14-13562-E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff/Appellant,

v.

BARRY J. GRAHAM, FRED DAVIS CLARK, JR., A/K/A DAVE CLARK, CRISTAL COLEMAN A/K/A CRISTAL CLARK, DAVID W. SCHWARZ and RICKY LYNN STOKES,

Defendants/Appellees.

BRIEF OF APPELLEES, FRED DAVIS CLARK, JR., CRISTAL CLARK, AND DAVID W. SCHWARZ

On Appeal from the United States District Court
for the Southern District of Florida, Key West Division
Case Number 13-cv-10011

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CERTIFICATE OF INTERESTED PERSONS

Appellees, FRED DAVIS CLARK, JR., CRISTAL CLARK, and DAVID W. SCHWARZ, by counsel and pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, hereby certify that the following persons and entities fall within the category of persons described in Eleventh Circuit Rule 26.1-1:

1. Augustini, Hope H., attorney for the Commission
2. Berlin, Amie Riggle, attorney for the Commission
3. Cay Clubs Resorts and Marinas - entities comprising or relating thereto:

    (1) 701 LLC

    (2) Addictive Fishing LLC

    (3) BXRL LLC

    (4) Cay Clubs International LLC

    (5) CC Distribution LLC

    (6) CC FBO LLC

    (7) CC701 LLC

    (8) CC704 LLC

    (9) CC705 LLC

(10) CC706 LLC

(11) CC707 LLC

(12) CC708 LLC

(13) CC709 LLC

(14) CC710 LLC

(15) CC711 LLC

(16) CC712 LLC

(17) CC713 LLC

(18) CC714 LLC

(19) CC715 LLC

(20) CC718 LLC

(21) CC719 LLC

(22) CC720 LLC

(23) CC721 LLC

(24) CC722 LLC

(25) CC723 LLC

(26) CC724 LLC

(27) CC725 LLC

(28) CC726 LLC

(29) CC771 LLC

(30) CC772 LLC

(31) CC773 LLC

(32) CC774 LLC

(33) CC775 LLC

(34) CCH CCI LLC, f/k/a DC701 HQ LLC

(35) CCH Clearwater LLC

(36) CCH Dove Creek LLC

(37) CCH Finance LLC

(38) CCH Keys LLC

(39) CCH Tavernaero LLC

(40) Cristal Clear Airport Services LLC

(41) Cristal Clear Associates, LLC, d/b/a Cay Club Realty

(42) Cristal Clear Aviation LLC

(43) Cristal Clear BXRL Productions LLC

(44) Cristal Clear BXRL Tournament LLC

(45) Cristal Clear Charters LLC

(46) Cristal Clear Contracting LLC

(47) Cristal Clear Development LLC

(48) Cristal Clear Distillers LLC

(49) Cristal Clear Docks LLC

(50) Cristal Clear Environmental LLC

(51) Cristal Clear FBO LLC

(52) Cristal Clear Keys Realty LLC, f/k/a TRECO

(53) Cristal Clear Maintenance LLC

(54) Cristal Clear Management LLC

(55) Cristal Clear Media LLC

(56) Cristal Clear Mining LLC

(57) Cristal Clear Mortgage LLC

(58) Cristal Clear Productions LLC

(59) Cristal Clear Property Management LLC

(60) Cristal Clear Realty LLC, d/b/a Waterfront Resort Realty

(61) Cristal Clear Realty NV LLC

(62) Cristal Clear Reclamation LLC

(63) Cristal Clear Rentals LLC

(64) Cristal Clear Services Group LLC

(65) Cristal Clear Title Agency LLC

(66) Cristal Clear Vessel Leasing LLC

(67) Cristal Clear Watercraft LLC

(68) Cristal Clear Productions, LLC

(69) DC701 LLC

(70) DC702 LLC

(71) DC703 LLC

(72) DC703OB LLC

(73) DC703 P5 LLC

(74) DC703 P6 LLC

(75) DC704 LLC

(76) DC705 BC LLC

(77) DC705 F&B LLC

(78) DC705 GS LLC

(79) DC705 JV LLC

(80) DC705 LLC

(81) DC705 Marina LLC

(82) DC706 CS LLC

(83) DC706 DR LLC

(84) DC706 FB LLC

(85) DC706 JV LLC

(86) DC706 KM LLC

(87) DC706 LLC

(88) DC706 LW LLC

(89) DC706 M1 LLC

(90) DC706 MV LLC

(91) DC706 P1 LLC

(92) DC706 P2 LLC

(93) DC706 RD LLC

(94) DC706 TV LLC

(95) DC706 FB LLC

(96) DC707 JV LLC

(97) DC707 LLC

(98) DC707 MY LLC

(99) DC707 P2 LLC

(100) DC707 P3 LLC

(101) DC707 P4 LLC

(102) DC707 06 LLC

(103) DC707 P7 LLC

(104) DC708 FB LLC

(105) DC708 LLC

(106) DC708 P2 LLC

(107) DC708 P3 LLC

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(109) DC709 FB LLC

(110) DC709 JV LLC

(111) DC709 LLC

(112) DC709 P2 LLC

(113) DC709 P3 LLC

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(115) DC710 JV LLC

(116) DC710 LLC

(117) DC710 MC LLC

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(119) DC710 P3 LLC

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(121) DC711 LLC

(122) DC713 LLC

(123) DC714 LLC

(124) DC715 LLC

(125) DC715 JV LLC

(126) DC716 LLC

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(128) DC719 LLC

(129) DC720 LLC

(130) DC721 LLC

(131) DC722 LLC

(132) DC723 LLC

(133) DC724 LLC

(134) DC725 LLC

(135) DC726 LLC

(136) DC770 LLC

(137) DC771 LLC

(138) DC772 LLC

(139) DC773 LLC

(140) DC774 LLC

(141) DC775 LLC

(142) DCWCC JV LLC

(143) F. Dave Clark Irrevocable Trust

(144) Flamingo Palms Villas, LLC

(145) Water Lifestyles LLC

(146) WCC investments Ltd.

(147) WCC Properties, Ltd.

4. Clark, Jr., Fred Davis, Appellee

5. Coleman, Cristal, R., n/k/a Cristal Clark, Appellee

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8. Dinero Shop, S.A

9. Graham, Barry J., Appellee

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11. Hazouri, Kenneth P., defense and appellate counsel for Appellees, Fred Davis Clark, Jr., Cristal Clark, and David W. Schwarz

12. King, James Lawrence, Senior Judge, U.S. District Court for S.D. Fla.

13. Lisitza, David D., attorney for the Commission

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16. Rumberger, Kirk & Caldwell, co-trial counsel for Appellees, Fred Davis Clark, Jr., and Cristal Clark

17. Russell C. Weigel III, PA, trial counsel for Appellee, Ricky L. Stokes

18. Salup-Schmidt, Linda, attorney for the Commission

19. Schiff, Andrew O., attorney for the Commission

20. Schwartz, David W., Appellee

21. Securities and Exchange Commission, Appellant

22. Small, Anne K., attorney for the Commission

23. Stillman, Jacob H., attorney for the Commission

24. Stokes, Ricky Lynn, Appellee

25. Valkenburg, Derrick Michael, former associate in deBeaubien, Knight, et al., counsel for Appellees, Fred Davis Clark, Jr., Cristal Clark, and David W. Schwarz

26. Weigel III, Russell Cornelius, trial counsel for Appellee, Ricky L. Stokes

27. Weiman, Theodore J., attorney for Commission

STATEMENT REGARDING ORAL ARGUMENT

The Clarks and Schwarz desire oral argument and believe it is very important for the appeal's disposition. This Court has not addressed the scope and application of the statute of limitations set forth in 28 U.S.C. § 2462 since the Supreme Court issued its landmark decision in *Gabelli v. SEC* interpreting that statute. Oral argument will allow the Court to question the parties and fully vet their respective positions regarding this material event in the development of the jurisprudence interpreting the statute, as well as their respective, overall positions.

The SEC regulates, and/or claims to regulate, hundreds of thousands of persons and entities who may be targeted by the SEC with: a) disgorgement claims demanding judgments for hundreds of thousands, millions, or even hundreds of millions of dollars; and b) claims for declaratory and injunctive relief that seek to label them wrongdoers and cripple their ability to earn a living. The instant case is of critical importance to all of such persons and entities. Accordingly, the Clarks and Schwarz respectfully request the Court to grant oral argument for the above-stated reasons and so that they may have the opportunity to address any arguments raised in the SEC's reply brief and answer any of the Court's questions.

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STATEMENT OF JURISDICTION

Pursuant to 15 U.S.C. § 77v and 15 U.S.C. § 77aa, the district court was generally vested with subject-matter jurisdiction over civil-enforcement actions like the instant case filed under the Securities Act of 1933 and Securities Exchange Act of 1934. As the district court correctly ruled below, however, it was divested of subject-matter jurisdiction over this action when the SEC failed to file it within the five-year period set forth in 28 U.S.C. § 2462. This Court has subject-matter jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

This Brief refers to Appellees, FRED DAVIS CLARK, JR., and CRISTAL CLARK, collectively as the "Clarks." Appellee, DAVID W. SCHWARZ, is referred to as "Schwarz," Appellee, RICKY LYNN STOKES, is referred to as "Stokes," and Appellee, BARRY GRAHAM, is referred to as "Graham." The Brief sometimes collectively refers to all of the Appellees as "Appellees." Appellant, SECURITES AND EXCHANGE COMMISSION, is referred to as the "SEC." Record cites are in the form set forth in Eleventh Circuit Rule 28-5.

STATEMENT OF THE CASE

On January 30, 2013, the SEC filed this civil-enforcement action relating to Cay Clubs Resorts and Marinas ("Cay Clubs"), a network of destination resorts that was being developed by Messrs. Clark and Schwarz. (Dkt. 1) The SEC amended its original Complaint before serving it. (Dkt. 4)

The SEC's Amended Complaint alleged that: a) the sales of Cay Clubs condominiums were actually investment contracts governed by the federal securities laws; and b) the Appellees sold unregistered securities and violated the anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. (Dkt. 4) The district court granted the Clarks' Motion to Dismiss the SEC's Amended Complaint, with leave to amend, based on the SEC's failure to plead sufficient facts demonstrating that the condominium sales were investment contracts (*i.e.*, securities). (Dkt. 28 & 40)

The SEC then filed its Second Amended Complaint (the "Complaint").[1] (Dkt. 41) It made similar allegations against the Appellees and sought the following relief: a) a declaration that the Appellees violated the federal securities laws alleged in the Complaint; b) an injunction permanently enjoining the Appellees from violating federal securities laws; c) disgorgement of Appellees' supposedly ill-gotten gains and prejudgment interest thereon; and d) imposition of civil penalties against the Clarks and Stokes. (Dkt. 41, pp. 32-33)

The Clarks and Schwarz answered the Complaint by denying its material allegations of wrongdoing and that the condo sales were investment contracts governed by the securities laws. (Dkt. 49 & 50) They also asserted that the SEC's claims were time-barred under 15 U.S.C. § 2462 ("§ 2462"). (Dkt. 49 & 50)

The Clarks, Schwarz, and Stokes later filed Motions for Summary Judgment on the grounds that: a) the sales of Cay Clubs condominiums were sales of real property, not investment contracts, and were not, therefore, transactions governed by the Securities and Exchange Acts; and b) all of the SEC's claims were barred under § 2462. (Dkt. 60, 62, 88) The district court scheduled oral argument on those two defenses. (Dkt. 171)

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[1] This complaint is misnamed "Amended Complaint" instead of "Second Amended Complaint."

At the March 24, 2014, hearing, the district court only took arguments on the Appellees' statute-of-limitations defenses under § 2462. (Dkt. 197) The district court directly asked the SEC's trial counsel why the commission had waited until January 30, 2013, to file this action even though the SEC had been investigating Cay Clubs since at least as early as October 2007. (Dkt. 197, pp. 72-73) After the SEC's counsel could not even offer a verbal response, the court took a recess. (Dkt. 197, pp. 72-73)

At the hearing, the district court also offered to reopen the record and allow the parties to present additional evidence on when § 2462's five-year statute of limitations began to run. (Dkt. 182) The Appellees accepted the court's offer at the hearing. (Dkt. 182; 197) The SEC's counsel, however, told the court she had to confer with her office before giving a response and would provide one by the following Wednesday. (Dkt. 197, p. 106) After Wednesday passed without the SEC's response, the court issued an order stating that the record shall remain closed, and there would be no evidentiary hearing. (Dkt. 182)

On May 12, 2014, the district court issued its Final Order of Dismissal (the "Dismissal Order"), which dismissed the Complaint with prejudice based on the SEC's failure to file this action within § 2462's five-year statute of limitations. (Dkt. 186) The Dismissal Order's primary rulings are that: a) § 2462 applies to all of the claims for relief filed by the SEC in this action; b) § 2462 is a jurisdictional statute of limitations, and, therefore, the SEC's failure to comply with § 2462 deprived the court of subject matter jurisdiction over this action. (Dkt. 186) After the district court issued a Final Judgment based on the Dismissal Order, the SEC filed its Notice of Appeal. (Dkt. 190 & 193)

SUMMARY OF THE ARGUMENT

The district court correctly ruled that the SEC's claims for disgorgement, injunctive relief, and declaratory relief are all governed by § 2462. The court was properly guided by the landmark decision in *Gabelli* articulating the fundamental policies behind, and protections afforded by, § 2462, all of which are plainly applicable to the SEC's claims. In addition to contravening *Gabelli*, the SEC's attempt to escape § 2462 by labeling its claims "equitable" is contrary to appellate decisions -- including this Court's recent decision in *Coghlan* -- that eschew such a superficial approach in favor of an examination of the genuine nature and consequences of the subject claims.

The trial court's determination that the SEC's disgorgement claims are a forfeiture for purposes of § 2462 is entirely consistent with: a) the fundamental policies and vital protections of § 2462 articulated in *Gabelli*; b) the synonymic definitions of "disgorgement" and "forfeiture"; and c) the fact that disgorgement claims and civil forfeitures share nearly identical characteristics and purposes. In advocating against that ruling, the SEC grossly misstates this Court's holding in

Calvo, which is, in fact, irrelevant to this appeal. The SEC also attempts to demonstrate that disgorgement claims are not sufficiently punitive to qualify for protection under § 2462. Properly analyzed, however, the same opinions cited by the SEC compel the opposite conclusion and further establish the correctness of the district court's ruling that the SEC's disgorgement claims are a forfeiture governed by § 2462.

The district court's companion finding that the SEC's injunctive and declaratory claims are a "penalty" governed by § 2462 is also correct and fully and consistent with *Gabelli* and *Coghlan*. Once again, the SEC's attempt to avoid § 2462 by labeling those claims "equitable" is inconsistent with the standards adopted by this Court in the latter decision. The environmental cases proffered by the SEC (*Banks* and *National Parks*) involved entirely different claims than those in the instant case are, therefore, materially distinguishable.

Based on the SEC's concession that it did not file this action within the five years authorized by § 2462, the trial court's ruling that § 2462 is a "jurisdictional" statute of limitations is not germane to this appeal's disposition. Nonetheless, that ruling is correct based on: a) courts' common use of the term "entertain" when discussing subject matter jurisdiction; and b) this Court's decision in *Williams* holding that a statute's use of the phrase "shall not be entertained" -- the identical limiting language in § 2462 -- clearly established Congress' intention to make the statute jurisdictional.

Importantly, the Dismissal Order does not prohibit the SEC from prosecuting claims for disgorgement, injunctive relief, and declaratory relief. It simply requires the SEC to file such claims within § 2462's five-year period. As explained in *Gabelli*, the SEC is equipped with a full set of powerful investigatory tools to facilitate its compliance with that exceedingly-reasonable time limitation. For all of these reasons, the Dismissal Order and Final Judgment should be affirmed.

ARGUMENT

I. THE SEC'S STATEMENT OF THE CASE GROSSLY VIOLATES THIS COURT'S RULE 28-1(i)(ii) AND FEDERAL RULE OF APPELLATE PROCEDURE 28(A)(6) AND, MORE IMPORTANTLY, CONCEDES THAT THE SEC DID NOT FILE THIS ACTION WITHIN § 2462'S FIVE-YEAR STATUTE OF LIMITATIONS.

The SEC's brief spends nearly 15 ½ pages restating the SEC's meritless factual allegations against the Clarks and Schwarz. (SEC Brf. pp. 4-19) The SEC was, however, prohibited from trying to prove those allegations as a result of its failure to timely file this action. (Dkt. 186) As such, the SEC has attempted to support the purported facts in its Statement of the Case by primarily citing to evidence the SEC untimely filed in support of its Motion for Summary Judgment, which the Clarks and Schwarz met with their own counter-evidence. (Dkt. 96, 121-1 - 121-10, 122-1) Yet, the SEC's Statement does not explain that those purported facts are merely unproven allegations against the Clarks and Schwarz that are, in most cases, drawn from inferences based on challenged evidence. Thus, the SEC's Statement clearly violates this Court's Rule 28-1(i)(ii).

Even more egregiously, the SEC's Statement of the Case gratuitously notes that the SEC's sister agency, the Department of Justice ("DOJ"), has decided to charge the Clarks, Graham, and Stokes with crimes arising out Cay Clubs. (SEC Brf., p. 14) The DOJ did not unseal the charges against the Clarks, and did not indict Messrs. Stokes and Graham, until after entry of the Final Judgment herein. Accordingly, the appellate record contains no evidence of the charges, and the SEC has, therefore, improperly cited to the separate criminal cases' dockets in support of its statements about them. (SEC Brf., p. 14) The SEC's transparent attempt to prejudice this Court against the Appellees by introducing facts that are outside of the record and entirely irrelevant to this appeal is yet another gross violation of this Court's Rule 28-1(i)(ii), as well as Federal Rule of Appellate Procedure 28(a)(6).[2]

The SEC has resorted to such improper tactics because its arguments on the salient issues herein are meritless. Desperate to avoid § 2462's proper application

[2] The undersigned asked the SEC to file an amended brief removing the statements regarding the criminal charges. The SEC refused to do so.

to its enforcement actions, the SEC has played similarly-untoward cards when its arguments did not pass muster in important appeals interpreting that statute like this one. *See, e.g., Gabelli v. S.E.C.*, 133 S.Ct. 1216, 1221 (2013)(admonishing the SEC for the lack of germane legal authority offered in support of its incorrect argument that the discovery rule applied to defenses raised under § 2462 to civil-penalty claims); *Johnson v. S.E.C.*, 87 F.3d 484, 492, n. 10 (D.C. Cir. 1996)(citing *SEC v. Telsey*, 144 B.R. 563 (Bankr.S.D.Fla.1992))(explaining that the "SEC's own position on what constitutes a penalty [under § 2462] appears to vary with the context" and rejecting the SEC's argument that § 2462 did not apply to its proceeding against the defendant). The SEC's ploys did not alter the outcomes of those appeals, and they cannot save the SEC's fatally-defective arguments in this one.

Critically, the SEC's Statement of the Case also concedes that the SEC did not file this action within § 2462's five-year limitations period and, concomitantly, abandons the SEC's civil-penalty claims, which are indisputably time-barred by the statute: "The Commission does not appeal the district court's determination that the defendants' violations did not continue after January 30, 2008, and thus does not appeal the district court's conclusion that the Commission's claims for civil penalties are time-barred by Section 2462." (SEC Brf. p. 19) If, therefore, this Court accepts the district court's legal conclusion that § 2462 applies to all of SEC's claims against the Appellees, the Dismissal Order and Final Judgment must be affirmed. As explained below, that is the correct result in this appeal.

II. AS THE DISTRICT COURT CORRECTLY FOUND, THE SEC'S POSITION THAT IT HAS AN UNLIMITED TIME TO FILE THE CLAIMS HEREIN DIRECTLY CONTRAVENES THE "VITAL" PURPOSES OF § 2462 ARTICULATED IN *GABELLI*.

This appeal centers on the interpretation of § 2462, which reads in pertinent part as follows:

> 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 . . . .

28 U.S.C. § 2462 (emphasis supplied). The Dismissal Order correctly explains that acceptance of the SEC's position that this statute does not govern its claims against the Appellees means that "the SEC can bring such claims without regard to how far in the past the acts giving rise to the claim occurred." (Dkt. 186, p. 13) At the March 24, 2014, hearing below, the SEC's trial counsel confirmed that the SEC indeed maintains there should be no time limitation whatsoever for it to file the subject claims for disgorgement and injunctive and declaratory relief. (Dkt. 197, pp. 55-56) The district court rejected that position and concluded that in addition to § 2462's text, "the long-held policies and practices that underpin the Supreme

Court's unanimous opinion in *Gabelli*…require the conclusion that § 2462 does reach all forms of relief sought by the SEC in this case." (Dkt. 186, p. 13) That conclusion is eminently correct.

In *Gabelli*, the SEC filed an action for civil penalties, disgorgement, and injunctive relief against the defendants based on alleged violations of the Investment Advisors Act of 1940. *Gabelli*, 133 S.Ct. at 1219. The defendants moved to dismiss on the grounds that the SEC's action was time-barred under § 2462. *Id.* The district court denied the motion as to the SEC's disgorgement and injunction claims, while granting the motion as to its civil-penalty claims. The SEC appealed, and the circuit court reversed upon finding that the "discovery rule" applies to § 2462, and, therefore, its statute of limitations did not began to run until the SEC discovered, or should have discovered, the alleged securities violations. *Id.*

The Supreme Court granted certiorari review of that decision. *Id.* Since the case came to the Court via the SEC's appeal of the dismissal of its civil-penalty claims, the district court's denial of the defendants' motion to dismiss the disgorgement and injunction claims was neither before nor addressed by the Court. *Id.* at 1224, n. 1.

The Court began its analysis by quickly agreeing with the defendant's position that the discovery rule does not apply to § 2462. *Id.* In so doing, the

Court explained that the defendants' interpretation of § 2462 "is the most natural reading of the statute" and promotes the fundamental, societal policies behind statutes of limitations like § 2462:

> This reading sets a fixed date when exposure to the specified Government enforcement efforts ends, advancing "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000). **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).

133 S.Ct. 1216, 1222 (2013)(emphasis supplied).

Responding to the SEC's arguments for the discovery rule, the Court noted that unlike private litigants, the SEC has a full panoply of tools to ensure it can timely investigate alleged securities violations and file appropriate claims within § 2462's limitations period. *Id.* at 1222. The Court also explained that the SEC seeks a different kind of relief than plaintiffs suing on their own behalf, who generally get the discovery rule's benefit in fraud claims:

> In a civil penalty action, the Government is not only a different kind of plaintiff, it seeks a different kind of relief. **The discovery**

> **rule helps to ensure that the injured receive recompense. But this case involves penalties, which go beyond compensation, are intended to punish, and label defendants wrongdoers.** See *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 423, 35 S.Ct. 328, 59 L.Ed. 644 (1915) (a penalty covered by the predecessor to § 2462 is "something imposed in a punitive way for an infraction of a public law"); see also *Tull v. United States*, 481 U.S. 412, 422, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987) (penalties are "intended to punish culpable individuals," not "to extract compensation or restore the status quo").

Id. at 1223 (emphasis supplied). The Court then reiterated the fundamental purposes of statutes of limitations and their indispensability to our legal system:

> Chief Justice Marshall used particularly forceful language in emphasizing the importance of time limits on penalty actions, stating that **it "would be utterly repugnant to the genius of our laws" if actions for penalties could "be brought at any distance of time."** *Adams v. Woods*, 2 Cranch 336, 342, 2 L.Ed. 297 (1805)**.** Yet grafting the discovery rule onto § 2462 would raise similar concerns. **It would leave defendants exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future.**

Id. (emphasis supplied). Based on these analyses, the Court reversed the circuit court's ruling that the discovery rule applied to defenses raised under § 2462. *Id.* at 1224.

The SEC's erroneous position that § 2462 does not govern its claims for disgorgement, injunction, and declaratory relief directly contravenes the purposes of § 2462 articulated in *Gabelli*, which are fundamental to our democratic system of justice. As explained in *Gabelli*, § 2462 "promote[s] 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," and these protections are "vital to the welfare of society." Any suggestion that the Clarks and Schwarz should not receive these "vital" protections as a result of the SEC's unwarranted delay in filing its claims against them is simply baseless. The SEC's disgorgement claim (improperly) seeks a $300,000,000 judgment against the Clarks and Schwarz, while the SEC's claims for injunctive and declaratory relief seek to label them fraudsters and cripple their livelihood. Section 2462's protections are no less needed in these claims than they were in the civil-penalty claims at issue in *Gabelli*.

Moreover, it would be equally "repugnant to the genius of our laws" to allow the SEC to prosecute its claims for disgorgement, injunctive relief, and declaratory relief "at any distance of time" -- be it 10, 20, or 30 years -- as the SEC claims it may do. *Gabelli* quoted this statement from Justice Marshall's opinion in *Adams v. Woods* in the context of the civil-penalty claims at issue in *Gabelli*. That immensely important discussion is clearly not, however, limited to such claims.

In *Adams*, the plaintiff filed a *qui tam* action on behalf of the United States to collect a debt in the form of a penalty that had been levied against the defendant for violating an anti-slave-trafficking statute. *Adams*, 2 Cranch at 336. The defendant raised a statutes-of-limitations defense, and the U.S. Attorney General argued the subject statute was only applicable to criminal prosecutions, not the plaintiff's civil action on the debt.[3] *Id.* at 337. After rejecting the government's proposed interpretation of the statute, Justice Marshall articulated the policy grounds for applying it, which were recently adopted in *Gabelli*:

> In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.

Id. at 342. *Adams* concluded by holding that the statute of limitations applied to the civil action on the debt. *Id.*

The fundamental concepts set forth in the above quote from *Adams* are not limited to civil-penalty claims. The result Justice Marshall found "utterly repugnant to the genius of our laws" is the injustice of holding the defendant forever liable on a pecuniary liability, while a person committing treason could not be prosecuted upon the passing of three years from his treasonous act.

Here, the SEC advocates for an equally repugnant and unjust result. The statute of limitations for the crimes of wire and mail fraud is five years. 18 U.S.C. § 1382. All manner of other extremely serious crimes have statutes of limitation

[3] The government's statutory-construction arguments rejected in *Adams* are very similar to the SEC's arguments herein regarding the proper construction of § 2462. *Id.* at 337-38.

that place time limitations on the government's ability to prosecute them. As explained in *Gabelli*, even persons who have actually committed such crimes are entitled to "to assume that their sins may be forgotten." *See supra* p. 12. Yet, despite the unique and extensive investigatory tools at its disposal, the SEC claims it should have unlimited time to prosecute its unproven claims for disgorgement, injunction, and declaratory relief against the Clarks and Schwarz. As the district court correctly found, acceptance of the SEC's position "would make the Government's reach to enforce such claims akin to its unlimited ability to prosecute murderers and rapists." (Dkt. 186, p. 14) As was the case in *Adams*, such a result is "utterly repugnant to the genius of our laws" and cannot possibly be the result intended under § 2462.

Nonetheless, the SEC advocates for that irrational and unjust outcome on the grounds that its claims for disgorgement and injunctive/declaratory relief are "equitable" and, therefore, they cannot possibly be governed by § 2462. (SEC Brf., pp. 24-25) The SEC's assertion that merely labeling its claims "equitable" establishes, *ipso facto*, that § 2462 does not govern them directly contravenes *Gabelli*'s entire discussion regarding the statute's fundamental policies and protections, which are "vital to the welfare of society." Furthermore, as explained in Section IV.B. below, two of the decisions relied upon by the SEC for this incorrect proposition are Clean Water Act cases (*Banks* and *National Parks*) that are clearly distinguishable, while the third one actually establishes the fallacy of the SEC's argument (*Coghlan*).

In sum, the district court correctly ruled that "the long-held policies and practices that underpin the Supreme Court's unanimous opinion in *Gabelli*," which are vital to the welfare of society, strongly support § 2462's application to the SEC's claims for disgorgement, injunction, and declaratory relief. Section 2462's language confirms the propriety of that result.

III. THE DISTRICT COURT CORRECTLY RULED THAT THE SEC'S DISGORGEMENT CLAIMS ARE A FORFEITURE GOVERNED BY § 2462.

Unless otherwise specified by Congress, § 2462 establishes a five-year statute of limitations on any government "action, suit or proceeding for the enforcement of any civil . . . forfeiture, pecuniary or otherwise." The district court ruled that "the disgorgement of all ill-gotten gains realized from the alleged violations of the securities laws -- *i.e.*, requiring defendants to relinquish money and property -- can truly be regarding as nothing other than a forfeiture (both pecuniary or otherwise), which remedy is expressly covered by § 2462." (Dkt. 186, p. 15) That ruling is clearly correct, and the SEC's contrary arguments fail upon proper examination.

A. Forfeiture and disgorgement share the same meaning and purposes, and the consequences of a disgorgement judgment are equally, or even more, severe than those of a civil-forfeiture judgment.

Congress did not define the term "forfeiture" as used in § 2426. Accordingly, *Black's Law Dictionary* is an appropriate starting point for ascertaining the meaning of "forfeiture" therein. *E.g.*, *U.S. v. Lopez*, 590 F.3d 1238, 1248 (11th Cir. 2009); *United States v. McNab,* 331 F.3d 1228, 1237 (11th Cir. 2003). In the context of an "action, suit or proceeding" contemplated by § 2462, *Black's Law Dictionary* defines "forfeiture" as: "A judicial proceeding, the object of which is to effect a confiscation or divestiture." *Black's Law Dictionary,* p. 765 (10th ed.). This is nothing less than a precise description of the SEC's disgorgement claims herein.

Furthermore, *Black's Law Dictionary* defines "disgorgement" as: "The act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." *Black's Law Dictionary*, p. 568 (10th ed.). Standing alone, these definitions establish that "forfeiture" and "disgorgement" are exceedingly-close synonyms. When coupled with the fact that § 2462's vital protections articulated in *Gabelli* are fully applicable to the SEC's disgorgement claims, it is patently obvious that there is no valid basis for distinguishing between them and a civil forfeiture for purposes of § 2462.

That conclusion is further confirmed by the fact that civil forfeiture and disgorgement serve the same purposes. "The primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains." *S.E.C. v. Fischbach Corp.*, 133 F.3d 170, 175 (2nd Cir. 1997). These are the same purposes served by civil forfeiture. Indeed, the Supreme Court has expressly held that the primary purpose of civil forfeiture is to effect a "disgorgement" of ill-gotten gains:

> Civil forfeitures, in contrast to civil penalties, are designed to do more than simply compensate the Government. **Forfeitures** serve a variety of purposes, but **are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct.**

U.S. v. Ursery, 518 U.S. 267, 284 116 S.Ct. 2135, 2145 (1996) (emphasis supplied). In addition to the clear application of the fundamental policies articulated in *Gabelli*, and the synonymic definitions of "forfeiture" and "disgorgement," the identical purposes served by them further establishes that the SEC's disgorgement claims are a "forfeiture" governed by § 2462.

Finally, the consequences of a disgorgement judgment are more severe than a judgment in an action strictly for civil forfeiture. Civil forfeitures are *in rem* proceedings, in which the government pursues specific property (*e.g.*, currency, automobiles, real property) traceable to the proceeds of the unlawful activity. *Usery*, 518 U.S. at 275, 116 S.Ct. at 2140. If no such property exists, the alleged wrongdoer cannot be put in financial jeopardy with a civil forfeiture. On the other hand, a disgorgement judgment -- like an at-law judgment for damages -- subjects all of the judgment debtor's non-exempt property to execution including, and not limited to, property that is traceable to the proceeds of the unlawful activity.[4] Disgorgement judgments based on securities laws are also non-dischargeable in bankruptcy. 11 U.S.C. § 523.

Based on the foregoing, the SEC's disgorgement claims impose substantially more financial jeopardy on the Clarks and Schwarz than that imposed on persons whose specified property is subjected to an action strictly for civil forfeiture.[5] Given these facts, the SEC's suggestion that the former class of persons is not entitled § 2462's protections, while the latter class of persons is so entitled is irrational, unjust, and, for all the above-stated reasons, clearly incorrect.

B. The SEC's arguments that its disgorgement claims are not a forfeiture governed by § 2462 are, in all cases, meritless and, in at least one case, extraordinarily misleading.

Subsection I.B.2. of the SEC's brief begins with a purely-semantic

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[4] A former Assistant Director of the SEC's Division of Enforcement convincingly maintains that the at-law nature of disgorgement judgments establishes that the SEC's disgorgement claims are not genuinely "equitable," as they are sometimes described. Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, Harvard Business Law Review Online, http://www.hblr.org/2013/11/the-equity-facade-of-sec-disgorgement/.

[5] One only needs to consider the case of Joseph Contorinis to quickly understand the immense, life-altering financial jeopardy imposed on persons whom the SEC targets for supposedly "remedial" and "non-punitive" disgorgement judgments. *See infra* pp. 35-39.

argument: "While Section 2462 reaches a 'fine, penalty, or forfeiture,' that list does not include 'disgorgement.'" (SEC Brf., p. 34) As explained by the district court, this is the "essence" of the SEC's meritless position. (Dkt. 186, p. 15) The SEC's introductory arguments continue by noting that disgorgement facilitates enforcement of the securities laws by "making violations unprofitable, which deters violations." (SEC Brf., p. 34) As explained in the above quote from *Usery*, those are the identical purposes served by civil forfeiture. *See supra* p. 19. Thus, the SEC's own observation strongly supports a finding that its disgorgement claims are governed by § 2462. The SEC's remaining arguments on that issue are no more meritorious.

1. Contrary to the SEC's assertions, *Calvo* and *Rind* do not hold that § 2462 is inapplicable to disgorgement clams, and, while *Riordan* reached that conclusion due to perceived precedential restrictions, *Riordan* also expressly recognized that disgorgements may indeed be a forfeiture under § 2462.

Subsection I.B.2.a. of the SEC's brief argues three opinions, which according to the SEC, hold that § 2462 does not apply to disgorgement claims. (SEC Brf., pp. 35-37) The lead case is *S.E.C. v. Calvo*, 378 F.3d 1211 (11^{th} Cir. 2004), which the SEC describes by stating that "this Court rejected the defendant's argument that the Commission's request for **disgorgement** was time-barred by various statutes of limitations, **including Section 2462**." (SEC, Brf. p. 35;

emphasis supplied) That description is grossly inaccurate and misleading. (SEC Brf., p. 35) The defendant in *Calvo* did not argue that § 2462 governs the SEC's disgorgement claim, and, therefore, the SEC's statement that *Calvo* rejected such an argument is simply incorrect.

In Calvo, the SEC obtained a judgment against the defendant on its three claims for civil penalties, disgorgement, and injunctive relief. *Id.* at 1213-14. The defendant appealed the judgment, in part, on statute-of-limitations grounds. *Id.* at 218. *Calvo* does not, however, identify the statute(s) under which the defendant raised that defense, and the opinion does not even cite, much less discuss, § 2462.

Addressing the defendant's argument under the unidentified statutes, *Calvo* stated that statutes of limitations normally do not apply when the government files suit in its sovereign capacity, except when it does so to "vindicate[] a private interest." *Id.* The Court also explained that Congress had enacted certain statutes of limitations for private securities claims, not SEC enforcement actions, which, as revealed below, foreshadows the real basis for the defendant's statute-of-limitations argument. *Id.* (quoting *S.E.C. v. Rind*, 991 F.2d 1486, 1490 (9th Cir. 1993)). Based on this reasoning, *Calvo* rejected the defendant's statute-of-limitations defense under the unidentified statutes. *Id.*

Since *Calvo* does not reference or discuss § 2462, the SEC resorts to citing the appellate brief filed by the defendant, Mr. Calvo, in a futile effort to support its inaccurate statement that this Court rejected his argument that § 2462 applied to the SEC's disgorgement claim against him. (SEC Brf., p. 35 - "Brief of the Appellant, *SEC v. Calvo*, 2003 WL 24046067 at *38 (raising Section 2462).") A review of that same brief, however, proves the falsity of the SEC's statement and reveals the true nature of Mr. Calvo's statute-of-limitations arguments.

Mr. Calvo made only one statute-of-limitations argument in defense of all three of the SEC's claims against him for civil penalties, injunctive relief, and disgorgement. Brief of Appellant at 34-38, *Calvo v. SEC*, No. 02-13445, 2003 WL 24046067 (11th Cir. Feb. 28, 2003). Specifically, he argued that the statute of limitations in 15 U.S.C. § 77m, which governs private claims for the sale of unregistered securities, should be "borrowed" and applied to the SEC's public-enforcement action against him.[6] *Id.* Mr. Calvo's brief spends four pages making those arguments under 15 U.S.C. § 77m. *Id.* Then, in the last sentence of the brief's statute-of-limitations arguments, Mr. Calvo makes his sole reference to § 2462: "This Court should also apply the 5 year limitations period from §§ 2462 **to bar the penalties assessed against Calvo.**" *Id.* (emphasis supplied). Thus, Mr. Calvo only raised § 2462 in his appeal of the civil penalties levied against him, not

[6] The fact that Mr. Calvo's statute-of-limitations defense focused on 15 U.S.C. § 77m and the "borrowing" doctrine is further confirmed by *Calvo*'s sister opinion, *S.E.C. v. Diversified Consulting Group*, 378 F.3d 1219 (11th Cir. 2004), which more thoroughly discusses the grounds for the statute-of-limitations defense raised by the defendants.

the disgorgement judgment, as inaccurately stated in the SEC's brief.

The simple fact is that *Calvo* is inapposite to this appeal. The Appellees' statute-of-limitations defenses herein are based on § 2462, not 15 U.S.C. 77m or the borrowing doctrine. Moreover, as confirmed by *Gabelli*, *Calvo's* statement that statutes of limitations generally do not apply where the government files suit in its sovereign capacity clearly does not apply to § 2462. The SEC prosecuted *Gabelli* in its sovereign capacity, not to vindicate any private interest. Nonetheless, *Gabelli* explicitly recognized and enforced § 2462's application to the SEC's civil-penalty claims. Thus, *Gabelli* establishes that the SEC's prosecution of an action in its sovereign capacity is not, in and of itself, a bar to defenses under § 2462, regardless of any contrary language in the earlier decision of *Calvo*.

The SEC next offers *S.E.C. v. Rind*, 991 F.2d 1486 (9th Cir. 1993), which was cited and relied on in *Calvo*. Not surprisingly, therefore, *Rind* is inapposite for the same reasons as *Calvo*. As was the case in *Calvo*: a) *Rind* does not cite or discuss § 2462; b) the bulk of the defendant's statute-of limitations arguments in *Rind* are that certain time-limiting statutes applicable to private securities claims should be "borrowed" and applied to the SEC's public action; and c) the court reached the sweeping conclusion -- without any reference to § 2462 -- that no statutes of limitation apply to SEC civil-enforcement actions due to their public nature, which is bad law under *Gabelli*. *Id.* at 1488-1492. Unlike *Calvo*, *Rind* identifies the statutes of limitations argued by the defendant, none of which are § 2462. As such, one does not have review the appellate briefs in *Rind* to easily confirm the decision has nothing to do with that statute.

Finally, the SEC's Brief quotes *Riordan v. S.E.C.*, 627 F.3d 1230 (D.C. Cir. 2010) for the proposition that § 2462 does not apply to SEC disgorgement claims. (SEC Brf., p. 37) In reliance on the court's earlier decision in *Zacharias v. S.E.C.*, 569 F.3d 458 (D.C. Cir. 2009), *Riordan* found that § 2462 did not govern the SEC's disgorgement claims before it based, in part, on the following reasoning:

> Because we have held that disgorgement is not a "civil penalty," the Court in *Zacharias* held that disgorgement was not subject to the five-year statute of limitations. In light of our precedents, we must reject Riordan's similar argument here. [FN1]

Riordan, 627 F.3d at 1234 (citations omitted). After focusing exclusively on whether disgorgement is a "penalty" for purposes of § 2462, the court noted in footnote one to this discussion that disgorgement may very well be a "forfeiture" governed by the statute:

> In reaching that conclusion in *Zacharias,* the Court focused on the meaning of "penalty" in 28 U.S.C. § 2462. **The statute also applies to "forfeiture." It could be argued that disgorgement is a kind of forfeiture covered by § 2462,** at least where the sanctioned party is disgorging profits not to make the wronged party whole, but to fill the Federal Government's coffers. **Our precedents have not expressly considered that point in holding that there is no statute of limitations for SEC disgorgement actions.** But *Zacharias*'s holding at least implicitly rejects that argument and is binding on us as a three-judge panel. . . .

Id. at 1235, n. 1 (emphasis supplied). This footnote exactly presages the district court's finding that the SEC's disgorgement claims against the Appellees are a "forfeiture" for purposes of § 2462. While the *Riordan* court believed its own precedent prohibited it from accepting such an argument, this Court labors under no such restriction. It should, therefore, affirm the district court's finding.

2. Disgorgement claims are no more remedial and non-punitive than civil forfeitures, which renders meritless the SEC's argument that those characteristics make § 2462 inapplicable to the former.

Subsections I.B.2.b. & c. of the SEC's brief argue that § 2462 does not apply to disgorgement claims because they are sometimes described as non-punitive and remedial. (SEC Brf., pp. 37-42) These arguments clearly fail because disgorgement claims are no more remedial and non-punitive than civil forfeitures, which are expressly governed by § 2462. Moreover, deterrence is the primary purpose of both disgorgement and civil forfeitures, which confirms they share the identical punitive characteristics.

One of the SEC's lead cases in its disgorgement argument and, more generally, its entire brief is *Meeker v. Lehigh Valley R Co*. 35 S.Ct. 328, 236 U.S. 412 (1915). The SEC cites *Meeker* for the proposition that "Congress's use of 'forfeiture' in Section 2462 refers to a 'punitive' sanction," with the implication being that disgorgement claims are not sufficiently punitive to be a forfeiture under

§ 2462. (SEC Brf., p. 39) This is a slight variation of the SEC's earlier quote of *Meeker* for the proposition that § 2462 "refers to something imposed in a punitive way." (SEC Brf., p. 24) A correct examination of *Meeker*, however, demonstrates that to the extent it applies herein, *Meeker* actually supports the trial court's finding that the SEC's disgorgement claims are a forfeiture for purposes § 2462.

Meeker did not involve an action filed by the government. 35 S.Ct. at 330, 236 U.S. at 417. Instead, *Meeker* arose out of a private proceeding between two companies based on allegations of illegal rate discrimination for services relating to shipping coal. *Id.* at 330-31, 417-19. In rejecting the defendant's argument that the plaintiff's claims against the defendant were time-barred by § 2462's predecessor statute, the Court explained:

> One of these [statutes of limitations relied upon by the defendant] is Rev. Stat. § 1047, Comp. Stat. 1913, § 1712, which places a limitation of five years upon any 'suit or prosecution for a penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States." **The words 'penalty or forfeiture' in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed solely for the purpose of redressing a private injury**, even though the wrongful act be a public offense, and punishable as such. Here the liability sought to be enforced was not punitive, but strictly remedial, as is shown by §§ 8, 9, 14, and 16 of the act to regulate commerce. So § 1047 was not applicable.

Id. (emphasis supplied). This is the discussion forming the basis for the SEC's references to *Meeker* in its brief.

As set forth in the highlighted language, *Meeker*'s phrase stating that § 2462's predecessor statute "refer[s] to something imposed in a punitive way" is only one part of a sentence. Read in its entirety, the sentence explains that the statute did not apply to the private plaintiff's claims because they only sought to redress a private injury (*i.e.*, price discrimination in business) and did not address an infraction of public law. The fact that private plaintiff's claims only sought compensation for its own injury is the reason *Meeker* concluded that the "liability sought to be enforced was not punitive, but strictly remedial." *See also Johnson v. S.E.C.*, 87 F.3d 484, 487 (1996)(discussing and quoting *Meeker* for the proposition that "where a legal action is essentially private in nature, seeking only compensation for the damages suffered, it is not an action for a penalty").

Here, the opposite is true. The SEC is not seeking redress for a private injury and is instead attempting to exact disgorgements (and injunctive and declaratory relief) from the Appellees based on their alleged infractions of public law. Moreover and as explained below, although both civil forfeitures and disgorgement claims are sometimes described as non-punitive and remedial, they are both "imposed in a punitive way" within the meaning of *Meeker* because their primary purpose is to deter illegal activity by depriving wrongdoers of their ill-gotten gains.

In a futile attempt to show that disgorgement claims are not sufficiently punitive for § 2462, the SEC cites opinions for the proposition that disgorgement's purpose is "not to inflict punishment but to prevent an unjust enrichment." (SEC Brf., pp. 37-48) The fatal defect in the SEC's argument is that civil forfeitures serve the identical purpose and are nonetheless expressly governed by § 2462.

As quoted above, the Supreme Court explained in *Usery* that a primary purpose of civil forfeitures is -- just like disgorgements -- to prevent unjust enrichment by "requir[ing] disgorgement of the fruits of illegal conduct." *See supra* quote of *Usery*, p. 19. *Usery* also describes the non-punitive and remedial nature of civil forfeiture:

> In another unanimous decision, we held that the forfeiture was not barred by the prior criminal proceeding. We began our analysis by stating the rule for our decision:
>
> > "Unless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable. **The question, then, is whether a § 924(d) forfeiture proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial."**
>
> Our inquiry proceeded in two stages. In the first stage, we looked to Congress' intent, and concluded that **"Congress designed forfeiture under § 924(d) as a remedial civil sanction."** This conclusion was based upon several findings. . . . Third, we concluded that **the civil forfeiture "further[ed] broad remedial aims,"** including both "discouraging unregulated commerce in firearms" and "removing from circulation firearms that have been used or intended for use outside regulated channels of commerce."
>
> In the second stage of our analysis, we looked to " 'whether the statutory scheme was so punitive either in purpose or effect as to

> negate' **Congress' intention to establish a civil remedial mechanism[.]"** . . . [W]e found that the gun owner had "failed to establish by the 'clearest proof' that Congress has provided a sanction so punitive as to 'transform **what was clearly intended as a civil remedy** into a criminal penalty.'" **We concluded our decision by restating that civil forfeiture is** "not an additional penalty for the commission of a criminal act, but rather is **a separate civil sanction, remedial in nature."**

U.S. v. Ursery, 518 U.S. 267, 278 116 S.Ct. 2135, 2142 (1996)(quoting and citing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099 (1984)) (emphasis supplied; citations omitted). This discussion establishes that disgorgement claims are no more remedial and non-punitive than civil forfeitures, and both remedies are designed to prevent unjust enrichment by depriving wrongdoers of their ill-gotten gains.

Accordingly, the SEC's argument has it exactly backwards. To the extent disgorgement claims are remedial and non-punitive, those characteristics do not remove them from the scope of § 2462. On the contrary, the fact that disgorgement claims share those identical characteristics with civil forfeitures further confirms -- just as the district court found -- that disgorgement is a forfeiture for purposes of § 2462.

The SEC's erroneous argument continues by asserting that "(f)orfeiture can be punitive but disgorgement cannot." (SEC Brf., p. 39) Once again, the SEC's assertion is contrary to *Usery*, which explains that civil forfeitures are never punitive:

> In reaching its conclusion [that the civil forfeiture did not implicate the Double Jeopardy Clause], the Court drew a sharp distinction between *in rem* civil *forfeitures* and *in personam* civil *penalties* such as fines: **Though the latter could, in some circumstances, be punitive, the former could not.**

518 U.S. at 274; 116 S.Ct. at 2140-41 (discussing and quoting *Various Items of Personal Property v. United States,* 282 U.S. 577, 51 S.Ct. 282 (1931)) (italicized emphasis in original; bold emphasis supplied).

The SEC, however, quotes *Austin v. U.S*, 113 S.Ct. 2801 509 U.S. 602 (1993), for the lukewarm and ultimately telling proposition that "[f]orfeitures 'historically have been understood, at least in part, as punishment,'" and then reiterates the SEC's false mantra that disgorgements are entirely non-punitive. (SEC Brf, p. 39) Once again, however, *Austin* proves the folly of the SEC's argument and actually supports the district court's ruling that the SEC's disgorgement claims are a forfeiture governed by § 2462.

Austin made the above-quoted statement that forfeitures "historically have been understood, at least in part, as punishment" in the course of finding that civil forfeitures under 21 U.S.C. §§ 881(a)(4) and (a)(7) are sufficiently punitive to invoke the protections of the Constitution's Excessive Fines Clause. *Austin,* 113 S.Ct. at 2812, 509 U.S. at 622. On the other hand, as quoted above, *Usery* held that civil forfeitures are never punitive for purposes of the Constitution's Double

Jeopardy Clause. Given that *Usery* and *Austin* interpreted different constitutional provisions, reached ostensibly different conclusions regarding the punitive nature (or not) of civil forfeitures, and did not involve § 2462, how does one harmonize *Usery* and *Austin* and properly apply them to the determination of whether disgorgement claims are a forfeiture for purposes of § 2462?

The answer lies in the standards applied by the *Austin* Court to determine if the civil-forfeiture statutes at issue therein were sufficiently punitive to invoke the protections of the Excessive Fines Clause:

> Fundamentally, even assuming that §§ 881(a)(4) and (a)(7) serve some remedial purpose, the Government's argument must fail. **A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive <u>or</u> deterrent purposes, is punishment, as we have come to understand the term.** In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, **and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose.**

Id. at 2812, 621-22 (citations and internal quotation marks omitted; italicized emphasis in original; bold and underlined emphasis supplied)). Like the civil-forfeiture statutes at issue in *Austin*, the SEC's disgorgement claims do not serve *solely* remedial purposes to the exclusion of all others, most notably deterrence. Quite the contrary and as explained above: "The primary purpose of disgorgement orders is to **deter violations** of the securities laws by depriving violators of their ill-gotten gains." *S.E.C. v. Fischbach Corp.*, 133 F.3d 170, 175 (2nd Cir. 1997)(emphasis supplied). Indeed, this Court has expressly stated that SEC disgorgement claims are "designed to deprive a wrongdoer of his unjust enrichment and **to deter others** from violating the securities laws." *F.T.C. v. Gem Merchandising Corp.*, 87 F.3d 466, 470(11th Cir. 1996)(citing *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1230 (D.C.Cir.1989))(emphasis supplied).

To summarize, *Usery* holds that civil forfeitures are not punitive for purposes of the Constitution's Double Jeopardy Clause. Application of that holding vitiates the SEC's contrary claim that civil forfeitures may be punitive and, concomitantly, the distinction the SEC attempts to draw between them and disgorgement claims. *Austin* does not better the SEC's lot. To the extent *Austin* supports the SEC's fundamentally weak assertion that civil forfeitures are considered "at least in part, as punishment," *Austin*'s above-quoted standards compel the same conclusion regarding disgorgement claims based on their primary purpose of deterrence. Either way, the SEC's argument fails.

This brings us full circle back to *Meeker*'s exceedingly-loose phrase that § 2462's predecessor statute refers "something imposed in a punitive way." The preceding analysis of *Usery* and *Austin* establishes that it is logically impossible for one to conclude that civil forfeitures are "something imposed in a punitive way" without reaching the identical conclusion regarding disgorgement claims. If, therefore, *Meeker* is relevant for determining whether a remedy is sufficiently punitive to be governed by § 2462, then disgorgements unquestionably qualify because they are equally, or even more, punitive than civil forfeitures, which are expressly governed by the statute.[7]

The SEC's final argument in Subsection I.B.2.c.i. of its brief is that "forfeiture is subject to Section 2462 because -- unlike disgorgement -- forfeiture is not limited to the direct proceeds of misconduct but also includes unlimited profits on such proceeds, *i.e.*, secondary profits or profits on profits." (SEC Brf., p. 40) This argument is simply baseless.

To recap: a) the SEC is (improperly) seeking a $300,000,000, non-dischargeable disgorgement judgment against the Clarks and Schwarz in an action that the SEC concedes was not filed within the five years authorized by § 2462; b) as explained in *Gabelli*, the fundamental policies of § 2462 are repose, elimination of stale claims, and providing defendants certainty about their potential liabilities; and c) as further explained in *Gabelli,* the protections afforded by § 2462 "promote justice" and are "vital to the welfare of society." In the face of these facts, the SEC maintains that § 2462 should not apply to its purported $300,000,000 disgorgement claim against the Clarks and Schwarz because the SEC cannot recover any (non-

[7] Indeed, the discussion of the *Contorinis* decisions below establishes that in practice, SEC disgorgement claims are far more punitive than forfeitures.

existent) "profits on profits" that may, or may not, have been realized on that $300,000,000.[8] Given that this argument so thoroughly defies common sense, it is not surprising the SEC has not identified any court that has reached such an anomalous conclusion.

The companion cases of *U.S. v. Contorinis*, 692 F.3d 136 (2nd Cir. 2012) and *S.E.C. v. Contorinis*, 743 F.3d 296 (2nd Cir. 2014) further establish the absence of merit in the SEC's purported "profits on profits" distinction between disgorgements and forfeitures. In *U.S. v. Contorinis*, the defendant, Mr. Contorinis, managed a hedge fund and was convicted of crimes relating to his insider trading on the fund's account. 692 F.3d at 138 & 145. The conviction included a criminal-forfeiture order for $12.65 million against him personally, even though the vast majority of those insider-trading profits were realized by the fund, not Mr. Contorinis. *Id.* He appealed, *inter alia*, the forfeiture on the grounds that he could not be ordered to forfeit the full $12.65 million because he never received or possessed the vast majority of those monies. *Id.* at 145. Although the circuit court affirmed Mr. Contorinis' conviction, it agreed that the forfeiture order was improper:

> **Criminal forfeiture focuses on the disgorgement by a defendant of his ill-gotten gains.** Thus, the calculation of a forfeiture amount in criminal cases is usually based on the defendant's

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[8] For good measure, the SEC also claims prejudgment interest on the $300,000,000. (SEC Brf., p. 42, n. 15)

actual gain.

> This general rule is somewhat modified by the principle that a court may order a defendant to forfeit proceeds received by others who participated jointly in the crime, provided the actions generating those proceeds were reasonably foreseeable to the defendant. . . . **This view does not support an extension to a situation where the proceeds go directly to an innocent third party and are never possessed by the defendant.**

Id. at 147 (citations omitted; emphasis supplied). Accordingly, the circuit court reversed the forfeiture order and remanded for a determination of the proper forfeiture amount based on monies actually received by Mr. Contorinis. *Id.* at 148.

On remand, the district court found that he had only personally received $427,875 in proceeds from the insider trades on the fund's account and entered a new forfeiture order in that amount. *S.E.C. v. Contorinis*, 743 F.3d 296, 300 (2d Cir. 2014). Not satisfied with that order (or Mr. Contorinis's prison sentence), the SEC moved for summary judgment in its own civil-enforcement action against Mr. Contorinis for the same insider-trading violations. *Id.* at 300. Even though he had only received $427,875 from the insider trades, the SEC requested a $7,260,604 disgorgement judgment against him, and prejudgment interest thereon, based on the proceeds that the hedge fund realized from the insider trading. *Id.* The district court granted the SEC's motion and entered a disgorgement judgment against Mr. Contorinis for the full $7,260,604 realized by the hedge fund, and an additional

$2,485,205 in prejudgment interest thereon, for a total of $9,745,809.[9] *Id.* at 300-01. Mr. Contirinis appealed arguing, *inter alia*, that the disgorgement judgment was contrary to the circuit court's opinion in *U.S. v. Contorinis* and the resulting $427,875 criminal-forfeiture order. *Id.* at 301-02.

A 2-1 majority of the circuit-court panel affirmed the SEC's disgorgement judgment and thereby justified the tremendous expansion of Mr. Contorinis's financial liability in the SEC's action. *Id.* at 308. The majority based its decision largely on: a) an analogy it drew to the court's precedents holding that "tippers" of inside information may be held liable for any illicit gains obtained by tippees by trading on it; and b) perceived differences between the purposes of criminal (not civil) forfeiture and disgorgement claims. *Id.* at 305-06.

In a sharp and lengthy dissent, Judge Chin explained, *inter alia*, that the $9,745,809 disgorgement judgment had the effect of improperly penalizing Mr. Contorinis for his insider trading:

> Here, the district court ordered Contorinis to pay an amount substantially above what he acquired through his wrongdoing. The district court ordered him to disgorge funds he never had and to pay back profits he never received. Instead of returning Contorinis to his status quo prior to his wrongdoing, the district court's disgorgement order penalized him by requiring him to pay an amount equal to the $7.2 million in profits earned by the Fund and an additional $2.5 million in prejudgment interest.

[9] The court also imposed a $1,000,000 civil penalty and permanent injunctive relief on Mr. Contorinis. *Id.* at 300-01.

Id. at 309. (J. Chin dissenting)(citations omitted). While the *Contorinis* decisions are not necessary to reach the correct conclusion that the SEC's disgorgement claims are governed by § 2462, they are germane for at least two reasons.

First, they further lay waste to the SEC's above-quoted, "profits-on-profits" argument, which purports to justify applying § 2462 to forfeitures and not disgorgements. The *Contorinis* opinions establish that the manner in which the SEC prosecutes its disgorgement claims puts the defendants therein in far more financial jeopardy than persons charged with criminal forfeitures based on the same alleged securities violations. This is true even though criminal forfeitures are deemed to be "punitive" and disgorgement is deemed to be "non-punitive" and "remedial" (as are civil forfeitures). *Contorinis*, 692 F.3d at 146. *Contorinis* demonstrates that those labels are meaningless in the real world and to the real people targeted by the SEC.

Second, as explained by Judge Chin the SEC's demand for a disgorgement judgment that was over $9,000,000 greater than the illicit proceeds received by Mr. Contorinis proves that the SEC prosecutes its disgorgement claims in a punitive fashion that far exceeds their remedial purpose of depriving wrongdoers of their ill-gotten gains. Obviously emboldened by *Contorinis*, the SEC's brief confirms that the commission (erroneously) claims entitlement to a $300,000,000 disgorgement judgment against the Appellees. (SEC Brf., p. 34) That sum is equal to the total, gross proceeds the SEC claims were generated by the sale of Cay Clubs condominiums. (SEC Brf., p. 34) The SEC seeks the $300,000,000 disgorgement judgment even though only a tiny fraction of that sum was actually received by any of the Appellees, and the vast majority went to Cay Club operating expenses, including millions of dollars of leaseback payments made to the allegedly-defrauded condominium buyers and renovations to their units and the projects in which they are located. (Dkt. 121-5)

Hence, the SEC wants it both ways. When seeking to avoid § 2462, the SEC asserts that its disgorgement claims are not punitive because they supposedly serve the remedial purpose of divesting the Appellees of the monies they received from the alleged securities violations arising out of Cay Clubs. In complete contradiction, the SEC also wants to pursue a disgorgement judgment against the Appellees in the tremendously-punitive sum of $300,000,000 (plus prejudgment interest) even though none of them received anywhere near that amount of money from Cay Clubs' operations and to also deprive them of § 2462's protections. These irreconcilable and exceedingly-unjust positions further establish the absence of merit in the SEC's argument that § 2462 does not govern its disgorgement claims.

The SEC ends its argument on disgorgement with an arcane and, in many cases, outdated list of supposed "differences" between forfeitures and disgorgements claims, which the SEC claims somehow justify the denial of § 2462's fundamental protections to defendants in the latter. (SEC Brf., pp. 43-45) Of note, the SEC asserts that the *in rem* nature of civil forfeiture somehow supports that incorrect and unjust outcome even though, as explained above, that characteristic demonstrates that civil forfeitures impose less financial peril than disgorgement claims. *See supra* pp. 19-20. Other than that observation, it suffices to say that either taken singularly or as a whole, these purported differences do not alter the inescapable conclusion that the SEC's disgorgement claims herein are a "forfeiture" that is governed by § 2462.

IV. THE DISTRICT COURT CORRECTLY RULED THAT THE SEC'S CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF ARE PENALTIES GOVERNED BY § 2462.

The SEC alleges that the Clarks and Schwarz committed securities fraud in the course of Cay Clubs' offering and sale of condominiums over seven years ago. (Dkt. 41) The Complaint's prayer for relief asked the court to: "Declare, determine, and find that [the Clarks and Schwarz] have committed the violations of the federal securities laws alleged in this Complaint." (Dkt. 41, p. 32) In other words, the SEC wants the Clarks and Schwarz to be forever labeled as fraudsters.

The SEC's Complaint does not, and cannot, allege that the Clarks or Schwarz have committed any securities violations since Cay Clubs ceased operations in 2007, and, as the district court correctly noted, there is no allegations of evidence of any such later violations. (Dkt. 186, p.15) Despite that material omission, the SEC also demands "a Permanent Injunction restraining and enjoining" the Clarks and Schwarz from violating the securities laws' anti-fraud (and unregistered-sale) provisions in the future. (Dkt. 41, p. 32) In addition to labeling them fraudsters, therefore, the SEC wants the ability to subject the Clarks and Schwarz to contempt-of-court proceedings for the rest of their lives even though the SEC cannot even allege, much less prove, they have offered or sold a security in the last seven-plus years.[10]

Given the tremendous consequences of the SEC's claims for declaratory and injunctive relief, § 2462's fundamental policies and protections articulated in *Gabelli* plainly apply to them. Once again, however, the SEC contends it should have no time limit whatsoever to file those claims, regardless of the loss of evidence and fading memories, and the never-ending uncertainty and peril such an outcome would impose on the Clarks and Schwarz.

The district court correctly rejected that "utterly repugnant" result and ruled that the declaratory and injunctive relief demanded by the SEC is a "penalty,"

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[10] The collateral consequences of a permanent injunction would also include disqualifying the Clarks and Schwarz from using exemptions to the registration of securities under the securities laws, which would effectively bar them from even being associated with securities offerings for a certain time period. *See* 17 C.F.R. § 230.262, 17 C.F.R. § 230.505(b)(2)(iii), and 17 C.F.R. § 230.506(d)(2)(ii). This further demonstrates the punitive nature of the SEC's claim for injunctive relief.

pecuniary or otherwise, for purposes of § 2462:

> Penalties, "pecuniary or otherwise," are at the heart of all forms of relief sought by the SEC in this case. First of all, by its very terms, the SEC's complaint seeks to have the Court, by way of a declaration that the defendants have violated the federal securities laws, "label defendants wrongdoers." *See Gabelli*, 133 S.Ct. 1223 (discussing what constitutes a penalty and then invoking the powerful words of Chief Justice Marshall that "it would be utterly repugnant to the genius of our laws if actions for penalties could be brought at any distance in time"). Similarly, the injunctive relief sought by the SEC in this case forever barring defendants from future violations of the securities laws can be regarded as nothing short of a penalty, "intended to punish," especially where, as here, there no evidence (or allegations) of any continuing harm or wrongdoing has been presented.

(Dkt. 186, p. 15). In opposition to these findings -- which are consistent with *Gabelli* and the real-world consequences of the SEC's alleged declaratory and injunction claims on the real people targeted by them -- the SEC seeks to avoid § 2462's application to those claims by labeling them "equitable." The SEC's tired argument is inconsistent with § 2462's policies and protections and the trend in the statute's jurisprudence, where courts (including this one) are looking past such meaningless labels and genuinely examining the demanded relief to determine if it is at least partially punitive and, therefore, governed by § 2462.

A. <u>This Court has adopted the standards set forth in *Johnson v. SEC* for determining whether non-pecuniary claims constitute a "penalty" governed by § 2462, under which the district court's ruling is correct.</u>

Johnson v. S.E.C., 87 F.3d 484 (D.C. Cir. 1996) sets forth standards for determining if claims like the SEC's herein for injunctive and declaratory relief constitute a "penalty" governed by § 2462. In *Johnson*, the SEC filed an administrative proceeding against a brokerage-firm manager based on her alleged failure to adequately supervise a broker who stole from the firm's clients. *Johnson*, 87 F.3d at 486. The manager moved to dismiss the proceeding as time-barred pursuant to § 2462. *Id.* The SEC asserted that § 2462 did not apply because the "proceeding before us does not seek to impose a *civil penalty*, but rather to determine the appropriate *remedial action*." *Id.* (emphasis in original). The ALJ accepted that argument and imposed a censure and a six-month suspension on the manager, which was upheld by the SEC. *Id.* Ms. Johnson then appealed the denial of her § 2462 defense to the circuit court. *Id.* at 486-87.

The court began its analysis by noting that the term "penalty" is not defined in § 2462, and, therefore, the term should be given its "ordinary, contemporary, common meaning." *Id.* at 487. After quoting several dictionary definitions of "penalty," the Court discussed Supreme-Court authority and explained:

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual...." Put another way, the question of whether a law is penal depends on whether its purpose "is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrong."
>
> Thus where a legal action is essentially private in nature, seeking only compensation for the damages suffered, it is not an

action for a penalty.

Id. (citing and quoting *Huntington v. Attrill,* 146 U.S. 657, 13 S.Ct. 224 (1892)) (footnotes omitted). The Court then concluded that "as used in § 2462, a 'penalty' is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action." *Id.* at 488.

After establishing that definition, the Court applied it to the censure and six-month suspension levied against the manager. *Id.* While noting the objective nature of the test for whether those non-pecuniary sanctions are penal, the court explained that "just as obviously, the degree and extent of the consequences to the subject of the sanction must be considered as a relevant factor in determining whether the sanction is a penalty." *Id.* The court continued:

> Here, the sanctions imposed by the SEC—censure and a six-month suspension—clearly resemble punishment in the ordinary sense of the word. The SEC not only restricted Johnson's ability to earn a living as a supervisor during her six-month suspension, but the suspension was also likely to have longer-lasting repercussions on her ability to pursue her vocation.

Id. at 489. After explaining the manager's public-reporting requirements, the court explained that:

> This sanction would less resemble punishment if the SEC had focused on Johnson's current competence or the degree of risk she posed to the public. Despite the SEC's claims to the contrary, however, it is evident that the sanctions here were not based on any

> general finding of Johnson's unfitness as a supervisor, nor any showing of the risk she posed to the public, but rather were based on Johnson's alleged failure reasonably to supervise Zetterstrom. . . .

Id. After extensively quoting the "indictment-like document" with which the SEC initiated its proceeding against the manager, the court rejected the SEC's pretext that the purpose of the sanctions was to protect the public:

> [W]e conclude that any inquiry into Johnson's current competence or the danger she posed to the public (and the SEC cites to no such inquiry) was at most *pro forma.* In substance, this proceeding was directed toward one thing only—determining whether Johnson had failed reasonably to supervise Zetterstrom within the meaning of the Exchange Act—and the resultant sanction was inflicted on Johnson for that failure.
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> The SEC argues nonetheless that a license suspension should not constitute punishment or a penalty where the government's purpose is to protect the public.
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> * * *
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> In interpreting § 2462, however, the court's concern is not whether Congress legislated the sanction as part of a regulatory scheme to protect the public, but rather whether the sanction is itself a form of punishment of the individual for unlawful or proscribed conduct, going beyond compensation of the wronged party. [FN 11]
>
> * * *
>
> [FN] 11: It is clearly possible for a sanction to be "remedial" in the sense that its purpose is to protect the public, yet not be "remedial" because it imposes a punishment going beyond the harm inflicted by the defendant.

Id. at 490-91, 492, n. 11. Based on these analyses, the court found that § 2462 applied to the proceeding and vacated the sanctions imposed on the manager. *Id.* at 492.

In *Coghlan v. National Transp. Safety Bd.*, 470 F.3d 1300 (11th Cir. 2006), this Court adopted *Johnson*'s standards for determining if non-pecuniary sanctions are penalties governed by § 2462. In *Coghlan*, the FAA initiated a proceeding to revoke a pilot's Airline Transportation Pilot ("ATP") certificate after he was convicting of a crime related to his falsifying of applications for flight ratings. *Id.* at 1301-02. In considering the pilot's defense that the proceeding was time-barred under § 2462, this Court adopted *Johnson*'s definition of "penalty": "[A] 'penalty,' as the term is used in § 2462, is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond *remedying* the damage caused to the harmed parties by the defendant's action." *Id.* at 1305 (citing *Johnson v. SEC,* 87 F.3d 484, 488 (D.C.Cir.1996))(emphasis in original).

In discussing the pilot's arguments, this Court further relied on *Johnson* and recognized that a sanction intended to be remedial under an "enforcement scheme" may be sufficiently punitive to constitute a "penalty" under § 2462:

> Coghlan concedes that, with regard to determining when constitutional protections such as the right to trial by jury are triggered, the general purpose of the FAA's enforcement scheme is punitive, rather than remedial. Even so, he argues, revocation can still constitute a "penalty" for purposes of § 2462 if it is at least partially punitive. *See Johnson,* 87 F.3d at 491 n. 11 ("It is clearly possible for a sanction to be 'remedial' in the sense that its purpose is to protect the public, yet not be 'remedial' because it imposes a punishment going beyond the harm inflicted by the defendant."). "In other words, a sanction is a penalty even if only one of its various objectives is to punish wrongful conduct; that is, if it serv[es] *in part* to punish."

Id. at 1305 (citing *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 7 (D.C.Cir.2000))(emphasis in original). After carefully applying these standards to the case's facts, the Court concluded that the revocation proceeding was not a penalty under § 2462 "because [the pilot's] falsifications called into question his fitness to hold an ATP certificate and implicated matters of public air safety." *Id.* at 1307.

In the instant case, the district court's above-quoted ruling that the SEC's claims for declaratory and injunctive relief are a penalty governed by § 2462 is entirely consistent with the standards set forth in *Johnson* and adopted in *Coghlan*. First, those claims seek "to punish an offense against the public justice of the State[, not] to afford a private remedy to a person injured by the wrong." They are, therefore, at least partially punitive pursuant to above-quoted standards set forth in *Johnson*. *See supra* pp. 44-46.

Second, like the SEC's sanctions in *Johnson*, its declaratory and injunctive claims against the Clarks and Schwarz are based entirely on the "indictment-like" allegations in the SEC's Complaint that they committed securities violations over seven years ago during Cay Clubs' operations. As the district court correctly found, the declaratory and injunctive relief sought by the SEC is designed to punish them for those alleged, long-past violations. Based on the Complaint's allegations, the requested relief has nothing to do with any purported risk the

Clarks and Schwarz currently pose to the public, which as the district court found, is non-existent.

Third, the imposition of the SEC's requested injunctive and declaratory relief would have a far more devastating impact on the Clarks and Schwarz than the censure and suspension had on the manager in *Johnson.* The SEC's censure of the manager was for merely failing to supervise the wrongdoer, whereas the SEC wants a declaration that the Clarks and Schwarz themselves committed securities fraud. Moreover, while the manager's suspension was for a mere six months, the SEC wants a permanent injunction authorizing it to keep the Clarks and Schwarz firmly under the SEC's thumb with the threat of contempt sanctions for the rest of their lives.

Given these facts, there is simply no question that the SEC's claims for declaratory and injunctive relief are designed, at least in part, to punish the Clarks and Schwarz for alleged conduct that occurred more than seven years ago. Pursuant to *Johnson* and *Coghlan*, therefore, the district court was clearly correct in finding that "the injunctive relief sought by the SEC in this case forever barring defendants from future violations of the securities laws can be regarded as nothing short of a penalty, 'intended to punish,' especially where, as here, there is no evidence (or allegation) of any continuing harm or wrongdoing has been presented." *See also SEC v. Bartek*, 484 Fed.Appx 949 (5^{th} Cir. 2012)(adopting

Johnson and finding that the permanent injunctive relief against the defendants sought by the SEC was a penalty governed by § 2462); *SEC v. Jones*, 476 F.Supp.2d. 374, 384 (S.D.N.Y. 2007)(holding that the SEC's claim to permanently enjoin the defendants from violating the Investment Advisors Act was governed by § 2462). That finding should be affirmed.

B. As the district court correctly ruled, this Court's decision in *U.S. v. Banks* is distinguishable and/or outdated based on *Coghlan*, and the SEC cannot escape § 2462 by merely labeling its claims for declaratory and injunctive relief "equitable."

Section I.B.1. of the SEC's brief asserts that its declaratory and injunction claims cannot possibly be governed by § 2462 because they are "equitable." This is a dramatic oversimplification of the proper and real-world analysis mandated by *Coghlan* and *Johnson*. The six-month suspension levied against the manager in *Johnson* and the revocation of the pilot's ATP certificate in *Coghlan* are classic forms of injunctive and, therefore, "equitable" relief. If the law simply held that such "equitable" claims are not, *ipso facto*, governed by § 2462, then the *Johnson* and *Coghlan* courts would not have performed their detailed analyses into the nature and consequences of those claims when determining § 2462's application. Instead, they would have simply deemed the injunctive sanctions "equitable" and ruled that § 2462 does not apply to them -- the opposite result reached in *Johnson*.

In support of its erroneous argument for the *ipso facto* denial of § 2462's application to any claim labeled as "equitable," the SEC cites *U.S. v. Banks*, 115 F.3d 916 (11th Cir. 1997). A proper analysis of *Banks*, however, establishes the fallacy of the SEC's argument, especially in light of the later decisions of *Coghlan* and *Johnson*.

In *Banks*, the government sued the defendant for violations of the Clean Water Act based on his dumping of fill into U.S. wetlands without a permit while cultivating a coconut farm. *Id.* at 917-18. The government sought both a restorative injunction requiring the defendant "to restore the wetlands to their undisturbed condition before" his illegal dredge-and-fill activities and, relatedly, an injunction against him illegally dumping fill into the wetlands in the future. *Id.* at 918. The defendant raised a defense under § 2462, which the Court rejected by stating:

> The parties dispute, however, the applicability of this statute of limitations to claims for equitable relief.
>
> Traditionally, "statutes of limitation are not controlling measures of equitable relief." *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S.Ct. 582, 584, 90 L.Ed. 743 (1946). The plain language of section 2462 does not apply to equitable remedies. *See North Carolina Wildlife Federation v. Woodbury*, Case No. 87-584-CIV-5 (E.D.N.C.1989) ("The express terms of 28 U.S.C. section 2462 apply only to suits for the enforcement of a 'civil fine, penalty or forfeiture.' "); *United States v. Hobbs*, 736 F.Supp. 1406, 1410 (E.D.Va.1990) ("[Section 2462], by its own terms, has no bearing on suits in equity.")

Id. at 918-19 (footnote omitted). This is the sum-total of the analysis relied upon by the SEC for its assertion that § 2462 does not apply to its claims for injunctive and declaratory relief in the instant action because they are "equitable."

As the district court correctly ruled, the SEC's arguments under *Banks* are meritless. First, this Court's more recent and germane decision in *Coghlan* establishes that the SEC cannot simply slap the label of "equitable" on those claims and "call it a day" for purposes of § 2462.

Second, the restorative injunction sought by the government in *Banks* is distinctly different than the SEC's declaratory and injunctive claims against the Clarks and Schwarz. In *Banks*, the government sought to restore the wetlands to their "undisturbed condition" and prevent the defendant from altering that condition with future dredging and filling on his property. There is nothing punitive about that relief, and it bears no resemblance whatsoever to the declaratory and injunctive relief the SEC seeks herein, which, as explained above, is, at a bare minimum, partially (and really mostly) punitive. Accordingly, *Banks* would have reached the same conclusion regarding § 2462's application to the restorative-injunction claim therein upon application of the current standards set forth in *Coghlan* and *Johnson*. Those same standards, however, compel the opposite conclusion in this case based on its distinct facts.

Finally, the decisions cited by *Banks* for its conclusory statement that § 2462 does not apply to equitable claims are simply not germane to the instant case under the present state of the law. *Holmberg* is a 1946 decision that did not involve § 2462 or any issue in the instant case. 327 U.S. 392, 66 S.Ct. 582 (1946). Instead, *Holmberg* merely considered whether a New-York state statute of limitations could be "borrowed" and applied to the subject federal action, which had no express statute of limitations. *Id.* at 395, 484. *Woodbury* and *Hobbs* are district-court decisions in environmental cases from North Carolina and Virginia, respectively, which bear no resemblance to the instant case. They were also issued years before *Johnson* and *Coghlan*, and any suggestion that *Woodbury* and *Hobbs* support a blanket, *ipso facto*, rule against applying § 2462 to the SEC's injunctive and declaratory claims herein violates *Coghlan*'s binding authority.

Earlier in its brief, the SEC also cites *National Parks and Conservation Ass'n, Inc. v. Tennessee Valley Authority*, 502 F.3d 1316 (2007) for the false proposition that § 2462 does not, *ipso facto*, apply to the SEC's claims for injunctive relief, declaratory relief, and disgorgement because they have been labeled as "equitable." (SEC Brf., pp. 24-25) Like *Banks*, *National Parks* involved claims filed under the Clean Water Act, which sought a restorative injunction to remediate environmental harms allegedly caused by the defendant's power plant. *Id.* at 1321. Not surprisingly, therefore, the Court cited *Banks* in support of its statement that § 2462 did not apply to such "equitable" claims. *Id.* at 1326.

Based on the foregoing, *National Parks* is inapposite to the SEC's claims herein for all the same reasons that *Banks* has no application to them. Additionally, *National Parks* only made its statements regarding § 2462's inapplicability to the specific "equitable" claims present therein as a pretext to, and in the context of, the Court's determination that those same claims were nonetheless barred by the "concurrent remedy doctrine" based on the untimeliness of the plaintiff's civil-penalty claims under § 2462. That fact further demonstrates *National Park*'s remoteness from the issues presented in this case.

For all of the above reasons, the district court correctly found that the SEC's claims for injunctive and declaratory relief are penalties governed by § 2462, which were not timely filed thereunder. Those rulings should be affirmed.

V. AS THE DISTRICT COURT CORRECTLY RULED, § 2462'S LANGUAGE ESTABLISHES THAT IT IS A JURISDICTIONAL STATUTE OF LIMITATIONS.

Since the SEC has now conceded that it did not file this action within the five-year period prescribed by § 2462, this Court's treatment of the district court's ruling that § 2462 is a jurisdictional statute of limitations is not germane to the disposition of the Dismissal Order and Final Judgment. If this Court affirms the district court's ruling that § 2462 applies to all of the SEC's claims for relief, then the SEC's concession mandates affirmance of the Dismissal Order and Final Judgment, irrespective of whether or not § 2462 is jurisdictional. It should be noted, however, that the district court correctly answered that inquiry in the affirmative.

In *Sebelius v. Auburn Regional Medical Center*, 133 S.Ct. 817 (2013), the Court explained that its earlier decision in *Arbaugh* "adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional." *Id.* at 824 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516, 126 S.Ct. 1235 (2006)). The test is "whether Congress has 'clearly state[d]' that the rule is jurisdictional." *Id.*

Here, the district court found that § 2462 satisfied that standard and is jurisdictional by primarily focusing on § 2462's phrase commanding that the proceedings described therein "**shall not be entertained"** unless commenced within the designated five-year period. (emphasis supplied) As the district court correctly ruled, § 2462's use of that phrase is an unequivocal expression of Congress' intention to divest courts of subject-matter jurisdiction over any such untimely proceedings.

In the jurisprudence of subject-matter jurisdiction, the word "entertain" is a term of art that courts use to describe their ability, or not, to exercise subject-matter jurisdiction over a controversy. *E.g.*, *Haywood v. Drown*, 556 U.S. 729, 755, 129 S.Ct. 2108, 2126 (2009)[11] ("Subject-matter jurisdiction determines only whether a

[11] *Haywood* is repeatedly uses of the term "entertain" when discussing the issues of subject matter jurisdiction therein.

court has the power to entertain a particular claim."); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484, 119 S.Ct. 1430, 1437 (1999)("After concluding that federal courts have subject-matter jurisdiction to entertain such a case, we announced that, prudentially, a federal court should stay its hand "until after the Tribal Court has had a full opportunity to determine its own jurisdiction."). Thus, § 2462's phrase "shall not be entertained" demonstrates Congress' intention to remove courts' subject-matter jurisdiction over actions that are not timely filed under the statute.

This Court recently reached that exact conclusion when interpreting the identical phrase -- "shall not be entertained" -- in the limiting statute at issue in *Williams v. Warden, Federal Bureau of Prisons*, 713 F.3d 1332 (11th Cir. 2013). *Williams* involved a habeus-corpus petition based on grounds the petitioner had previously raised in collateral attacks on his conviction. *Id.* at 1337. As such, the petition was barred under 28 USC § 2241 unless it was authorized by that statute's "savings clause" set forth in 28 U.S.C. § 2555(e), which reads as follows:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, **shall not be entertained** if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Id. (emphasis supplied). This Court determined that its first task was to determine if the savings clause "impose[d] a subject-matter jurisdictional limit on § 2241 petitions." *Id.* at 1338.

After setting forth *Arbaugh*'s standards for determining whether limiting statutes are jurisdictional, this Court held:

> Thus, whether a statutory limitation is jurisdictional is essentially based on whether there is a clear expression of congressional intent to make it so.
>
> In this case, Congress expressed its clear intent **to impose a jurisdictional limitation** on a federal court's ability to grant a habeas petitioner what is effectively a third bite at the apple after failing to obtain relief on direct appeal or in his first postconviction proceeding. **The savings clause states that a § 2241 habeas petition "*shall not be entertained* ... unless it ... appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." Based on the text alone,** which speaks in imperative terms of what class of cases the district court has the *power* to hear, not what the petitioner himself must allege or prove in order to state a claim, **we are compelled to conclude that the savings clause is a limitation on jurisdiction.** It commands the district court not to "entertain[ ]" a § 2241 petition that raises a claim ordinarily cognizable in the petitioner's first § 2255 motion except in the exceptional circumstance where the petitioner's first motion was "inadequate" or "ineffective" to test his claim. The provision does everything but use the term "jurisdiction" itself, and there is no magic in that word that renders its use necessary for courts to find a statutory limitation jurisdictional in nature.
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> * * *
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> **A plain reading of the phrase "shall not entertain" yields the conclusion that Congress intended to, and unambiguously did strip the district court of the power to act—that is, Congress stripped the court of subject-matter jurisdiction—in these circumstances unless the savings clause applies.**

Id. at 1238-39 (citations omitted; italicized emphasis in original; bold emphasis supplied).

In emphatic terms, *Williams* holds that Congress' use of the phrase "shall not be entertained" unequivocally establishes that 28 U.S.C. § 2555(e) limits courts' subject matter jurisdiction over habeus corpus petitions. There is no basis for interpreting that identical phrase any differently as used in § 2462. Pursuant to *Williams*, therefore, § 2462 is a jurisdictional statute of limitations.

The SEC attempts to distinguish *Williams* by proffering purported differences between 28 U.S.C. § 2555(e) and § 2462 that are simply meaningless in light of the above-quoted discussion regarding the significance of the phrase "shall not be entertained." (SEC Brf., p. 58) The SEC also asserts that this Court treated § 2462 "as an affirmative defense in *Banks*" (SEC Brf., p. 57) The issue of whether § 2462 is a jurisdictional statute of limitations was not, however, raised or discussed in *Banks*. Simply put, *Williams* is controlling. Pursuant to that authority, the trial court correctly ruled that it was deprived of subject matter jurisdiction over this action when the SEC failed to timely file it within the five-year period set forth in § 2462.

CONCLUSION

Based on all of the foregoing, the Clarks and Schwarz respectfully request the Court to affirm, in all respects, the district court's May 12, 2014, Final Order of Dismissal and June 11, 2014, Final Judgment.

Dated February 12, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,985 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4.

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2015, I electronically filed this Motion with the Clerk of the Court using the CM/ECF system, which will serve copies on all parties of record. I further certify that on the same day I served a copies of this Brief by U.S. mail to all parties of record.

/s/ Kenneth P. Hazouri
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