# 14-13562-E

## UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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On Appeal from United States District Court
for the Southern District of Florida, No. 13-cv-10011

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## CORRECTED BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLANT

---

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# CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

*SEC v. Graham et al.*, No. 14-13562-E

Pursuant to Federal Rule of Appellate Procedure 26.1 and the Eleventh Circuit Rule 26.1-1, counsel for the Securities and Exchange Commission, plaintiff-appellant, certify that the following persons have or may have an interest in the outcome of this appeal:

1. Augustini, Hope H., attorney for the Commission
2. Berlin, Amie Riggle, attorney for the Commission
3. Cay Clubs Resorts and Marinas entities, and associated entities and persons:

    (1) 701 LLC

    (2) Addictive Fishing LLC

    (3) Aquanuts – Bayside Resort

    (4) Barlow, Steve

    (5) Barwick, Gary L.

    (6) Beck, Elizabeth

    (7) Bellagio Development LLC

    (8) Birdman, Diane

    (9) Birdman, Harvey

    (10) Birdman, Louis

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*SEC v. Graham et al.*, No. 14-13562-E

(11) BLG Aviation, LLC

(12) Bower, Holly

(13) Brillhart, Jeffrey

(14) Brown, Jeanne

(15) BXRL LLC

(16) Carson One Mining, LLC

(17) Cash Sol

(18) Cash Whiz

(19) Cay Clubs International LLC

(20) CC Distribution LLC

(21) CC FBO LLC

(22) CC701 LLC

(23) CC704 LLC

(24) CC705 LLC

(25) CC706 LLC

(26) CC707 LLC

(27) CC708 LLC

(28) CC709 LLC

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(29) CC710 LLC

(30) CC711, LLC

(31) CC712 LLC

(32) CC713 LLC

(33) CC714 LLC

(34) CC715 LLC

(35) CC718 LLC

(36) CC719 LLC

(37) CC720 LLC

(38) CC721 LLC

(39) CC722 LLC

(40) CC723 LLC

(41) CC724 LLC

(42) CC725 LLC

(43) CC726 LLC

(44) CC771 LLC

(45) CC772 LLC

(46) CC773 LLC

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*SEC v. Graham et al.*, No. 14-13562-E

(47) CC774 LLC

(48) CC775 LLC

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

(50) CCH Clearwater LLC

(51) CCH Dove Creek LLC

(52) CCH Finance LLC

(53) CCH Keys LLC

(54) CCH Tavernaero LLC

(55) Clark, Fred D. d/b/a Southern Cross Realty and Management Co.

(56) Clark, Marilyn R.

(57) Clearwater Cay Community

(58) CMZ Group, Ltd.

(59) Crigger, Donald

(60) Cristal Clear Airport Services LLC

(61) Cristal Clear Assc LLC, d/b/a Cay Club Realty

(62) Cristal Clear Aviation LLC

(63) Cristal Clear BXRL Productions LLC

(64) Cristal Clear BXRL Tournament LLC

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT(cont'd)**

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(65) Cristal Clear Charters – Clearwater Cay Club

(66) Cristal Clear Charters – Mangrove Marina

(67) Cristal Clear Charters – Sarasota Cay Club

(68) Cristal Clear Charters LLC

(69) Cristal Clear Contracting LLC

(70) Cristal Clear Development LLC

(71) Cristal Clear Distillers LLC

(72) Cristal Clear Docks LLC

(73) Cristal Clear Environmental, LLC

(74) Cristal Clear FBO LLC

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

(76) Cristal Clear Maintenance LLC

(77) Cristal Clear Management LLC

(78) Cristal Clear Media LLC

(79) Cristal Clear Mining LLC

(80) Cristal Clear Mortgage LLC

(81) Cristal Clear Productions LLC

(82) Cristal Clear Property Management LLC

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(84) Cristal Clear Realty NV LLC

(85) Cristal Clear Reclamation LLC

(86) Cristal Clear Rentals LLC

(87) Cristal Clear Services Group LLC

(88) Cristal Clear Title Agency LLC

(89) Cristal Clear Vessel Leasing LLC

(90) Cristal Clear Watercraft LLC

(91) Cristal Clear WCC Productions LLC

(92) DC6 LLC

(93) DC701 LLC

(94) DC702 LLC

(95) DC703 LLC

(96) DC703 OB LLC

(97) DC703 P5 LLC

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(100) DC705 BC LLC

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(103) DC705 JV LLC

(104) DC705 LLC

(105) DC705 Marina LLC

(106) DC706 CS LLC

(107) DC706 DR LLC

(108) DC706 FB LLC

(109) DC706 JV LLC

(110) DC706 KM LLC

(111) DC706 LLC

(112) DC706 LW LLC

(113) DC706 M1 LLC

(114) DC706 MV LLC

(115) DC706 P1 LLC

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(118) DC706 TV LLC

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(119) DC707 FB LLC

(120) DC707 JV LLC

(121) DC707 LLC

(122) DC707 MY LLC

(123) DC707 P2 LLC

(124) DC707 P3 LLC

(125) DC707 P4 LLC

(126) DC707 P6 LLC

(127) DC707 P7 LLC

(128) DC708 FB LLC

(129) DC708 LLC

(130) DC708 P2 LLC

(131) DC708 P3 LLC

(132) DC708 P4 LLC

(133) DC709 FB LLC

(134) DC709 JV LLC

(135) DC709 LLC

(136) DC709 P2 LLC

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(137) DC709 P3 LLC

(138) DC710 FB LLC

(139) DC710 JV LLC

(140) DC710 LLC

(141) DC710 MC LLC

(142) DC710 P2 LLC

(143) DC710 P3 LLC

(144) DC710 P4 LLC

(145) DC711 LLC

(146) DC713 LLC

(147) DC714 LLC

(148) DC715 JV LLC

(149) DC715 LLC

(150) DC716 LLC

(151) DC718 LLC

(152) DC719 LLC

(153) DC720 LLC

(154) DC721 LLC

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(155) DC722 LLC

(156) DC723 LLC

(157) DC724 LLC

(158) DC725 LLC

(159) DC726 LLC

(160) DC770 LLC

(161) DC771 LLC

(162) DC772 LLC

(163) DC773 LLC

(164) DC774 LLC

(165) DC775 LLC

(166) DCWCC JV LLC

(167) DeMontigny, Joseph

(168) Dempsey, James

(169) Denues, Lori M.

(170) Dinero Shop

(171) Dive In Inc.

(172) Drebenstedt, Anna

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(173) FDC Trust

(174) Fishkind, Henry

(175) Flamingo Palms Villas, LLC

(176) Friedman, Harris

(177) G-360 LLC

(178) Grand Venezia Clearwater, Inc.

(179) Grand Venezia COA Inc.

(180) Gray, James A.

(181) Hirsch, Herbert

(182) Holt, Craig

(183) Hopke Jr., James C.

(184) Hughes, Mike

(185) Hurst, David B.

(186) Hutcheson, John K.

(187) IMG Acadamies

(188) Island Reef Diver – Pilot House Harbor

(189) JDI Clearwater LLC

(190) JDI Marathon LLC

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(191) JDI Sarasota Marina LLC

(192) JDI Sombrero LLC

(193) JDI Tavernier LLC

(194) Lodestar Mining and Exploration LLC

(195) Marathon SunVest Cay Club, Inc.

(196) Melanson, Noelle M.

(197) Miller, Joseph T.

(198) Minor, Mary

(199) Mishlove, Alan

(200) Monzulla, Bruce

(201) North Abaco Power & Electric Company Ltd.

(202) Osman, Scott A.

(203) Patterson, Jennifer

(204) Phoenix, Charles PT

(205) Priday, Deanna Frances

(206) Rego, Frank F.

(207) Ricky L. Stokes & Associates

(208) Sarasota Cay Club

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(209) Sea Lion Productions Inc.

(210) Schwarz, Gary

(211) Schwarz, Jane O.

(212) Seegmiller, Scott

(213) Smith, David B.

(214) Steams, Deborah K.

(215) SunVest LLC

(216) Tavernier SunVest Cay Club LLC

(217) Upper Keys Dive

(218) Walkers Cay Club Ltd.

(219) Water Lifestyles LLC

(220) WCC Investments Ltd.

(221) WCC Properties Ltd.

(222) Wynn, Nanci D.

4. Clark, Jr., Fred Davis, A/K/A Dave Clark, defendant-appellee

5. Coleman, Cristal R., A/K/A Cristal Clark, defendant-appellee

6. Conley, Michael A., attorney for the Commission

7. deBeaubien, Knight, Simmons, Mantzaris & Neal, LLP, defense counsel

# CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT(cont'd)

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8. Graham, Barry J, defendant-appellee
9. Handley, Leon H., defense counsel
10. Hazouri, Kenneth Paul, defense counsel
11. King, James Lawrence, Senior Judge, U.S. District Court for S.D. Fla.
12. Lisitza, David D., attorney for the Commission
13. Rose, Neil, attorney for defendant-appellee Ricky Lynn Stokes
14. Rumberger, Kirk & Caldwell, defense counsel
15. Russell C Weigel III PA, defense counsel
16. Salup-Schmidt, Linda, attorney for the Commission
17. Schiff, Andrew O., attorney for the Commission
18. Schwarz, David W., defendant-appellee
19. Securities and Exchange Commission, plaintiff-appellant
20. Shutts & Bowen LLP, defense counsel
21. Small, Anne K., attorney for the Commission
22. Stillman, Jacob H., attorney for the Commission
23. Stokes, Ricky Lynn, defendant-appellee
24. Valkenburg, Derrick Michael, defense counsel
25. Weigel III, Russell Cornelius, defense counsel
26. Weiman, Theodore J., attorney for the Commission

## STATEMENT REGARDING ORAL ARGUMENT

The Securities and Exchange Commission, appellant, respectfully requests oral argument. *See* Fed. R. App. P. 34(a). The district court erroneously concluded that the statute of limitations for actions to impose a "civil fine, penalty, or forfeiture" in 28 U.S.C. § 2462 reaches the Commission's requests for equitable relief, including an injunction against securities law violations and disgorgement of the ill-gotten gains from violations, as well as the finding of a violation. The district court also erroneously concluded that Section 2462 is not a statute of limitations that provides an affirmative defense but instead limits courts' subject-matter jurisdiction. Oral argument may assist the Court in its consideration of these important issues.

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*United States v. Hawkey*, 148 F.3d 920 (8th Cir. 1998) ........................................40

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*United States v. One 1980 Rolls Royce*, 905 F.2d 89 (5th Cir. 1990) .....................40

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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On Appeal from United States District Court
for the Southern District of Florida, No. 13-cv-10011-JLK

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CORRECTED BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLANT

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## PRELIMINARY STATEMENT

In this civil law enforcement action brought by the Securities and Exchange Commission, the district court dismissed the Commission's claims for equitable relief as barred by a statute of limitations, notwithstanding that the Supreme Court and this Court have held that that statute does not apply to equitable relief. After defendants' securities fraud had collapsed, the Commission brought this action seeking—apart from civil monetary penalties—equitable and nonpunitive relief that consists of an injunction against defendants' securities law violations, disgorgement of defendants' ill-gotten gains from their violations, and a finding that defendants had violated the securities laws. Contrary to controlling precedent,

the district court concluded that the five-year statute of limitations for actions to impose a "civil fine, penalty, or forfeiture" in 28 U.S.C. § 2462 reaches beyond civil penalties to also bar injunctive relief and equitable remedies to prevent unjust enrichment, and even extends to a liability finding that supports equitable relief. The district court also appears to be the first court in that statute's two-hundred-year history to conclude that it is not a statute of limitations that provides defendants an affirmative defense, but instead deprives courts of subject-matter jurisdiction. The district court's erroneous decision should be reversed.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action under Sections 20(b), 20(d)(1), and 22(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77t(b), 77t(d)(1), 77v(a); and Sections 21(d)(1), 21(d)(3), 21(d)(5), 21(e), and 27(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78u(d)(1), 78u(d)(3),78u(d)(5), 78u(e), and 78aa(a). The district court entered final judgment on June 11, 2014. D190. The Commission filed a timely notice of appeal on August 7, 2014. Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

The district court dismissed this action based on its conclusion that Section 2462 is jurisdictional in nature. In Argument II (*infra* at 53-59), the Commission

explains why the district court's determination that Section 2462 deprives courts of subject-matter jurisdiction is erroneous.

## STATEMENT OF THE ISSUES

This Court has held that the five-year statute of limitations for actions to impose a "civil fine, penalty, or forfeiture" in 28 U.S.C. § 2462 does not apply to equitable remedies, including an injunction against violations and disgorgement of the ill-gotten gains from those violations. In addition, this Court treats Section 2462 as a statute of limitations, not a limitation on a court's subject-matter jurisdiction. The issues in this appeal are:

1. Whether the district court erred in concluding that, under the Section 2462 statute of limitations: (a) an injunction against defendants' securities law violations is a "penalty," (b) disgorgement of defendants' ill-gotten gains from their securities law violations is a "forfeiture," and (c) a finding that defendants violated the securities laws is a "penalty."

2. Whether the district court erred in concluding that Section 2462 limits courts' subject-matter jurisdiction.

## STATEMENT OF THE CASE

### A. Nature of the case

The Commission, plaintiff-appellant, appeals from a judgment entered after the district court (Hon. James Lawrence King) dismissed this action on the ground of a lack of subject-matter jurisdiction. D186:24-25; D190.[1] The Commission brought this action against defendants Barry J. Graham, Fred Davis Clark, Jr., Cristal R. Coleman, David W. Schwarz, and Ricky Lynn Stokes, alleging violations of the antifraud, securities registration, and broker-dealer registration provisions of the federal securities laws. The Commission sought a finding that defendants committed the alleged violations, an injunction against violations of the provisions that each defendant violated, and disgorgement of defendants' ill-gotten gains from their violations plus prejudgment interest. D41:32-33. The Commission also sought, but no longer seeks, civil penalties against Clark, Coleman, and Stokes. The district court concluded that all of the remedies sought by the Commission, as well as a finding that defendants violated the securities laws, were a "civil fine, penalty, or forfeiture" that were time-barred by 28 U.S.C.

[1] "D_:_" refers to the document number on the district court's docket, *SEC v. Graham et al*, No. 13-cv-10011-JLK (S.D. Fla.), and the page number of the original document.

§ 2462, and then dismissed the Commission's action based on its *sua sponte* conclusion that Section 2462 is jurisdictional. D186 ("Op.").

### B. Facts

From August 2004 until at least October 2007, defendants used a web of entities collectively called "Cay Clubs Resorts and Marinas" ("Cay Clubs") to commit an elaborate $300 million fraud that victimized over 1,300 investors. Defendants' scheme involved the sale of investment contracts—a type of "security"—comprised of condominium sales paired with investment management services. Under these investment contracts, defendants kept control of the condominiums, purportedly to renovate the units and turn the surrounding property into luxury "five star" resorts, while investors were promised guaranteed financial returns from defendants' efforts. Despite their promises, defendants never developed the properties, but instead misappropriated millions of dollars and operated Cay Clubs as a Ponzi scheme.

#### 1. Defendants and Cay Clubs

Clark and Schwarz formed Cay Clubs, an enterprise that was not incorporated, but rather refers to a collection of more than 200 entities over which Clark and Schwarz split ownership. D92-3:57-58,91; D92-4:23; D92-8;D179:4. Cay Clubs maintained more than 150 bank accounts in the names of the various

entities, and used its complicated structure to conceal its financial condition from investors. D179-1:6; D92-9:56; 92-13:1.

Clark was Cay Clubs' CEO and managed the Cay Clubs enterprise. D92-2:18; D92-28:3. Schwarz served as Chief Operating Officer and oversaw Cay Clubs' bank accounts, administration, and operations. D92-4:23-24,46; D92-9:31-34; D92-28:3. Graham served as Cay Clubs' Director of Sales and managed Cay Clubs' sales agents. D92-16:15-16; D92-28:4. Coleman was a Cay Clubs sales agent and managed Cay Club entities. D92-2:83-84,214; D92-14:93-94,160. Stokes was Cay Clubs' Director of Investor Relations and one of Cay Clubs' highest producing sales agents. D92-2:228; D92-7:89-92, D92-16:78.

#### 2. Defendants offered and sold investment contracts that paired condominium sales with management services.

Defendants marketed Cay Clubs as a "No Headaches," passive investment for investors who were disenchanted with the stock market but wanted to "retire rich and young in paradise." D92-9:26,28; D92-17:1,9; D92-23:59. Cay Clubs purported to be in the business of renovating aged, abandoned condominium projects in Florida and Las Vegas, Nevada to convert them into new luxury resorts. D92-3:86-87; D92-16:108-09; D92-28. Directly and through a network of hundreds of commissioned sales agents (D92-2:135,140; D92-16:45-48,56-57,163,287), defendants solicited investors to enter into investment contracts

consisting of condominium unit sales paired with investment management services. D92-16:41-42.

Specifically, defendants sold each investor one or more $300,000 to $1 million condominium units. D92-28; D92-34:8; D92-60. Investors who bought units were also required to purchase an additional $15,000 to $35,000 "membership" with each unit that defendants promised would appreciate in value because it granted access to the amenities at any of the Cay Clubs locations that defendants promised to develop. D92-2:177-78; D92-16:99-100; D92-23:137-38. In purchasing a unit, investors also agreed to give Cay Clubs control over the entire condominium property in which the unit was located, which defendants promised to manage and develop into a luxury resort to increase all units' value. D92-60 to D92-63; D92-1:165-67; D92-23:67-68. At the time of the sale of each condominium unit, defendants also offered the investor a 15% guaranteed return on the unit's purchase price if the investor agreed to lease it back to Cay Clubs for a two-year period, during which time defendants promised to completely renovate the unit. D92-2:142-144; D92-16:139-40,143-44; D92-17:9; D92-26:2-3; D92-42:3; D92-59; D92-64:2; D179-1:4; D179-2:4. Defendants further promised that after the two years, investors could continue Cay Clubs' management and Cay Clubs would generate additional returns for the investor by renting the unit to third parties. D92-23:129; D92-26:3; D92-29:2,7; D92-49; D92-64:5. While an

investor technically did not have to agree to lease his unit back to Cay Clubs, 99 percent of condominium unit purchasers did so. D92-53:1; D92-40:190-91; D92-42:3.[2]

Defendants targeted investors who were non-residents that lacked the skill and ability to manage, develop, or rent the properties on their own, and who instead expected profits on their investment from Cay Clubs' promised efforts. D92-23:59,133,152; D92-26:3; D92-50:26-27. Investors did not use the condominiums as their living quarters (D92-29:2; D92-47:2; D92-48:2), as the investment contracts gave Cay Clubs "total control" and possession over the units. D92-3:84; D92-4:140; D92-40:29-30; D92-50:66-72; D59 to D63. The success or failure of any single investment contract was tied to the others because defendants promised to increase all units' value by developing the resorts (D92-16:218; D92-17; D92-23:67-68; D92-42:3), spread risk and profits across all Cay Clubs

[2] Cay Clubs' outside attorney—Charles P.T. Phoenix—stated in a declaration that he advised Graham, Clark, and Schwarz that pairing condominium unit sales with the investment management agreements "could amount to the sale of a security under the securities laws." D179-1:5. According to Phoenix, Cay Clubs principals "ignored the advice" and continued to market the investment using the same promises. D179-1:5; D92-29:3. Cay Clubs also put "false policies or procedures" into effect to make it appear that the condominium unit sales and returns from the investment management agreements were separate, when in fact they were part of the same investment contract offered and sold to investors. D179-1:4-5,7; *see, e.g.*, D41-7; D92-16:139-40,144.

properties (D92-2:76-77; D92-11:374-75,515-20), and commingled investor funds between Cay Clubs entities (D92-10:209-211).

**3. Defendants made materially false promises to investors, misappropriated investor funds, and operated Cay Clubs as a Ponzi scheme.**

Defendants promised to generate profits for investors by renovating the condominium units, transforming the Cay Clubs properties into five-star resorts, and renting the renovated condominium units to third parties. D92-16:218; D92-17; D92-23:129; D92-28; D92-42:3-4. But Defendants renovated only a fraction of the condominium units, never converted any of the properties into luxury resorts, and never generated rental profits. D92-4:250; D92-7:120,153-64,197-99,205-06; D92-33:20-22,33-36,39-44,60-61,68-69,88-89; D92-40:62-63,166-67; D92-42:3. Defendants also misled investors about the investment contracts' profit potential by giving them a false "Appreciation Analysis" that purported to depict significant gains realized by previous investors, when in fact the defendants manufactured most of the purported appreciation by selling the units to each other at inflated prices. D92-7:170-71; D92-14:288-89,300-307,311-19; D92-16:117-18,132-35; D92-17:25; D179:2:5-6; D92-28:54-55; D92-23:123-24; D92-56.

Instead of applying investor funds and defendants' efforts to achieve the promised profits, defendants diverted tens of millions of dollars in investor funds for their personal use, spent investor funds on airplanes and boats, and spent

millions in investor funds on dozens of undisclosed projects including a liquor distribution company and unprofitable gold and coal mining operations. D92-2:101-04,113-14,123-27,133,187-88; D92-3:151,171-72; D92-4:204; D92-13:4-6; D92-50:39-41.

Defendants also operated Cay Clubs as a Ponzi scheme. Defendants had guaranteed investors a 15% return. D92-2:142; D92-17:9; D92-23:148; D92-26:2-3; D92-64:2; D179-1:4; D179-2:4. But by April 2005, when defendants were unable to generate the income necessary to pay these returns, defendants began using funds from new investors to pay earlier investors their purported returns. D179-1:5-6; D92-1:248; D92-2:148-50,155-58; D92-7:109-10,114-15; D92-13:6. Cay Clubs' outside counsel admitted that, at that time, Cay Clubs "could be fairly described as a 'Ponzi Scheme.'" D179-1:6. Yet defendants still continued to solicit new investors and falsely painted a rosy financial picture to investors. D179-1:6; D92-16:272-73; D92-50:82-84,98-99. In total, defendants disbursed over $80 million from new investors to earlier investors (D92-13:6), and ultimately failed to pay millions of dollars in promised returns (D92-50:98-99).

#### 4. Clark, Coleman, Graham, and Stokes unlawfully offered and sold unregistered securities.

Cay Clubs' securities offerings were never registered with the Commission. D50:22; D96-4:37. Clark, Coleman, Graham, and Stokes thus offered and sold securities to the public without a registration statement in effect. D92-2:135

(Clark); D92:14:194-97 (Coleman); D92-16:163-64 (Graham); D92-6:109-12 (Stokes). Because no registration statement was in effect, prospective investors did not receive a statutory prospectus containing information necessary to enable them to make an informed investment decision, including the issuer's financial condition, investment risks, and the background of management.[3]

#### 5. Graham and Stokes unlawfully acted as unregistered brokers.

Graham and Stokes acted as brokers by soliciting investors, receiving transaction-based compensation, and regularly participating in securities transactions. D92-6:80, 85; D92-16:31-34,41-42,56-57,163-64; D92-23:154,156. But neither Graham nor Stokes registered with the Commission as a broker. D48:7; D51:5. Because Graham and Stokes were unregistered brokers, there was no assurance that they had the requisite professional training, kept and preserved records, or conducted their broker activity according to regulatory standards designed to ensure that investors are treated fairly and receive adequate disclosure.

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[3] For example, although Clark touted his real estate expertise to investors, he failed to disclose that he was already subject to a multi-million dollar judgment for a failed real estate venture. D92-2:23; D92-28:4. Likewise, Graham touted his market savvy, but he and Clark knowingly concealed that Graham was a convicted felon who had been imprisoned for violating the securities laws. D179:1:7; D92-16:10-12; D92-28:5; D92-1:211-12; D92-29:6.

#### 6. Cay Clubs collapsed and investors lost millions of dollars.

By fall 2006, Cay Clubs began having serious cash flow problems. D92-2:64,69; D92-11:392,430. Yet defendants still continued to solicit investors, who were not told of Cay Clubs' financial difficulties. D92-16:272-73; D179-1:6. In October 2007, Cay Clubs defaulted on a loan for which its properties served as collateral. D92-1:36-37. Cay Clubs then ceased operations and its properties went into foreclosure. D92-1:36; D92-3:128; D92-23:224.

In total, Cay Clubs brought in over $300 million from more than 1,300 investors nationwide. D92-13:2-3. Over the course of the scheme, Clark, Coleman, and Schwarz misappropriated tens of millions of dollars for their personal use. D92-2:258-59; D92-13:4-6. Graham and Stokes each received commissions totaling more than $6 million for selling Cay Clubs investment contracts. D92-13:5.

### C. Proceedings and dispositions below

#### 1. The Commission's investigation

In October 2007, the Commission's Division of Enforcement notified Clark of its investigation into Cay Clubs for violations of the federal securities laws. D85-1:2; Ex.A. The Commission requested that Cay Clubs produce documents in its possession containing information about company personnel, prospective and current investors, its investment management services, and its organizational

structure. *Id.* at 2-4. The Commission also issued subpoenas in July 2010 directing Clark, Coleman, and Schwarz to turn over such documents. D85-1;Exs. B-D.

By that time, however, Clark and Coleman had left the country, moving first to the Turks and Caicos Islands in mid-2009 and then to the Cayman Islands a year later. D92-2:214-15; D92-14:131-34. The Commission was unable to take Clark's investigative testimony until he briefly returned to the United States in May 2011. Clark revealed that, after receiving the Commission's original document request, Cay Clubs moved all records from its offices into an offsite storage facility that it later abandoned. D92-1:158-62,168; D92-2:10-13. Those documents—including accounting records, investment management agreements, and other corporate records—were lost, presumably destroyed, and never produced to the Commission. D92-1:161-62.

The Commission's investigation into defendants' fraud ultimately uncovered a web of more than 200 Cay Clubs entities and associates, as well as more than 150 different foreign and domestic bank accounts held by dozens of different shell companies. D179-1:6; D92-8; D92-9:56; 92-13:1, Ex. A; *see also* Certificate of Interested Persons and Corporate Disclosure Statement, *supra* at C-1 to C-13.

In November 2013, Clark was criminally indicted for, among other things, obstructing the Commission's investigation into the Cay Clubs fraud "by providing false and misleading testimony, engaging in certain financial transactions, using shell entities, and other conduct designed to conceal the source, location and control of income, assets and funds" that he owned and controlled. *See* Indictment at 10, *United States v. Clark*, 13-cr-10034 (S.D. Fla.), Dkt. 3.[4] Coleman, Graham, and Stokes were charged in September and October 2014 with participating in a conspiracy to commit bank fraud that was furthered by Clark's obstruction of the Commission's investigation in this case. *See* Information at 9, *United States v. Graham*, 14-cr-10026 (S.D. Fla.), Dkt. 1; Superseding Indictment at 4, 10, 19, *United States v. Clark*, 13-cr-10034 (S.D. Fla.), Dkt. 65. Neither proceeding charges criminal securities fraud.

**2. The Commission's complaint**

The Commission filed its complaint on January 30, 2013. In the complaint and subsequent amended complaints, the Commission alleged that (i) all the defendants committed securities fraud in violation of Securities Act Section 17(a),

[4] The indictment, which remains pending, also charges Clark and Coleman with mail,wire, and bank fraud in connection with their alleged diversion of funds from pawn shops they operated in the Caribbean after learning that the Commission would file this enforcement action. *See* Indictment, *Clark*, Dkt. 3; Superseding Indictment, *Clark*, Dkt. 65.

15 U.S.C. § 77q(a), Exchange Act Section 10(b), 15 U.S.C. § 78j(b), and Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5; (ii) Clark, Coleman, Graham, and Stokes violated Securities Act Section 5(a) and 5(c), 15 U.S.C. §§ 77e(a) and 77e(c), by publicly selling or offering to sell securities without a registration statement; and (iii) Graham and Stokes violated Exchange Act Section 15(a)(1), 15 U.S.C. 78o(a)(1), by acting as a broker or dealer without so registering with the Commission. D41:28-32.

The Commission sought a finding that defendants violated these securities laws; an injunction against violating the securities law provisions that each defendant violated (see Securities Act Section 20(b), 15 U.S.C. § 77t(b), and Exchange Act Section 21(d)(1), 15 U.S.C. § 78u(d)(1)); and disgorgement of defendants' ill-gotten gains from the violations with prejudgment interest (see *id.*, Exchange Act Section 21(d)(5), 15 U.S.C. § 78u(d)(5)). D41:32-33. The Commission also sought civil monetary penalties against Clark, Coleman, and Stokes (see Securities Act Section 20(d), 15 U.S.C. § 77t(d), and Exchange Act Section 21(d)(3), 15 U.S.C. § 78u(d)(3)). D41:33.

### 3. The parties filed cross-motions for summary judgment, and the district court dismissed the action on jurisdictional grounds.

Both the Commission and the defendants moved for summary judgment. The parties' summary judgment briefing focused largely on whether the

investments offered and sold by defendants constituted "securities." *See* D60; D90:5-18; D122; D131:5-16; D146:5-20. The Commission explained that defendants' offers and sales of condominium units paired with investment management services were "investment contracts," a category of "security" under the Securities Act and Exchange Act. D90:5-18; D131:5-16; D146:5-20.[5] The Commission also argued that to the extent that defendants operated a Ponzi scheme by making payments from new investors to earlier investors, defendants had offered and sold securities. D90:10-11, 14.[6] In response to defendants' motions for summary judgment on this issue, the Commission also argued that defendants had failed to meet their burden of demonstrating that there is no genuine dispute of material fact that they had not offered and sold "securities." D131:2.

The defendants sought to establish an affirmative defense that the Commission's claims are time-barred under the five-year statute of limitations in

[5] The Commission cited Exchange Act Section 3(a)(10), 15 U.S.C. § 78c(a)(10) ("The term 'security'" includes any "investment contract"); Securities Act Section 2(a)(1), 15 U.S.C. § 77b(a)(1) (same); *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298-99 (1946) (An investment contract "means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party."); *Hocking v. Dubois*, 885 F.2d 1449, 1457-62 (9th Cir. 1989) (en banc), *cert. denied*, 494 U.S. 1078 (1990) (denying summary judgment to defendants and stating that condominium unit sales combined with investment management services can be investment contracts).

[6] The Commission cited *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 732 (11th Cir. 2005); *Hayes v. Adam*, 512 F.Supp.2d 1330, 1337-39 (N.D. Ga. 2007).

28 U.S.C. § 2462. Defendants argued that Section 2462 should be applied to all of the Commission's claims for relief, including equitable relief; that, as a factual matter, the acts underlying their violations ended in October 2007; and that the Section 2462 limitations period expired four months before the Commission filed its January 30, 2013 Complaint. D60:20; D62:4; D88:6-7. The Commission argued that Section 2462 does not apply to an injunction against securities law violations, disgorgement of the ill-gotten gains from those violations, or a finding of securities law violations. D131:16-18; D55:6-7. With regard to its civil penalty claims, the Commission disputed the date when the acts underlying the violations ended. D131:18.

The district court did not rule on the summary judgment motions. The court instead dismissed this action for lack of subject-matter jurisdiction. Its dismissal was based on two legal conclusions. First, the district court concluded that the statute of limitations in Section 2462 precluded the Commission from seeking any relief for defendants' securities law violations. Citing *Gabelli v. SEC*, 133 S.Ct. 1216 (2013)—a case involving only civil penalties—the district court decided that "[p]enalties, pecuniary or otherwise, are at the heart of all forms of relief sought by the SEC in this case." Op. 14-15. In the district court's view, (a) an injunction against defendants' securities law violations is "nothing short of a penalty,"

(b) disgorgement of defendants' profits from violations "can truly be regarded as nothing other than a forfeiture," and (c) a finding that defendants violated the securities laws is a "penalty" because it seeks to "'label defendants wrongdoers." *Id.*

Second, the district court concluded that Section 2462 deprived it of subject-matter jurisdiction over claims based on conduct outside of the five-year limitations period. Op. 9-10. The court recognized that statutes of limitations typically are an affirmative defense that do not limit jurisdiction, but concluded that Section 2462 is "more absolute" and carries "jurisdictional significance" such that it "operates to remove from the court's adjudicatory authority" claims to which Section 2462 applies. *Id.*

Based on its ruling that Section 2462 is jurisdictional, the district court concluded that defendants were relieved of their summary judgment burden to show the absence of a material dispute that this action is time-barred, and instead assigned the Commission the burden of proving that defendants' wrongful conduct occurred within the five years before the filing of the complaint. Op. 16-17. The district court then concluded that the Commission failed to "show[] by a preponderance of the evidence that any of the defendants committed any acts giving rise to the SEC's claim[s]" after January 30, 2008, which was five years before the Commission filed its January 30, 2013 complaint. Op. 23. Because the

court held that Section 2462 applied not only to the Commission's claims for civil penalties but also to the claims for equitable relief and request for a finding of violations, the court dismissed the action.

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.

## STANDARD OF REVIEW

This Court "review[s] issues of jurisdiction and issues of law *de novo*." *Malu v. U.S. Att'y Gen.*, 764 F.3d 1282, 1286 (11th Cir. 2014). *De novo* review means this Court should make an independent determination of the issues without deference to the district court's legal conclusions. See *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967); *General American Life Ins. Co. v. AmSouth Bank*, 100 F.3d 893, 897 (11th Cir. 1996).

## SUMMARY OF ARGUMENT

1. The district court erred in holding that the statute of limitations in 28 U.S.C. § 2462 applies to the equitable remedies sought by the Commission. Section 2462 applies only to claims for a "civil fine, penalty, or forfeiture," and binding Supreme Court and Eleventh Circuit precedent establishes that these statutory terms extend only to punitive, and not equitable, relief. *Meeker v. Lehigh*

*Valley RR Co.*, 236 U.S. 412, 423 (1915); *National Parks & Conserv. Ass'n, Inc. v. TVA*, 502 F.3d 1316, 1326 (11th Cir. 2007). The three types of relief the Commission seeks here—(a) an injunction against defendants' securities law violations, (b) disgorgement of the ill-gotten gains from those violations, and (c) the finding of violations on which that relief is based—are equitable and non-punitive, and thus not subject to Section 2462.

a. This Court held in *United States v. Banks*, 115 F.3d 916, 918-19 (11th Cir. 1997), that an injunction against future violations of the law is not a "penalty" subject to Section 2462, but is an equitable remedy outside of Section 2462's ambit. The district court's attempt to limit *Banks* to injunctions against "continuing violations" is at odds with the opinion itself and other authority establishing that both an injunction against an ongoing violation and an injunction against the resumption of a violation are imposed not to punish the defendant, but to protect the public where there is a likelihood that the defendant will engage in future violations. It is unnecessary to impose Section 2462's fixed limitations period on an injunction against the resumption of violations in order to avoid stale claims: the remoteness in time of a defendant's violation or its cessation is a factor a court may consider when it decides whether to order injunctive or any other "equitable relief that may be appropriate or necessary for the benefit of investors." Exchange Act Section 21(d)(5), 15 U.S.C. § 78u(d)(5).

b. This Court held in *SEC v. Calvo*, 378 F.3d 1211, 1218 (11th Cir. 2004), that a Commission action seeking disgorgement of a defendant's ill-gotten gains from a securities violation is not subject to any statute of limitations, including Section 2462. As a general matter, disgorgement is an equitable remedy that deprives wrongdoers of their unjust enrichment. In particular, the district court's unprecedented conclusion that disgorgement is a "forfeiture" under Section 2462 is incorrect. Disgorgement and forfeiture are distinct forms of redress with different legal foundations, different procedures, and different scope.

For example, forfeiture is punitive (thus properly subject to a limitations period) because in addition to proceeds from violations a defendant must also forfeit any and all profits subsequently earned on those proceeds. In contrast, because a defendant can be ordered to disgorge only the proceeds from violations and not an unlimited amount of subsequent profits earned on those proceeds, disgorgement is not punitive and there is no comparable justification for subjecting it to a limitations period. See *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978).

c. The Commission requests a finding that the defendant violated the securities laws, not as a "penalty," but for two nonpunitive purposes. First, a finding of a violation is a determination of liability that remains available as a remedy should a court deny all of the other relief the Commission requests. In such circumstances, the finding of a violation is an equitable decree that is milder

than an injunction. Second, a finding of a violation can serve as a predicate for the other relief the Commission seeks in a case. Irrespective of whether that other relief is equitable or punitive, the predicate finding itself is not a "penalty." The district court's suggestion that anything that "labels" a defendant a wrongdoer is a "penalty" misconstrues language from the Supreme Court's decision in *Gabelli v. SEC*, 133 S.Ct. 1216, 1223 (2013), which was discussing a consequence of a civil monetary penalty while making clear that to constitute a "penalty" relief must be "intended to punish."

2. The district court further erred in concluding that Section 2462 is a restriction on courts' subject-matter jurisdiction rather than a typical statute of limitations defense. Section 2462 does not augment or impair the express grants of jurisdiction that the federal securities laws provide over this action and the specific relief sought. The court's unprecedented conclusion that Section 2462 is jurisdictional would undermine Commission enforcement actions as well as actions brought by other federal agencies and should be rejected.

# ARGUMENT

## I. The district court erred in concluding that the statute of limitations in 28 U.S.C. § 2462 applies to the Commission's requests for an injunction against securities law violations, disgorgement of proceeds from violations, and a finding of violation of the securities laws.

### A. Statutory background

Congress provided no general limitations period in the federal securities laws for enforcement actions brought by the Commission, a decision that "must be interpreted as deliberate." *SEC v. Calvo*, 378 F.3d 1211, 1218 (11th Cir. 2004). Outside the securities laws, 28 U.S.C. § 2462 provides a catch-all statute of limitations applicable to three specific remedies sought by the federal government where Congress has not otherwise provided a limitations period. Section 2462 applies only to a claim for a "civil fine, penalty, or forfeiture":

> 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 if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

The direct predecessors of Section 2462 date back to 1839, and their antecedents date to the 1790s. *3M Co. v. Browner*, 17 F.3d 1453, 1458 (D.C. Cir. 1994). Section 2462 itself was codified in 1948 in a comprehensive revision of the Judicial Code, but any alterations were merely "changes in phraseology," and the "revised statute means only what it meant before 1948." *Id.*

In interpreting Section 2462, this Court recognizes two "well-established" principles: "[A]ny statute of limitations sought to be applied against the United States must receive a strict construction in favor of the government"; and "an action on behalf of the United States in its governmental capacity is subject to no time limitation, in the absence of congressional enactment clearly imposing it." *United States v. Banks*, 115 F.3d 916, 918-19 (11th Cir. 1997). The district court violated these principles by applying Section 2462 to bar relief that Section 2462 does not limit, much less clearly limit.

**B. Section 2462 does not apply to the equitable relief the Commission seeks.**

The district court's dismissal of the Commission's requests for equitable relief is contrary to Supreme Court precedent holding that the terms "civil fine, penalty, or forfeiture" in Section 2462 "refer to something imposed in a punitive way." *Meeker v. Lehigh Valley RR Co.*, 236 U.S. 412, 423 (1915); *see also Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 779-80 (1994) ("fines, penalties, and forfeitures are readily characterized as sanctions" with "punitive[] purposes"). This Court likewise has held that "the statute of limitations set forth in 28 U.S.C. § 2462 applies only to claims for legal relief; it does not apply to equitable remedies." *National Parks & Conserv. Ass'n, Inc. v. TVA*, 502 F.3d 1316, 1326 (11th Cir. 2007); accord *Banks*, 115 F.3d at 919 ("[S]ection 2462 does

not apply to equitable remedies."); *Coghlan v. NTSB*, 470 F.3d 1300, 1305 (11th Cir. 2006) (Section 2462 reaches only "form[s] of punishment").

As discussed below, the relief the Commission seeks here—an injunction against defendants' violations, disgorgement of their ill-gotten gains from those violations, and a finding that the defendants violated the securities laws—are equitable remedies outside of Section 2462. The district court's contrary conclusions are erroneous. If Congress had intended Section 2462's catch-all to extend beyond claims for a "civil fine, penalty, or forfeiture" to also include requests for injunctions, disgorgement, or a finding supporting such relief, it would have included those additional terms in Section 2462.

#### 1. An injunction against securities law violations is not a "penalty" under Section 2462.

A Commission enforcement action is brought to "expeditiously safeguard the public interest by enjoining securities violations." *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993). Congress specifically authorized the Commission to seek injunctions in order to "prohibit the violation of the securities laws." *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1321 (11th Cir. 1982); see Securities Act Section 20(d)(1), 15 U.S.C. § 77t(d)(1); Exchange Act Section 21(d)(3), 15 U.S.C. § 78u(d)(1).

The Commission requested that the district court "[i]ssue a permanent injunction restraining and enjoining" the defendants from violating the securities

law provisions that each violated. D41:32. The Commission demonstrated that it was "entitled to injunctive relief" by showing "a reasonable likelihood that [defendants] would violate the securities laws in the future." *SEC v. Ginsburg*, 362 F.3d 1292, 1304 (11th Cir. 2004); D90:31-32. But the district court dismissed the Commission's action as time-barred by Section 2462 based on its conclusion that an injunction against future violations "can be regarded as nothing short of a penalty intended to punish." Op. 5. That ruling is contrary to *Banks* and other decisions by this Court, the weight of authority among other Circuits, and Congress's intent.

**a. This Court held in *Banks* that an injunction against violations is not subject to Section 2462.**

In *Banks*, this Court held that the government's request for an order to "enjoin future discharge of additional or fill materials into" wetlands was not a "penalty" subject to Section 2462. 115 F.3d at 918-19. Ten years after Mr. Banks began violating the environmental laws by filling wetlands to build coconut farms, the government requested an injunction against his environmental violations. *Id.* at 918. This Court rejected Banks's argument that such relief was an untimely "penalty" under Section 2462. The Court reasoned that Section 2462 "appl[ies] only to civil penalties," and the "plain language of section 2462 does not apply to equitable remedies." *Id.* at 918-19. Since an injunction against Banks's environmental law violations was a type of "equitable relief," the "government's

equitable claims against Banks [were] not barred" by Section 2462. *Id.* Likewise, an injunction against defendants' securities law violations sought by the Commission is equitable relief, not a "penalty" subject to Section 2462.

### b. The district court erroneously read *Banks* as limited to injunctions against "continuing violations."

The district court sought to distinguish *Banks*, reasoning that the injunction in *Banks* was "different" from injunctive relief here because the harm remedied in *Banks* was "continuing in nature," "enjoining the continuing harm was the purpose of the enforcement action," and thus its purpose was "not to punish defendants for discharging the fill." Op. 14-15. This purported distinction fails for several reasons.

First, *Banks* does not distinguish between an injunction against ongoing violations and an injunction against resumption of past violations. Like the injunction the Commission seeks here, the injunction against violations in *Banks* enjoined future harm. As the Court in *Banks* stated: "In December 1991, the government filed this suit against Banks, requesting that the district court enjoin future discharge of additional dredged or fill materials into the wetlands on the property." *Banks*, 115 F.3d at 918.[7] And this Court did not make such a distinction when it broadly held in *Banks* that an injunction against future

[7] All emphasis is added unless otherwise noted.

violations is an "equitable remed[y]" to which Section 2462 does not apply. *Id.* 918-19.

Second, the district court's approach confuses the standard for determining whether an injunction is a "penalty" under Section 2462 with the standard for determining whether the district court has discretion to impose an injunction. The Section 2462 inquiry turns on whether relief is "equitable" or "punitive," not whether the harm the relief alleviates is ongoing. See *supra* at 24-25. It is well-settled that "the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *SEC v. Continental Tobacco Co.*, 463 F.2d 137, 162 (5th Cir. 1972).[8] But whether a violation is ongoing may bear on a district court's discretion to impose or deny injunctive relief, because the fact that a defendant's securities violation has ceased for some time could show that future violations are not sufficiently likely. See *Ginsburg*, 362 F.3d at 1305; *Continental Tobacco*, 463 F.2d at 162.

Third, an injunction against violations that prevents the resumption of past activity is equitable relief not subject to Section 2462. Regardless of whether an

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[8] Specifically, injunctive relief under the securities laws is proper where "the very existence of improper conduct in the past raises an inference that such conduct will continue in the future even though the improper conduct has been discontinued." *SEC v. First Am. Bank and Trust Co.*, 481 F.2d 673, 682 (8th Cir. 1973), citing *Hecht Co. v. Bowles*, 321 U.S. 321, 327 (1944) ("the cessation of violations, whether before or after the institution of a suit" is "no bar to the issuance of an injunction").

injunction stops ongoing activity, or only prevents resumption of past activity, injunctive relief is a "remedy available only from equity." *Cory v. White*, 457 U.S. 85, 91 (1982). "A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction." 1 J. Pomeroy, *Treatise on Equity Jurisprudence* § 1349 (1905). And that is because "[t]he primary purpose" of an injunction against securities violations is "not to punish" the violators but to protect the public from future violations (*SEC v. Koracorp Indus., Inc.*, 575 F.2d 692, 697 (9th Cir. 1978)), whether those violations are ongoing or the violations have ceased but could recur. Punishment is no more the purpose of an enforcement action to enjoin the resumption of a violation, as here, than it is the purpose of an enforcement action to enjoin an ongoing violation, as in *Banks*.

Indeed, an injunction against violations cannot be imposed—either against ongoing violations or against resumption of past violations—unless the Commission can demonstrate "a reasonable likelihood that [defendants] would violate the securities laws in the future." *Ginsburg*, 362 F.3d at 1304. This is the requisite showing even "[w]here, as here, the SEC is not attempting to stop an ongoing violation of the securities laws." *SEC v. Monarch Fund,* 608 F.2d 938, 943 (2d Cir. 1979); accord *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978). In moving for summary judgment, the Commission demonstrated a reasonable likelihood defendants will repeat their violations if the court does not

enjoin them by presenting evidence concerning: "the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations." *Ginsburg*, 362 F.3d at 1304. *See* D90:31-32. In dismissing this action without ruling on the Commission's summary judgment motion (see *supra* at 17-18), the district court failed to address these factors or this evidence.

#### c. This Court has also held in non-Section 2462 cases that an injunction against violations is equitable.

The district court's interpretation of *Banks*'s application of Section 2462 runs headlong into settled precedent in this Court establishing that, even beyond the context of Section 2462, an injunction "to forestall future violations" is an "equitable" remedy that is "unrelated to punishment." *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1133 (11th Cir. 2005); accord *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668, 670 (5th Cir. 1968) (An injunction's purpose is "not to punish for past violations, but to prevent future violations."); *Mitchell v. Bland*, 241 F.2d 808, 810 (5th Cir. 1957) ("The nature of injunctive relief is that it is prospective, prophylactic, preventive—not punitive."). See also *Hodgson v. First Federal Savings and Loan Ass'n*, 455 F.2d 818, 826 (5th Cir. 1972) ("An injunction in this type of case is not a burdensome thing; it simply requires the

[defendant] to obey the law."); *Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962) ("The injunction subjects the defendants to no penalty, to no hardship. It requires the defendants to do what the Act requires anyway—to comply with the law.").[9]

**d. Other courts of appeals have held that an injunction against securities law violations is not a "penalty" under Section 2462.**

Three other courts of appeals have concluded that an injunction or cease-and-desist order is not a "penalty" under Section 2462. The Tenth Circuit in *United States v. Telluride Co.*, 146 F.3d 1241, 1244-48 (10th Cir. 1998), held that it does "not consider the Government's request for injunctive relief an action for a 'civil penalty' barred by § 2462." The D.C. Circuit in *Riordan v. SEC*, 627 F.3d 1230, 1234-35 (D.C. Cir. 2011), held that Section 2462 does not apply to a cease-and-desist order because such relief "is purely remedial and preventative and not a penalty" given that it "simply requires [defendants] not to violate the relevant securities laws in the future." And the Third Circuit in *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 289 (3d Cir. 2013), concluded that under Section 2462, "[i]f the [Environmental Protection Agency] does not object

[9] Fifth Circuit decisions decided on or before September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

within five years of the completion of a facility's modification, then it loses the right to seek civil penalties under the statute of limitations, but can still obtain an injunction requiring the owner or operator to comply with the [environmental law] requirements."[10]

**e. Congress has distinguished between injunctions against securities violations and civil penalties for securities violations.**

The plain text of Section 2462 reaches a "fine, penalty, or forfeiture," not an "injunction." And in the securities laws, Congress distinguished "injunctions" and "civil penalties" by the labels it chose in different statutory subsections that were enacted at different times. For example, Securities Act Section 20(*d*) is titled "Money penalties in civil actions" and expressly refers to an action to impose a "civil penalty." 15 U.S.C. § 77t(d); see also Exchange Act Section 21(d)(3), 15 U.S.C. § 78u(d)(3) (titled "money penalties in civil actions" and authorizing an action to impose a "civil penalty"). In contrast, the injunction the Commission seeks here is expressly authorized by Securities Act Section 20(*b*), which is titled "Action for injunction" and expressly refers to an action "to enjoin" violations. 15

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[10] In *SEC v. Bartek*, 484 Fed.Appx. 949, 956-57 (5th Cir. 2012)—an unpublished and therefore non-precedential decision (see Fifth Circuit R. 47.5.4)—the Fifth Circuit determined that where there was a "minimal likelihood of similar conduct in the future," an injunction against future securities law violations was a "penalty" barred by Section 2462. In any event, the Commission disagrees with *Bartek*.

U.S.C. § 77t(b); see also Exchange Act Section 21(d)(1), 15 U.S.C. § 78u(d)(1) (titled "Injunction proceedings" and authorizing an action for a "permanent or temporary injunction"). Cf. *Hudson v. United States*, 522 U.S. 93, 100, 103 (1997) ("only the clearest" proof will override Congress's denomination of a remedy); *Tull v. United States*, 481 U.S. 412, 425 (1987) (remedies "separably authorized" in different "subsection[s]" are distinct).

Indeed, the Commission has had the authority to seek injunctions against securities law violations since the 1930s under the Securities Act and Exchange Act, but had no general authority to obtain civil penalties until Congress in 1984 enacted the Insider Trading Sanctions Act (Pub.L. No. 98–376, 98 Stat. 1264), and in 1990 enacted the Remedies Act (Pub.L No. 101-429, 104 Stat. 931). When it first gave the Commission authority to seek these civil penalties, Congress noted that, before then, the principal remedy available to the Commission was "an injunction against further violations of the securities laws," which serves "only a remedial function and does not penalize a defendant for the illegal conduct." H.R. Rep. 98-355 at *7-*8 (1984); accord H.R. Rep. 100-910 at *11 (1988). In giving the Commission new authority to seek these civil penalties, Congress did not thereby bring all previously authorized equitable relief within the purview of Section 2462.

### 2. Disgorgement of defendants' profits from securities law violations is not subject to Section 2462.

Like injunctive relief, disgorgement of ill-gotten gains is an equitable remedy not covered by Section 2462. While Section 2462 reaches a "fine, penalty, or forfeiture," that list does not include "disgorgement." A district court order of disgorgement requires "a defendant to account for all profits reaped through his securities law violations and to transfer all such money to the court." *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006). Disgorgement is an equitable remedy ancillary to the district court's authority to issue injunctions. See *Porter v. Warner Holding Co.*, 328 U.S. 395, 398-400 (1946); *SEC v. Clark*, 915 F.2d 439, 453 (9th Cir. 1990) ("The SEC's power to obtain injunctive relief has been broadly read to include disgorgement of profits realized from violations of the securities laws."). "Disgorgement plays a central role in the enforcement of the securities laws" by "mak[ing] violations unprofitable," which "deter[s] violations" and thereby "further[s] the Commission's public policy mission of protecting investors and safeguarding the integrity of the markets." *Rind*, 991 F.2d at 1491.

In this case, the Commission seeks only the "ill-gotten gains including prejudgment interest, resulting from the acts or course of conduct" of defendants (D41:33), calculated either by reference to the approximately $300 million total sum defendants fraudulently obtained from investors or the individual amounts each defendant personally retained from their violations (D90:33). For the reasons

discussed below, the district court's unprecedented conclusion that the Commission's requests for disgorgement are subject to Section 2462 is erroneous.

**a. This Court and two other courts of appeals have held that disgorgement is not subject to a statute of limitations; no court of appeals has held otherwise.**

In *SEC v. Calvo*, this Court held that "there is no indication that Congress intended for a statute of limitations to apply to this enforcement action" where "the relief sought is disgorgement." 378 F.3d at 1214, 1218 (citing *Rind*, 991 F.2d 1486). 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. *Id.* at 1218; Brief of the Appellant, *SEC v. Calvo*, 2003 WL 24046067, at *38 (raising Section 2462). Although *Calvo* also stated that no statute of limitations governs the Commission's requests for civil penalties (378 F.3d at 1214, 1218), the government has since acknowledged that Section 2462 applies to civil penalties, and the Commission advanced no argument to the contrary here.[11] But this Court's holding in *Calvo* that no statute of limitations applies to the Commission's requests for disgorgement—the focus of the Court's

[11] See Brief for the United States, *Gabelli v. SEC*, 133 S.Ct. 1216, (2013), 2012 WL 6131633 ("The timeliness" for an "enforcement action in which the Commission seeks monetary penalties" is "governed by 28 U.S.C. 2462.").

statute of limitations determination (*Calvo*, 378 F.3d at 1218)—remains binding precedent that the district court did not follow or even address.

And this Court's conclusion in *Banks* that a restorative injunction is not subject to Section 2462 is equally applicable to disgorgement, because both are equitable remedies that restore the status quo that existed before defendants' violations. In addition to an injunction against future violations, the government in *Banks* also sought a restorative injunction "requir[ing] Banks to restore the wetlands" he had marred to "their undisturbed condition before such unlawful discharge," which this Court held was an equitable claim to which Section 2462 did not apply. 115 F.3d at 918-19. Such a "restorative injunction" is "similar to the purpose of a disgorgement action to restore only 'ill-gotten gains' earned by the defendant while in violation of securities laws." *Telluride*, 146 F.3d at 1247-48 (disgorgement is an "equitable remed[y]"). Indeed, disgorgement is "an equitable adjunct to an injunction" that "restore[s] one's illegal gains." *Porter*, 328 U.S. at 399-400; accord *Zacharias v. SEC*, 569 F.3d 458, 471 (D.C. Cir. 2009) ("disgorgement restores the *status quo ante* by depriving violators of ill-gotten profits").

The district court's conclusion that disgorgement is subject to Section 2462 also conflicts with cases in two other Circuits holding that the Commission's

requests for disgorgement are not subject to a limitations period. In *Rind*—on which this Court relied in *Calvo* (378 F.3d at 1218)—the Ninth Circuit held that "no statute of limitations" applies to the Commission's requests for disgorgement because disgorgement is a type of "equitable relief." 991 F.2d at 1490-93. The D.C. Circuit has also expressly concluded that disgorgement is not a "fine," "penalty," or "forfeiture" under Section 2462:

> The five-year statute of limitations in 28 U.S.C. § 2462 applies to an action for the enforcement of a "fine, penalty, or forfeiture." Does that list include disgorgement? This Court has said no.

*Riordan*, 627 F.3d at 1234 (discussing *Zacharias*, 569 F.3d at 471-72).

**b. Disgorgement is equitable and nonpunitive.**

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

21(d)(5), 15 U.S.C. § 78u(d)(5). Consistent with that authority, this Court has long held that "[d]isgorgement is an equitable remedy intended to prevent unjust enrichment." *SEC v. Monterosso*, 756 F.3d 1326, 1337 (11th Cir. 2014); accord *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 n.6 (11th Cir. 2005) ("Contrary to [defendant]'s assertions, disgorgement is an equitable remedy.") (citing *SEC v. Yun*, 327 F.3d 1263, 1268 n.10 (11th Cir. 2003)); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) ( "Disgorgement is remedial and not punitive" because it merely "deprive[s] the wrongdoer of his ill-gotten gain.").[12]

[12] For these reasons, disgorgement is not a "penalty" or "fine" under Section 2462. Additionally, the D.C. Circuit in *Zacharias*, 569 F.3d at 471-72, correctly concluded that disgorgement is not a "penalty" under Section 2462, and no court of appeals has concluded otherwise. Congress in the securities laws distinguished between disgorgement and civil penalties. *Compare* Exchange Act Section 21(d)(*5*), (authority to seek "equitable relief") *and* Securities Act Section 8A(*e*) (authority to enter "an order requiring accounting and disgorgement") *with* Exchange Act 21(d)(*3*) (authority to seek "a civil penalty") *and* Securities Act Section 8(A)(*g*) ("[a]uthority to impose money penalties"). 15 U.S.C. § 78u(d)(3), (d)(5); 15 U.S.C. § 77h-1(e), (g). See also H.R. Rep. 101-616, at 1383-84 (1990) (explaining that the Commission was given additional authority to obtain civil penalties in part because disgorgement "does not result in any actual economic penalty"). And disgorgement is not a "fine" under Section 2462 because the terms "fine" and "penalty" in that statute "mean precisely the same thing." *In re Landsberg*, 14 F. Cas. 1065, 1067 (E.D. Mich. 1870).

### c. Disgorgement is not a "forfeiture" under Section 2462.

In addition to the foregoing reasons why Section 2462 is inapplicable to disgorgement generally, there are several additional reasons why the district court was wrong in concluding that disgorgement "can truly be regarded as nothing other than a forfeiture" under Section 2462. Op. 15. No other court has concluded that the Commission's requests for disgorgement seek a "forfeiture" under Section 2462. The only court of appeals to consider this precise "forfeiture" issue, the D.C. Circuit, concluded that its "binding" precedents "implicitly reject[]" the argument that "disgorgement is a kind of forfeiture covered by § 2462." *Riordan*, 627 F.3d at 1234 & n.1 (discussing *Zacharias*, 569 F.3d at 471-72).

#### i. Forfeiture can be punitive but disgorgement cannot; in particular, forfeitures include profits earned from forfeited proceeds, but disgorgement cannot include profits on disgorged proceeds.

Congress's use of "forfeiture" in Section 2462 refers to a "punitive" sanction. *Meeker*, 236 U.S. at 423. Forfeitures "historically have been understood, at least in part, as punishment." *Austin v. United States*, 509 U.S. 602, 614, 618, (1993). But as explained (*supra* at 34, 37-38), disgorgement is "not punitive" (*Blatt*, 583 F.2d at 1335), and its purpose is "not to inflict punishment" (*Sheldon*, 309 U.S. at 399). Indeed, by definition, disgorgement cannot be a punishment because a district court lacks discretion to order disgorgement that exceeds the

amount obtained through the wrongdoing, and being required to disgorge only the amount by which one has been unjustly enriched is not punitive. See *Blatt*, 583 F.2d at 1335; *Riordan*, 627 F.3d at 1234.[13]

In particular, 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 unlawful proceeds, *i.e.*, secondary profits or profits on profits. For example, "any profits, appreciation, or income from drug money proceeds is forfeitable—profits from tainted proceeds are still tainted." *United States v. One 1980 Rolls Royce*, 905 F.2d 89, 91 (5th Cir. 1990); see also *United States v. Hawkey*, 148 F.3d 920, 928 (8th Cir. 1998) ("[T]he district court correctly ordered that the motor home be forfeited without regard to any increased value that [defendant] may have added."). Even where a defendant purchased a winning lottery ticket with proceeds of drug trafficking, his winnings were forfeited. *United States v. Betancourt*, 422 F.3d 240 (5th Cir. 2005). This Court

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[13] That the Supreme Court has held that forfeiture is not sufficiently punitive to qualify as a punishment for purposes of the Double Jeopardy Clause does not change the analysis. See*, e.g.*, *United States v. Ursery*, 518 U.S. 267, 290-91 (1996). The Supreme Court also has held that forfeiture can be sufficiently punitive to qualify as punishment for purposes of the Excessive Fines Clause. See *Austin*, 509 U.S. at 614, 618. In any event, "[t]he standards that govern whether imposition of a civil penalty violates the Double Jeopardy Clause are not the same as the standards for determining" whether a penalty exists under a statute reflecting a different policy. *Talley Indus. Inc. v. CIR*, 116 F.3d 382, 388 (9th Cir. 1997).

follows this well-established rule, holding that where a defendant had to forfeit a building used for racketeering, he was also required to forfeit "any increase in the property's value during" the eight years between the start of the racketeering activity and when the building was sold. *United States v. Reed*, 924 F.2d 1014, 1017 (11th Cir. 1991).[14]

By contrast, *Blatt* holds that a defendant in a Commission action cannot be ordered to disgorge any "income earned on ill-gotten profits." 583 F.2d at 1335. *Blatt* followed *Manor Nursing*, in which the Second Circuit held that a court had discretion to order a defendant to disgorge "proceeds received in connection with" fraudulent securities sales, but also held that, where the defendant subsequently earned additional income on the proceeds from the securities sales, the court lacked discretion to order disgorgement of the "income *earned on such proceeds*." *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972) (original emphasis). See generally L. Loss, J. Seligman & T. Paredes, *Securities Regulation* § 9.a (2014) (discussing *Blatt* and *Manor Nursing*, and explaining that courts can require

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[14] See generally, *United States Department of Justice Manual for Federal Prosecutors*, DOJML Comment 9-110.000C vol.8 pp. 202-203 (5th ed. 2009, 2014 supplement) (explaining that the government obtains "forfeiture of assets that have appreciated" because "the appreciation represents additional proceeds received by the defendant, which may be included in the total amount of proceeds subject to forfeiture," and collecting cases).

disgorgement of fraud proceeds and interest thereon, not "profits earned on these proceeds").[15]

This distinction regarding when secondary profits are available explains why there is an express time limit on forfeitures but not on disgorgement. It is sensible to include an express limit on the time after a violation that profits on forfeited assets can also be forfeited, as such profits from subsequent enterprises could otherwise multiply without bound. But that rationale does not warrant imposing a time limit on disgorgement, because under *Blatt* a defendant cannot be ordered to disgorge more than the value of the initial proceeds of his wrongdoing, even where he subsequently obtains profits from those proceeds.

[15] Prejudgment interest on ill-gotten gains does not constitute profits on those ill-gotten gains. Prejudgment interest is only the "time value of money" that was initially obtained from the securities law violation. *SEC v. Koenig*, 557 F.3d 736, 745 (7th Cir. 2009). This Court accordingly distinguishes between "profits and interest wrongfully obtained" that a defendant can be ordered to disgorge and "income earned on ill-gotten profits" that he cannot be ordered to disgorge. *Blatt*, 583 F.2d at 1335. And unlike forfeiture, a defendant pays prejudgment interest at a set rate even if his actual profits on proceeds exceed that rate. In any event, prejudgment interest is not mandatory; a district court has equitable discretion to order disgorgement without prejudgment interest. See *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1476-77 (2d Cir. 1996).

**ii. Other significant differences demonstrate that "forfeiture" under Section 2462 does not include disgorgement.**

When Congress uses a legal term of art like "forfeiture," courts interpret the term "in light of [its] history, and presume Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment." *Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 275 (1994); see *Medical Transp. Mgmt. Corp. v. IRS*, 506 F.3d 1364, 1368 (11th Cir. 2007) (applying this rule of statutory construction). The key language in Section 2462 traces back to the 18th century (see *supra* at 23), and historically, forfeiture and disgorgement are distinct. The following differences—in addition to forfeiture's punitive and disgorgement's nonpunitive nature—demonstrate that Congress did not in Section 2462 intend "forfeiture" to include disgorgement:

- Forfeiture arose from admiralty, customs, and criminal law. See *United States v. Bajakajian*, 524 U.S. 321, 329-32 & n.7 (1998); Jimmy Gurulé et al., *The Law of Asset Forfeiture* § 1-2(b), (c) at 10-15 (2d ed. 2004). But disgorgement derives from "the ancient remedies of accounting, constructive trust, and restitution" that require "wrongdoers to 'disgorge'—*i.e.*, account for and surrender— their ill-gotten gains." *Cavanagh*, 445 F.3d at 119-20.

● Historically, the government brought forfeiture actions in a court of law or admiralty, not a court of equity. See *C. J. Hendry Co. v. Moore*, 318 U.S. 133, 137-39 (1943); *The Sarah*, 21 U.S. 391, 394-95 (1823). Disgorgement actions, in contrast, were brought in a court of equity. See *Cavanagh*, 445 F.3d at 117-20; *Sheldon*, 309 U.S. at 399.

● Forfeiture is "mandatory, and a creature of statute." *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3270 (U.S. No. 14-471, Oct. 20, 2014); see, *e.g.*, *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (Congress "express[ed] its intent that forfeiture be mandatory in cases where the statute applied"). In contrast, a "district court's discretion in determining disgorgement is not confined by precise contours of statutory language, but rather serves the broader purposes of equity." *Contorinis*, 743 F.3d at 307. Such "flexibility" and lack of "mechanical rules" is why "[t]raditionally * * * statutes of limitation are not controlling measures of equitable relief." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946).

● A historical and procedural difference that persists today is that "[c]ivil forfeiture acts *in rem* against the seized property itself" (*United States v. Fleet*, 498 F.3d 1225, 1231 (11th Cir. 2007)), while civil disgorgement proceedings act *in personam* against the defendant (*SEC v. Ross*, 504 F.3d 1130, 1133 (9th Cir. 2007)).

- Forfeitures of contraband—such as illegal drugs—and forfeitures of "instrumentalities," *i.e.*, property used in the commission of wrongdoing—such as an apartment used to sell illegal drugs—predominate in forfeiture actions. See *Austin*, 509 U.S. 602; *Bajakajian*, 524 U.S. 321. But disgorgement is "an equitable obligation to return a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset." *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000).

**3. A finding that defendants violated the securities laws is not a "penalty" under Section 2462.**

The district court erroneously concluded that by requesting that the court "[d]eclare, determine, and find that Defendants Clark, Schwarz, Coleman, Graham, and Stokes have committed the violations of the federal securities laws alleged in this Complaint" (D41:32), the Commission is seeking a "penalty" subject to Section 2462. Op. 15. The Commission seeks a finding of securities law violations because it serves two purposes. A finding of a violation is (1) an equitable remedy in the form of a determination of liability, and (2) a predicate for the other remedies sought in the case. In neither way is a finding of a violation punitive or intended to punish.

The first of the two purposes that seeking a finding of violations can serve is to ensure an independent equitable determination of liability that would exist even if a court were to deny all other remedies sought, or if they otherwise become

unavailable. Courts have recognized that in such circumstances, the Commission would remain "entitled" to an "adjudication that [defendant] had violated the law." *United States v. Parke, Davis & Co.*, 365 U.S. 125, 125-26, 81 S. Ct. 433, 434 (1961); see, *e.g.*, *SEC v. Antoine Silver Mines, Ltd.*, 299 F. Supp. 414, 417-18 & n.7 (N.D. Il. 1968).

Second, the Commission seeks a finding of a securities law violation as a predicate for other remedies, including a civil penalty that is subject to Section 2462 as well as equitable relief (disgorgement and an injunction) that is not. In a litigated action, a finding of a securities law violation is necessary before a defendant can be ordered to disgorge "the profits that he had realized through violation of the" securities laws. *Blatt*, 583 F.2d at 1327, 1335; see also *First City Fin.*, 890 F.2d at 1231-32 (disgorgement amount must be a "reasonable approximation of profits causally connected to the violation"). And the Commission supports its claim for injunctive relief by showing "previous violations of federal securities laws." *Calvo*, 378 F.3d at 1216. In the same way, although the Commission no longer seeks civil penalties here, in other cases a determination to award civil penalties is predicated on a finding of a securities law violation. See Securities Act Section 20(d)(1), 15 U.S.C. § 77t(d)(1); Exchange Act Section 21(d)(3), 15 U.S.C. § 78u(d)(3).

The district court erroneously reasoned that, no matter its purpose, a finding that defendants violated the securities laws would be a "penalty" because it would "label defendants wrongdoers." Op. 15. The quoted words are a partial quotation from the Supreme Court's decision in *Gabelli*, 133 S.Ct. at 1223. Contrary to the district court's reasoning, *Gabelli* does not conclude that any remedy that labels defendants wrongdoers is a penalty. *Gabelli* explains that to be a civil penalty under Section 2462, the remedy must also be "intended to punish":

> 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 <u>intended to punish</u>, <u>and</u> label defendants wrongdoers.

133 S.Ct. at 1223 (citing *Meeker*, 236 U.S. at 423 (the term "penalty" in Section 2462 "refer[s] to something imposed in a punitive way")). Furthermore, while *Gabelli* observed that being labeled a wrongdoer is one <u>consequence</u> of a civil penalty, that observation does not mean that being labeled a wrongdoer <u>constitutes</u> a civil penalty.

Whether serving as a separate determination of liability or as a predicate for another remedy, a finding of a violation is not a "penalty" because it is not "intended to punish" the defendant. *Gabelli*, 133 S.Ct. at 1223. Where the finding of a violation acts as an independent remedy because other types of relief are unavailable, it is "in effect an equitable decree" that represents "milder relief" than

an injunction. E. Borchard, *Declaratory Judgments* 428-30 (2d ed. 1941). In such circumstances, the Commission can obtain a finding that a defendant violated the securities laws even where it is not "specifically asking for declaratory relief" because courts have "discretionary power" to "enabl[e] an issue to be determined." *Id.* Even where the Commission expressly asks for declaratory relief, such relief is "equitable." *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 300 (1943); accord *Brett v. Jefferson County, Ga.*, 123 F.3d 1429, 1435 n.14 (11th Cir. 1997) ("declaratory relief" is a "type[] of relief traditionally available at equity"); *Meltzer v. Bd. of Public Instr. Of Orange County*, 548 F.2d 559, 568 n.15 (5th Cir. 1977) (declaratory relief is a "milder form of relief than an injunction") (quoting *Steffel v. Thompson*, 415 U.S. 452, 471 (1974)).

Nor is a finding of a violation a "penalty" that is intended to punish the defendant where the Commission's action seeks the finding as a predicate for other remedies sought in that action. The finding's nonpunitive nature is self-evident where it is a predicate for equitable relief; to conclude otherwise would eliminate any distinction between equitable and punitive relief under Section 2462 because the government's requests for even injunctive relief are predicated on a finding of past wrongdoing. See, *e.g.*, *Banks*, 115 F.3d at 917. And even where the Commission seeks a finding of a violation as a predicate for a civil penalty, that does not render the finding itself a "penalty." Courts routinely distinguish between

finding a violation and imposing a penalty. See, *e.g.*, *McGlory v. United States*, 763 F.2d 309, 311 (7th Cir. 1985) ("This court has distinguished between challenges to the finding of violation and challenges to the penalty, given a violation."); *R&W Technical Svcs. Ltd. v. CFTC*, 205 F.3d 165, 168 (5th Cir. 2000) ("We affirm the finding of liability, but find that the civil monetary penalty imposed was not reasonable in light of the violations at issue."). And Section 2462 by its terms reaches the imposition of a "fine, penalty, or forfeiture," not a predicate finding of a violation that supports such relief.

### C. The Supreme Court's decision in *Gabelli* does not address the equitable remedies at issue here or transform any of them into a "fine, penalty, or forfeiture" under Section 2462.

The district court's suggestion that the Supreme Court's decision in *Gabelli v. SEC* supported its conclusion that "[p]enalties, pecuniary or otherwise, are at the heart of all forms of relief sought by the SEC in this case" is erroneous. Op. 15.

First, *Gabelli* concerned the meaning of "accru[e]" in Section 2462, not the meaning of "penalty." In *Gabelli*, the Commission brought an enforcement action alleging that the defendants aided and abetted securities fraud, and requested injunctive relief, disgorgement, and a civil penalty. 133 S.Ct. at 1219-20. The defendants moved to dismiss the Commission's claim for civil penalties, contending it was untimely under Section 2462 because it was filed more than "five years from the date when the claim first accrued." *Id.* (quoting Section

2462). The Commission argued that its civil penalty claim was timely because the word "accrued" in Section 2462 refers to the time when the fraud is discovered. *Id.* at 1221. The Supreme Court rejected that argument, holding that a claim "accrues" under Section 2462 when the fraud occurs, not when it is discovered. *Id.* at 1220.

Second, the Supreme Court in *Gabelli* expressly noted that injunctive relief and disgorgement were not at issue in that case: "The SEC also sought injunctive relief and disgorgement, claims the District Court found timely on the ground that they were not subject to § 2462. Those issues are not before us." *Gabelli*, 133 S.Ct. at 1220 n.1. While *Gabelli* would be applicable to the Commission's claims for civil penalties under Securities Act Section 20(d) and Exchange Act Section 21(d)(3) (D41:33), the Commission is not appealing the district court's dismissal of those claims (Op. 24-25). See also *supra* at 47, discussing *Gabelli*'s inapplicability to a finding of securities law violations.

Third, no other court has construed *Gabelli* as applicable to the government's requests for an injunction, disgorgement, or findings on which they are based. When *Gabelli* itself was remanded, the Second Circuit concluded that the Supreme Court's decision did not affect the district court's earlier ruling there that the Commission could pursue claims for injunctive relief and disgorgement. *See SEC v. Gabelli*, 518 Fed.Appx. 32 (2d Cir. 2013), *adhering in part, and*

*reversing in part, SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011). Likewise, the Second Circuit vacated the civil penalty in another Commission case in light of *Gabelli*, but affirmed injunctive relief and disgorgement. *See SEC v. Pentagon Capital Mgmt.*, 725 F.3d 279, 285-88 (2d Cir. 2013). Numerous district courts, including in this Circuit, have correctly concluded that *Gabelli* does not make government requests for injunctions or disgorgement subject to Section 2462.[16] These courts' consistent rulings are strong support for the Commission's argument

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[16] See *SEC v. Funinaga*, No 13-cv-1658 (JCM), 2014 WL 4977334, at *6 (D. Nev. Oct. 3, 2014) ("*Gabelli* involved an SEC civil enforcement proceeding for penalties, not disgorgement"); *SEC v. LeCroy*, No. 09-cv-2238 (AKK), 2014 WL 4403147 (N.D. Ala. Sept. 5, 2014) ("this court declines to expand *Gabelli* beyond its limited holding"); *SEC v. Geswein*, 2 F. Supp. 3d 1074, 1084 (N.D. Ohio 2014) (injunction and disgorgement "were not before the Supreme Court in *Gabelli*"); *SEC v. Amerindo Invest. Advisors, Inc.*, No. 05-cv-5231 (RJS), 2014 WL 405339, at *9 (S.D.N.Y. Feb. 3, 2014) ("[T]he statute of limitations at issue in *Gabelli* applies only to civil penalties, and does not prevent a finding of liability or an awarding of other kinds of remedies."); *SEC v. Syndicated Food Serv. Intern., Inc.*, No. 04-cv-1303 (NGG), 2014 WL 1311442, at *25 (E.D.N.Y. March 28, 2014) ("The Supreme Court in *Gabelli* noted that unlike claims for injunctive relief and disgorgement, claims for civil penalties are subject to the five-year statute of limitations in 28 U.S.C. § 2462"); *Donell v. Mojtahedian*, 976 F. Supp. 2d 1183, 1189 (C.D. Cal. 2013) (distinguishing *Gabelli* because an action for disgorgement "does not involve civil penalties"); *CFTC v. Reisinger*, No. 11-cv-8567, 2013 WL 3791691, at *8 (N.D. Ill. July 18, 2013) (Section 2462 and *Gabelli* "appl[y] only to suits seeking civil penalties," not a request to "issue injunctions and award other types of equitable relief, such as restitution or disgorgement"); *SEC v. Wyly*, 950 F. Supp. 2d 547, 558-59 (S.D.N.Y. 2013) (Section 2462 and *Gabelli* do not apply to injunctions against violating the securities laws).

that the equitable relief sought here is not subject to Section 2462 because it is not "intended to punish." *Gabelli*, 133 S. Ct. at 1223.

### D. The remoteness in time of a defendant's violation is a factor that district courts can consider when fashioning equitable relief.

The district court concluded that not applying Section 2462 to the Commission's claims here would lead to relief for stale claims. Op. 13-14. While that conclusion, even if correct, would not justify an otherwise unwarranted interpretation of Section 2462, the district court's conclusion is not correct. The court reached that erroneous conclusion by relying on the *Gabelli* Court's emphasis on the "importance of time limits on penalty actions," even though for all the reasons discussed above the injunctive relief and disgorgement the Commission is seeking (as well as the findings of violations) are not penalties. Op. 13-14 (quoting *Gabelli*, 133 S.Ct. at 1223).

Compared to the express civil penalties sought in *Gabelli*, the Commission's requests for an injunction against securities law violations, disgorgement of ill-gotten gains, and a finding of violations "will not open the door to the prosecution of stale claims" because "[a] court can and should consider the remoteness of the defendant's past violations in deciding whether to grant the requested equitable relief." *Rind*, 991 F.2d at 1492. Whether a defendant has discontinued his violations for a length of time is one of the factors a district court can consider in determining the appropriateness of granting equitable relief. See

*United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953); *Continental Tobacco*, 463 F.2d at 162; *supra* at 28-29. This "flexibility" to consider the remoteness of time as well as a defendant's cessation of violations, as compared to the mandatory rules governing actions for civil penalties and forfeitures, is a reason why "statutes of limitation are not controlling measures of equitable relief." *Holmberg*, 327 U.S. at 396. In any event, it is at the relief stage of a case—not the start of a case—that the district court ultimately determines, based on the demonstrated facts and established liability, whether to exercise its equitable discretion to limit the relief the Commission has requested. Thus it was error for the district court to foreclose the possibility of such relief when it did.

## II. The district court erred in holding that Section 2462 limits courts' subject-matter jurisdiction.

The district court erred in holding *sua sponte* that the statute of limitations in Section 2462 is not an affirmative defense, but rather limits the court's jurisdiction over this action. To our knowledge, no other court in Section 2462's more than 200-year history has held it to be jurisdictional, and for good reason: Section 2462 provides a typical affirmative defense and is unconnected to provisions that expressly grant jurisdiction. Turning Section 2462's affirmative defense into a jurisdictional mandate would undermine not only the enforcement actions brought by the SEC, but also the numerous actions brought by other federal agencies that are subject to Section 2462's catch-all statute of limitations.

### A. The Section 2462 statute of limitations is an affirmative defense that does not limit the jurisdiction granted by the securities laws.

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

#### 1. Section 2462 is a typical statute of limitations that is not jurisdictional.

Section 2462—titled "Time for commencing proceedings"—is a statute of limitations, and statutes of limitations "ordinarily are not jurisdictional." *Sebelius*, 133 S. Ct. at 824-25. "[T]he law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver," in contrast to statutes that are

"jurisdictional and not susceptible" to equitable tolling or waiver. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008). This Court in *Banks* correctly concluded that Section 2462 provides an affirmative "statute of limitations defense" that can be "waived." 115 F.3d at 918 n.4; accord *Canady v. SEC*, 230 F.3d 362, 364-65 (D.C. Cir. 2000) (defendant's reliance on Section 2462 is "an affirmative defense and is waived if a party does not raise it"); *United States v. Core Labs, Inc.*, 759 F.2d 480, 484 (5th Cir. 1985) (Section 2462 is subject to equitable tolling). Indeed, although Section 2462's antecedents date back to the 1790s (*supra* at 23), no court appears to have ever before held it to be jurisdictional. It is notable that while the Supreme Court in *Gabelli* determined that the Commission's requests for civil penalties were untimely under Section 2462, at no point did the Supreme Court or the Second Circuit on remand suggest that this determination was "jurisdictional" in nature. 133 S.Ct. at 1224; 518 Fed.Appx. at 32.

**2. The federal securities laws provide subject-matter jurisdiction that Section 2462 does not impair.**

Further proof that Section 2462 is not jurisdictional is that it is "located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over" the Commission's securities law claims. *Reed*, 559 U.S. at 164; see also *Gonzalez v. Thaler*, 132 S. Ct. 641, 651 (2012) ("In characterizing certain requirements as nonjurisdictional," the Court has "observed their separation from

jurisdictional provisions."). In *Reed*, the Supreme Court explained that a requirement for copyright infringement actions (17 U.S.C. § 411(a)) was "not located in a jurisdiction-granting provision" and thus did not limit the "jurisdiction" provided by those "separate" provisions (28 U.S.C. §§ 1331, 1338(a)). 559 U.S. at 164-66.

Likewise, Section 2462 is not part of the securities laws that expressly provide courts subject-matter jurisdiction over Commission actions. Section 2462 is not labeled "jurisdictional," and it is located in the "Particular Proceedings" Part of Title 28 of the U.S. Code dealing generally with the "Judiciary and Judicial Procedure," not the "Jurisdiction and Venue" Part or the "District Courts; Jurisdiction" chapter. See 28 U.S.C. § 2462; Title 28, Parts IV, VI, chs. 85, 163. Moreover, Section 2462 is not located near, nor is it a part of, the securities laws under Title 15 of the U.S. Code that expressly grant courts subject-matter jurisdiction over the Commission's claims here. The Securities Act provides that "district courts * * * shall have jurisdiction of offenses and violations" and over "all suits in equity and actions at law" under the Act. Section 22(a), 15 U.S.C. § 77v(a). The Exchange Act likewise provides that district courts "shall have exclusive jurisdiction" over violations and suits. Section 27(a), 15 U.S.C. § 78aa(a). The securities laws also expressly grant district courts jurisdiction to award the relief the Commission sought here: "jurisdiction to issue" injunctions

(Exchange Act Section 21(e), see also Securities Act 20(b)); authority to "grant" disgorgement (Exchange Act 21(d)(5)); and "jurisdiction to impose" civil penalties (Securities Act Section 20(d)(1), Exchange Act 21(d)(3)(A)). See *supra* at 2 ("Jurisdictional Statement").

**B. The district court's contrary jurisdictional analysis is erroneous.**

The district court reasoned that Section 2462 is jurisdictional because it employs the phrase "shall not be entertained," which the court construed as speaking in mandatory terms to the power of the court. Op. 11. But "that the statute is written in mandatory terms" is not determinative; the "Supreme Court has rejected the idea that all mandatory prescriptions, however emphatic, are properly typed jurisdictional." *Avila-Santoyo v. U.S. Att'y Gen.*, 713 F.3d 1357, 1361 (11th Cir. 2013) (citing *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1205 (2011)). The district court failed to address factors that demonstrate Section 2462 is not jurisdictional, including this Court's treatment of Section 2462 as an affirmative defense in *Banks* and the securities law provisions that expressly provide subject-matter jurisdiction in this case.

The district court also relied on inapposite cases construing the rules that govern petitions for writs of habeas corpus. See Op. at 11-12 (citing *Swain v. Pressley*, 430 U.S. 372 (1977)); see also *Williams v. Warden, Federal Bureau of Prisons*, 713 F.3d 1332, 1339 (11th Cir. 2013). Unlike Section 2462, the habeas

provisions determined to be jurisdictional are not statutes of limitation that provide an affirmative defense, and do not even express a time limit. Rather, the habeas provisions state that a prisoner's petition "shall not be entertained" where the prisoner failed to apply to the court that sentenced him, or where such court has denied him relief. See *Williams*, 713 F.3d at 1339 (construing 28 U.S.C. § 2255(e)); *Swain*, 430 U.S. at 374-76 & n.2, 5 (construing D.C. Code § 23-110(g) (1973)). And whereas Section 2462 is located in a provision that is separate from securities law provisions that here grant subject-matter jurisdiction, these habeas provisions are "housed in a section of the statute that concerns jurisdiction." *Williams*, 713 F.3d at 1339-40 (28 U.S.C. § 2255(e) concerns jurisdiction under 28 U.S.C. § 2241); see also *Swain*, 430 U.S. at 374-79 & n.4, 12 ("Congress enacted [D.C. Code] s 23-110(g) as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 608; that Act created a new local court system and transferred in its entirety the Federal District Court's responsibility for processing local litigation to the Superior Court of the District of Columbia.").

**C. The district court's error is detrimental.**

"Branding a rule as going to a court's subject-matter jurisdiction" is not merely a "semantic" distinction but "one of considerable practical importance for judges and litigants." *Henderson*, 131 S.Ct. at 1202; accord *Corbett v. Transp. Sec. Admin.*, 767 F.3d 1171, 1177 (11th Cir. 2014). The district court's conclusion

that Section 2462 is jurisdictional has "drastic" (*Henderson*, 131 S.Ct. at 1202) consequences not just for the Commission, but also for different federal agencies that bring actions that are governed by Section 2462's catch-all provisions. For example, Section 2462 is an affirmative defense that defendants have to plead, and for which defendants have the burden of production and persuasion. But the district court's ruling that Section 2462 is jurisdictional improperly shifts these burdens to the government. In addition, "[w]here a time limit is jurisdictional," courts have held that it cannot "be tolled or extended on account of fraud" by the defendant. *Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1040 (D.C. Cir. 1986). But the government should be permitted to invoke the fraudulent concealment doctrine where the defendant takes steps beyond the challenged conduct itself to conceal that conduct from the government. See *Core*, 759 F.2d at 484; cf. *Gabelli*, 133 S. Ct. at 1220 n.2 (noting that the application of the fraudulent concealment doctrine to Section 2462 is "not before us").

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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December 2014

# CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,501 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-Point Times New Roman.

/s/ Theodore J. Weiman
THEODORE J. WEIMAN

December 4, 2014

# CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on December 4, 2014. I further certify that on the same date I have caused seven copies of the foregoing brief to be delivered to the Clerk of the Court.

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December 4, 2014