UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
MICHAEL A. HOROWITZ
and
MOSHE MARC COHEN
Respondent

RESPONDENT MOSHE MARC COHEN OPPOSITION TO MOTION TO CORRECT MANIFEST ERROR OF FACT IN THE INITIAL DECISION

ADMINISTRATIVE PROCEEDING
File No. 3-15790

INTRODUCTION

Respondent Moshe Marc Cohen opposes the Division of Enforcement's ("Division") motion to correct a manifest error in fact pursuant to SEC Rule of Practice 111(h) and also moves to dismiss the entire claim for an associational bar and civil damages, due to lack of subject matter jurisdiction with regards to such claims, pursuant to 28 U.S.C. § 2642. The Initial Decision was issued on January 7, 2015 - in the aftermath of three grueling days of hearing, where Cohen acted pro se, and the Division employed an entire team of Division Staff - in which the Court correctly applied the Statue of Limitation pursuant to 28 U.S.C. § 2642, thus properly denying any civil money penalties and association bars. The Division is not satisfied with the decision that granted $766,958 in disgorgement fees in addition to $210,204 of prejudgment interest that are representative of equitable remedies; rather it seeks an associational bar in conjunction with draconian punitive civil damages, specifically of the third tier penalty of $150, 000 multiplied by 28, (Div. Br. 48-50). Additionally, the Division

surreptitiously made a legal argument in a motion designed to correct a purported error, and asserted that § 2642 is not applicable because such damages and penalties are "equitable" in nature.[1]

STATEMENT OF FACTS

The alleged conduct, the basis for this claim, occurred in January and February 2008, while the Order Instituting Administrative and Cease-and Desist Proceedings (OIP) was issued on March 13, 2014, more than five years later. Consequently, the Court ruled that the statute of limitations precludes the castigation of civil damages and bar from association (Initial Decision 30). At the twilight of the proceeding, the Division, in a motion to correct a manifest error in fact, not unlike Charlie's "Golden Ticket" seeks to introduce a purportedly valid tolling agreement, in an attempt to circumvent the statute of limitations (Motion to Correct 4).

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[1] Division argued in the initial footnote stating "while not the basis for this motion" the association bar is not governed by *Johnson v. S.E.C.*, 87 F.3d 484, (D.C. Cir. 1996). The Court is respectfully noted of *S.E.C. v. Bartek*, 484 F. App'x 949, 957 (5th Cir. 2012), which stated that "various cases hold that excluding a person from their chosen profession is considered a penalty or punitive in nature. *See e.g. United States v. Lovett,* 328 U.S. 303, 313, 316, 106 Ct.Cl. 856, 66 S.Ct. 1073, 90 L.Ed. 1252 (asserting that the purpose of Section 304 was to permanently bar the petitioners from government service and that a "permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type."); *see also Dailey v. Vought Aircraft Co.,* 141 F.3d 224, 229 (5th Cir.1998) ("Although disbarment is intended to protect the public, it is a 'punishment or penalty imposed on the lawyer.' ") (citing *In re Ruffalo,* 390 U.S. 544, 550, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968)).

It seems that the decision in *Johnson* clearly supports such findings. The Court specifically based its analysis of remedial versus punitive, because to "pursue.... vocation likely to have longer-lasting repercussions on her ability to pursue... vocation" and considered collateral repercussions as a factor in the determination of a punitive measure, *Id.* at 488-89. It is inconceivable, how such factors are deemed inapplicable to this situation, especially in light of the mere temporary six-month bar, at issue in *Johnson.*

ARGUMENTS

I. TOLLING AGREEMENT IS NOT LEGALLY RELEVANT TO INITIAL DECISION

The Division has the burden to establish that there was a manifest error which doesn't simply denote a purely fact-based analysis, but rather incorporates an explanation of the legal significance of any factual error. "The Commission's Rules of Practice do not describe what is meant by 'manifest error' and the term does not appear at any other place in the Rules of Practice. I define manifest error as '[a]n error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record' from *Black's Law Dictionary* 563 (7th ed. 1999) "(*Matter of Robert Cord Beatty*, Release No. 618 (Feb. 10, 2005)). Division's argument that the existence of a purportedly valid tolling agreement is indicative of a manifest error is anemic in substance and concomitantly lacking in merit.

It is well-settled that "even if the exclusion of this evidence constituted error, the error would be harmless. *See PDK Laboratories Inc. v. DEA,* 362 F.3d 786, 799 (D.C.Cir.2004) ("In administrative law, as in federal civil and criminal litigation, there is a harmless error rule....")", *Riordan v. S.E.C.,* 627 F.3d 1230, 1233 (D.C. Cir. 2010), I respectfully argue 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. Consequently, its omission is legally deemed a harmless error.

Furthermore, I considerately aver that the Court correctly ruled that the statute of limitation is unequivocally an issue. Furthermore, the Court correctly never considered the possibility of any purported agreement to circumvent such statute, because §2462 is a jurisdictional statute and the Court lacks subject matter jurisdiction, regarding all punitive

remedies, including, but not limited to, the civil damages and industry bars which was clearly described as "punitive" by the Court (Initial Decision 30). [2]

Thereafter, this Court should categorically deny the Division's motion to profligately introduce evidence - at the eleventh hour- that has no legal significance in general, and more specifically with regards to punitive damages. Additionally, as the Court never had jurisdiction with regards to punitive damages and therefore, the tolling agreement is immaterial. It is axiomatic in our judicial system that "subject-matter jurisdiction, because it involves court's power to hear case, can never be forfeited or waived," *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). Subject-matter jurisdiction cannot be created ex nihilo or by any agreement by the parties. "It is manifest that 'objections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy' " See *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 184 L. Ed. 2d 627 (2013).

II. SECTION § 2462 IS JURISDICTIONAL IN NATURE

A. SUPREME COURT RULINGS REGARDING JURISDICTION-STRIPPING TIME BARS

To state with simplicity, Section § 2462 is not simply a "statute of limitations" that "prescribes" a time limit for brining "civil penalty claims." On its face, based on the plain meaning of the statute, it uniquely deprives a tribunal of subject-matter jurisdiction and the

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[2] Respondent respectfully maintains that disgorgement is at its core, a forfeiture and is therefore punitive. Consequently, it is within the contours of Section 2462, and is also time-barred. The Court is respectfully directed at the decision in *S.E.C. v. Graham*, No. 13-10011-CIV, 2014 WL 1891418 (S.D. Fla. May 12, 2014), in which the venerable Judge King forcefully and compellingly affirms the aforementioned position. It is based partly on the words of Chief Justice Marshall in *Gabelli*, 133 S.Ct. at 1223 that "it would be utterly repugnant to the genius of our laws if actions for penalties could be brought at any distance of time"

lawful power to "*entertain*" a penalty "*proceeding*" at all. At the onset, it is important to highlight, that the Division glaringly failed to cite a single case that directly addressed Administrative Proceedings; it merely obfuscated and attempted to confuse the issues by exclusively referring to Federal Courts, with regards to interpretation of statute of limitations as non-jurisdictional in nature (Motion to Correct 3).

The proper method for interpretation of whether a statute is jurisdictional, has been outlined by the Supreme Court. Such indicators include "[C]ontext, including this Court's interpretations of similar provisions in many years past," is probative of whether Congress intended a particular provision to rank as jurisdictional, *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 819, 184 L. Ed. 2d 627 (2013). It is clear that section 2462 is no ordinary statute of limitations. It is uniquely worded in a way that does not merely allow a plaintiff to assert a claim within a prescribed period of time, with the defendant then obliged to raise and prove the untimely component, as an affirmative defense. It is an explicit deprivation of the relevant Court's jurisdiction and lawful power to act, clearly distinct from similar claims in non-Article II courts.

The controlling statute, 28 U.S.C. § 2462, provides in relevant part:

> "[A] proceeding for the enforcement of any civil fine, penalty, or forfeiture ... shall not be entertained unless commenced within five years from the date when the claim first accrued."

The express language of the statute and its simple meaning is evidenced by the use of the word "shall" which denotes absoluteness and jurisdictionality.

The use of statutory interpretation in time-barring statutes is a recurring theme in recent decisions of the Supreme Court. In a case involving a state prisoner whose petition for habeas corpus, and subsequent motion for new trial or to amend judgment, had been denied moved to

reopen appeal period. The Supreme Court ruled that the time for appeal was jurisdictional in nature. In *Bowles v. Russell*, 551 U.S. 205, 212, 127 S. Ct. 2360, 2365, 168 L. Ed. 2d 96 (2007), the Court noted that "jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."

In a cause of action under of a bartender/waitress's claim for relief for sexual harassment under Title VII of the Civil Rights Act of 1964, which defines "employer" as one who has fifteen employees, the Court decided that the numerosity requirement was not jurisdictional in nature, rather on element to the claim. The statutory bases for this conclusion was that "nothing in Title VII's text indicates that Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 501, 126 S. Ct. 1235, 1237, 163 L. Ed. 2d 1097 (2006).

In a similar vein the Court applied an analysis of the statutory meaning, in holding that a Medicare 180-day time limit for appeals was not jurisdictional that was based on the language of the statute. "Section 1395*oo* (a)(3) hardly reveals a design to preclude any regulatory extension. The provision instructs that a provider '*may* obtain a hearing' by filing 'a request ... within 180 days after notice of the intermediary's final determination.' It "does not speak in jurisdictional terms." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 819, 184 L. Ed. 2d 627 (2013) (emphasis added).

It is evident that the Court construes the language of "*may*" as nonjurisdictional in nature. Consequently, the statute in question which clearly states that *"shall not be entertained unless*

commenced within five years from the date when the claim first accrued" is one that relates to the actual jurisdiction of the Court. Therefore, it is clear, that 2462 relates to the threshold requirement of subject matter jurisdiction.[3]

B. INTERPRETATION OF JURISDICTIONAL STATUTES BY LOWER COURTS

The lower courts have categorically adopted the guidelines of the Supreme Court regarding the interpretation of the word "shall" in statutes, and its applicability to time-barring claims in a jurisdictional context. The importance that *Sebelius* turned on the language of ***"may"*** in the statute, is underscored by a recent decision in *Utah v. U.S. Envtl. Prot. Agency*, 765 F.3d 1257, 1259 (10th Cir. 2014), in which time-filing deadline as jurisdictional, the Judge ruled:

> We first look to the statutory text. "[A] statutory restriction need not go so far as to use the magic word 'jurisdiction,' but must use 'clear jurisdictional language.' " *United States v. McGaughy,* 670 F.3d 1149, 1156 (10th Cir.2012) (quoting *Gonzalez v. Thaler,* —— U.S. ——, 132 S.Ct. 641, 649, 181 L.Ed.2d 619 (2012)). In § 7607(b)(1), Congress used jurisdictional terminology: "shall" and "petition for review." Clean Air Act, 42 U.S.C. § 7607(b)(1) (2012); *see Sebelius v. Auburn Reg'l Med. Ctr.,* —— U.S. ——, 133 S.Ct. 817, 825–26, 184 L.Ed.2d 627 (2013) (stating that the words "shall" and "notice of appeal" carry "jurisdictional import" in connection with the statutory deadline for appeals from district courts). Congress used this terminology because it regarded the 60–day deadline as jurisdictional.

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[3] In *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 131 S. Ct. 1197, 1198-200, 179 L. Ed. 2d 159 (2011), the Court ruled that a Veteran's 120-time limit was a claims-processing rule, was based on the placement of the statute coupled with the unique characteristics and "longstanding solicitude for veterans" and the nonadversarial nature of the proceedings. Furthermore, the Court noted that "its placement in a subchapter entitled "Procedure," was indicative of its nonjurisdictional nature. It is important to highlight, that Section 2462 is likewise not in Part V titled "Procedure", rather in Part VI. See also *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 155, 130 S. Ct. 1237, 1240, 176 L. Ed. 2d 18 (2010), regarding the importance of "context" to deciding the jurisdictional nature of a time-barring statute.

In a statute that strikingly resembles the one in question, 28 U.S.C. § 2255, which limits certain federal habeas corpus relief available under 28 U.S.C. § 2241, and federal courts have left no doubt that this type of statutory location reflects an explicit legislative intention to deprive the tribunal of subject matter jurisdiction and the lawful power to act unless the "savings clause" applies. The Eleventh Circuit recently articulated this point at length in *Williams v. Warden*, 713 F.3d 1332, 1337-40 (11th Cir. 2013), explaining its reasons for joining with "the great weight of authority" in holding that "the savings clause is jurisdictional in nature."

> The savings clause [of § 2255] states that a § 2241 habeas petition "shall not be entertained...unless it...appears that the remedy by motion is inadequate or ineffective to test the legality of the detention." Based on the text alone, which speaks in imperative terms of what class of cases the district court has the power to hear, not what the petitioner himself must allege or prove in order to state a claim, we are compelled to conclude that the savings clause is a limitation on jurisdiction. It commands the district court not to "entertain[]" a § 2241 petition that raises a claim ordinarily cognizable...except in the exceptional circumstance where the petitioner's first motion was "inadequate" or "ineffective" to test his claim. The provision does everything but use the term "jurisdiction" itself, and there is no magic in that word that renders its use necessary for courts to find a statutory limitation jurisdictional in nature. As we have explained before, "[a] jurisdictional defect is one that strips the court of its power to act and makes its judgment void. *A plain reading of the phrase "shall not entertain" yields the conclusion that Congress stripped the court of subject-matter jurisdiction – in these circumstances unless the savings clause applies.*

Id. at 1338-39 (emphasis added; citations omitted; first two ellipses in original). *Accord Abernathy v. Wandes*, 713 F.3d 538, 557-558 (10th Cir. 1013); *Rice v. Rivera*, 617 F.3d 802, 807 (4th Cir. 2010); *Harrison v. Ollison*, 519 F.3d 952, 961 (9th Cir.), *cert. denied*, 555 U.S. 911 (2008).

C. THE USE OF "SHALL" IN SECTION § 2462 IS INDEED JURISDICTIONAL

In *S.E.C. v. Graham*, No. 13-10011-CIV, 2014 WL 1891418 (S.D. Fla. May 12, 2014), the Judge ruled that 2462 is jurisdictional and cited the hallowed language of the Supreme Court that:

> Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims. Thus, the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver.... *Some statutes of limitations, however, seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal* such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency. The Court has often read *the time limits of these statutes as more absolute,* say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period." *John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 133, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008) (emphasis supplied, internal citations and quotation marks omitted). The Court has referred to these second, "more absolute" statutes of limitations as *"jurisdictional." Id.* at 134, 128 S.Ct. 750 (emphasis supplied) (citing *Bowles v. Russell,* 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007)).

III. SUBJECT MATTER JURISDICTION IS NONWAIVABLE

It is well-settled in our judicial system that subject matter jurisdiction is an absolute right, and can never be waived, by any party, either explicitly or by failure to raise it at a proper time. The reason is obvious, it is not an affirmative defense, as in Federal courts, but is a threshold matter that relates to the very heart of ability of the Court to rule on the case.

The Supreme Court noted that "First, 'subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.' *United States v. Cotton,* 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Moreover, courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the

absence of a challenge from any party." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999), See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 1244, 163 L. Ed. 2d 1097 (2006). In *Bowles v. Russell*, 551 U.S. 205, 213, 127 S. Ct. 2360, 2366, 168 L. Ed. 2d 96 (2007), the Court noted that because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations. See *Arbaugh, supra,* at 513–514, 126 S.Ct. 1235.

CONCLUSION

The so-called tolling agreement, which is used an express waiver is not legally material, for subject matter jurisdiction cannot be waived. Therefore, its absence at the hearing is clearly not a manifest error in fact. More particularly, the Court correctly ruled that the statute of limitation is absolute for it lacked subject matter jurisdiction with regards to the punitive associational bar and gargantuan civil damages. Consequently, the motion to correct should be denied in its entirety.

Dated: January 23, 2015

Respectfully Submitted,

Moshe Marc Cohen Pro Se