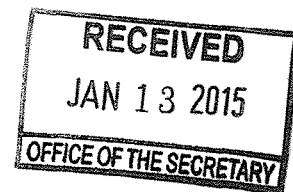


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15790

In the Matter of

MICHAEL A. HOROWITZ

and

MOSHE MARC COHEN,

Respondent.

DIVISION OF ENFORCEMENT'S
MOTION TO CORRECT MANIFEST
ERROR OF FACT IN THE INITIAL
DECISION

The Division of Enforcement ("Division") respectfully moves pursuant to SEC Rule of Practice 111(h) to correct a manifest error of fact in the Initial Decision issued on January 7, 2015. The basis for the motion is a misstatement of fact in the Initial Decision concerning Respondent Moshe Marc Cohen's ("Cohen") statute of limitations defense. The Court wrote, "Cohen's conduct occurred in January and February 2008, more than five years before the OIP was issued on March 13, 2014. *The statute of limitations is therefore an issue.*" (Initial Decision 30 (emphasis added).) The Court then relied on the statute of limitations to deny the Division's request for civil monetary penalties and an associational bar. This is a manifest error of fact under SEC Rule of Practice 111(h), which should be corrected for the following reasons:

First, the factual misstatement is obvious and readily visible. *See Trautman Wasserman & Co., Inc.*, Admin. Proc. Rulings Release No. 637, at 2 (ALJ Feb. 4, 2008) (order on motion to correct manifest error of fact). The statute of limitations was not an issue at the Hearing because

the Court previously denied all of Cohen's affirmative defenses at the second Pre-Hearing Conference on July 7, 2014:

19 In addition to the filings, I have 29
20 affirmative defenses that Mr. Cohen has put in his answer
21 on pages 15 through 20. As far as those affirmative
22 defenses go, they're denied. The definition of an

(Pre-Hearing Conference Tr. 24.) Cohen's Fourth Defense, which improperly asserted that the Division's claims and requested relief were time-barred, was included in the Court's wholesale denial of Cohen's affirmative defenses:

FOURTH DEFENSE

The Division of Enforcement's claim and requested relief are barred by the statute of limitations and the doctrine of laches because the Commission delayed unreasonably and inexcusably in commencing this action and Respondent Cohen suffered prejudice as a result. Respondent Cohen's ability to summon witnesses and produce testimony is significantly and adversely affected. Given the age of events in this matter, it is "inherently unfair" and in violation of due process to proceed against Respondent Cohen.

(Respondent Moshe Marc Cohen's Answer And Defenses To The Order Instituting Public Administrative And Cease-And-Desist Proceedings, 16, Apr. 10, 2014.) Therefore, the Initial Decision's statement that the statute of limitations was at issue and provided a basis for denying the Division's request for civil monetary penalties and an associational bar is "an error that is plain and indisputable."¹ *Raymond J. Lucia Cos.*, Admin. Proc. Rulings Release No. 780, 2013 SEC

¹ While not the basis for this motion, the Division respectfully disagrees with the Court's legal conclusion that 28 U.S.C. § 2462 prohibits the imposition of an associational bar for conduct more than five-years-old. The Court cited *Johnson v. SEC*, 87 F.3d 484, 488-92 (D.C. Cir. 1996); but the Commission has not read *Johnson* to categorically prohibit bars for conduct more than five-years-old. See, e.g., *Contorinis*, Admin. Proc. Rulings Release No. 3824, 2014 WL 1665995, at *3 (Apr. 25, 2014) ("[T]he five-year statute of limitations of § 2462 does not apply in this case because a follow-on proceeding seeking an industry-wide bar is not 'for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise' within the meaning of § 2462.") (Comm. Op.); *Zubkis*, Admin. Proc. Rulings Release No. 52876, 2005 WL 3299148 at *4 (Dec. 2, 2005) (associational bar was remedial and not subject to § 2462) (Comm. Op.). Nor have courts in the District of Columbia read *Johnson* to categorically prohibit bars for conduct more than five-years-old. *SEC v. Brown*, 740 F. Supp. 2d 148, 157 (D.D.C. 2010) (officer-and-director bar is remedial

LEXIS 2292, at *2 (ALJ Aug. 7, 2013) (citation and internal quotation marks omitted) (order on motion to correct manifest error of fact).

Second, because Cohen's statute of limitations affirmative defense was previously denied and not an issue addressed at the Hearing, the Division was provided no opportunity to demonstrate that any applicable statute of limitations had, as Cohen well knew, been tolled as to liability and remedies. In federal court, the defense that a statute of limitations has expired is an affirmative defense that a defendant has the burden to prove. *See, e.g., Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 464 (6th Cir.2013) ("Because the statute of limitations is an affirmative defense, the burden is on the defendant to show that the statute of limitations has run, and if the defendant meets this requirement then the burden shifts to the plaintiff to establish an exception to the statute of limitations." (internal citations and quotations omitted)). The Court should look to federal court guidance and conclude that the statute of limitations is also an affirmative defense in administrative proceedings that a respondent has the burden to prove. *Cf. Egan-Jones Rating Comp.*, Admin. Proc. Rulings Release No. APR-712, 2012 WL 8704617, at *3 (July 13, 2012) (looking to federal courts decisions for guidance on interpreting Commission rules); *Weeks*, Release No. 199, 2002 WL 169185, at *7, n. 63 (Feb. 4, 2002) ("While the Federal Rules of Civil Procedure and the Federal Rules of Evidence do not govern the Commission's administrative proceedings, they often provide helpful guidance on issues not directly addressed by the Commission's Rules of Practice.") Here, because his affirmative defense was raised and denied by the Court, the burden never shifted to the Division to present its incontrovertible evidence that the statute of limitations had not expired. *See Lutz*, 717 F.3d at 464. As detailed in the attached

if the Commission can show a "future risk of harm"); *see also McCurdy v. SEC*, 396 F.3d 1258, 1265 (D.C. Cir. 2005) ("The purpose of the [102(e) suspension] was not to punish McCurdy, but rather to protect the public from his demonstrated capacity for recklessness in the present, and presumably to encourage his more rigorous compliance with GAAS in the future.")

declaration of Division attorney James Lee Buck, II, Cohen voluntarily entered into a series of tolling agreements that extended the statute of limitations on the Division's case against Cohen by approximately fifteen months or until May 2014—a full two months after the Order Instituting Proceedings was actually filed. (Decl. Of James Lee Buck, II, Jan. 12, 2015.)

The Division understands that the Court may not have been aware of the existence of these tolling agreements. After all, the Division saw no need to rebut an affirmative defense that was never raised at the Hearing—let alone one that the Court categorically rejected before the Hearing even opened. But as a result of the denial of Mr. Cohen's affirmative defense and the absence of proof at trial, the Division respectfully submits that the Court had no evidentiary basis to conclude that Cohen made out his statute of limitations defense or that the Division failed to establish an exception to it.²

For these reasons, the Division respectfully requests that the Court correct the manifest error of fact in the Initial Decision. Specifically, the Division asks the Court: (1) to find that the statute of limitations defense was neither an issue at the Hearing nor established by the evidence

² Toward the end of his 72-page Post-Hearing brief, Cohen references the statute of limitations as “barring censures, bars, and suspensions.” (Cohen's Post-Hearing Brief at 69-70, 72.) But a passing reference in a Post-Hearing brief is neither a substitute for the actual evidence required to establish the statute of limitations defense at trial, nor can it revive the defense after the Court already rejected it or give the Court a basis for reconsidering its earlier ruling. *See, e.g., Agostini v. Felton*, 521 U.S. 203 (1997) (“Under [the law of the case] doctrine, a court should not reopen issues decided in earlier stages of the same litigation [unless] . . . the court is convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.” (internal citations and quotations omitted)). In this case, the Division had no indication that the Court might reconsider its earlier decision to deny Cohen's statute of limitations affirmative defense.

Further, to credit Cohen's mention of the statute of limitations defense in his Post-Hearing Brief could be procedurally unfair, because it leaves the Division with no opportunity to present the evidence of the tolling agreements. *Cf. U.S. v. Lewis*, --- F.3d ---, 2011 WL 12557785 (5th Cir. 2014) (“[W]e have previously determined that a statute of limitations defense is an affirmative defense that must be affirmatively assert[ed] . . . at trial to preserve it for appeal. This is because defenses such as a statute of limitations defense will, in many cases, turn on disputed factual issues. If defendants were allowed to raise a limitations defense after a conviction, the prosecution would be prevented from introducing evidence to rebut defense. By requiring a defendant to raise and develop his statute of limitations defense at trial, the prosecution will have a chance to rebut the defendant's arguments with evidence of its own.” (internal citations and quotations omitted)).

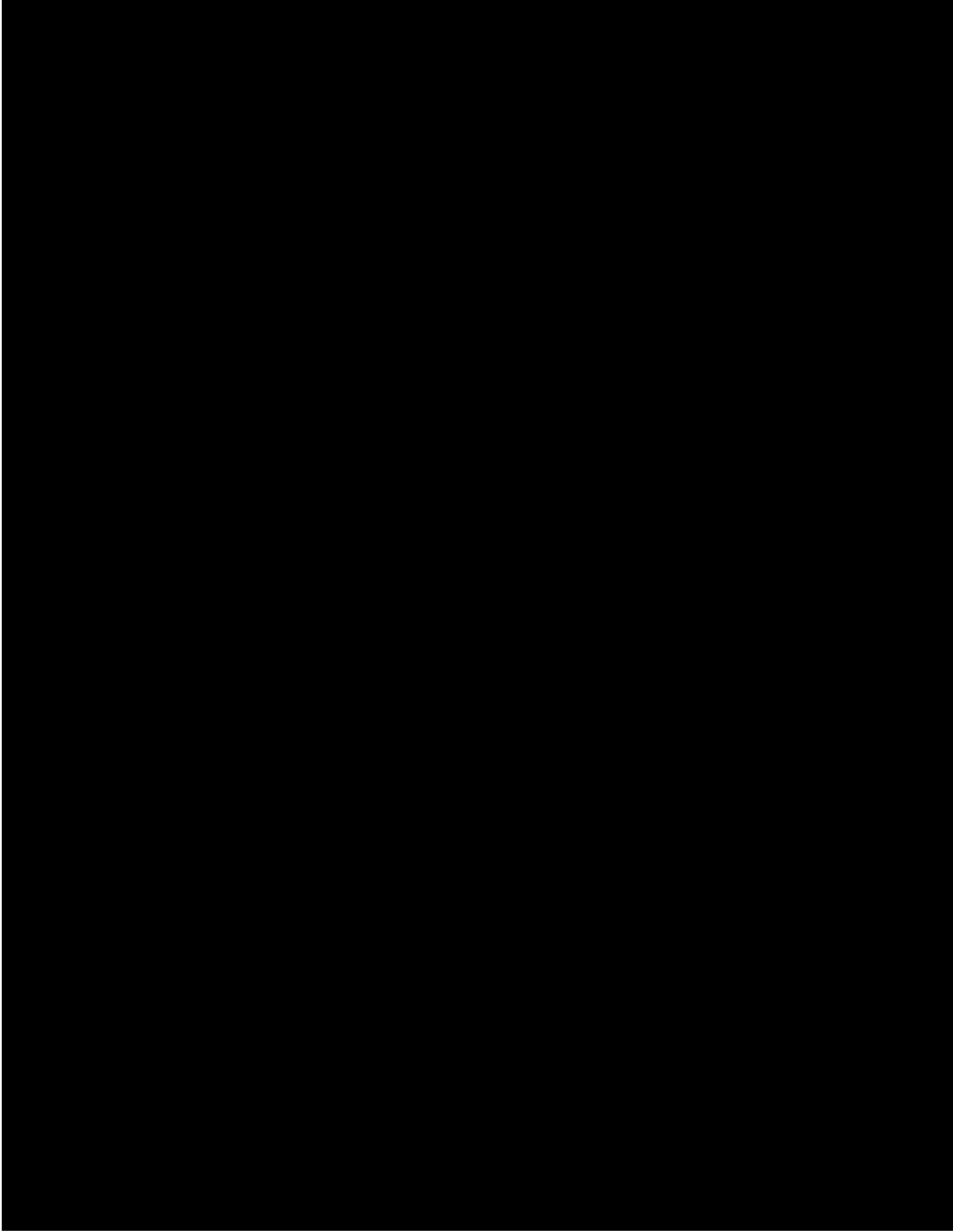
presented therein; and (2) impose on Cohen the civil monetary penalties and associational bar requested by the Division, and such other relief as the Court may deem appropriate.

Dated: January 13, 2015

Respectfully submitted,



Dean M. Conway
Britt Biles
Division of Enforcement
Securities and Exchange Commission
Mail Stop 5971
100 F Street, N.E.
Washington, D.C. 20549
Tel: 202-551-4412 (Conway)
Fax: 202-772-9246 (Conway)
conwayd@sec.gov



UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15790

<p>In the Matter of</p> <p>Michael A. Horowitz and</p> <p>Moshe Marc Cohen,</p> <p>Respondents.</p>

DECLARATION OF JAMES LEE BUCK, II IN SUPPORT OF
THE DIVISION OF ENFORCEMENT'S MOTION TO CORRECT A MANIFEST
ERROR OF FACT

James Lee Buck, II, pursuant to 28 U.S.C. § 1746, declares:

1. I am an Assistant Director with the Division of Enforcement ("Division") of the Securities and Exchange Commission ("Commission"). I submit this Declaration in support of the Division's Motion to Correct A Manifest Error of Fact in the Initial Decision.

2. As part of my job duties as an Assistant Director, I and other members of the Division staff investigated the conduct that led to the charges in this administrative proceeding.

3. On July 10, 2012, I signed a Tolling Agreement that was sent to then-counsel for Respondent Moshe Marc Cohen ("Mr. Cohen"). Mr. Cohen's counsel executed the Tolling Agreement on August 24, 2012 and returned it to the Division. A true and correct copy of the executed Tolling Agreement is attached to this declaration as Exhibit 1.

4. Paragraph 1 of the Tolling Agreement provides:

the running of any statute of limitations applicable to any action or proceeding against Cohen authorized, instituted, or brought by or on behalf of the Commission or to which the Commission is a party arising out of the investigation (“any related proceeding”), ***including any sanctions or relief that may be imposed therein***, is ***tolled and suspended*** for the period beginning on June 14, 2012 through September 14, 2012 (the “tolling period”).

(emphasis added.)

5. Paragraph 2 of the Tolling Agreement provides:

Cohen and any of his agents or attorneys shall not include the tolling period in the calculation of the running of any statute of limitations or for any other time-related defense applicable to any related proceeding, ***including any sanctions or relief that may be imposed therein***, in asserting or relying upon any such time-related defense.

(emphasis added.)

6. Under the original terms of the Tolling Agreement the statute of limitations was tolled and suspended for a period of three (3) months: June 14, 2012 through September 14, 2012.

7. The Tolling Agreement was amended twice: first in September 2012 and again in March 2013. The September 2012 amendment tolled and suspended the statute of limitations through March 14, 2013. Attached as Exhibit 2 to this Declaration is a true and correct copy of the first amendment to the Tolling Agreement which was executed by Mr. Cohen’s counsel.

8. Thus, under the terms of the original Tolling Agreement and its first amendment the statute of limitations was tolled and suspended for a period of nine (9) months: June 24, 2012 through March 14, 2013.

9. In March 2013, the Tolling Agreement was amended for a second time, and the statute of limitations was tolled and suspended through September 14, 2013. Attached as Exhibit 3 to this Declaration is a true and correct copy of the second amendment to the Tolling Agreement which was executed by Mr. Cohen's counsel.

10. Thus, under the terms of the original Tolling Agreement, its first amendment, and its second amendment, the statute of limitations was tolled and suspended for a period of approximately fifteen (15) months: June 24, 2012 through September 14, 2013.

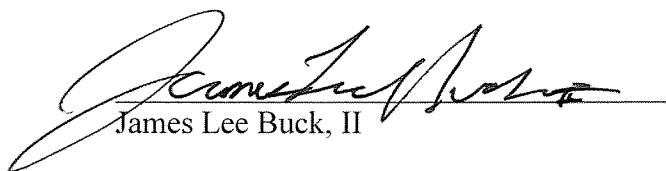
11. Accordingly, the Division had fifteen (15) months after any statute of limitations would have otherwise expired to bring its action against Mr. Cohen and to seek any sanctions or relief subject to the statute of limitations.

12. The statute of limitations on Mr. Cohen's February 2008 conduct would have expired in February 2013 but for the Tolling Agreement and its two amendments. The fifteen (15) months added by the Tolling Agreement and its two amendments extended the statute of limitations to May 2014.

13. Because the Order Instituting Proceedings was instituted on March 13, 2014, the claims and relief requested therein were not barred by the five-year limitations period set forth in 28 U.S.C. § 2462. Under the terms of the Tolling Agreement, its first amendment, and second amendment, Mr. Cohen's conduct in January and February 2008 falls within the statute of limitations.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12th, 2015.

A handwritten signature in black ink, appearing to read "James Lee Buck, II", is written over a horizontal line. The signature is fluid and cursive.

James Lee Buck, II

EXHIBIT 1
To Declaration of James Lee
Buck, II

SINGER DEUTSCH LLP

MICHAEL C. DEUTSCH
MEMBER OF NEW YORK AND NEW JERSEY BARS

555 FIFTH AVENUE, 17TH FLOOR
NEW YORK, NY 10017
TEL: (212) 682-3939
FAX: (212) 682-2006

MCD@SINGERDEUTSCH.COM

WWW.SINGERDEUTSCH.COM

VIA EMAIL AND FEDERAL EXPRESS - HaggertyP@SEC.GOV

August 24, 2012


Peter J. Haggerty, Esq.
U.S. Securities & Exchange Commission |
Enforcement
100 F. Street, N.E.
Washington, DC 20549-5030-B

Re: In the Matter of Certain Variable Annuities - HO-10840

Dear Pete:

Enclosed please find an executed Tolling Agreement for the above referenced matter.

Very truly yours,



Michael C. Deutsch

MCD/mw

enc.

TOLLING AGREEMENT

WHEREAS, the Division of Enforcement ("Division") of the United States Securities and Exchange Commission ("Commission") has notified Moshe Marc Cohen ("Cohen"), through his counsel, that the Division is conducting an investigation entitled In the Matter of Certain Variable Annuities, File No. HO-10840 ("the investigation") to determine whether there have been violations of certain provisions of the federal securities laws;

WHEREAS, Mr. Cohen has, through counsel, requested time to meet with the staff and/or consider exploring resolution of the investigation;


ACCORDINGLY, IT IS HEREBY AGREED by and between the parties that:

1. the running of any statute of limitations applicable to any action or proceeding against Cohen authorized, instituted, or brought by or on behalf of the Commission or to which the Commission is a party arising out of the investigation ("any related proceeding"), including any sanctions or relief that may be imposed therein, is tolled and suspended for the period beginning on June 14, 2012 through September 14, 2012 (the "tolling period");
2. Cohen and any of his agents or attorneys shall not include the tolling period in the calculation of the running of any statute of limitations or for any other time-related defense applicable to any related proceeding, including any sanctions or relief that may be imposed therein, in asserting or relying upon any such time-related defense;
3. nothing in this agreement shall affect any applicable statute of limitations defense or any other time-related defense that may be available to Cohen before the commencement of the tolling period or be construed to revive any proceeding that may be barred by any applicable statute of limitations or any other time-related defense before the commencement of the tolling period;
4. the running of any statute of limitations applicable to any related proceeding shall commence again after the end of the tolling period, unless there is an extension of the tolling period executed in writing by and on behalf of the parties hereto;
5. nothing in this agreement shall be construed as an admission by the Commission or Division relating to the applicability of any statute of limitations to any proceeding, including any sanctions or relief that may be imposed therein, or to the length of any limitations period that may apply, or to the applicability of any other time-related defense; and
6. the Commission and Cohen intend this agreement solely for the benefit of the Commission and Cohen and agree that there are no third-party beneficiaries of this tolling agreement.

Tolling Agreement
July 10, 2012
Page 2

This instrument contains the entire agreement of the parties and may not be changed orally, but only by an agreement in writing.

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

By:  Date: 7/10/2012
James Lee Buck, II, Esq.
Assistant Director

Mosh Marc Cohen

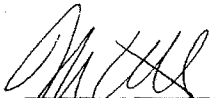
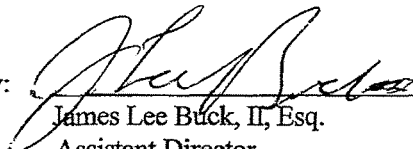
By:  Date: 8/24/12
Michael C. Deutsch, Esq.
Singer Deutsch LLP
Counsel for Moshe Marc Cohen

EXHIBIT 2
To Declaration of James Lee
Buck, II

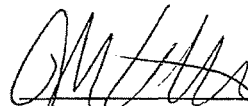
AMENDMENT TO TOLLING AGREEMENT

IT IS HEREBY AGREED by and between the parties that the Attached Tolling Agreement is amended as follows: the clause "through September 14, 2012" is modified to read: "through March 14, 2013".

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

By:  Date: 9/24/12
James Lee Buck, II, Esq.
Assistant Director

MOSHE MARC COHEN

By:  Date: 9/14/12
Michael C. Deutsch, Esq.
Singer Deutsch LLP
Counsel for Moshe Marc Cohen

TOLLING AGREEMENT

WHEREAS, the Division of Enforcement ("Division") of the United States Securities and Exchange Commission ("Commission") has notified Moshe Marc Cohen ("Cohen"), through his counsel, that the Division is conducting an investigation entitled in the Matter of Certain Variable Annuities, File No. HO-10840 ("the investigation") to determine whether there have been violations of certain provisions of the federal securities laws;

WHEREAS, Mr. Cohen has, through counsel, requested time to meet with the staff and/or consider exploring resolution of the investigation;

ACCORDINGLY, IT IS HEREBY AGREED by and between the parties that:

1. the running of any statute of limitations applicable to any action or proceeding against Cohen authorized, instituted, or brought by or on behalf of the Commission or to which the Commission is a party arising out of the investigation ("any related proceeding"), including any sanctions or relief that may be imposed therein, is tolled and suspended for the period beginning on June 14, 2012 through September 14, 2012 (the "tolling period");
2. Cohen and any of his agents or attorneys shall not include the tolling period in the calculation of the running of any statute of limitations or for any other time-related defense applicable to any related proceeding, including any sanctions or relief that may be imposed therein, in asserting or relying upon any such time-related defense;
3. nothing in this agreement shall affect any applicable statute of limitations defense or any other time-related defense that may be available to Cohen before the commencement of the tolling period or be construed to revive any proceeding that may be barred by any applicable statute of limitations or any other time-related defense before the commencement of the tolling period;
4. the running of any statute of limitations applicable to any related proceeding shall commence again after the end of the tolling period, unless there is an extension of the tolling period executed in writing by and on behalf of the parties hereto;
5. nothing in this agreement shall be construed as an admission by the Commission or Division relating to the applicability of any statute of limitations to any proceeding, including any sanctions or relief that may be imposed therein, or to the length of any limitations period that may apply, or to the applicability of any other time-related defense; and
6. the Commission and Cohen intend this agreement solely for the benefit of the Commission and Cohen and agree that there are no third-party beneficiaries of this tolling agreement.

Tolling Agreement
July 10, 2012
Page 2

This instrument contains the entire agreement of the parties and may not be changed orally,
but only by an agreement in writing.

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

By:  Date: 7/10/2012
James Lee Buck, II, Esq.
Assistant Director

Mosh Marc Cohen

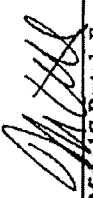
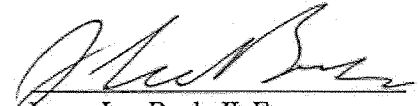
By:  Date: 8/24/12
Michael C. Deutsch, Esq.
Singer Deutsch LLP
Counsel for Mosh Marc Cohen

EXHIBIT 3
To Declaration of James Lee
Buck, II


SECOND AMENDMENT TO TOLLING AGREEMENT

IT IS HEREBY AGREED by and between the parties that the attached Tolling Agreement, as amended, is further amended as follows: the clause "through March 14, 2013" is modified to read: "through September 14, 2013".

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

By:  Date: 3/11/2013
James Lee Buck, II, Esq.
Assistant Director

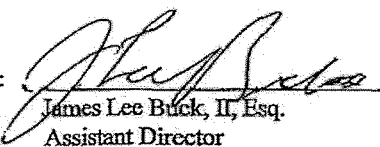
MOSHE MARC COHEN

By:  Date: 3/11/13
Michael C. Deutsch, Esq.
Singer Deutsch LLP
Counsel for Moshe Marc Cohen

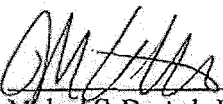
AMENDMENT TO TOLLING AGREEMENT

IT IS HEREBY AGREED by and between the parties that the Attached Tolling Agreement is amended as follows: the clause "through September 14, 2012" is modified to read: "through March 14, 2013".

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

By:  Date: 9/24/12
James Lee Buck, II, Esq.
Assistant Director

MOSHE MARC COHEN

By:  Date: 9/14/12
Michael C. Deutsch, Esq.
Singer Deutsch LLP,
Counsel for Moshe Marc Cohen

TOLLING AGREEMENT

WHEREAS, the Division of Enforcement ("Division") of the United States Securities and Exchange Commission ("Commission") has notified Moshe Marc Cohen ("Cohen"), through his counsel, that the Division is conducting an investigation entitled In the Matter of Certain Variable Annuities, File No. HO-10840 ("the investigation") to determine whether there have been violations of certain provisions of the federal securities laws;

WHEREAS, Mr. Cohen has, through counsel, requested time to meet with the staff and/or consider exploring resolution of the investigation;

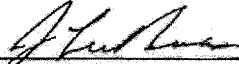
ACCORDINGLY, IT IS HEREBY AGREED by and between the parties that:

1. the running of any statute of limitations applicable to any action or proceeding against Cohen authorized, instituted, or brought by or on behalf of the Commission or to which the Commission is a party arising out of the investigation ("any related proceeding"), including any sanctions or relief that may be imposed therein, is tolled and suspended for the period beginning on June 14, 2012 through September 14, 2012 (the "tolling period");
2. Cohen and any of his agents or attorneys shall not include the tolling period in the calculation of the running of any statute of limitations or for any other time-related defense applicable to any related proceeding, including any sanctions or relief that may be imposed therein, in asserting or relying upon any such time-related defense;
3. nothing in this agreement shall affect any applicable statute of limitations defense or any other time-related defense that may be available to Cohen before the commencement of the tolling period or be construed to revive any proceeding that may be barred by any applicable statute of limitations or any other time-related defense before the commencement of the tolling period;
4. the running of any statute of limitations applicable to any related proceeding shall commence again after the end of the tolling period, unless there is an extension of the tolling period executed in writing by and on behalf of the parties hereto;
5. nothing in this agreement shall be construed as an admission by the Commission or Division relating to the applicability of any statute of limitations to any proceeding, including any sanctions or relief that may be imposed therein, or to the length of any limitations period that may apply, or to the applicability of any other time-related defense; and
6. the Commission and Cohen intend this agreement solely for the benefit of the Commission and Cohen and agree that there are no third-party beneficiaries of this tolling agreement.


Tolling Agreement
July 10, 2012
Page 2

This instrument contains the entire agreement of the parties and may not be changed orally,
but only by an agreement in writing.

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

By:  Date: 7/10/2012
James Lee Buck, II, Esq.
Assistant Director

Mosh Marc Cohen

By:  Date: 8/24/12
Michael C. Deutsch, Esq.
Singer Deutsch LLP
Counsel for Mosh Marc Cohen