

UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION

IN THE MATTER OF:

MICHAEL A. HOROWITZ and
MOSHE MARC COHEN

RESPONDENTS.

ADMINISTRATIVE PROCEEDING
FILE NO: 3-15790

**RESPONDENT MOSHE MARC COHEN'S
SUMMARY DISPOSITION AS TO 17(a)(1) OF THE SECURITIES ACT OF
1933 ALLEGED VIOLATIONS IN THE OIP**

Respondent Moshe Marc Cohen ("Respondent") respectfully requests the Court's Dismissal of the Division's alleged violations of 17(a)(1) of the Securities Act of 1933.

INTRODUCTION

The hearing of Respondent concluded on August 27, 2014. During the hearing the Division's alleged "misrepresentation" of the "Investment Access" question was argued by the Division. Although the Division brought up new allegations that were not brought up in the OIP- they are irrelevant to the OIP's alleged claim of a "misrepresentation" of the "investment access" question.

The Division's admission in **their pre-hearing brief also stated that this is a[n alleged] "straightforward misrepresentation case"**. (Page 1 paragraph 1)

Before the hearing, in the Division's filed "Reply to Cohen's Opposition to its Motion to Quash and for a Protective Order Regarding Subpoenas to Division Counsel" on August 6, 2014.

On Page 1 of the Division's Reply the Division stated the following "*the only relevant facts in this case concern his representation to his broker dealer, Woodbury Financial Services ("Woodbury"), in connection with the issuance of variable annuities measured by the lives of terminally ill people.*" They then continue with the following "*This case is not about whether insurance companies were defrauded*

by Cohen's acts. Indeed the OIP is clear about the Division's claim against Cohen." They then quote paragraphs 99, 100 and 101 of the OIP which are.

99. As part of the principal review, Broker-Dealer 3 principals scrutinized the investment access information that Cohen provided on behalf of his customers to ensure that that each customer would not need access to their investment during the surrender charge period in the annuity being purchased. Each of the variable annuity products that Cohen sold had a surrender charge period of at least 7 years.

100. Knowing that Broker-Dealer 3 would not approve his variable annuity sales if he provided truthful investment access information for his customers, Cohen provided false information regarding how soon the customers intended to access the investment (i.e., not before "11 to 15 years") on each of the 28 Broker-Dealer 3 "Annuity-Point of Sale" forms that he completed.

101. By providing false investment access information for the nominees of Institutional Investor 1, and by failing to disclose that they intended to access their annuities well within the surrender charge period, Cohen was able to fraudulently obtain principal approval of his stranger-owned annuities sales. As a result of Cohen's fraudulent acts and practices, the insurance companies whose variable annuities Cohen sold unwittingly issued stranger-owned variable annuities to Cohen's customers, and paid out substantial upfront sales commissions to Cohen.

OIP at Paragraphs 99-101.

The Division then makes the following statement *"As such, any facts that do not concern the above alleged conduct are not relevant to any aspect of this case."*

The Division's reply clearly and factually show that their only allegation is the "alleged" misrepresentation of the "investment access information" question on Woodbury's Annuity Point-of Sale form.

By the Division's own admission of the allegations against Cohen, it is clearly a case of an alleged "misrepresentation" case which would fall under the 17(a)(2) and not 17(a)(1) of the Securities Act of 1933.

Rule 17(a) states:

- a. It shall be unlawful for any person in the offer or sale of any securities or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly--

1. to employ any device, scheme, or artifice to defraud, or

2. to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

Any effort to rely on misrepresentations, but then “back doors” them into subsection (a)(1) in order to avoid requirements in 17(a)(2) is barred by the caselaw. Misrepresentation cases must be brought under section 17(a)(2). To bring a case under subsection (a)(1), the Staff must demonstrate that the alleged scheme went beyond any misrepresentation or omission to encompass conduct that could not be charged under 17(a)(2).

Courts have routinely rejected the SEC’s attempt to bypass the elements necessary to impose ‘misstatement’ liability under subsection (a)(2) by labeling the alleged misconduct a ‘scheme’ rather than a ‘misstatement’. Allegations of scheme liability cannot be used as a back door into liability for those who make a false statement or omission in violation of subsection (2) of Rule 17(a).

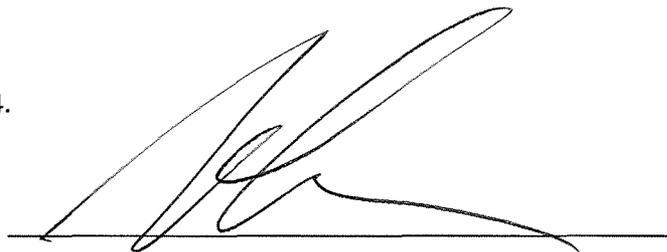
Where the SEC alleges a misrepresentation *and* a scheme, courts reject the scheme counts when they merely reiterate the conduct that allegedly caused the misrepresentation. See e.g. *SEC v Lucent Technologies*, 610 F. Supp. 2d 342,361 (D.N.J. 2009) (“[t]he alleged deception in this case arose from the failure to disclose ‘the real terms of the deal,’ which is nothing more than a reiteration of the misrepresentation and omissions that underlie plaintiff’s’ disclosure claim”) (internal citations omitted).

The Division’s efforts to lighten the SEC’s burden by invoking scheme liability under 17(a)(1) should not be allowed since case law makes it clear that the SEC cannot back door statements and omissions cases through 17(a)(1) by dressing them up as scheme liability. The SEC must bring such cases under subsection (a)(2) only.

Conclusion

As such respondent Cohen respectfully requests that the alleged violation of 17(a)(1) within the OIP be dismissed prior to the filing of the Division’s Closing brief.

Respectfully Submitted August 28, 2014.

A handwritten signature in black ink, appearing to read 'Moshe Marc Cohen', is written over a horizontal line. The signature is stylized and cursive.

By: Moshe Marc Cohen – Pro-Se