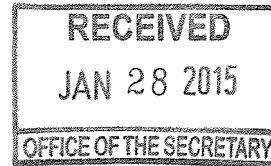


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15790

In the Matter of

MICHAEL A. HOROWITZ

and

MOSHE MARC COHEN,

Respondent.

DIVISION OF ENFORCEMENT'S REPLY
TO COHEN'S OPPOSITION TO
CORRECT MANIFEST ERROR OF FACT
IN THE INITIAL DECISION

Respondent Moshe Marc Cohen ("Cohen") does not—and cannot—dispute the manifest error of fact that serves as the basis for the Division of Enforcement's ("Division") Rule 111(h) motion. Cohen does not contest that:

- He voluntarily entered into a series of valid and binding tolling agreements that extended the statute of limitations on the Division's case by approximately fifteen months or until May 2014—a full two months after the Order Instituting Proceedings was filed;
- The Court denied his statute of limitations defense as to both liability and remedies prior to start of the Hearing; or
- He presented no evidence at the Hearing to carry his burden of demonstrating that the statute of limitations had run.

Cohen ignores these incontrovertible facts and instead asserts that "a tolling agreement is legally immaterial to the applicability of the statute of limitations, and thereby should not alter or affect the Initial Decision." (Resp. Moshe Marc Cohen Opp. To Motion To Correct Manifest Error Of Fact

In Initial Decision at 3.) Cohen is wrong. The tolling agreement demonstrates that the Division's claims for remedies were timely.

Cohen also improperly recasts his Opposition as a petition for review by raising a new legal challenge to the Court's subject matter jurisdiction. In an argument that is both procedurally misplaced and legally unsound, Cohen argues that 28 U.S.C. § 2462 (the statute of limitations provision which governs penalties available to the Division in enforcement actions) cannot be tolled because it strips the Court of subject matter jurisdiction, instead of merely setting time limits. This argument ignores the overwhelming weight of authority that recognizes § 2462 as a statute of limitations that can be tolled by valid tolling agreements, such as the ones that Cohen undeniably executed. For example, the Court in *SEC v. Geswein* squarely rejected an argument identical to the one made by Cohen here:

[The defendants] contend that 28 U.S.C. § 2462, as interpreted by the Supreme Court [in *Gabelli v. SEC*], is a statute of repose and not a statute of limitations. . . . A statute of repose, as Defendants see it, is not subject to tolling . . . due to any tolling agreements After a careful reading of *Gabelli*, and upon consideration of Defendants' thoughtful arguments, the Court refuses to read more into the Supreme Court's decision than it says on its face. Chief Justice Roberts repeatedly refers to 28 U.S.C. § 2462 as a statute of limitations; and this Court will not declare 28 U.S.C. § 2462 a statute of repose.

Geswein, 2 F. Supp. 3d 1074, 1084 (N.D. Ohio 2014). See also *SEC v. Mannion*, 2013 WL 5999657, at *5 (N.D. Ga. Nov. 12, 2013) (enforcing tolling agreement to extend statute of limitations in 28 U.S.C. § 2462 by one year); *CFTC v. Tunney & Assocs.*, 2013 WL 4565690, at *2-4 (N.D. Ill. Aug. 21, 2013) (finding that a valid tolling agreement precluded the defendant from raising a statute of limitations defense based on 28 U.S.C. § 2462).

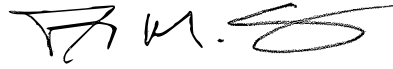
Cohen bases his subject matter jurisdiction argument entirely on a case in which there was no tolling agreement: *SEC v. Graham*, 2014 WL 1891418 (S.D. Fla. May 12, 2014). Not only is this case factually inapposite due to the lack of a tolling agreement, it is also legally out of line with

more than two-hundred-years of case law interpreting § 2462 and its predecessor statutes. *See United States v. Core Labs, Inc.*, 759 F.2d 480, 484 (5th Cir. 1985) (“The current § 2462 is derived from predecessor statutes dating from 1799; the statutes have produced a respectable body of decisional law.” (internal citations omitted)). As far as the Division is aware, no other court in the statute’s history has concluded that § 2462 is a jurisdictional statute and not a typical affirmative defense. *Accord Canady v. SEC*, 230 F.3d 362, 364-65 (D.C. Cir. 2000) (finding that defendant’s reliance on § 2462 is an affirmative defense that will be waived if not raised); *United States v. Banks*, 115 F.3d 916, 918 n.4 (concluding that § 2462 provides an affirmative statute of limitations defense that can be waived) (11th Cir. 1997); *Core Labs, Inc.*, 759 F.2d at 484 (finding that § 2462 is subject to equitable tolling). Indeed, this Court implicitly recognized in the Initial Decision that § 2462 is not a jurisdictional statute as evidenced by the Court’s relying on that provision to deny only the penalties sought by the Division and not the Division’s claims *in toto*. The Court should not now change course (especially in the context of the Division’s Rule 111(h) motion) and follow *Graham* because that case is an outlier that faces possible reversal on appeal to the Eleventh Circuit. *SEC v. Graham*, No. 14-13562-E (11th Cir. appeal filed Aug. 7, 2014).

For the foregoing reasons, as well as those set forth in the Division’s opening brief, 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 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 28, 2015

Respectfully submitted,



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