UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15790

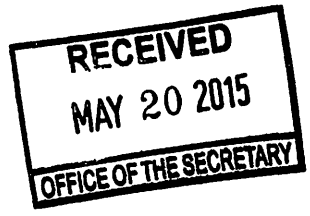
In the Matter of

MICHAEL A. HOROWITZ

and

MOSHE MARC COHEN,

Respondent.



DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT'S APPEAL OF THE INITIAL DECISION AND BRIEF IN FURTHER SUPPORT OF DIVISION'S REQUEST FOR ADDITIONAL REMEDIES

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I. INTRODUCTION

The appeal of Respondent Moshe Marc Cohen ("Cohen") is based on several narrow and unavailing legal arguments. Cohen claims the following: (1) the Law Judge misapplied *U.S. v. Naftalin*, 441 U.S. 768 (1979) in concluding that Cohen's annuity scheme violated Section 17(a) of the Securities Act of 1933 ("Securities Act") because no investors were harmed; (2) the Commission's "novel statutory interpretation" in *John P. Flannery*, Securities Act Release No. 9689 (Dec. 15, 2014) was wrong and improperly relied upon by the Law Judge to support her conclusion that Cohen violated Section 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 (a) and (c) thereunder; (3) the applicable statute of limitations, 28 U.S.C. § 2462, cannot be tolled—even though Cohen does not dispute that he executed valid tolling agreements—because it is "jurisdiction-stripping;" and (4) 28 U.S.C. § 2462 also applies to the remedy of disgorgement. None of these arguments, however, is remotely supported by controlling precedent or the relevant facts.

II. PROCEDURAL HISTORY

The Order Instituting Administrative Proceedings ("OIP") was filed on March 13, 2014. The Initial Decision was issued by Chief Administrative Law Judge Brenda P. Murray on January 7, 2015 ("Initial Decision"). The Division of Enforcement ("Division") filed a Motion to Correct Manifest Error of Fact in the Initial Decision on January 13, 2015 in order to correct the Law Judge's determination that a civil money penalty and an associational bar were proscribed by 28 U.S.C. § 2462. The Law Judge denied that motion on February 9, 2015. The Division and Cohen then each petitioned the Commission for review of the Initial Decision and the respective requests were granted on March 20, 2015.

III. INITIAL DECISION

The proceedings instituted against Cohen arose out of a fraudulent scheme to profit from the imminent deaths of terminally-ill hospice and nursing home patients through the sale of variable annuities. *See* Initial Decision at 4-6. At the time of the scheme, Cohen was a registered representative with Woodbury Financial Services, Inc. ("Woodbury"). *See id.* at 2-3. Cohen was recruited by co-Respondent Michael Horowitz ("Horowitz") to serve as the selling representative on annuities to be purchased by nominees after Horowitz was no longer able to sell the annuities himself. *See id.* at 8-9.

Cohen believed he could exploit "loopholes" in the annuity underwriting process (for annuities below a certain dollar threshold) at various insurance companies because they did not solicit information concerning the health of the annuitant. *See* Initial Decision at 4. Notwithstanding this circumstance, Woodbury did have robust review procedures in place to determine "whether the product in question was being sold in the correct manner and for its intended purpose." Initial Decision at 15. In order to properly carry out suitability review, Woodbury relied on Cohen's written promise "to provide complete, pertinent and accurate information about prospective customers...." *Id.* at 14.

Notwithstanding his assurance, Cohen entirely abandoned his role as a securities industry gatekeeper and intentionally misled Woodbury concerning the true nature of his annuity sales. Motivated by the prospect of lucrative upfront sales commissions, Cohen falsified the Woodbury annuity point of sale forms—in at least twenty-eight separate instances—that he was required to submit to Woodbury for suitability review. Had Cohen been truthful with Woodbury, none of his annuity sales would have passed suitably review and not a single annuity would have been issued. *See* Initial Decision at 15.

After a three-day hearing, Judge Murray ordered Cohen to cease and desist from committing or causing violations of Section 17(a) of the Securities Act, Sections 10(b) and 17(a) of the Exchange Act, and Exchange Act Rules 10b-5 and 17a-3(a). In reaching this conclusion, Judge Murray found that Cohen acted with a high degree of scienter:

> The *Steadman* factors weigh heavily in favor of a cease-and-desist order. Cohen's misconduct involved repeated fraudulent misrepresentations on forms that he submitted to his broker-dealer about securities, the twenty-eight variable annuities that Cohen sold to investors. On each of the twenty-eight forms he submitted, Cohen affirmed that the information he provided was accurate and the product sold was suitable for the investor, when he knew he was supplying inaccurate information. Relying on Cohen's untruthful responses, Woodbury approved sales it would not have allowed if it had known the truth about the annuitants and the investors.

Initial Decision at 31. Although Judge Murray ordered Cohen to pay $766,958 in disgorgement, along with prejudgment interest, she did not order him to pay a civil money penalty. *Id.* at 33. This remedy was not ordered because Judge Murray incorrectly held that since "there is no evidence of violations by Cohen within the five-year period prior to the issuance of the OIP, civil money penalties are time-barred." *Id.* at 30. Likewise, Judge Murray did not impose an associational bar for the same reason. *Id.*

IV. STANDARD OF REVIEW

The Commission is entitled to conduct a *de novo* review of initial decisions of hearing officers. As stated in Rule 411(a) of the SEC Rules of Practice, the Commission may "make any findings or conclusions that in its judgment are proper and on the basis of the record." 17 C.F.R. § 201.411(a). The Commission has observed that Section 7(c) of the Administrative Procedure Act [5 U.S.C. § 556(d)] provides that an order issued by an administrative agency must be supported by "reliable, probative and substantial evidence" and stated that "[t]hat standard has traditionally been held to be satisfied when the agency decides on the 'preponderance of the

evidence.'" *Norman Pollisky,* 43 S.E.C. 458 (1967) at * 1, *aff'd,* 43 S.E.C. 852 (196), at *7.[1] The Commission has also stated that "[c]redibility determinations are the prerogative of the trier of fact, and are ordinarily entitled to great weight in our review of the record." *Fundamental Portfolio Advisors, Inc.,* Securities Act Release No. 8251, Exchange Act Release No. 48177, Investment Advisers Act Release No. 2146, Investment Company Act Release No. 26099, 2003 WL 21658248 (July 15, 2003) at n. 57. "[T]he Commission will reject [the] initial fact-finder[']s determination as to credibility only when the record contains 'substantial evidence' to the contrary." *Id.,* citing *Litwin Sec., Inc.,* 52 S.E.C. 1339, 1342 n. 13 (1997).

V. ARGUMENT

A. COHEN COMMITTED FRAUD IN VIOLATION OF THE ANTIFRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS.

Judge Murray correctly found that Cohen committed securities fraud. The Commission should do the same. Ample record evidence proves that Cohen intentionally deceived Woodbury into approving twenty-eight variable annuity sales that he made to two New York-based hedge funds. *See* Initial Decision at 31. Cohen claims, however, that his misconduct did not violate Section 17(a) of the Securities Act or Rule 10b-5 (a) and (c) of the Exchange Act. *See* Respondent Moshe Marc Cohen's Initial Brief in Support of Commission Review ("Cohen App. Br.") at 4-9. Cohen's strained interpretation of precedent lends no support to this erroneous argument. The Law Judge, on the other hand, correctly applied the law to the facts, which abundantly demonstrated Cohen's scienter-based fraud. Initial Decision at 27-28.

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[1] *Norman Pollisky* noted that the "substantial evidence" standard applies to the review of Commission orders by courts of appeal in accordance with Section 25 of the Exchange Act and similar provisions in the other federal securities law that the Commission administers. *See also, Steadman v. SEC,* 450 U.S. 91, 97-104 (1981).

1. Harm To Investors Is Not Required In Order For A Fraud To Be Actionable Under Section 17(a) Of The Securities Act.

Cohen argues that his numerous and frequent lies to Woodbury on the point of sale forms did not amount to securities fraud because "the requisite nexus to investor harm is lacking." Cohen App. Br. at 5. Cohen correspondingly claims that the Law Judge improperly relied on the *Naftalin* decision to support her Initial Decision. *Id.* at 6. He is wrong on both accounts.

Cohen's arguments misapprehend *Naftalin* and the scope and purpose of the federal securities laws. "[N]either [the Supreme Court] nor Congress has ever suggested that investor protection was the *sole* purpose of the Securities Act." *Naftalin*, 441 U.S. at 775 (emphasis in original). Preventing unethical business practices, including frauds upon intermediaries such as Woodbury, is a key objective of the federal securities laws because "the welfare of investors and financial intermediaries are inextricably linked—frauds perpetrated upon either business or investors can redound to the detriment of the other and to the economy as a whole." *Id.* at 776.

Accordingly, the Supreme Court unambiguously held in *Naftalin* that "*the statutory language does not require that the victim of the fraud be an investor*—only that the fraud occur 'in' an offer or sale." *Naftalin*, 441 U.S. at 772 (emphasis added). *See also SEC v. Czarnik*, 2010 WL 4860678, at *4 (S.D.N.Y. Nov. 29, 2010) ("The fact that Czarnik's statements were not disseminated directly to investors does not foreclose liability under section 10(b), Rule 10b–5 and section 17(a). In *United States v. Naftalin* . . . the Supreme Court held that the fraud need not have been perpetrated on an actual or potential investor to constitute a violation of section 17(a)(1)."); *Graham v. SEC*, 222 F.3d 994, 1001-02 (D.C. Cir. 2000) (rejecting petitioner's argument that he did not violate Section 10(b) because "fraud on a broker is not fraud 'in connection with the

purchase or sale of [a] security' as required by the statutory language.'').[2] Thus, the Initial Decision correctly determined that Cohen's misconduct violated Section 17(a)(1) of the Securities Act.

2. The Law Judge Correctly Applied *John P. Flannery.*

Cohen next claims that "[t]he ALJ applied Commission's recent decision in *John P. Flannery* [] to adopt a novel interpretation of 17(a)(1), 10b-5(a) and (c)." Cohen App. Br. at 7. Cohen reexamines the merits of the *Flannery* decision and attempts to undo what he calls the Commission's "novel statutory interpretation." *Id.* at 8. Regardless of Cohen's opinion of the *Flannery* case, it is Commission precedent that the Law Judge properly relied upon to find that "Cohen's violations were part of a device, scheme, or artifice to defraud Woodbury into selling variable annuities that the broker-dealer would not have sold if it knew the true facts surrounding the sales." Initial Decision at 26. Cohen also attempts to downplay the seriousness of the examples of his misconduct cited by Judge Murray to support her finding of a violation. *See Id.* at 26-27. In a cursory fashion, Cohen argues that these acts do not "satisfy the distinct conduct requirement for scheme liability...." Cohen App. Br. at 9-10. He is incorrect.

There is no doubt that Cohen was attempting to advance his scheme when annuity-issuer Penn Mutual was contacted to determine what application characteristics would trigger heightened scrutiny. *See* Initial Decision at 26-27. Shortly after learning that applications for annuities greater than $5,000,000 would draw unwanted attention, "Cohen faxed two variable annuity applications

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[2] Furthermore, even assuming *arguendo* that *Naftalin* required that there be "potential[] actual harm" to investors in order for Cohen's misconduct to be actionable (*see* Cohen App. Br. at 5-6), that requirement is nonetheless satisfied here. It is not difficult to foresee the potential harm that investors could suffer if Cohen's scheme was allowed to proceed unchecked, *e.g.*, his fraud had the potential to harm investors by increasing the cost of annuities. *See Naftalin*, 441 U.S. at 776 ("Losses suffered by brokers increase their cost of doing business, and in the long run investors pay at least part of this cost through higher brokerage fees.")

to Chu at Penn Mutual, each for $4.9 million and each with the anticipated holding period of '10+' years." *Id.* at 16. This extraordinarily deceptive act reveals a high degree of scienter and easily supports Judge Murray's finding that Cohen violated Rule 10b-5 (a) and (c) of the Exchange Act. *Id.* at 26. Likewise, Cohen's recommendation that the scheme utilize phony family trusts (*see id.* at 8) and Cohen's coaching of Mr. Feder (regarding how to respond to inquiries from outsiders) certainly support Judge Murray's conclusion that Cohen violated Rule 10b-5 (a) and (c) of the Exchange Act. *Id.* at 27. For these reasons, the Commission should also conclude that Cohen committed securities fraud.

B. SECTION 2462 IS NOT A STATUTE OF REPOSE BUT RATHER A STATUTE OF LIMITATIONS SUBJECT TO TOLLING.

Judge Murray declined to impose a civil money penalty and an associational bar against Cohen because his "conduct occurred in January and February 2008, more than five years before the OIP was issued on March 13, 2014. *The statute of limitations is therefore an issue.*" Initial Decision at 30 (emphasis added). Cohen, however, had voluntarily entered into a series of tolling agreements that extended the statute of limitations on the Division's case against Cohen by approximately fifteen months or until May 2014—a full two months after the OIP was actually filed. *See* Declaration of James Lee Buck, II, Jan. 12, 2015 attached as Exhibit A.[3] Cohen does not dispute that he executed these tolling agreements. He also does not dispute that the time period for filing was extended until May 2014. *See* Cohen App. Br. at 2. Instead he argues that the tolling agreements are "immaterial" because Section 2462 is "jurisdiction-stripping" and cannot be extended by consent of the parties. *See* Cohen App. Br. at 16-19. He is wrong.

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[3] In the Division's Petition for Review and Motion to Submit Additional Evidence filed on March 2, 2015 ("Petition"), the Division asked the Commission, for the reasons stated therein, to make these tolling agreements a part of the record. *See* Petition at 8-9.

1. Section 2462 Is A Statute of Limitations That Does Not Limit The Jurisdiction Granted By The Securities Laws.

"To ward off profligate use of the term 'jurisdiction,'" courts "inquire whether Congress has clearly stated that the rule is jurisdictional; absent such a clear statement" courts should "treat the restriction as nonjurisdictional in character." *Sebelius v. Auburn Regional Med. Ctr.*, 133 S. Ct. 817, 824 (2013). This inquiry focuses on the statutory "text, context, and relevant historical treatment." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010). In particular, a statute imposing a time limit should not be viewed as jurisdictional (1) where the statute is similar to provisions that "ordinarily are not jurisdictional" (*Sebelius*, 133 S. Ct. at 824-25), or (2) where the statute is "located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over" the claim (*Reed*, 559 U.S. at 162-65). Section 2462 meets both criteria and therefore is non-jurisdictional.

2. Section 2462 Is A Typical Statute Of Limitations That Is Subject To Tolling.

Section 2462—titled "Time for commencing proceedings"—is a statute of limitations and statutes of limitations "ordinarily are not jurisdictional." *Sebelius*, 133 S. Ct. at 824-25. "[T]he 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" in contrast to statutes that are "jurisdictional and not susceptible" to equitable tolling or waiver. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008).

Cohen argues that Section 2462 cannot be tolled because it strips the Court of subject matter jurisdiction rather than merely setting time limits. *See* Cohen App. Br. at 18-19. This argument, however, ignores the overwhelming weight of controlling authority, which recognizes

Section 2462 as a statute of limitations that is subject to tolling by agreement. For example, the Court in *SEC v. Geswein* squarely rejected an argument identical to the one made by Cohen here:

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

SEC v. Geswein, 2 F. Supp. 3d 1074, 1084 (N.D. Ohio 2014) (emphasis added).[4] *See also SEC v. Mannion*, 2013 WL 5999657, at *5-6 (N.D. Ga. Nov. 12, 2013) (enforcing tolling agreement to extend statute of limitations in 28 U.S.C. § 2462 by one year); *CFTC v. Tunney & Assocs.*, 2013 WL 4565690, at *2-4 (N.D. Ill. Aug. 21, 2013) (finding that a valid tolling agreement precluded the defendant from raising a statute of limitations defense based on 28 U.S.C. § 2462); *Canady v. SEC*, 230 F.3d 362, 364-65 (D.C. Cir. 2000) (finding that defendant's reliance on § 2462 is an affirmative defense that will be waived if not raised); *United States v. Banks*, 115 F.3d 916, 918 n. 4 (11th Cir. 1997) (concluding that § 2462 provides an affirmative statute of limitations defense that can be waived); *United States v. Core Labs, Inc.*, 759 F.2d 480, 484 (5th Cir. 1985) (finding that § 2462 is subject to equitable tolling).[5] Not a single case cited by Cohen interprets Section 2462 in a manner that supports his "jurisdiction-stripping" argument. *See* Cohen App. Br.

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[4] It is notable that while the Supreme Court in *Gabelli* determined that the Commission's requests for civil penalties were untimely under Section 2462, at no point did the Supreme Court or the Second Circuit on remand suggest that this determination was "jurisdictional" in nature. *Gabelli v. SEC*, 133 S.Ct. 1216, 1224 (2013); *on remand*, 518 Fed. Appx. 32 (2d Cir. 2013).

[5] Cohen's attempt to convert Section 2462 into a statute of repose is unpersuasive. In addition to failing to distinguish the relevant precedent cited above, Cohen relies on irrelevant cases interpreting *other* statutes, such as 28 U.S.C. §§ 2255 and 2241. *See* Cohen App. Br. at 18.

at 11-19.[6] Accordingly, there simply is no merit to Cohen's argument that the statute of limitations expired because it could not be extended by valid tolling agreements.

3. The Equitable Remedy Of Disgorgement Is Not Governed By Section 2462.

Section 2462 is inapplicable to disgorgement because, as the Supreme Court has explained, disgorgement is relief "given in accordance with the principles governing equity jurisdiction," and its purpose is "not to inflict punishment but to prevent an unjust enrichment." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940); accord *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998) ("we have characterized as equitable" requests for "disgorgement of improper profits"). Courts award disgorgement pursuant to their "inherent equitable powers" (*SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)), as well as express authority under the Exchange Act to grant "any equitable relief that may be appropriate or necessary." Section 21(d)(5) of the Exchange Act.

Cohen nonetheless argues that disgorgement is governed by Section 2462 and cites in support of this dubious proposition a decision in which there was no tolling agreement: *SEC v. Graham*, 2014 WL 1891418 (S.D. Fla. May 12, 2014). *See* Cohen App. Br. at 19-21. The *Graham* decision, however, is a complete outlier that faces possible reversal on appeal to the Eleventh Circuit. *SEC v. Graham*, No. 14-13562-E (11th Cir. appeal filed Aug. 7, 2014).

Not only is *Graham* factually inapposite due to the lack of a tolling agreement, it also is legally out of line with more than two-hundred-years of case law interpreting Section 2462 and its predecessor statutes. *See, e.g., Core Labs, Inc.*, 759 F.2d at 482 ("The current § 2462 is derived

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[6] Cohen does not cite *SEC v. Graham*, 2014 WL 1891418 (S.D. Fla. May 12, 2014) to support his argument that Section 2462 is "jurisdiction-stripping." He does cite this case; however, in support of his argument that disgorgement is governed by Section 2462. *See* Cohen App. Br. at 20. Notwithstanding this fact, *Graham* is unpersuasive for either proposition. *See* Sections IV. B. 2 & 3.

from predecessor statutes dating from 1799; the statutes have produced a respectable body of decisional law." (internal citations omitted)). As far as the Division is aware, no other court in the statute's history has concluded that § 2462 is a jurisdictional statute and not a typical affirmative defense—let alone applies to the equitable remedy of disgorgement. No court other than *Graham*, moreover, has ever accepted the argument that disgorgement is a forfeiture and the D.C. Circuit specifically held that disgorgement is not a "forfeiture covered by § 2462." *Riordan v. SEC*, 627 F.3d 1230, 1234 & n.1 (D.C. Cir. 2011) (citing *Zacharias v. SEC*, 569 F.3d 458, 471-72 (D.C. Cir. 2009)). Indeed, the Law Judge here correctly applied the law in recognizing that Section 2462 is neither a jurisdictional statute nor applicable to equitable remedies, as evidenced by the Court's relying on that provision to deny only the money penalty and the associational bar sought by the Division (but not the Division's request for disgorgement). Initial Decision at 30.[7] Accordingly, Cohen is wrong that Section 2462 applies to the equitable remedy of disgorgement.

C. DISGORGEMENT IS AN EQUITABLE REMEDY INTENDED TO PREVENT WRONGDOERS FROM PROFITING FROM THEIR MISCONDUCT.

Cohen—in order to selfishly enrich himself— ran an annuity scheme, which exploited the misery of terminally-ill people. There simply is no conceivable reason why he should not be ordered to relinquish his ill-gotten gains from this fraud. Contrary to Cohen's argument (Cohen App. Br. at 19-21), disgorgement is an equitable remedy—not a penalty—and therefore not subject to Section 2462. *See, e.g., SEC v. Lines*, 2011 WL 3627695 at *2 (S.D.N.Y. Aug. 16, 2011) ("[W]hen a defendant is found liable for violations of a federal securities law, a court may grant disgorgement of any ill-gotten gains as an equitable remedy."). *See also supra* at 10-11. Furthermore, "[t]he primary purpose of disgorgement as a remedy for violation of the securities

[7] For the reasons set forth in its Petition, the Division does not view the imposition of an associational bar against Cohen as a penalty subject to Section 2462. *See* Petition at 4-6.

laws is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996).

1. It Is Irrelevant That Cohen Claims He Purportedly No Longer Possesses His Illicit Gains.

Cohen argues that he should not be made to pay disgorgement because he purportedly is "no longer in possession of such funds...." Cohen App. Br. at 19. This unsupported claim, however, is irrelevant to whether Cohen should be ordered to pay disgorgement. *See, e.g., SEC v. Rosenfeld*, 2001 WL 118612 at *2 (S.D.N.Y. Jan. 9, 2001) ("Court may order disgorgement in the amount of the wrongdoer's total gross profits, without giving consideration to whether or not the defendant may have squandered and/or hidden the ill-gotten profits."). Likewise, the manner in which Cohen chose to spend his illicit gains does not eliminate his obligation to pay disgorgement. *See, e.g., SEC v. Benson*, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987) ("The manner in which [the defendant] chose to spend his misappropriations is irrelevant as to his objection to disgorge. Whether he chose to use this money to enhance his social standing through charitable contributions, to travel around the world, or to keep his co-conspirators happy is his own business.").[8]

2. Cohen Should Be Ordered To Pay Disgorgement With Prejudgment Interest Even If He Purportedly Is Unable To Pay It Or Claims That It Would Be Difficult.

Cohen also argues that he should not be made to pay disgorgement because supposedly "it is well beyond his current financial ability...." Cohen App. Br. at 19. Cohen cannot avoid paying disgorgement though simply because it purportedly would be difficult. *See, e.g., SEC v. Grossman*, 1997 WL 231167 at *10 (S.D.N.Y. May 6, 1997), *aff'd in part, vacated in part (on*

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[8] In his Post-Hearing Brief at 69, Cohen claims that he spent all of his ill-gotten gains on "legal and advisory fees," office moves and a "sign-on bonus of $125,000" for someone he employed during the operation of his scheme.

other grounds) and remanded (for clarification of judgment only) sub nom. SEC v. Hirshberg, 173 F. 3d 846 (2d Cir. 1999) (unpublished table opinion) ("[T]here is no legal support for [defendant's] assertion that his financial hardship precludes the imposition of an order of disgorgement."). Additionally, disgorgement is properly ordered "despite a defendant's inability to pay, given that the defendant may subsequently acquire the means to satisfy the judgment." *Id.* Accordingly, the Law Judge properly ordered Cohen to pay disgorgement and prejudgment interest.[9]

CONCLUSION

For these reasons, the Division respectfully requests that the Commission (1) affirm the Initial Decision as to liability and the ordering of disgorgement and prejudgment interest and (2) impose on Cohen a civil money penalty and an associational bar as requested by the Division in its post-hearing briefs.

Dated: May 20, 2015

Respectfully submitted,

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[9] Cohen also has a pending FINRA arbitration proceeding in which he is seeking in excess of $1,300,000 in additional sales commissions (that Woodbury withheld after it discovered his fraud). *See* Hearing Transcript 843:24-25-844:1-14. In the event that Cohen prevails in this arbitration, he should be compelled to disgorge any portion of the award, which consists of withheld sales commissions because that money also represents ill-gotten gains from his annuity scheme.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was served on the following on this 20th day of May, 2015 by First Class U.S. Mail and Email on:

Yehuda C. Morgenstern
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Dean M. Conway

EXHIBIT A

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15790

In the Matter of

Michael A. Horowitz and

Moshe Marc Cohen,

Respondents.

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

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

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

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

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

4. Paragraph 1 of the Tolling Agreement provides:

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

(emphasis added.)

5. Paragraph 2 of the Tolling Agreement provides:

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

(emphasis added.)

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

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

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

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

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

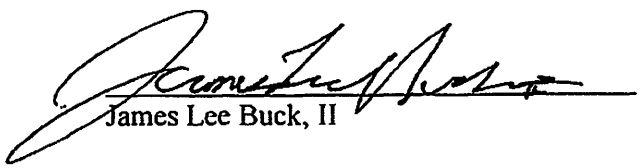
11. Accordingly, the Division had fifteen (15) months after any statute of limitations would have otherwise expired to bring its action against Mr. Cohen and to seek any sanctions or relief subject to the statute of limitations.

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

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

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

Executed on January 12th, 2015.



James Lee Buck, II

EXHIBIT 1
To Declaration of James Lee Buck, II

SINGER DEUTSCH LLP

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

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

MCD@SINGERDEUTSCH.COM

WWW.SINGERDEUTSCH.COM

VIA EMAIL AND FEDERAL EXPRESS - HaggertyP@SEC.GOV

August 24, 2012

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

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

Dear Pete:

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

Very truly yours,

Michael C. Deutsch

MCD/mw

enc.

TOLLING AGREEMENT

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

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

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

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

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

3. nothing in this agreement shall affect any applicable statute of limitations defense or any other time-related defense that may be available to Cohen before the commencement of the tolling period or be construed to revive any proceeding that may be barred by any applicable statute of limitations or any other time-related defense before the commencement of the tolling period;

4. the running of any statute of limitations applicable to any related proceeding shall commence again after the end of the tolling period, unless there is an extension of the tolling period executed in writing by and on behalf of the parties hereto;

5. nothing in this agreement shall be construed as an admission by the Commission or Division relating to the applicability of any statute of limitations to any proceeding, including any sanctions or relief that may be imposed therein, or to the length of any limitations period that may apply, or to the applicability of any other time-related defense; and

6. the Commission and Cohen intend this agreement solely for the benefit of the Commission and Cohen and agree that there are no third-party beneficiaries of this tolling agreement.

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

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

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

Mosh Marc Cohen

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

EXHIBIT 2
To Declaration of James Lee Buck, II

AMENDMENT TO TOLLING AGREEMENT

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

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

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

MOSHE MARC COHEN

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

TOLLING AGREEMENT

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

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

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

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

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

3. nothing in this agreement shall affect any applicable statute of limitations defense or any other time-related defense that may be available to Cohen before the commencement of the tolling period or be construed to revive any proceeding that may be barred by any applicable statute of limitations or any other time-related defense before the commencement of the tolling period;

4. the running of any statute of limitations applicable to any related proceeding shall commence again after the end of the tolling period, unless there is an extension of the tolling period executed in writing by and on behalf of the parties hereto;

5. nothing in this agreement shall be construed as an admission by the Commission or Division relating to the applicability of any statute of limitations to any proceeding, including any sanctions or relief that may be imposed therein, or to the length of any limitations period that may apply, or to the applicability of any other time-related defense; and

6. the Commission and Cohen intend this agreement solely for the benefit of the Commission and Cohen and agree that there are no third-party beneficiaries of this tolling agreement.

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

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

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

Moshe Marc Cohen

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

EXHIBIT 3
To Declaration of James Lee Buck, II

SECOND AMENDMENT TO TOLLING AGREEMENT

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

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

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

MOSHE MARC COHEN

By: _____ Date: 3/1/13
Michael C. Deutsch, Esq.
Singer Deutsch LLP
Counsel for Moshe Marc Cohen

AMENDMENT TO TOLLING AGREEMENT

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

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

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

MOSHE MARC COHEN

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

TOLLING AGREEMENT

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

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

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

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

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

3. nothing in this agreement shall affect any applicable statute of limitations defense or any other time-related defense that may be available to Cohen before the commencement of the tolling period or be construed to revive any proceeding that may be barred by any applicable statute of limitations or any other time-related defense before the commencement of the tolling period;

4. the running of any statute of limitations applicable to any related proceeding shall commence again after the end of the tolling period, unless there is an extension of the tolling period executed in writing by and on behalf of the parties hereto;

5. nothing in this agreement shall be construed as an admission by the Commission or Division relating to the applicability of any statute of limitations to any proceeding, including any sanctions or relief that may be imposed therein, or to the length of any limitations period that may apply, or to the applicability of any other time-related defense; and

6. the Commission and Cohen intend this agreement solely for the benefit of the Commission and Cohen and agree that there are no third-party beneficiaries of this tolling agreement.

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

SECURITIES AND EXCHANGE COMMISSION
DIVISION OF ENFORCEMENT

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

Mosh Marc Cohen

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