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**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** |
| **Respondent.** |

**RESPONDENT MOSHE MARC COHEN'S PETITION FOR REVIEW OF INITIAL DECISION**


**ADMINISTRATIVE PROCEEDING**
**File No. 3-15790**

## RESPONDENT'S PETITION FOR REVIEW

Pursuant to Rules 410(b) and 411(b)(2)(i) & 2(ii)(B) of the Commission's Rules of Practice, Respondent Moshe Marc Cohen ("Respondent") hereby petition the Securities and Exchange Commission (the "Commission") to review the Initial Decision (the "Initial Decision") by the Hearing Officer in this case, rendered in the above-captioned action on January 7, 2015.[1]

## INTRODUCTION

Respondent, Moshe Marc Cohen is a resident of Brooklyn, New York with no record of any prior violations of the law. Cohen was a registered representative with Woodbury Financial Services, from 2003 to 2008, and held Series 6, 7, 24, 63 and 65 securities licenses. In January and early February of 2008, he was involved in the purchase of 28

[1] The Division filed a motion to correct a manifest error of fact; a decision on that motion was rendered on February 9, 2015, such that this petition is timely under Rule 410(b).

variable annuities that were annuitant-driven, and were owned by trusts. The annuitants were individuals who were not in the best of health. Therefore, upon their death, the purchasers were returned their principal plus investment return. The Initial Decision, applying a preponderance of evidence standard, ruled that Respondent's alleged conduct was in violation of Securities Act Section 17(a)(1) for his alleged involvement in a scheme to defraud and 17(a)(2), for alleged misrepresentations on the point of sale forms and Exchange Act Section 10(b) and Exchange Act Rule 10b-5, as well as secondary liability for record keeping violations.

The Respondent respectfully petitions the Commission to review the Initial Decision for multiple reasons. The Hearing Officer systematically prejudiced Respondent throughout the duration of the Hearing, which culminated in the prevention of testimony of several star witnesses in his defense which would have undermined the Division's case against Cohen. Furthermore, the Initial Decision engaged result-oriented legal analysis, and concocted a decision in which it **intentionally** mistakenly cited controlling precedent, while simultaneously conveniently selecting mere persuasive authorities. This means-end justification, is an attempt to broaden the tentacles of the SEC over alleged common law fraud violations.

## PREJUDICIAL ERRORS

### A. PREVENTION OF WITNESSES FOR THE DEFENSE

The Commission is respectfully asked to review the Initial Decision, based on Rule 411(b)(2)(i), which - in the spirit of the Due Process Clause of our Constitution, and in the entire notion of democratic justice - allows review upon the existence of "a prejudicial error was committed in the conduct of the proceeding." There was conduct at the Hearing that

was indecent and clearly wrong, that prejudiced Respondent and precluded the opportunity for justice to be attained. This was facilitated by the deceptive acts of opposing counsel; committed with the implicit blessing of the Hearing Officer,[2] Respondent was prevented from having his supporting witnesses testify at the hearing. Dean Conway of the Division stated that it would present its case for the duration of five days, and then the following five days, commencing with the day after Labor Day, would be granted to Respondent; an opportunity to present countervailing evidence. Judge Murray also stated during the pre-hearing conference that the hearing would last 10 days and as such signed subpoenas for Respondent's witnesses with a 10 day subpoena schedule.

On direct reliance of such affirmation, Respondent arraigned for several supporting witnesses to arrive in New York on Labor Day to testify on Cohen's behalf after Labor Day.. To his shock and chagrin, the hearing was truncated to two and a half days, and thereby his defense was thwarted. Due to Respondent's apparent naiveté, he assumed and expected that when this would be highlighted subsequent to the hearing, the Hearing Officer would amend the error and would, at the very least make an attempt, to rectify and/or ameliorate the miscarriage of justice. Unfortunately, the Hearing Officer cavalier and matter-of-fact response was that "he had not requested a continuance" (Initial Decision at 28). Yet, at the Hearing, the Hearing Officer was clearly made aware of this occurrence, and "apologized for the confusion." (Transcript at 966), yet never notified Respondent – who was appearing *pro se* – that he had to make a subsequent request for a continuance. She merely stated

[2] See Respondent Moshe Marc Cohen's Post-Hearing Brief at 7

> "I never told anyone that this case was going for two weeks, because as I indicated to you and as I just checked with my office, the case that I have scheduled that goes to hearing in Salt Lake City starts September 2nd which is Tuesday, so am I going to be in Salt Lake City next week."

This communication did not convey to Respondent that a continuance was necessary, [3]possible or even potentially effective. His confusion only intensified, at the issuance of the Initial Decision where the confusing interchange was retroactively construed as a clear communication regarding the necessity, reasonableness and feasibility of a continuance, and deemed Respondent to have effectively waived his right to request for a continuance. Based on the above, Respondent respectfully maintains that the Initial Decision violated procedural Due Process, the bedrock of our judicial system and the protection of fundamental individual right and liberties from governmental prejudice. It is a self-evident truth, that an adversarial system can only be effective and viable when it conforms to basic standards of decency and societal norms. It is a fortiori, that it runs afoul of "the evolving standards of decency that mark the progress of maturing society," *Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958).

**B. PROCEDURAL BIASES**

Cohen would like to point out how lopsided, unbalanced and biased the Court was to the Respondent.[4] Here are instances that illustrate such tactics:

- Tr. 667 Court biased and leading comments to the Division's witnesses.

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[3] Numerous attempts by Respondent Cohen were made during the hearing to reschedule the Respondent Witnesses but they were either ignored or blown off by the Deaf ears of the Hearing Officer. The post hearing briefs also made note of these facts and requests.

[4] With regards to such tactics by the Division, the Commission should look at the deceptive interchangeable use of "agents" in the plural, as opposed to the singular. See (Tr. 79:23-25-80: 1-12).

- Tr. 608:18 Cohen warned that he has only 3 minutes to cross examine Division's witness
- Tr. 610:6 Court states Cohen has one more question.
- Tr. 651:16-653:25 Court seems to have pre-judged Cohen by mention of Sanction and Public interest during the hearing before Respondent had an opportunity to present his defense.
- 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 and numerous other occasions.
- 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. Respondent Cohen requested a 5 minute bathroom break which the Court granted. Unbeknownst to Cohen at the Time of the hearing, the extreme unprofessionalism of the Chief Administrative Judge occurred which highlighted the biases and prejudices Cohen faced.—During the break, which Judge Murray asked to go off the record- she had a non-parte conversation with the Division's witness and asked numerous questions that was not in the presence of Cohen. She assumed it was off the record- but to Cohen's relief the Court recorder was shocked to see the events and deliberately recorded and transcribed the conversations as part of the court records. Cohen was made aware of this unbelievable total disregard to his rights by the court recorder and the review of the Hearing transcripts.

- 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 Court comments to not back track.
- Tr. 410 Court 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.

There were many more instances of where the Court was unfairly biased against Cohen and deprived him of a fair and impartial hearing. This list is by no means exhaustive.

## LEGAL ANALYSIS

### I. 17(A)(2) & 10(B)

The Commission is respectfully requested to review the Initial Decision pursuant to Rule411(b)(2)(ii)(B) of the Commission's Rules of Practice, which allows review to correct "a conclusion of law that is erroneous." The Initial Decision (Initial Decision at 26, 27)

stated that Section 17(a)(2) and Exchange Act Section 10(b) are applicable to the alleged conduct. Respondent maintains that 17(a) and 10(b) is entirely inapplicable to the facts at issue, and therefore the Hearing Officer incorrectly applied the aforementioned statutes to the facilitation of the purchase of variable annuities with no concomitant detriment to the investor.

At the onset, we are obliged to follow the guidance of the Supreme Court regarding the confines and ramification of the aforementioned statutes. The "language in § 10(b) of the Securities Exchange Act and Rule 10b–5 prohibiting fraud 'in connection with the purchase or sale of any security' must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of those provisions," *S.E.C. v. Zandford*, 535 U.S. 813, 122 S. Ct. 1899, 153 L. Ed. 2d 1 (2002).

Section 17 states that "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

> "(1) to employ any device, scheme, or artifice to defraud, or
>
> "(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

## A. DISTINCTIONING FEATURES OF *NAFTALIN*

### 1. LACK OF DIRECT OR POTENTIAL HARM TO INVESTORS

Respondent respectfully maintains a dual claim that 17(a) is limited and does not apply to the unique facts at issue, in which there was no means fraud against the investors or purchasers of the variable annuities. By design of the Drafters, in the aftermath of the Great Depression, 17(a) only relates to conduct that either actually harms investors directly or, at the very least, has the potential to directly harm investors. Furthermore, the plain meaning of the words of 17(a) - the "offer and sale" provision - are facially unambiguous and shall be construed to mean what it plainly states and therefore clearly does not apply to does not apply to the purchase of securities. The Hearing Officer categorically rejected these rather compelling arguments, and grossly failed to even address their merits; thereby exhibited willful blindness to the objective reality that this case involves a rather novel fact pattern and, by any account, is not directly analogous to any precedent.

The Initial Decision heavily relied on a Supreme Court decision in *United States v. Naftalin,* 441 U.S. 768, 99 S. Ct. 2077 , 60 L.Ed.2d 624 (1979). It is clear that it conveniently failed to comprehensibly analyze *Naftalin*; evidenced by the irresponsible and sloppy of the proverbial cherry-picking of quotations. It was willfully negligent of the multiple references in *Naftalin*, to the harm or potential harm to investors, as a result of the respondent's conduct; it did not solely rest its case on an unattenuated link to the market in the aggregate to the individual investors. In *Naftalin*, a criminal case, the respondent who was a president of a broker-dealer firm engaged in the scheme "short selling." He placed orders with brokers to sell stocks that he did not own, and he subsequently failed to deliver such stocks. The

brokers were compelled to honor the sale via the borrowing of stock, at a loss. The Court at 777-778, noted that

> "unchecked short-sale frauds against brokers would create a level of market uncertainty that could only work to the detriment of both investors and the market as a whole. Finally, while the investors here were shielded from direct injury, that may not always be the case. Had the brokers been insolvent or unable to borrow, the investors might well have failed to receive their promised shares."

Additionally, the Court noted that there was a distinct possibility of direct harm to investors, for "at that time the kind of fraud practiced by respondent might well have caused investors direct financial injury," *Id.* at note 8. The Initial Decision neglected to mention all of the references to direct investor harm, and the very best, read and applied select sentences in *Naftalin* in a vacuum.

**2. SELLER VERSUS PURCHASER**

Respondent respectfully maintains that 17(a) only applies to the sale of securities, and not to the purchasing of securities. The Initial Decision,[5] in similar sole reliance on *Naftalin*, dismissed the argument, without explanation, with a shockingly brief quotation that egregiously and unconscionably omitted text that is clearly inapposite to the issue at hand.

I would like to respectfully call to the attention of the Commission, the persuasive words of Judge Stewart:

> "Plaintiffs argue that *United States v. Naftalin,* 441 U.S. 768, 772 (1979) (*'Naftalin'* ), supports their current and proposed Rule 10b-5 claims because Congress intended the term "sale" to be defined broadly and the term is expansive

[5] It is important to note, that the Court solely addressed 17(a)(1) vis-à-vis 17(a)(3) and left open the interpretation of 17(a)(2), in which there is no stare decises that it is analogous to the succeeding and arguably derivative statue. This cannot be understated, especially in light of the bifurcation and distinction this Petition to Review does regarding the first two provisions.

> enough to encompass the entire selling process, since the purpose of the Securities Act is to "achieve a high standard of business ethics in every facet of the securities industry." *Id* at 775, quoting *SEC v. Capital Gains Bureau,* 375 U.S. 180, 186-87 (1963) (internal quotations omitted). However, plaintiffs' reliance on *Naftalin* is misguided. *Naftalin* involved a "short selling scheme," where the plaintiff sold selected stocks that he did not own which, "in his judgment, had peaked in price and were entering into a period of market decline." *Naftalin,* 441 U.S. at 770. Since *Naftalin* involved a criminal charge against a purported seller of securities, the Supreme Court did not address the definition of a purchaser or seller, instead noting that "[a]n offer and sale clearly occurred here." *Id* at 772. Additionally, the Court clarified that '[t]his case involves a criminal prosecution. The decision in *Blue Chip Stamps* ... which limited to purchasers or sellers of the class of plaintiffs who have private implied causes of action under ... Rule 10b-5, is therefore *inapplicable.'" Id* at 774 n6 (citation omitted) (emphasis added), *Webb v. Fain*, No. CIV. 02-645-ST, 2002 WL 31973726, at *2 (D. Or. Nov. 27, 2002).

It cannot be understated, that it is apparent that the Initial Decision was not unaware of the aforementioned distinguishing elements of *Naftalin*, and purposely misquoted the immortal words of the Supreme Court. The Initial Decision (Initial Decision at 27) stated that:

> "Cohen also attacks the applicability of Securities Act Section 17(a), claiming that there were no 'sales' of the variable annuities, only purchases. Resp. Br. at 65. The cases he cites to do not support Cohen's proposition, and in any case, predate the Supreme Court's clarification that 'in the offer and sale' requirement of Section 17(a) should be interpreted broadly. Naftalin, 441 U.S. at 773 (citing 15 U.S.C. §77b(a)(3), which defines sale broadly to include 'every....disposition of a security interest in a security, for value.')."

The incorrect and improper citation of *Naftalin* is misleading because it avers that Naftalin clearly ruled that 17(a) applies to the purchaser as well. Now, let us examine that actual language of Justice Brennen, who wrote:

> "The term 'sale' . . . shall include every contract of sale or disposition of a security or interest in a security, for value. The term . . . 'offer' shall include *every attempt* or offer *to dispose of . . . a security* or interest in a security, for value." (Emphasis added.) This language does not require that the fraud occur in any particular phase of the selling transaction. At the very least, an order to a broker to sell securities is certainly an 'attempt to dispose' of them," *Id*, at 773.

The relevant sentence, in its entirety, states that "'sale'.... should include every contract or sale or disposition." Clearly, read in its entirety, the term "disposition" does not refer to a mere purchaser, as was well-known to the incorrect "cut and paste" of a mere fraction of the sentence. This notion is further supported by the following sentences in which the Court concluded that an attempt to sell – which was basis of the claim against the Respondent – falls under the aegis of 17(a). Nowhere does in that the Court rebut the distinction between purchaser and seller, for the alleged conduct and decision in *Naftalin* turned solely on an attempted sale of securities. Therefore, the Initial Decision's sole reliance on *Naftalin*, besides for being disingenuous is unfounded and not substantiated.

## II. 17(A)(1)

### A. SCHEME LIABILITY

The Initial Decision maintained that the Respondent's alleged actions during the Relevant Period, were in violation of Securities Act Section 17(a)(1) and Exchange Act Rule 10b-5(a) and (c). 15 Section 17(a)(1) in its pertinent part, prohibits the use of any device, scheme or artifice to defraud in the offer or sale of any securities by use, directly or indirectly, of the means of interstate commerce or the mails. 15 U.S.C. § 77q(a)(1). To prove its claim under section 17(a)(1) of the Securities Act, the SEC must establish (1) the direct or indirect use of a device, scheme or artifice, to defraud; (2) with scienter; (3) in the offer or sale of a security; (4) using interstate commerce or the mail. *SEC v. Coffman,* 2007 WL 2412808 at *10 (D. Colo. Aug. 21, 2007).

The Initial Decision explicitly based its decision (Initial Decision at 26) on a novel and original interpretation of the aforementioned statue. Simply put, it completely

obfuscated the separate and distinct requirement to engage in a scheme, and maintains that alleged misrepresentations can contain within it the "scheme or artifice to defraud." Thereby, it effectively removes any independent requirement to engage in a scheme – the conduct element – from the relevant statute, and attempts to repackage a fraudulent misrepresentation as a scheme to defraud; ignoring the distinct language of 17(a)(1) & 17(a)(2), thereby attempting judiciously-labeled "double dipping," see *U.S. S.E.C. v. St. Anselm Exploration Co.*, 936 F. Supp. 2d 1281, 1299 (D. Colo. 2013).

Stated differently, scheme liability exists only where there is deceptive conduct going beyond misrepresentations. *Public Pension Fund KV Pharmaceutical Co.,* 679 F.3d at 987; *Kelly,* 817 F.Supp.2d at 344. Allegations of a scheme based on the same misstatements that would form the basis of a misrepresentation claim under Rule 10b–5(b) and nothing more are not sufficient. ***See*** *KV Pharmaceutical Co.,* 679 F.3d at 987; *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.,* 655 F.3d 1039, 1057 (9th Cir.2011), *cert. denied,* —— U.S. ——, 132 S.Ct. 2713, 183 L.Ed.2d 68 (2012); *Lentell v. Merrill Lynch & Co., Inc.,* 396 F.3d 161, 177 (2nd Cir.), *cert. denied,* 546 U.S. 935, 126 S.Ct. 421, 163 L.Ed.2d 321 (2005); *Lucent Technologies, Inc.,* 610 F.Supp.2d at 359. *See also SEC v. Familant,* 2012 WL 6600339 at *9 (D.D.C. Dec. 19, 2012) (noting that courts have rejected scheme liability "where the primary purpose and effect of a purported scheme is to make a public misrepresentation or omission.... In other words, because only [defendant] ultimately 'made' the false statement, the executives who plotted to unleash the false statement could not violate Rule 10b–5."); *TCS Capital Management, LLC v. Apax Partners, L.P.,* 2008 WL 650385 at *22 (S.D.N.Y. Mar. 7, 2008) (rejecting Rule 10b–5(a) and (c) claims where alleged deception "arose from the failure to disclose the 'real terms' of the

deal," which was "nothing more than a reiteration of the misrepresentations and omissions" of the disclosure claim).

"The two circuit courts that traditionally see the most securities cases [are] the Second and Ninth Circuits." Nicholas Fortune Schanbaum, *Scheme Liability: Rule 10b–5(a) and Secondary Actor Liability after Central Bank,* 26 Rev. Litig. 183, 197 (Winter 2007). Both the Second and the Ninth Circuits have held "[a] defendant may only be liable as part of a fraudulent scheme based upon misrepresentations and omissions under Rules 10b–5(a) or (c) when the scheme also encompasses conduct beyond those misrepresentations or omissions." *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.,* 655 F.3d 1039, 1057 (9th Cir.2011); - *Lentell v. Merrill Lynch & Co.,* 396 F.3d 161, 177 (2d Cir.2005) ("[W]here the sole basis for such claims is alleged misrepresentations or omissions, plaintiffs have not made out a market manipulation claim under Rule 10b–5(a) and (c)[.]"). This was also followed by Eight and Tenth Circuits.

The Initial Decision gives examples of specific alleged conduct during the relevant period, in an attempt to satisfy the distinct conduct requirement for scheme liability (Initial Decision at 27). It included: one phone call that was admittedly equally reflective of Respondent's naiveté, rather than his "chutzpah." Secondly, it referenced Respondent's alleged recommendations regarding the creation of familial trusts, which as merely a prepatory conversation to facilitation of alleged misrepresentation and was not made directly to any broker/dealer It clearly lacked the requisite nexus to alleged fraudulent statements, and was unattenuated and tentative connection to alleged fraud. Lastly, it incorrectly stated that Respondent "assisted in preventing the nominees from making statements that might have illuminated that true nature of the investment strategy." This misleading representation,

references a call made by a relative of one of the annuitants to the trustee of one of nominee-controlled trust. Yet, the Initial Decision (*Id.* at 12) clearly states that the recipient of said call believed that the caller was an employee of the insurance company Sun Life, and was unaware that it was the wife of an annuitant.

**INSUFFICIENCY TO PROVE SCIENTER FOR 17(A)(1)**

The Initial Decision claimed that the scienter requirement under 17(a)(1) was satisfied, by the existence of circumstantial evidence, a low threshold that only requires equally-likely inferences, See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 326, 127 S. Ct. 2499, 2511, 168 L. Ed. 2d 179 (2007). Scienter relates not the act, but to the mental state of the actor. Thereby, it is synonymous with "intent, in a criminal context," E.g., *Holdridge v. United States*, 282 F.2d 302, 309 (8th Cir. 1960); Rollin M. Perkins, Criminal Law 774, 771, (2d ed. 1969) ; Wayne R. LaFave & Austin W. Scott, Jr., Handbook on Criminal Law 192 (1972), Gerhard O.W. Mueller, On Common Law Mens Rea, 42 Minn. L. Rev. 1043, 1051-52 (1958).

It is axiomatic that intent must be contemporaneous with the proscribed actions. The bulk of the factual allegations that were the express basis of the inference of scienter occurred during a single phone conversation between Respondent and one Mr. Smallidge (Initial Decision at 23). During the course of that conversation, Respondent allegedly made comments regarding the nature of the annuity owners and the purpose of the creation of the trusts by some of the nominees. The alleged misrepresentations to Woodbury on the point of sales form related to sales made on January 28, 2008 and February 7, 2008 (Initial Decision at 11, note 17). The phone call at issue, occurred on February 13, 2008, (Initial Decision at 18) a full week after the sales at issue. Therefore, there lacks the requisite nexus between the timing of the conduct and

inferences of wrongful state of mind at the time of the actions, and the decision should, at the very least, be subject to review.

**10(b) & 10(b)(5)**

The Hearing Officer failed to adequately address the "in connection with" requirement of 10(b)(5), and the fact that the alleged conduct, in our case, lacks the requisite nexus with the sale of securities. Because of the way in which 10b-5 is formulated, it is not enough that the defendant have committed one of the many "bad acts" thought to be actionable under the rule. Rather, the defendant's bad act must have been made "in connection with the sale of ... securit[ies]." The Initial Decision neglected to even consider whether Respondent's alleged conduct actually was legally connected with the sale of securities.

The Commission should look to the precedent of the Supreme Court which repeatedly ruled that the "in connection with" nexus fails as a stricter 'transaction nexus" will apply. *Banker's Life* 404 U.S. at 12-13 states "the crux of the present case is that Manhattan suffered an injury as a result of deceptive touching its "sale as an investor" (emphasis added). *SEC v. Pirate investor, LLC,* the 4th circuit had 4 relevant factors to be considered: the 4th element required was "whether material misrepresentations were disseminated to the "public" in a medium upon which a reasonable investor would rely" (emphasis added)." it clearly said the following "We do not presume to exclude other factors that could help distinguish between fraud in the securities industry and common law fraud that happens to involve securities."

**SANCTIONS**

**CEASE AND DESIST**

The Initial Decision chastised respondent for lack of acknowledgment "that his actions were wrong" (Initial Decision, at 32), in its determination that a Cease and Desist Order is appropriate. The Hearing Officer conflated and confused two distinct concepts; the rigorous defense of conduct that was done with the advice of counsel such as Cohen's, in comparison to individuals who acted with the full awareness that their conduct was wrong, morally and legally, and remained unrepentant even when nakedly faced with the opprobriousness of their actions. We are reminded of the words of the venerable Justice Ginsburg, in *S.E.C. v. First City Fin. Corp.*, 890 F.2d 1215, 1229 (D.C. Cir. 1989), who stated:

> "The securities laws do not require defendants to behave like Uriah Heep in order to avoid injunctions. They are not to be punished because they vigorously contest the government's accusations. We think "lack of remorse" is relevant only where defendants have previously violated court orders, *see SEC v. Koenig,* 469 F.2d 198, 202 (2d Cir.1972), or otherwise indicate that they did not feel bound by the law, *see Savoy Indus.,* 587 F.2d at 1168."

## SECTION 2462

**DISGORGEMENT**

The Initial Decision, which was reiterated in the February 9, 2015 Denial of the Motion to Correct Manifest Error, ruled that the §2462 bars the imposition of civil damages and the punitive associational bar. Respondent's response to Division's motion, strongly argued that the language of the statute is jurisdiction-conveying in nature, based on a mere sampling of a host of Supreme Court decisions and analogous statutes. Besides for the plain meaning of the statute, the strategic location, title and section of the statute, supports such an interpretation. (Opposition to Motion to Correct, at 6 note 2). The Division was unable to offer *a single* countervailing

argument vis-à-vis statutory interpretation, rather relied on a paucity of mere persuasive authority.[6]

Likewise, the notion that the disgorgement of the Respondent is equitable in nature, and thereby not barred by the statute of limitations under 28 U.S.C. § 2642, is unavailing; precisely because to the contrary, the disgorgement is punitive in nature. In *S.E.C. v. Graham*, No. 13-10011-CIV, 2014 WL 1891418 (S.D. Fla. May 12, 2014) Judge James Lawrence King proclaimed:

> In essence, the SEC's argument in this case is that because the words "declaratory relief," "injunction," and "disgorgement" do not appear in § 2462, no statute of limitations applies. The principles underlying the Supreme Court's decision in *Gabelli,* however, counsel against accepting the SEC's argument. Penalties, "pecuniary or otherwise," are at the heart of all forms of relief sought by the SEC in this case. First of all, by its very terms, the SEC's complaint seeks to have the Court, by way of a declaration that the defendants have violated the federal securities laws, "label defendants wrongdoers." *See Gabelli,* 133 S.Ct. at 1223 (discussing what constitutes a penalty and then invoking the powerful words of Chief Justice Marshall that "it would be utterly repugnant to the genius of our laws if actions for penalties could be brought at any distance of time"). Similarly, the injunctive relief sought by the SEC in this case forever barring defendants from future violations of the federal securities laws can be regarded as nothing short of a penalty "intended to punish," especially where, as here, no evidence (or allegations) of any continuing harm or wrongdoing has been presented. Finally, the disgorgement of all ill-gotten gains realized from the alleged *1311 violations of the securities laws—*i.e.,* requiring defendants to relinquish money and property-—can truly be regarded as nothing other than a forfeiture (both pecuniary and otherwise), which remedy is expressly covered by § 2462. To hold otherwise would be to open the door to Government plaintiffs' ingenuity in creating new terms for the precise forms of relief expressly covered by the statute in order to avoid its application.

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[6] The Initial Decision heavily relied on the Commission's blatant disregard of decisions of District Courts regarding 17(a) and 10(b). The Division has no qualms with such reliance. Yet, it simultaneously invokes persuasive authority with regards to 2462. This is another illustration of selective prosecution.

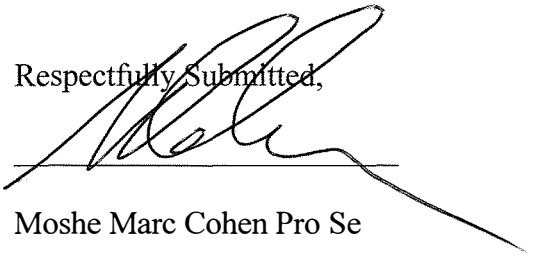
Besides for the general punitive characteristic of disgorgements, in this case specifically, there are additional supporting elements specific to the novel facts, at hand. It is clear that this Initial Decision does not view the disgorgement to be purely equitable, rather it has strong undertones of retributorious maxims and notions of utilitarian justice laced with general and specific deterrence (Initial Decision at 32) This is evidenced by the totality of the circumstances, including, but not limited to the contention that Respondent did not explicitly recognize that his "actions were wrong" in conjunction with its punitive application and affect; the fact that Respondent does not currently have the funds.

## CONCLUSION

It appears compelling and in the interest of justice, for the Commission to grant this Petition and to review the Initial Decision by the Hearing Officer. Respondent demonstrated that besides for the procedural biases – subtle and overt – the law used against Respondent was not properly applied, as this novel issue was attacked with deliberate cherry-picking of unsettled law, as a means to achieve a desired result. It does not offer predictability, uniformity and reliability in the application of the doctrines of our Republic. Therefore, I respectfully ask the Commission to grant this Petition.

Dated: February 27, 2015

Respectfully Submitted,



Moshe Marc Cohen Pro Se