:4-8 Court comment that was biased against Cohen
- Tr. 306 Court seems to coach Division's witnesses.
- Tr. 610-13 Court states "Okay. That's it" to Cohen cross examining Division's witness.
- Tr. 306 Court assists the Division in the line of questioning that was unfairly prejudicial to Cohen. (9-14)
- Tr. 717-719 Court had an off the record conversation with key division witness (mistakenly recorded) conversation without the presence of Cohen.
- Tr. 591:21-592:2 Cohen constantly had to correct the Court as to claims that committed fraud. Cohen had to constantly interject that it was allegedly etc.
- Tr. 398 Courts claim to crack down on Cohen's cross examinations of witnesses.
- Tr. 404 Courts comment to not back track.
- Tr. 410 Courts comments that Cohen only had 20 minutes left.
- Tr. 395 Court's comments that are clearly prejudicial against Cohen (16-19)
- Tr. 349 Court's assistance in helping Division in questioning the Division's witness.
- Tr. 365:11-16 Court's comments and prejudging once again.
- Tr. 366:7-13 Court once again cutting Cohen off and throwing him off track.
- Tr. 542 Court's insistence of showing division's evidence to another of Division's witnesses. Playing prosecutor and Judge at the same hearing.
- Court not allowing 3 key witness's that were from out of state to testify on Cohen's behalf- clearly exonerating the Division's claims.

There were many more instances of where the Court was unfairly biased against Cohen depriving Cohen a fair and impartial hearing.

Brian Jedwab Division Witness

Brian Jedwab testified that he never spoke to or ever met Marc Cohen (Tr. 21:12-18), (Tr. 67:9-22). So any testimony or claim that Jedwab testified to as to Cohen making recommendations is unsubstantiated hearsay and non-admissible. Jedwab then contradicts his previous statements and states that he "does not know" of which the court confirmed "He doesn't know". (Tr. 59:14-60:23)

Jedwab also testified that he wasn't at the meeting with Horowitz when introduced to annuity strategy (Tr. 29:7-16).

Jedwab also qualified the funds as institutional investors by mentioning they allocated 60-70 million dollars (Tr. 31:11-13).

The Court stated that Jedwab was not involved in the "Nooks and Crannies of the Deal". (Tr. 50:23-51:22).

At Cross Jedwab seems to recall that his wife purchased annuities through other agents like Horowitz and Finestone- initially Jedwab claims they were purchased from Horowitz but recalls the brokers names after prompting from Respondent. This clearly shows that the Fund, BDL, Feder and affiliates of the fund previously purchased annuities from other brokers. This confirms Cohen's claim that he did not make any recommendations as to product or investments. (Tr. 61:6-63:13)

In Summary, the Division's attempt to create a tie between Brian Jedwab and Cohen fails. They both never

spoke to each other or had any contact with each other prior to the hearing.

Bina Levy Division Witness

Bina Levy repeatedly stated that the events were "such a long time ago". (Tr. 112:25-113:1). She also confirmed that "it was a long time ago. That is why I am really not remembering. (119:21-25). Mrs. Levy then testifies that "this is over 6 years ago....).

Mr. Feder testified that he never spoke about surrender charges or a lock up period with Cohen or others. Mr. Feder clearly lied as he clearly stated in paragraph 3 of (Exhibit 1601A) that was read into the record at Tr. 133:14-136:5 clearly stating that "**the annuities might be locked up for up to 9 years and you might not have access to the money during that time (answer is yes)".** This also proves that other Brokers (in paragraph 2) were involved with the nominees and the fund. This completely and directly disputes the Division's OIP that Horowitz or Others did not sell the fund and rather introduced Cohen to sell the fund annuities.

Richard Jedwab Division Witness

The Division refers to the Nominees as the actual nominees to the annuity purchases- there were no written nominee agreements for any of the annuities that Cohen sold the investors nor has the Division produced them as they don't exist. Both Exhibits 1191 and 1418 show dates of 11/13/07. This clearly shows that the Nominees, funds, and Trustees were purchasing variable annuities prior to Cohen learning about the annuities in Vegas in the beginning of January 2008. Once again this is a fact that the Division tried to cover up from the Court in order to try and falsely make accusations that Cohen was the first to sell these Owners the variable annuities.

Howard Feder Division Witness

Feder testified that BDL and the funds had in excess of $100 million in assets – qualifying the Fund and BDL as institutional investors- (which FINRA and SEC would exempt the suitability requirement). (Tr. 361:21-25)

Feder confirms Cohen's claim that the Investors and Feder were already purchasing Annuities from other brokers prior to Cohen's arrival. He also confirmed that there were purchases through trusts and purchases by individuals that Feder was involved in. The Division purposely deceived the Court to believe that Cohen was the first Broker to sell annuities to the Investors involved with BDL. (Tr. 247:16-23).

Feder confirms that the Investors would have remained in the Annuities if the annuitants lived 10 years or more. (Tr.253:10-23)

Q. Now, Did BDL have any intention of remaining in any of the annuity investments for 10 or more years?

A. I guess if the annuitants lived that long.

Feder also says the following: "We never planned on surrendering the policies." (Tr. 277 9-10).

Feder also states that he doesn't know how Cohen got involved and that he doesn't know if the strategy was discussed during the call.

To confirm the dubious trickery of Dean Conway and the Division in tampering of the Exhibits of Division Exhibit 288 with Division Exhibits 396 and 397- see Tr. 267-273. See brief for more details of the cut and paste of the Division in order to mislead the court as to when Feder first received the spreadsheet which was prior to Cohen even knowing the details of the strategy on January 2nd 2008.

The Division attempts to state that Cohen admitted to making a recommendation at Tr. 362- their argument has no legs as the following paragraphs clarify Cohen's intent on his questions to Feder. Feder clearly states that they had no qualms with Cohen or his processing of the business. Feder also testified that they were making money and that the investors were happy with Cohen. (Tr. 362:13-364:4).

The Court confirms that "He [Feder] has told you it was a lot of data that they were given and then made a decision from it.-(Tr.394:23-395:1).

Steven Smallidge Division Witness

Any conversations or emails between Smallidge and Cohen are deemed immaterial on at least two grounds.

1. The Division has failed to prove that Cohen had a duty to speak to Smallidge whom was only a Marketing Director. Smallidge was not Cohen's supervisor. Smallidge's role was to help add registered

reps to Woodbury and help generate income. Smallidge clearly testified that Frieda was Cohen's supervisor. (Tr. 598:10-20)

2. Any conversations with Smallidge occurred AFTER the sales and had no impact on the sales. So any attempt by the Division to state that Smallidge's testimony proves Scienter – must fail as an after the fact issue. It would also fail the 'in connection" test.

Tim Stone Division Witness

Cohen was denied a Fair trial throughout the hearing. He was repeatedly rushed, and silenced and cut short various times. At Tr.717-718, Cohen asked for a few minute break- unbeknownst to Cohen the Court held a side bar conversation with the Division's witness which was held off the record which is a complete disregard to Cohen's right if a fair trial. Fortunately for Cohen the court recorder continued typing and this was documented.

Stone clearly showed that he himself was confused as to industry and Finra regulations. He was at 3 Broker Dealers since 2008. Various Finra regulations were in place throughput that period, and although Stone testified that suitability in his opinion was needed in unsolicited sales**- nowhere do the manuals confirm such statements. (Tr. 723-726).**

Stone testified that Finra and the SEC always require suitability rules in all cases. As per the brief and any Finra memo in regards to suitability clearly shows how wrong stone is. As a suitability specialist as he self-described himself during his testimony- he clearly has no clue as to whether suitability is needed or not. If his understanding of the industry Standards and Finra regulations are wrong, - he surely has been wrong with his interpretations of Woodbury Rules especially when no written rules corroborate Stone's testimony. (Tr. 757:4-14). Stone's credibility as to the core subject matter of suitability in this proceeding is not only questionable but suspect of being biased.

Stone also admits that Time Horizon or the liquidity issue was never brought up by him or Woodbury (Tr. 745:21-746:1-7).

Moshe Marc Cohen Testimony

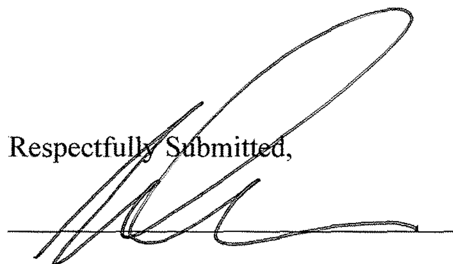
Dean Conway asked Cohen to read a sentence into the record at Tr. 834:1- 835:2. He cut Cohen off before the context of last few words of the sentence show the purpose of Woodbury Suitability forms. This pattern of deceit has been prevalent throughout the proceeding and should be noted.

Conclusion

Based on the above factors, we petition the Court to rule fairly and impartially with Cohen's constitutional rights in mind, together with how the securities laws were written in order to find Cohen not guilty of any securities law violations.

November 17, 2014

Respectfully Submitted,



Marc Cohen Pro Se

EXHIBIT A

Sent from my BlackBerry 10 smartphone.

From: Mike Horowitz < >
Sent: Saturday, November 15, 2014 11:02 PM
To: Marc Cohen
Subject: Fwd: Itinerary for New York Sun, Aug 31, 2014

Is this what you're looking for?

Sent from my iPhone

Begin forwarded message:

> **From:** Alona Horowitz < >
> **Date:** November 15, 2014 at 7:59:02 PM PST
> **To:** " " < >
> **Subject: Fwd: Itinerary for New York Sun, Aug 31, 2014**
>
> Sent from my iPhone
>
> Begin forwarded message:
>
> > **From:** Orbitz <travelercare@orbitz.com>
> > **Date:** November 15, 2014 at 7:58:25 PM PST
> > **To:** < >
> > **Subject: Itinerary for New York Sun, Aug 31, 2014**

ORBITZ Trip Itinerary

Itinerary for New York Sun, Aug 31, 2014

You can always view your itinerary online for the most up-to-date information.

Orbitz booking number: **PBORB-844-417-5334**

This flight has been cancelled

YOUR FLIGHT

Outbound

**Please do not respond directly to this e-mail. Contact us here
This booking is subject to our Privacy Policy and our Terms and Conditions.
Again, thank you for choosing Orbitz.
Enjoy your trip!

Orbitz
500 W. Madison St. Suite 1000
Chicago, IL 60661

Sent from my BlackBerry 10 smartphone.

From: Bob Rose <rrose@sheppardmullin.com>
Sent: Monday, November 17, 2014 11:54 AM
To: Marc Cohen
Subject: FW: E-Ticket Confirmation-AMACFS 30AUG

Marc:

Here's my receipt. I'll look today for more info on the other question you posed.

Bob

From: American Airlines@aa.com [mailto:notify@aa.globalnotifications.com]
Sent: Wednesday, August 13, 2014 9:37 AM
To: Bob Rose
Subject: E-Ticket Confirmation-AMACFS 30AUG

Reservations Redeem Miles My Account Deals

eTicket Itinerary & Receipt Confirmation

Ticket Issued: Aug 13, 2014

Robert Dale Rose,

Thank you for choosing American Airlines / American Eagle, a member of the **one**world® Alliance. Below are your itinerary and receipt for the ticket(s) purchased. Please print and retain this document for use throughout your trip.

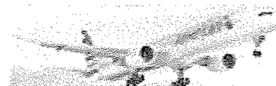
You may check in and obtain your boarding pass for U.S. domestic electronic tickets within 24 hours of your flight time online at AA.com by using www.aa.com/checkin or at a Self-Service Check-In machine at the airport. Check-in options may be found at www.aa.com/options. For information regarding American Airlines checked baggage policies, please visit www.aa.com/baggageinfo.

For faster check-in at the airport, scan the barcode below at any AA Self-Service machine.

You must present a government-issued photo ID and either your boarding pass or a priority verification card at the security screening checkpoint.

You can now Manage Your Reservation on aa.com, where you can check in and purchase additional items to customize your journey. A variety of seating options are also available for purchase to enhance your travel with features such as convenient front of cabin location, extra legroom and early boarding.

As American and US Airways merge, many changes are taking place at our airport locations. Visit Find Your Way to assist with your journey.



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Record Locator **AMACFS**

Itinerary

Carrier	Flight #	Departing	Arriving	Fare Code
American	94	SAN DIEGO SAT 30AUG 7:45 AM	NEW YORK JFK 4:20 PM	W
Robert Rose	Seat 19D		FF#: B853272 GLD	Food For Purchase
American	95	NEW YORK JFK WED 03SEP 5:20 PM	SAN DIEGO 8:15 PM	Q
Robert Rose	Seat 16D	Economy	FF#: B853272 GLD	Food For Purchase

Receipt

Passenger	Ticket #	Fare-USD	Taxes and Carrier-Imposed Fees	Ticket Total
Robert Rose	0012340800547	547.91	69.29	617.20
Master Card XXXXXXXXXXXX9320				**$ 617.20**

Baggage Information

Baggage charges for your itinerary will be governed by American Airlines BAG ALLOWANCE -SANJFK-No free checked bags/ American Airlines BAG ALLOWANCE -JFKSAN-No free checked bags/ American Airlines 1STCHECKED BAG FEE-SANJFK-USD0.00/ American Airlines /UP TO 50 LB/23 KG AND UP TO 62 LINEAR IN/158 LINEAR CM 1STCHECKED BAG FEE-JFKSAN-USD0.00/ American Airlines /UP TO 50 LB/23 KG AND UP TO 62 LINEAR IN/158 LINEAR CM 2NDCHECKED BAG FEE-SANJFK-USD35.00/ American Airlines /UP TO 50 LB/23 KG AND UP TO 62 LINEAR IN/158 LINEAR CM 2NDCHECKED BAG FEE-JFKSAN-USD35.00/ American Airlines /UP TO 50 LB/23 KG AND UP TO 62 LINEAR IN/158 LINEAR CM ADDITIONAL ALLOWANCES AND/OR DISCOUNTS MAY APPLY

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This is to certify that I have this date caused to be served a true and correct copy of the within upon the other parties to this action as follows:

By Fed Ex and email to:

The Honorable Brenda P. Murray
Chief Administrative Law Judge
Securities & Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

Jill Peterson
Office of the Secretary
Securities Exchange Commission
100 F. Street NE
Washington, DC 20549

By First Class U.S. Mail and Email:

Dean Conway, Esq.
Chris Matthews, Esq.
Britt Biles, Esq.
Securities & Exchange Commission
100 F Street, N.E.
Washington, DC 20549-5971

This 17th day of November, 2014.

____
Moshe Marc Cohen – Pro Se
1496 Ocean Parkway
Brooklyn, NY 11230