

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

HARD COPY

ADMINISTRATIVE PROCEEDING
File No. 3-15617

In the Matter of
LARRY C. GROSSMAN
And GREGORY J. ADAMS,
Respondents.



LARRY C. GROSSMAN'S REPLY BRIEF

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I. INTRODUCTION

The Law Judge made specific findings as to Larry Grossman's ("Grossman") violations that by the very nature of the violations themselves demonstrate that the violative conduct occurred beyond 28 U.S.C. §2462's five year statute of limitations, yet the Law Judge erroneously assessed a penalty, disgorgement and industry bars against him.

The Division provides no explanation as to why it waited for over five years to seek action against Sovereign International Asset Management, Inc. ("Sovereign") or Grossman which is curious considering that the Office of Compliance and Examinations audited Sovereign in 2004 and issued a Deficiency Letter in the beginning of 2005 outlining many of the same violations contained in the OIP filed on November 20, 2013. During the Division's delay in taking action, witnesses memories have faded, crucial witnesses-such as Nikolai Battoo-have disappeared, and Grossman has been deprived of a bright-line date as to when his exposure to an SEC enforcement action would ultimately end.¹ These are the exact perils that the Supreme Court in *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) sought to guard against by imposing a bright line test on the application of §2462's limitation period.

The Division's account of the evidence in the record for the proposition that Grossman committed violations within the limitations period, or that the continuing violation doctrine tolls such period, is strained and misinterpreted. The most probable explanation for the Divisions' and Law Judge's difficulty in finding any discrete actionable acts on behalf of Grossman within the limitation period is because Grossman had already sold Sovereign to Gregory J. Adams

¹ In fact, the Division urges reliance upon the Stephen Richard's testimony despite his inability to ascertain whether he testified accurately because Grossman did not object to the entry of the deposition during the Final Hearing. The very purpose of allowing Stephen Richard's testimony into the final hearing is to demonstrate the adverse effects of the passage of time, the very harm that the Supreme Court in *Gabelli* sought to guard against.

("Adams"), and no longer rendered any investment advice to Sovereign clients. Although the Division argues otherwise, its actions of only seeking disgorgement of ill-gotten gains through mid-October of 2008, demonstrates that it was only seeking to recover for acts outside of the limitation period, otherwise it would have sought disgorgement against Grossman for violations that occurred within the limitation period as well.

II. ARGUMENT

A. NO VIOLATIVE CONDUCT OCCURRED WITHIN THE LIMITATIONS PERIOD THEREBY BARRING PENALTIES AND DISGORGEMENT AND THE DOCTRINE OF CONTINUING VIOLATION DOES NOT TOLL §2462'S STATUTE OF LIMITATIONS.²

Grossman methodically dissected the Law Judge's findings of Grossman's violations at pages 32-42 of the Initial Decision, demonstrating that each of the violations arose from discrete acts occurring beyond the limitation period. The Division does not challenge Grossman's arguments, instead the Division focuses on the Law Judge's application of the continuing violation doctrine. The Division's arguments should be rejected because the evidence relied upon by the Division is misinterpreted or flatly rejected by the Law Judge and does not show any discrete violation within the limitation period.³

To the extent that the Division has not waived the continuing violation doctrine and it remains a viable method of equitably tolling claims under §2462, which Grossman contends it is

² Grossman directs the Commission to his argument at Section IV of his Initial Brief concerning §2462's complete bar of disgorgement and industry bars.

³ Similar to the SEC in *Kovzan*, the Division in the current case has not argued that Grossman had any duty to correct any of the misrepresentations or omissions made outside the limitations period and has therefore failed to preserve such argument. *SEC v. Kovzan*, 2013 WL 5651401 (D. Kan. Oct. 15, 2013). Furthermore, unlike the SEC in *Kovzan* where it brought its Rule 10(b)-(5)(a) and (c) claims based on the existence of a scheme to defraud, the Division did not allege such claims against Grossman and as a result any "scheme" claims are waived. *See* OIP.

not, such mechanism can only be invoked if the unlawful practices are part of an ongoing fraud or wider scheme and not separate or discreet acts. *Id.*⁴ The continuing violation doctrine does not make timely claims based on discretely actionable acts occurring outside the limitations period, even if those acts are related to a part or a series of acts committed within the limitations period. *Id.* at *2. Furthermore, the doctrine cannot be predicated on the continuing ill-effects of the violation occurring beyond the limitation period. *SEC v. Leslie*, 2010 WL 2991038 at *9 (N.D. Cal. July 29, 2010).

Grossman will not reiterate his arguments asserted at Section V of his Initial Brief as to the error in the Law Judge's application of the continuing violation doctrine. Grossman, however, is compelled to respond to several of the Division's misstatements regarding the evidence in support of the continuing violation doctrine and misplaced arguments regarding the same.

(a) Grossman Did Not Render Any Investment Advice Within the Limitation Period.

Grossman did not render any investment advice to Sovereign clients within the limitation period. Op. at 8; Tr. 496:20-497:7; 760:20-761:13. The Division argues that two letters for the share exchange of Sovereign investor shares from Anchor C to PIWM to which Grossman's electronic signature was affixed is evidence to the contrary. Div. Ex. 113, 113-1. The Law Judge flatly rejected the Division's position and accepted Paturzo's testimony that she inadvertently

⁴ In *Kovzan*, the defendant prevailed at summary judgment on as to the Rule 10(b)(5) claims asserted against him because the claims first accrued beyond §2462's limitation period. *Id.* at *3. The Court rebuked the SEC's argument that the continuing violation doctrine rendered acts outside the limitation period actionable, holding that the SEC failed to describe how particular misrepresentation and omissions occurring outside the limitations period would not be discretely actionable. *Id.*

sent the letters thereby disputing the Division's charge and the Law Judge did not rely on such letters. Op. 44, FN 46.

(b) Grossman Was Not an Investment Representative of Sovereign.

The absence of the November 21, 2008 letters as evidence of Grossman rendering investment advice within the limitation period is significant in support of the finding that the Law Judge erred in the application of the continuing violation doctrine or that any violations occurred within the limitation period. To overcome this blow, the Division argues that Sovereign's October 23, 2008 Form ADV Part II, December 28, 2008, Form ADV I, and Investment Advisor Public Disclosure ("IARD"), conclusively show that Grossman was more than a Sovereign consultant during the limitation period and was actually a registered representative rendering investment advice. The Division's argument however is at best misplaced.⁵

The October 23, 2008 Form ADV Part II (Div. Ex. 42; p.4) identifies Sovereign International Pension Services as a pension consultant, of which Grossman is a controlling owner. This document solidifies the testimony that Grossman was not rendering investment advice while at Sovereign, because it identifies Adams as the person giving general investment advice to Sovereign clients. (DX 42; p. 4; Tr: Op. at 8; Tr. 496:20-497:7; 760:20-761:13). Furthermore, contrary to the Division's representation otherwise, the Law Judge flatly rejected

⁵ Grossman was hired as a consultant to assist in transitioning Sovereign to Adams and later to communicate with clients concerning Anchor A's suspension of redemptions, exposure of Anchor A to Bernard Madoff and efforts taken by Sovereign to recover such investments. Tr. 505; 759:15-760:14; Div. Ex. 50:6-7; Div. Ex. 50R; Div. Ex. 50U. As a consultant Grossman did not possess: (a) any decision making authority; (b) the ability to sign checks on behalf of Sovereign; (c) the ability to enter into contracts on behalf of Sovereign; (d) receive compensation that was tied in any way to the performance of the investments managed at Sovereign; and (e) any authority to file an ADV on behalf of Sovereign. Tr. 494:4-494:2; 761:14-792:20.

the proposition that Grossman signed the December 23, 2008 ADV Part I, (Div. Ex. 84) because it was intended to be signed by Adams and did not include such filing in the calculation of penalties assessed Grossman. Op. 47: FN 49. Finally, Grossman did not recognize the IARD document that identified him as an investment representative of Sovereign through December 31, 2011. Op. 4; Tr. 242:1-244:14; Div. Ex. 2. The Law Judge's and the Division's reliance on the IARD showing Grossman as a Sovereign investment representative through December 31, 2011 is misplaced because Sovereign's October 23, 2008 Form ADV Part II (Div. Ex. 42; p. 4) does not identify Grossman as such.

(c) No Record Evidence of Grossman Receiving Any Referral Fees Within Limitation Period.

The Division argues that Grossman received the undisclosed fees within the limitation period by virtue of his consultancy position at Sovereign. Opp. Brief at 23. In support of such argument the Division requests the Commission to make several unsupported assumptions regarding Sovereign's receipt of the referral fees and use of the fees to pay Grossman his consultant fee and payments for the purchase of Sovereign. Such argument is completely unsupported by the record and should be rejected outright.

(d) The Division Has The Burden To Prove That The Violations Within The Limitation Period Are Not The Continuing Ill-Effects Of The Original Violation.

The Division argues that Grossman's failure to disclose the receipt of the referral fees to a Sovereign client during each communication with them after the sale of Sovereign amounts to a new violation permitting the application of the continuing violation doctrine. The Division's argument is misplaced because the continuing violation doctrine does not make timely claims based on discretely actionable acts occurring outside the limitations period, even if those acts are

related to or part of a series of acts committed within the limitations period. *SEC v. Kovzan*, 2013 WL 5651401 at *2. Furthermore, this doctrine may not be predicated on the continuing ill-effects of the original violation, rather, it requires continued unlawful acts. *SEC v. Leslie*, 2010 WL 2991038 at *9 (N.D. Cal. July 29, 2010). It is the Division's burden to provide the applicability of the continuing violation doctrine and the Law Judge erred in its application because the Division failed to fulfill such burden.

In *SEC v. Leslie*, the Court refused to apply the continuing violation doctrine to cure the SEC statute of limitation problem, holding that the filing of a misleading 10-K that caused the company's stock to artificially inflate was a discrete act that occurred outside the limitation period. *Id.* at *3. The SEC argued that the sale of the artificially inflated stock within the limitation period was an act triggering the continuing violation doctrine. *Id.* *35. The argument was rejected because the continuing violation doctrine cannot be predicted on the continuing ill-effects of the original violation. *Id.* The Division's argument for the application of the continuing violation doctrine is also misplaced, because its argument that Grossman's omissions concerning receipt of undisclosed referral fees is a continuing ill-effect of the original violation that occurred beyond the limitation period.

III. GROSSMAN DID NOT WAIVE ANY ISSUES CONCERNING THE PENAL NATURE OF THE DISGORGEMENT ORDER

The Petition for Review states that Grossman is challenging the Initial Decision's award of disgorgement against him because such remedy is barred by §2462's five year statute of limitations. Each of Grossman's arguments concerning the punitive nature of the disgorgement award arising from the lack of causal connection, limitation of award to fees received attributable to the testifying Sovereign clients, and the refusal to offset the tax liability attributable to the

receipt of the fees supports Grossman's argument that disgorgement is tantamount to a penalty or forfeiture under §2462 and barred by its five year statute of limitations.

IV. CONCLUSION

Grossman requests that the Commission find that all of the Division's remedies are barred by §2462's five year statute of limitations.

s/Zachary D. Messa

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