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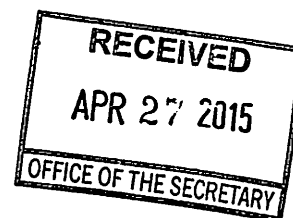
UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION



In the Matter of **MOSHE MARC COHEN** **Respondent.**

RESPONDENT MOSHE MARC COHEN'S INITIAL BRIEF IN SUPPORT OF COMMISSION REVIEW

ADMINISTRATIVE PROCEEDING
File No. 3-15790

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Pursuant to Commission Rules of Practice 410 and 411, 17 CFR §§ 201.410 and 201.411, Respondent Moshe Marc Cohen ("Cohen") submitted a Petition for Review of the Initial Decision issued on January 7, 2015 by the Administrative Law Judge ("ALJ"). The Commission issued orders granting Cohen's Petition for Review and a Petition for Review submitted by the Division of Enforcement ("Division"). It further required Cohen to address the merits of the Division's Petition, in his initial brief.

I. 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 variable annuities that were annuitant-driven, and were owned by individuals or 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 ALJ, applying a preponderance of evidence standard, ruled that Respondent's alleged conduct was in violation of Securities Act Sections 17(a)(1) and 17(a)(2), for his alleged involvement in a scheme to defraud and for misrepresentations on the point of sale forms and of Exchange Act Section 10(b) and Exchange Act Rule 10b-5 enacted thereunder, as well as secondary liability for record keeping violations. As a result, Cohen was and charged the fee of $766,958.00 in disgorgement from the sales in early 2008, plus the statutorily proscribed prejudgment interest (Initial Decision at 33).

Respondent respectfully maintains that the Initial Decision ruling on the merits should be reversed by the Commission. The ALJ speciously conflated the applications of the aforementioned provisions and failed to recognize that although they are inter-related, they are clearly distinct in scope of regulated conduct, as it is facially apparent from their respective texts. Furthermore, the Initial Decision's novel analysis of both provisions independently, is likewise is exemplar of infidelity to the language it purports to interpret. Consequently, it reached erroneous conclusions with regards to the merits of the case and its appropriateness to this forum; the sanctioning of conduct that can only be aptly classified as mere common-law fraud, willfully blind of the history and purpose, of the establishment of this Commission.

A distinct issue relates to the imposition of sanctions, particularly the third-tier penalty requested by the Division. Apparently not satisfied with the sum of close to a million dollars related to the disgorgement, 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). The ALJ correctly ruled that penalties are time-barred under 28 U.S.C. § 2462 due to the untimely commencement of this proceeding, irrespective of multiple tolling agreements.

II. SUMMARY OF ARGUMENTS

The Initial Decision erred in its conclusion that Cohen violated Securities Act Section 17(a) because said provision is facially and unambiguously limited to fraud against the investors. Therefore, any liability that is based on Securities Act Sections 17(a)(1) and 17(a)(2) is inapplicable to the case at bar, and should be reversed. Specifically, the claim of violation of Section 17(a)(1) and Exchange Act Section 10(b) and Rule 10b-5(a) and (c), should be reversed because its predicated on unsubstantiated interpretation of said provisions that renders some of

its terms obsolete; via obfuscation of the act requirement. It erroneously attributes this reading on Supreme Court precedent, which will be convincingly established that such *stare decises*, is nonextant, because the Court didn't even address this issue directly, let alone in dicta. Furthermore, the ALJ heavily relied on ex post facto conduct to import a retroactive scienter inference, in order to invoke Securities Act Section 17(a)(1) and Exchange Act Rule 10(b).

28 U.S.C. § 2462 is clearly a jurisdictional-setting statute. This evidenced by the plain meaning of its language in concert with Legislative intent and purpose, especially in the aftermath of *Gabelli v. S.E.C.,* 133 S. Ct. 1216, 185 L. Ed. 2d (2013). Furthermore, in *Gabelli,* the Supreme Court expressly left open the question whether equitable tolling is applicable, a notion that is undoubtedly predicated on an absolute and jurisdictional reading of the statute. However, in the event that equitable tolling would theoretically be applicable, that would relate solely to when the five years commences, and does not relate to the extension of the statutory time frame via mere agreement by the parties. Although, pursuant to its express terms, Congress can decide to broaden the scope of Section 2462, absent such an indication, the relevant parties cannot arbitrarily tamper with subject matter jurisdiction, with regards to its diminution and certainly pertaining to its augmentation. Furthermore, the notion that Section 2462 actually means what it says; it supported by the traditional canons of statutory interpretation, and recent Supreme Court decisions in analogous statutes. It is also advances public policy objectives to the stark contrast of its alternative; an open-ended allowance of penalization of antediluvian claims.

The Commission is respectfully asked to consider the real-life ramifications of levying a heavy fine on Cohen, regardless if it is categorized and labeled a disgorgement. The forfeiture

of close to a million dollars, in light of his current financial situation, can only be aptly classified as a fine and a penalty, for its castigatory effect on Cohen and his family. Therefore, it likewise fails within the aegis of Section 2462.

III. ARGUMENTS

A. ANALYSIS OF SECURITIES ACT SECTION 17(A) AND EXCHANGE ACT RULE 10(B) AND THE ALJ'S ERRONEOUS APPLICATION THEREOF

1. Inapplicability of Section 17(a) Due to Lack of Direct Actual Harm To Investors

At the onset, we are obliged to follow the guidance of the Supreme Court regarding the confines and ramification of the facially broader Rule 10(b) by extension, to its coextensive predecessor. 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 10(b) does not incorporate common-law fraud into federal securities law." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008) It is a fortiori that such guidance should be applied to an analysis of Section 17(a).

The ALJ erroneously concluded that Cohen was in violation of Section 17(a). Its preamble states in its pertinent part that "It shall be unlawful for any person in the offer or sale of any securities…" The language is clear and facially unambiguous. The fraudulent conduct proscribed and regulated is of the kind that it is in the offer or sale of any securities. Clearly

distinct from the express broad language of 10(b)-5 which relates to "It shall be unlawful for any person . . . (t)o use or employ, in connection with the *purchase or sale* of any security" (emphasis added). Consequently, the conduct in question, which relates to alleged fraud against the seller of the securities, falls solely under the aegis of the latte provision, and falls outside the parameters of Section 17(a).

The ALJ relied heavily on *United States v. Naftalin*, 441 U.S. 768, 99 S. Ct. 2077, 60 L. Ed. 2d 624 (1979), to support the notion that Section 17(a) encompasses fraud against a seller. However, a careful reading of *Naftalin* does not support such a conclusion. The Court was mindful of the glaring statutory language that is limited to fraud against the purchasers, and went to great lengths to explain how the conduct at issue directly and indirectly detrimentally impacted investors. Clearly, the facts in the case at bar is clearly dissimilar from *Naftalin*, and the requisite nexus to investor harm is lacking. Therefore, the reliance on *Naftalin* is clearly misplaced. [1]

Naftalin related to a respondent who placed orders with broker/dealers to sell stock which he did not own, in which subsequent to his failed delivery of said stock, the defrauded broker/dealers had to "buy in" and purchase stocks at higher prices, in order to deliver stock to the purchasers. The investors were not actually defrauded and *Naftalin* turned on whether fraud solely on the broker is within the aegis of Section 17(a). The Court ruled in the affirmative, but clearly acknowledged at length that there was potentially actual harm to investors and stated:

> 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. Entitled to

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[1] See *Naftalin Id.* at 774 n.6 that clearly limits its scope to 17(a) and not to 10(b) and 10(b)(5). Yet, the ALJ conflated both statutes with regards to the applicability of *Naftalin*, (Initial Decision at 22).

receive shares at one price under the purchase agreement, they would have had to buy substitute shares in the market at a higher price.[8]

Id. at 777-8. It is clear and unequivocal that the Court did not categorically reject the notion that Section 17(a) was primarily intended to protect investors and thereby systematically expounded on how short-selling can potentially, cause direct and actual harm to investors. See also *Id. at 778* n.8, where the Court explained that the relevant conduct, from the perspective and anticipation of the legislatures, would have *actually* affected investors. Indeed, this reading of *Naftalin* has been recently adopted by the Commission, which stated that "none of this is to suggest that liability may attach under Section 17(a) without any investors having been actually or potentially defrauded. Indeed, in any case brought under Section 17(a), there would need to be a showing that investors were or could have been defrauded." *In the Matter of John P. Flannery & James D. Hopkins*, Release No. 3981 (Dec. 15, 2014) WL 7145625 at * 16.

The notion that *Naftalin* stands for the interpretation that Section 17(a) ignores any direct harm to the investors - actual or potential - runs afoul the express choice of language and legislative history that is at the very heart of said statute.[2] Furthermore, it is willfully blind to the pains the Court went to ascertain actual and direct harm to investors. Therefore, the Initial Decision's repeated reliance (Initial Decision at 23 and 27) on *Naftalin* to support a claim that Section 17(a) incorporates fraud where no direct investor harm existed is unwarranted and should not be upheld.

2. Failure to Prove the Conduct Requirement under Sections 17(a)(1) and 10(b)

[2] Additionally, 17(a)(3) is clearly limited to fraud against the purchaser, thereby revealing on the preceding provisions.

In 1942, acting under the authority granted to it by § 10 (b) of the 1934 Act, the Commission promulgated Rule 10b-5, 17 CFR § 240.10b-5, now providing, its pertinent pars as follows:

> "§ 240.10b-5 Employment of manipulative and deceptive devices.
>
> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, or artifice to defraud,
>
> or...
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, "in connection with the purchase or sale of any security."

The ALJ applied Commission's recent decision in *John P. Flannery*, Securities Act of 1993 Release No. 3981, 2014 SEC LEXIS 4981, at * 38-39 to adopt a novel interpretation of 17(a)(1), 10b-5(a) and (c). Essentially, it completely obfuscated the separate and distinct requirement to engage in a scheme in both provisions, and maintained 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, in an attempt to repackage a fraudulent misrepresentation as a scheme to defraud.

In an outright repudiation of aforementioned argument, it was noted that "it is cardinal principle of statutory construction that statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" *S.E.C. v. Familant*, 910 F. Supp. 2d 83 (D.D.C. 2012). Indeed, the prevailing view many circuits, and more specifically in the Second Circuit, is that the statute must be interpreted to mean what it plainly states and a conduct requirement exists, that it

distinct and independent of the actual words spoken. "Finally, plaintiffs cast their claims in ..., pursuant to Rule 10b–5(a) and (c). We hold that where the sole basis for such claims is alleged misrepresentations or omissions, plaintiffs have not made out a... claim under Rule 10b–5(a) and (c)" *Lentell v. Merrill Lynch & Co.,* 396 F.3d 161, 177 (2d Cir. 2005). Consequently, claims brought under 10(b) should not be upheld, in light of the failure to satisfy the conduct requirement.

It is respectfully maintained that the Commission's decision in *In the Matter of John P. Flannery & James D. Hopkins*, Release No. 3981 (Dec. 15, 2014), incorrectly applied a recent Supreme Court decision in support of its novel statutory interpretation. The Commission opined that

> Indeed, the Supreme Court recently indicated that it agreed with this understanding—at least to the extent that Rule 10b-5(a) encompasses the "making" of a material misrepresentation.58

As it explained in attendant n. 58

> *Chadbourne & Parke LLP v. Troice,* 134 S. Ct. 1058, 1063 (2014) (stating that Rule 10b5 "forbids the use of any 'device, scheme, or artifice to defraud' (*including* the making of 'any untrue statement of a material fact' or any similar 'omi[ssion]') 'in connection with the purchase or sale of any security"' (alterations in original; emphasis added)).

Chadbourne & Parke LLP v. Troice, 134 S. Ct. 1058, 1063, 188 L. Ed. 2d 88 (2014), in a case that turned primarily on the ramifications of The Securities Litigation Uniform Standards Act of 1998 that precluded class-actions brought on state law claims, the court stated:

> (1) Section 10(b) of the underlying regulatory statute, the Securities Exchange Act of 1934. 48 Stat. 891, as amended, 15 U.S.C. § 78j (2012 ed.). This well-known statutory provision forbids the "use" or "employ[ment]" of "any manipulative or deceptive device or contrivance" "in connection with the

> purchase or sale of any security." § 78j(b).Securities and Exchange Commission Rule 10b–5 similarly forbids the use of any "device, scheme, or artifice to defraud" (including the making of "any untrue statement of a material fact" or any similar "omi[ssion]") "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b–5 (2013).

The sole mention of 10b-5, as an introductory matter, states in parenthesis that the aforementioned statute encompasses the making of untrue statements. Yet, nowhere does it purport to support the novel argument that this parenthetical statement is referring to the provision to 10b-5(a) or (c). It most certainly is referring to 10b-5(b) the classic "maker" provision and does not allude to its sister provisions – (a) and (c) – pertaining to "device" and "act." Yet, the Commission seems to somehow construe the Court's statement differently, as it repeatedly did in *Flannery, Id* n.66.

The ALJ, apparently unconvinced by the glossing over of express statutory language, offers 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 was merely in 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 tentatively connected to the 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.

3. INSUFFICIENTLY ESTABLISHED SCIENTER FOR SECTION 17(A)(1) AND RULE 10(B)

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 (*Id.* at 11, n.17). The phone call at issue, occurred on February 13, 2008, (Id. at 18) a full week after the sales at issue. Therefore, it 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 ALJ's determination rests on tentative grounds.

B. SANCTIONS

1. CIVIL DAMAGES ARE BARRED BY SECTION 2462

The Initial Decision ruled that the statute of limitation is an issue with regards to civil penalties (Initial Decision at 30). The Division insists that third-tier penalties should apply[3] because of the execution of three consecutive tolling agreements which would allow the commencement of a suit beyond the five years mandated by statute. There is no claim of equitable tolling, or any other of the traditional tolling principals. There is no contention that § 2462 does not apply to administrative proceedings, nor is there a dispute as to the time of the accrual of the claim, which accrues at the time of the alleged offense, as the Supreme Court unanimously held in *Gabelli v. S.E.C.,* 133 S. Ct. 1216, 185 L. Ed. 2d (2013). Nor, is there any disagreement regarding the recognition that civil remedies are purely punitive in nature, and thereby are certainly within the contours of § 2462 bar on "civil fine, penalty, or forfeiture" brought past the statutorily proscribed period. The issue before us is solely one of statutory interpretation and is therefore guided by the traditional canons and maxims of statutory interpretations.

The question on the general applicability of civil penalties, in the case at hand, turns on whether 28 U.S.C. § 2462 is a jurisdiction-limiting statute, rather than a mere time-limitation on the assertion of an affirmative defense.[4] Although in *Gabelli v. S.E.C.,* 133 S. Ct. 1216, 1220, 185 L. Ed. 2d 297, n.4 (2013) the Supreme Court left such a claim open, not at any time hitherto, has Respondent argued that said statute is a statute of repose, irrespective of the Division's misrepresentation of such claim (Div. Reply to Cohen's opposition to Correct Manifest Error at

[3] There was no basis or precedent offered in support of such draconian fines, especially in light of the indirect harm to investors and Cohen's limited financial resources.

[4] Accordingly, *Canady v. SEC*, 230 F.3d 362, 364-65 (D.C. Cir. 2000), is irrelevant because in that case there was no claim of civil penalties.

2-3). It is undisputed this case is not one that is purportedly related to equitable tolling as in *United States v. Core Labs., Inc.,* 759 F.2d 480, 484 (5th Cir. 1985), and is inapposite of the fraudulent concealment and continuing violations doctrines, in *U.S. S.E.C. v. Geswein*, No. 5:10CV1235, 2014 WL 861317 (N.D. Ohio Mar. 5, 2014).[5] For, the time of the accrual of the claim is not an issue, as the alleged conduct, occurred in January and February 2008, while the Order Instituting Administrative and Cease-and Desist Proceedings was issued on March 13, 2014, beyond the statutorily mandated period.

A proper analysis of the statutes, is mindful of the words of Justice Scalia that "moreover, the line between misclassifying a ground as subject-matter jurisdiction and misapplying a proper ground of subject-matter jurisdiction is sometimes elusively thin," *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234, 127 S. Ct. 2411, 2418, 168 L. Ed. 2d 112 (2007).

The controlling statute, 28 U.S.C. § 2462, provides that:

> "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

As "(t)he starting point in every case involving construction of a statute is the language itself.' *Blue Chip Stamps*, supra, at 756, 95 S.Ct. at 1935, 44 L.Ed.2d at 561 (Powell, J., concurring); see *FTC v. Bunte Bros., Inc.,* 312 U.S. 349, 350, 61 S.Ct. 580, 581, 85 L.Ed. 881, 883 (1941)." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197, 96 S. Ct. 1375, 1383, 47 L. Ed. 2d 668 (1976). The plain meaning of the statute is clear, unequivocal and unambiguous. The statue does not merely

[5] Admittedly, the legislature can preclude even equitable tolling of the statute of limitation via express statutory provision. See dicta in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363, 111 S. Ct. 2773, 2782, 115 L. Ed. 2d 321 (1991).Yet, Respondent does not advance the argument that it had done so with regards to Section 2462.

limit the assertion of an affirmative defense, rather it relates to the very heart of the right to adjudicate the subject matter at hand. This is patently evidenced by the choice of the word *"shall"* which denotes absoluteness and jurisdicitonality. "The express language of a statute is controlling, absent a clearly expressed legislative intention to the contrary." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). To interpret otherwise, "would work a kind of linguistic havoc," as Justice Breyer said in a not-dissimilar context in *United States v. Brockamp*, 519 U.S. 347, 352, 117 S. Ct. 849, 852, 136 L. Ed. 2d 818 (1997).

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.

This specific choice of language is reflective of the recurring and historic language of the general statute of limitation set forth in § 2462 which has its roots way prior to its antecedent in 1839 and to the 1948 version whence it took on its current form, See *Gabelli v. S.E.C.*, 133 S. Ct. 1216, 1219, 185 L. Ed. 2d 297 (2013). In all permutations of the relevant statute, it has always and steadily maintained the clear denotation of absoluteness evidenced by the language and select choice of words. The Act of February 28, 1839, Ch. 36 § 4, 5 Stat. 322, states:

> That no suit or prosecution shall be maintained, for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture accrued.

Similarly, the 1874 official codification into Revised Statues, Preface, Code of the Laws of the United States, 1934 ed. states in relevant part:

> No suit or prosecution for any penalty or forfeiture, pecuniary or other wise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued.

The recurrence of the phraseology of absoluteness runs throughout Revised Statutes § 1047 of 1925, and were codified verbatim 28 U.S.C. § 791 until it was renumbered and coded in its current location. See, *3M Co. (Minnesota Min. & Mfg.) v. Browner*, 17 F.3d 1453, 1458 n. 7(D.C. Cir. 1994).

The very purpose of an absolute interpretation of § 2462 is advanced by the very same reasons that the Supreme Court in *Gabelli* rejected the "discovery rule" with regards to computation of relevant time. The Court *Id.* at 1221 noted:

> Statutes of limitations are intended to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348–349, 64 S.Ct. 582, 88 L.Ed. 788 (1944). They provide "security and stability to human affairs." *Wood v. Carpenter,* 101 U.S. 135, 139, 25 L.Ed. 807 (1879). We have deemed them "vital to the welfare of society," *ibid.,* and concluded that "even wrongdoers are entitled to assume that their sins may be forgotten," *Wilson v. Garcia,* 471 U.S. 261, 271, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).

See also *Burnett v. New York Central R.R. Co.,* 380 U.S. 424 (1965) that clarifies the primary purposes of statute of limitations, because it "establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim."

Although the legislature can and has in the past, carved out exceptions to the catch-all statute of limitations, as explicitly provided for by said statute, it has not purported to do so with

regards to the case at bar.[6] This is sensible from the perspective of public policy, as it is faithful to the ancient doctrine of *lex dilationes semper exhorret.* Specifically, the allowance of tolling the statute of limitation via consent of the parties, can potentially allow claims to be brought way beyond the statutorily- intended and reasonable time frame. Furthermore, a strict construction of § 2462 would allow for uniformity and predictability of the law, as it would likewise preclude an agreement to limit the time in which a claim shall be brought, see e.g. *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586, 608, 67 S.Ct. 1355, 91 L.Ed. 1687 (1947). Clearly, the adoption of a literal interpretation is just and reasonable, particularly in light of the plethora of enforcement mechanisms at the disposal of the SEC, which prompted the *Gabelli* court to notice:

> The SEC, for example, is not like an individual victim who relies on apparent injury to learn of a wrong. Rather, a central "mission" of the Commission is to "investigat[e] potential violations of the federal securities laws." SEC, Enforcement Manual 1 (2012). Unlike the private party who has no reason to suspect fraud, the SEC's very purpose is to root it out, and it has many legal tools at hand to aid in that pursuit. It can demand that securities brokers and dealers submit detailed trading information. *Id.,* at 44. It can require investment advisers to turn over their comprehensive books and records at any time. 15 U.S.C. § 80b–4 (2006 ed. and Supp. V). And even without filing suit, it can subpoena any documents and witnesses it deems relevant or material to an investigation. See §§ 77s(c), 78u(b), 80a–41(b), 80b–9(b) (2006 ed.).The SEC is also authorized to pay monetary awards to whistleblowers, who provide information relating to violations of the securities laws. § 78u–6 (2006 ed., Supp. V). In addition, the SEC may offer "cooperation agreements" to violators to procure information about others in exchange for more lenient treatment. See Enforcement Manual, at 119–137. Charged with this mission and armed with these weapons, the SEC as enforcer is a far cry from the defrauded victim the discovery rule evolved to protect.

[6] Wartime suspension of limitations by operation of 18 U.S.C. § 3287 have been upheld, See *Bridges v. U.S.*, 346 U.S. 209 (1953).

Id. at 1222. Based on the above, it is clear that doctrines of statutory interpretation, legislative intent, and public policy, collectively and individually, mandate that Section 2462 is a jurisdictional statute.

. A. Supreme Court Decisions in Similar Jurisdiction-Stripping Statutes

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).

The use of similar statutory interpretations 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, and 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 an 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 a decision that was based on the language of the statute, albeit with a contrary result. "Section 1395oo (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.[7]

B. LOWER COURTS' DECISIONS IN SIMILAR JURISDICTION-STRIPPING STATUTES

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[7] 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. This was based on countervailing considerations: 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). See also *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).

For the aforementioned reasons, based on the plain meaning of the statutes, its histoy and construction of similar statutes, it is clear that the Initial Decision was correct with regards to the immateriality of the tolling agreement. "In the absence of a conflict between the reasonably plain meaning of a statute and legislative history, the words of the statute must prevail." *Aaron v. Sec.*

& Exch. Comm'n, 446 U.S. 680, 100 S. Ct. 1945, 64 L. Ed. 2d 611 (1980). 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). The Commission is urged to consider that "subject matter jurisdiction is conferred and defined by statute; it cannot be created by consent of parties, nor supplanted by considerations of convenience and efficiency," *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255 (11th Cir. 2000).

2. DISGORGEMENT IS GOVERNED BY SECTION 2462

It is undisputed that Section 2462 refers to punitive measures brought five years after the fraud occurred. This is expressly delineated by the terms of the statute, which bars untimely suits "for the enforcement of any civil fine, penalty, or forfeiture." The ALJ maintained the position that, although the action is time-barred, disgorgement is warranted, because it is purportedly not a penalty or forfeiture and is merely an equitable remedy. Therefore, Cohen must pay the amount of close to a million dollars, although he is no longer in possession of such funds and it is well beyond his current financial ability, under the guise of an equitable remedy. [8]Additionally, the notion that the statutorily proscribed prejudgment interest is purely equitable

[8] Notably, the Division is not satisfied with the imposition of gargantuan penalties, representative of the disgorgement, plus interest and accompanied by third-tier civil penalties of approximately five million dollars. It simultaneously wants to impose an associational bar on Respondent, likewise, under the guise of an equitable remedy (Div. Motion to Correct at 2 n.1). It is

in nature is disconcerting in general, but particularly odious in the case at bar, where interest was calculated on sums not in the possession of the Respondent and currently way beyond his means In light of the above, the view the Respondent has to somehow come up with such an amount is clearly punitive in its effect and a contrary conclusory labeling as "equitable" is a view dangerously bordering on the anodyne.

In a seminal case that distinguishes between equitable and punitive remedies, it was noted that it that "question of whether law is penal, for purposes of statute of limitations, depends on whether its purpose is to punish offense against the public justice of the state, or to afford private remedy to person injured by the wrong, *Johnson v. S.E.C.,* 87 F.3d 484 (D.C. Cir. 1996). Also, See Black's Law Dictionary 1247 (9th ed. 2009) (defining "penalty" as "[p]unishment imposed on a wrongdoer ... as distinguished from compensation for the injured party's loss"). 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 maintained:

> 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

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unsettling, both intellectually and realistically, to require Cohen to pay an enormous sum while at the same time bar him from the securities industry, and to unabashedly claim that it is solely concerned with equity.

> 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.

This definition of the meaning of penalty is by no means novel, and conforms with normative interpretations of such term. Dictionaries generally define "penalty" as relating to punishment. See, e.g., Black's Law Dictionary 1020 (5th ed.1979) (defining penalty as "involv[ing] idea of punishment"); Webster's Third New International Dictionary 1668 (1981) (defining penalty as "punishment for [a] crime or offense"). See also the Supreme Court's definition of a penalty in *Meeker v. Lehigh Valley R.R. Co.,* 236 U.S. 412, 423, 35 S.Ct. 328, 59 L.Ed. 644 (1915), as "something imposed in a punitive way for an infraction of a public law." Similarly, in *Huntington v. Attrill*, 146 U.S. 657, 673–74, 13 S.Ct. 224, 36 L.Ed. 1123 (1892), the Court concluded whether a law is penal depended on "whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."

IV. CONCLUSION

It is clear that sanctions are not warranted because the alleged conducts in this proceeding is clearly beyond the contours of Section 17(a), which expressly and unambiguously does not relate to defrauded sellers. Similarly, Rule 10b is not applicable because as a threshold matter, scienter must be established and there must be independent conduct beyond mere statements or

omissions. In the alternative, sanctions do not apply because of the jurisdiction-limiting nature of Section 2462, which applies to all penalties, even those clothed as equitable remedies. Therefore, the Initial Decision of the ALJ should be vacated in its entirety.

Dated: April 20, 2015

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CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing document were served on the following on this 20th day of April, 2015, in the manner indicated below:

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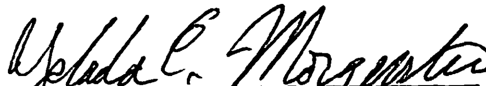

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