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UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

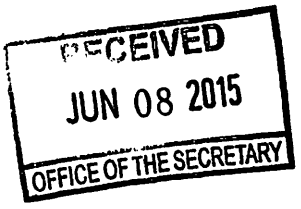
In the Matter of

MOSHE MARC COHEN

Respondent.

ADMINISTRATIVE PROCEEDING
File No. 3-15790

RESPONDENT MOSHE MARC COHEN'S REPLY BRIEF



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I. INTRODUCTION

On January 7, 2015, the Administrative Law Judge ("ALJ") issued an Initial Decision ("Initial Decision") in the above-referenced proceeding. The Respondent ("Respondent" or "Cohen") petitioned the Commission to review the Initial Decision based primarily on the merits whilst the Division of Enforcement ("Division") petitioned for additional punishments. Both petitions were granted. Pursuant to the Commission's order, Respondent's Initial Brief in Support of Commission Review ("Initial Brief") addressed the merits of both petitions, to which the Division responded with a Brief in Opposition ("Brief in Opposition"). The following, which is limited to the issues addressed in the Brief of Opposition, pursuant to Commission Rules of Practice 450(b), is the reply.

II. SUMMARY OF ARGUMENTS

The relevant alleged conduct and the coextensive statutory applications are by no means ubiquitous. A proper analysis of the related provisions must reflect this reality. Yet, the Initial Decision conflated Securities Act Section 17(a) of 1933 with Exchange Act Rule 10(b) of 1934 based solely on a perfunctory analyses of *United States v. Naftalin*, 441 U.S. 768 (1979) and its appropriateness to the matter at hand (Initial Decision at 23, 26). Consequently, it misapplied dicta in *Naftalin* to advance a result that directly contravenes the distinct statutory language of Section 17(a), which is evidenced by our nation's history, legislative intent and by several proclamations of the Commission. The Brief in Opposition merely highlighted the foregoing dicta, and failed to even address any of the aforementioned considerations. More significantly, a reading of *Naftalin* in its entirety makes it readily apparent, that the Supreme Court was conscious of the distinctive contours of Section 17(a) and elaborated with specificity, how its decision is in conformance thereof. Accordingly, *Naftalin* does not stand for the obscuration of the distinguishing characteristics of Section 17(a).

A separate, but not completely dissimilar issue pertains to the finding of violations of Exchange Act Section 10(b) and especially Rule 10b-5(a) and (c) enacted thereunder. The Initial Decision relied on the Commission's order *In the Matter of John P. Flannery & James D. Hopkins*, Release No. 3981 (Dec. 15, 2014). However, the Second Circuit expressly rejects the statutory analysis advanced in *Flannery*. Furthermore, it is respectfully maintained that *Flannery's* repeated reliance on Supreme Court precedent is clearly unwarranted.

The interpretation of 28 U.S.C. § 2462 that supports the Initial Decision is one that is in conformance with the plain meaning of the text and with its choice location. Indeed, the Supreme Court ruled that such a language in similar statutes is to be interpreted similarly. More significantly, in *Gabelli v. S.E.C.*, 133 S. Ct. 1216, 1220, 185 L. Ed. 2d 297, n.4 (2013) the Supreme Court openly considered an interpretation of Section 2462 that presupposes such a construal. Furthermore, legislative intent, inexorably bound with public policy outlined in *Gabelli* conforms to said interpretation. The Brief in Opposition countered with citation to persuasive authority which overwhelmingly does not address the issue at hand. Arguably, its omission's are more probative than what was expressed. It has failed to offer an alternative interpretation of Section 2462.

III. ARGUMENTS

A. ANALYSIS OF SECURITIES ACT SECTION 17(A) AND EXCHANGE ACT RULE 10(B) AND THEIR INAPPLICABILITY TO ALLEGED CONDUCT

1. SECTION 17(A)

The ALJ opinioned that Cohen was in violation of Section 17(a), and adopted the novel argument that Section 17(a) encompasses fraud against a seller, irrespective of lack of direct investor harm. Initial Decision at 23 and 27. This proposition runs afoul of the Supreme Court's

repeated admonitions against the conversion of every common-law fraud that happens to involve securities into a violation of the Securities Acts. See *e.g. S.E.C. v. Zandford*, 535 U.S. 813, 122 S. Ct. 1899, 153 L. Ed. 2d 1 (2002); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008). It relied primarily on dicta in *United States v. Naftalin*, 441 U.S. 768, 99 S. Ct. 2077, 60 L. Ed. 2d 624 (1979), to support such a conclusion. Initial Decision at 22 and 27. It will be established, in turn, that *Naftalin* does not stand for the complete eradication of a direct harm to investors' requirement. Consequently, neither does *U.S. S.E.C. v. Czarnik*, 2010 WL 4860678 (S.D.N.Y. Nov. 29, 2010), the primary case that the Division uses in its misrepresentation and resultant misapplication of *Naftalin*, to the unique facts at hand.

(A) DISTINCTIVE NATURE OF SECTION 17(A) IS SUPPORTED BY PLAIN MEANING OF THE TEXT, COUPLED WITH EXPRESS LEGISLATIVE INTENT

It is well-settled that Section 17(a) of the Securities Act of 1933 is clearly distinct in scope and applicability to the later Exchange Act Rule 10b-5. This is patently attributed to their similar yet individual purposes. "During the early days of the New Deal, Congress enacted two landmark statutes regulating securities. The 1933 Act was described as an Act 'to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.' The Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. s 78a et seq. (1934 Act), was described as an Act 'to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes.' " *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727-28, 95 S. Ct. 1917, 1921-22, 44 L. Ed. 2d 539 (1975).

The unique contours of the relevant statutes, are not merely a matter of legislative intent, but are clearly reflected in the different choice of language in said statutes. "As with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197, 96 S.Ct. 1375, 1382, 47 L.Ed.2d 668 (1976). Section 17(a) of the Securities Act of 1933, in its pertinent part states: "It shall be unlawful for any person in the offer or sale of any securities..." By its express terms, it relates solely to fraud in the offer or sale of securities. This is in stark contrast to the language of 10b-5 (c) that relates 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." (emphasis added). The limited text of Section 17(a) is harmonious with the abovementioned legislative purpose: to prevent fraudulent conduct by sellers of securities. Yet, the broader language of 10(b) is intended to incorporate fraud against the seller, in synchronization with its intended purpose, to prevent inequitable practices and the like, in the industry.

This obvious reading of the relevant statutes is by no means novel, and is the view of the Supreme Court. "The two substantive statutory provisions at issue here are § 17(a) of the 1933 Act, 48 Stat. 84, as amended, 15 U.S.C. § 77q(a), and § 10(b) of the 1934 Act, 48 Stat. 891, 15 U.S.C. § 78j(b). Section 17(a), which applies only to sellers, provides... Section 10(b), which applies to both buyers and sellers, makes it 'unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security.' " *Aaron v. Sec. & Exch. Comm'n*, 446 U.S. 680, 687, 100 S. Ct. 1945, 1950, 64 L. Ed. 2d 611 (1980).[1] See also *Sec. & Exch. Comm'n v. Hasho,* 784 F. Supp. 1059, 1105 (S.D.N.Y. 1992).

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[1] See e.g. *Transamerica Mtg. Advisors, Inc. v. Lewis,* 444 U.S. 11, at 20-23 (1979). The Supreme Court took the stance that the complexity of the security statute led to the determination that Congress's omissions were deliberate.

This has been expressed recently by this Commission, in an analysis of the distinct natures of both relevant provisions. "And 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) at * 16. Of course, this approach is not modern, and is representative of the respective historicity of such statutes. "In adopting Rule 10b-5 and 1942, the Securities and Exchange Commission issued a press release stating: 'The new rule closes a loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase.' SEC Release No. 3230 (May 21, 1942)." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 766, 95 S. Ct. 1917, 1940, 44 L. Ed. 2d 539 (1975). Therefore, it is clear that the alleged facts at hand do not fall within the aegis of Section 17(a).

(B) NAFTALIN AND LACK OF DIRECT INVESTOR HARM

The Initial Decision's reliance on *Naftalin* vis-à-vis Section 17(a) is not supported by a comprehensive reading of said decision. *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 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.

The Division relies solely on a district court decision of *U.S. S.E.C. v. Czarnik*, 2010 WL 4860678 (S.D.N.Y. Nov. 29, 2010) with its attendant quotations from *Naftalin* to support the ALJ's misapplication of the latter. *Czarnik* involved an attorney who facilitated the sale of various penny stocks on investor, for a sum, *in toto*, that exceeded $20 million in profits after a "pump and dump" scheme. The Defendant, with knowledge of the scheme, made multiple false statements to the issuers of the unregistered stock; thereby inducing them to sell said stock to the promoters, in order to perpetuate the inevitable harm on the looming investors. The district court, after expressly acknowledging the above distinctions between the pertinent provisions, ruled that the relevant conduct falls within the parameters of both Sections 17(a) and 10(b). The Division maintains that *Czarnik* stands for an interpretation of *Naftalin* that eclipses the requirement of direct investor harm, actual or potential, requisite for a violation of Section 17(a). Such a contention is myopic at best and at worst, disingenuous.

The Division argued that although there was admittedly no direct harm to the investors as a result of the alleged conduct, potential harm is nevertheless extant. Brief in Opposition at 6 n.2. This is based on Cohen's theoretical forthcoming conduct, for an unspecified time period, which might have affected investors, at some undetermined time in the future, for an undeterminable

amount. Of course, *Naftalin* did not view all similar conduct in the aggregate with regards to determining investors' harm; since the short-selling in question might have directly impacted investors.

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. 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 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. RULE 10(B)

The ALJ maintained that Respondent's alleged misrepresentations were in violation of Securities Act Section 17(a)(1) and likewise Exchange Act Rule 10b-5(a) and (c). Initial Decision at 26. This was expressly predicated on the Commission's recent decision *In the Matter of John P. Flannery & James D. Hopkins*, Release No. 3981 (Dec. 15, 2014) *Id.* at 26. which in response to *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 180 L. Ed. 2d 166 (2011), expanded the confines of the aforementioned provisions, by viewing misstatements as satisfying the "device" or "artifice" to defraud elements.

The controlling view of the Second Circuit is to the contrary. "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). This reading is compelling because it does not deem the scheme requirement as effectively superfluous. See *S.E.C. v. Familant*, 910 F. Supp. 2d 83 (D.D.C. 2012). Furthermore, it views the different provisions

distinctly. For "the only way in which they might be conceived to be deceptive is by virtue of the SEC's contention that they bolstered the allegedly false impression created by defendants' misrepresentations and omissions which form the basis of the 10b–5(b) and section 17(a)(1) claims. However, the statute does not permit such legal 'double dipping.' " *U.S. S.E.C. v. St. Anselm Exploration Co.*, 936 F. Supp. 2d 1281, 1299 (D. Colo. 2013).

The Commission in *Flannery*, twice referenced a Supreme Court decision in *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1063 (2014) in support of its interpretation of Exchange Act Rule 10b-5(a) and (c). See *Flannery* at 12 n. 58, & 14 n. 66. As was advanced in Respondent's Initial Brief at 8-9, this position is untenable, mainly because the relevant citation from the *Troice* decision was clearly not pertaining to the above mentioned provisions. Tellingly, the Division had adequate opportunity to counter respond, and has hitherto failed to propose a *single* response – potent or otherwise – to these contentions.

B. ANALYSIS OF 28. U.S.C. § 2462

(A) PLAIN AND NATURAL READING OF THE STATUTE

The issue of subject matter jurisdiction runs at the very heart of a court's right to hear a case and may be brought *sua sponte*, at any time during a proceeding. It is undisputed that it is the Division's burden to convincingly establish subject matter jurisdiction. See *Moses v. Deutche Bank Nat. Trust Co.*, No. 11-CV-5002 ENV VVP, 2012 WL 2017706, at *1 (E.D.N.Y. June 5, 2012) (collecting cases). In this proceeding, the Division previously had several opportunities to satisfy its burden of establishing subject-matter jurisdiction: at the Motion to Correct with its Response. At this juncture, the Division essentially rehashed its prior arguments, without an expectant addendum of fortification of aforementioned claims, and thereby continues to fail to establish jurisdiction.

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 sole issue vis-à-vis subject matter jurisdiction is one of statutory interpretation. It was repeatedly decided that civil penalties are barred by the general "catch-all" provisions of 28 U.S.C. § 2462. Initial Decision at 30 and subsequent denial of Division's motion to correct. The controlling statute 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..."

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 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 jurisdictionality. 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).

The express statutory language uses the absolute term "shall" which connotes jurisdicitonality. This choice of terms is been consistent for centuries, in all of 2462's predecessor statutes. Respondent's Initial Brief at 13. Since the plain language of § 2462 is clear, the court need not consider secondary rules of statutory construction, See *Greenport Basin & Constr. Co. v. United States,* 260 U.S. 512, 516 (1923) (Brandeis, J.). "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). "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).

(B) CONTEXT AND SUPREME COURT INTERPRETATIONS OF SIMILAR 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). "This is not to say that Congress must incant magic words in order to speak clearly." *Id.* at 824.

The initial consideration of context is in uniformity with the plain meaning of the statute. Section 2462 is placed in Title VI governing "Particular Proceedings" and not in Title V pertaining merely to Procedure. See *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 131 S. Ct. 1197, 1198-200, 179 L. Ed. 2d 159 (2011) (the Court noted that relevant statute's "placement in a subchapter entitled "Procedure" was indicative of its nonjurisdictional nature). Also contained in Title VI are §§ 2255 and 2241, which undisputedly are jurisdictional statutes which likewise use

absolutist language. Initial Brief at 17. The Division points to the title of Section 2462 – "Time for Commencing Proceeding" – to support the claim that it does not control jurisdiction. Brief in Opposition at 8. This argument is unavailing. "Congress has used the term 'statute of limitations' when enacting statutes of repose. See, *e.g.*, 15 U.S.C. § 78u–6(h)(1)(B)(iii)(I)(aa) (2012 ed.) (creating a statute of repose and placing it in a provision entitled "Statute of limitations"); 42 U.S.C. § 2278 (same)" *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185, 189 L. Ed. 2d 62 *reh'g denied*, 135 S. Ct. 23, 189 L. Ed. 2d 874 (2014).

The second factor outlined in *Sebelius* of Supreme Court interpretations of analogous statutes likewise implicates the jurisdicitonality of Section 2462. The use of similar statutory interpretations in time-barring statutes is a recurring theme in recent decisions of the Supreme Court. Initial Brief at 15, 16. 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 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).

Clearly, those decisions are material to interpretation of Section 2462 in conformity with the guidance of *Sebelius* and in the spirit of *in pari materia*. Consequently, this line of reasoning has been followed by many courts throughout the country. Initial Brief at 17, 18 (collecting cases). The Division has hitherto failed to distinguish any of the similar statutes. Furthermore, the Division has not advanced a *single* alternative interpretation to the relevant statute, despite several opportunities to do so.

(C) EQUITABLE TOLLING AND § 2462

The sole question before the Commission, with regards to Section 2462, is whether an agreement by the parties can circumvent its express terms. Of course, this question can be answered negatively, without implicating the fraudulent concealment or the continuing violations doctrines; traditional axioms that are immaterial to this proceeding. For it is well settled that "equity reads the doctrine of fraudulent concealment into every statute of limitations." *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S. Ct. 582, 584-585, 90 L. Ed. 743 (1946). Thus, an adoption of these equitable principals does not implicate the interpretation of the text of the relevant statute. Hence, the Division's attempt to conflate the irrelevant aforementioned doctrines with the facts at hand is unpersuasive.[2]

The fundamental distinction between equitable tolling from the case at bar, clearly relegates much of the mere persuasive authority cited by the Division as extraneous. The Division makes its

[2] Furthermore, the equitable doctrines mentioned above relate to the assessment of when the claim accrued, unlike express tolling which occur subsequent to accrual of a claim, and relate to the time of filling of claim.

argument primarily on *SEC v. Geswein,* 2 F. Supp. 3d 1074, 1084 (N.D. Ohio 2014) a case where the district court distinctively noted the presence of the principles of fraudulent concealment and continuing violations doctrines and thus barred the application of Section 2462, *Id.* Simultaneously, it relies on *United States v. Core Labs., Inc.*, 759 F.2d 480, 759 F.2d 480, 484 (5th Cir. 1985) which related solely to equitable tolling. Brief in Opposition at 9.

In a similar vein, the Division analogized several of other cases that are unequivocally inapposite to the issues at hand. Some illustrations are the citation of *Canady v. SEC*, 230 F.3d 362, 364-65 (D.C. Cir. 2000), a case that did not involve civil penalties. Also, the Division cited to *United States v. Banks*, 115 F. 3d 916, 918 n. 4 (11th Cir. 1997) which likewise does not pertain to civil damages, rather to equitable remedies. For the foregoing, it is abundantly clear, that the Division has failed to satisfy its burden of establishing subject-matter jurisdiction with regards to the implementation of civil remedies.

(D) PUBLIC POLICY RATIONAL

Notably, with regards to Section 2462, the legislative intent highlighted in *Gabelli*, confirms and even supports such a reading (Respondent's Initial Brief at 14-15). Furthermore, public policy would be supported by the adaptation of the plain meaning of the statute, for the open-ended alternative would allow the adjudication of antediluvian claims. *Id* at 3. Furthermore, 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).

III. CONCLUSION

The Commission is well aware that Mr. Cohen no longer poses a threat to the securities industry. The Division seeks unprecedented gargantuan penalties and is unabashedly indifferent to the direct harm – potential and actual – that this will wreak on human beings completely unaffiliated with the alleged conduct. In light of the above, it would be prudent to decide these issues on the merits.

Dated: June 3, 2015

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I hereby certify that true copies of the foregoing document were served on the following on this 3rd day of June, 2015, in the manner indicated below:

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