No. 12-____

IN THE

Supreme Court of the United States

MARC J. GABELLI and BRUCE ALPERT,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Edward A. McDonald
Kathleen N. Massey
Joshua I. Sherman
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036
212-698-3500

Lewis J. Liman
Counsel of Record
Katherine Wilson-Milne
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
212-225-2000

Counsel for Petitioners

April 20, 2012

QUESTION PRESENTED

Section 2462 of Title 28 of the United States Code provides that "except as otherwise provided by Act of Congress" *any* penalty action brought by the government must be "commenced within five years from the date when the claims first *accrued*." (emphasis added). This Court has explained that "[i]n common parlance a right accrues when it comes into existence." *United States v. Lindsay*, 346 U.S. 568, 569 (1954).

Where Congress has not enacted a separate controlling provision, does the government's claim first accrue for purposes of applying the five-year limitations period under 28 U.S.C. § 2462 when the government can first bring an action for a penalty?

LIST OF PARTIES

The parties to the proceedings are listed in the caption of the decision of the United States Court of Appeals for the Second Circuit. Pet. App. 1a.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE PETITION	9
I. CIRCUIT COURTS ARE SPLIT ON THE MEANING OF "ACCRUE" UNDER SECTION 2462	13
II. THE DECISION OF THE COURT OF APPEALS MISAPPREHENDS THE DECISIONS OF THIS COURT AND RAISES ISSUES OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT	19

Page

III. THE QUESTION WHETHER A DISCOVERY RULE APPLIES TO SECTION 2462 IS OF SWEEPING SCOPE AND IMPORTANCE WARRANTING REVIEW BY THIS COURT............ 27

CONCLUSION..................................... 36

APPENDICES

Opinion of the United States Court of Appeals for the Second Circuit decided August 1, 2011.......................1a-23a

Mandate Order of the United States Court of Appeals for the Second Circuit filed November 30, 2011.........24a-25a

Memorandum and Order of the United States District Court for the Southern District of New York filed March 17, 2010..........26a-51a

Order of the United States Court of Appeals for the Second Circuit filed November 22, 2011...................52a-53a

TABLE OF AUTHORITIES

Page(s)

Rules and Statutes

17 C.F.R. § 240.10b-5 28
7 U.S.C. § 6c(b) 35
15 U.S.C. § 77m 3
15 U.S.C. § 77o 35
15 U.S.C. §77q 28
15 U.S.C. § 77q(a) 35
15 U.S.C. § 77www(a) 4
15 U.S.C. § 78i(f) 5
15 U.S.C. § 78j(b) 35
15 U.S.C. § 78m 35
15 U.S.C. § 78r 5
15 U.S.C. § 78t(a) 35
15 U.S.C. § 78t(e) 35
15 U.S.C. § 80b-6(1) and (2) 2
15 U.S.C. § 80b-7 35
26 U.S.C. § 6700 35
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1658 .... 3, 21
28 U.S.C. § 1658(b) 24
28 U.S.C. § 2462 .... *passim*
40 U.S.C. § 123 35

Page(s)

Cases

3M Co. v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) ....*passim*

Adams v. Woods,
6 U.S. (2 Cranch) 336 (1805)
(Marshall, C.J.) 29

Ainbinder v. Kelleher,
No. 92 Civ. 7315 (SS), 1997 WL 420279
(S.D.N.Y. July 25, 1997) 31

Astra USA, Inc. v. Santa Clara Cnty.,
131 S. Ct. 1342 (2011)....................... 34

Bailey v. Glover,
88 U.S. 342 (1874).....................22, 23-24, 31

Bank of the U.S. v. Daniel,
37 U.S. (12 Pet.) 32 (1838) 20

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975).......................... 21

BP Am. Prod. Co. v. Burton,
549 U.S. 84 (2006)............................ 30

Cent. Bank of Denver, N.A. v.
First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994).......................... 21

Credit Suisse Securities (USA) LLC v.
Simmonds,
566 U.S. ___, No. 10-1261, Slip Op.
(Mar. 26, 2012) ....*passim*

Page(s)

Dommert v. Raymond James Fin. Servs., Inc.,
No. 1:06-CV-102, 2009 WL 275440
(E.D. Tex. Feb. 3, 2009) 22

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 21

Evans v. Gee,
36 U.S. (11 Pet.) 80 (1837) 20

Exploration Co. v. United States,
247 U.S. 435 (1918) 24

FEC v. Williams,
104 F.3d 237 (9th Cir. 1996) 13, 17

Hennegan v. Pacifico Creative Serv. Inc.,
787 F.2d 1299 (9th Cir. 1986) 32

Holmberg v. Armbrecht,
327 U.S. 392 (1946) 31

In re Linerboard Antitrust Litig.
Winoff Indus., Inc.,
305 F.3d 145 (3d Cir. 2002),
cert. denied, 538 U.S. 977 (2003) 32

Janus Capital Grp., Inc. v.
First Derivative Traders,
131 S. Ct. 2296 (2011) 34

Jay E. Hayden Found. v. First Neighbor
Bank, N.A.,
610 F.3d 382 (7th Cir. 2010) 32

Page(s)

Kahn v. Kohlberg, Kravis, Roberts & Co.,
970 F.2d 1030 (2d Cir. 1992) 21-22

Kleinman v. Oak Assocs., Ltd.,
No. 5:07-CV-0698, 2007 WL 2071968
(N.D. Ohio July 16, 2007) 22

Lancashire Shipping Co. v. Durning,
98 F.2d 751 (2d Cir. 1938)................... 13

Merck & Co. v. Reynolds,
130 S. Ct. 1784 (2010) 22, 24, 25, 30

Meredith v. United States,
38 U.S. (13 Pet.) 486 (1839)................. 20

New York v. Hendrickson Bros., Inc.,
840 F.2d 1065 (2d Cir. 1988) 32

Order of R.R. Telegraphers v. Ry. Express Agency,
321 U.S. 342 (1944) 30

Phoenix Four, Inc. v. Strategic Res. Corp.,
No. 05 Civ. 4837 (HB), 2006 WL 399396
(S.D.N.Y. Feb. 21, 2006) 22

Pinter v. Dahl,
486 U.S. 622 (1988) 21

Purdy v. Zeldes,
337 F.3d 253 (2d Cir. 2003) 8

SEC v. Capital Gains Research Bureau, Inc.,
375 U.S. 180 (1963) 28

Page(s)

SEC v. Jones,
476 F. Supp. 2d 374 (S.D.N.Y. 2007)...... 22

SEC v. Koenig,
557 F.3d 736 (7th Cir. 2009) 11, 14, 18

SEC v. Miller,
No. Civ.A. 1:04CV1655-JEC,
2006 WL 2189697
(N.D. Ga. July 31, 2006) 11

Smith v. United States,
143 F.2d 228 (9th Cir. 1944)................ 13

Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 21, 34

The Ng Ka Py Cases,
24 F.2d 772, 774 (9th Cir. 1928) 13

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) 21

Trawinski v. United Techs.,
313 F.3d 1295 (11th Cir. 2002)............ 13

TRW, Inc. v. Andrews,
534 U.S. 19 (2001)............................. 30, 34

United States v. Ancorp Nat'l Servs., Inc.,
516 F.2d 198 (2d Cir. 1975) 13

United States v. Athlone Indus., Inc.,
746 F.2d 977 (3d Cir. 1984) 13

Page(s)

United States v. Brockamp,
519 U.S. 347 (1997) 22

United States v. Core Labs., Inc.,
759 F.2d 480 (5th Cir. 1985) 13, 15-16, 29

United States v. Home Concrete & Supply, LLC,
132 S.Ct. 71 (2011)........................... 30

United States v. Johnson,
529 U.S. 53 (2000)............................. 22

United States v. Lindsay,
346 U.S. 568 (1954) ....i, 19-20

United States v. Maillard,
26 F. Cas. 1140 (S.D.N.Y. 1871) 13

United States v. Mayo,
26 F. Cas. 1230 (C.C.D. Mass. 1813)...... 29

United States v. Midwest Generation, LLC,
781 F. Supp. 2d 677 (N.D. Ill. 2011) 14

United States v. Rutherford Oil Corp.,
756 F. Supp. 2d 782 (S.D. Tex. 2010)..... 14

United States v. Witherspoon,
211 F.2d 858 (6th Cir. 1954)............13, 17-18

W. Pac. Fisheries, Inc. v. S.S. President Grant,
730 F.2d 1280 (9th Cir. 1984) 13

Wilcox v. Plummer,
29 U.S. (4 Pet.) 172 (1830) 20

Page(s)

William A. Graham Co. v. Haughey, 646 F.3d 138 (3d Cir. 2011) 15, 25, 32-33

Other Authorities

1 AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 142 (1886)............................ 20

1 BOUBIER'S LAW DICTIONARY 66 (1897)......... 20

AMERICAN HERITAGE DICTIONARY 12 (3d ed. 1994).................................... 20

BLACK'S LAW DICTIONARY 23 (9th ed. 2009) .. 20

H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 274 (3d ed. 1901).................................. 34

Merriam-Webster.com, *available at* http://www.merriam-webster.com 20

In re Flanagan, Release No. 160, 2000 WL 98210 (SEC Jan. 31, 2000).......................... 7

Offers of Exch. Involving Registered Open-End Inv. Cos. & Unit Inv. Trusts, Release No. 16504, 1988 WL 1000029 (SEC July 29, 1988)... 7

PETITION FOR A WRIT OF CERTIORARI

Petitioners Marc J. Gabelli and Bruce N. Alpert respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit permitting the United States Securities and Exchange Commission ("SEC") to seek penalties against Petitioners for conduct that was not fraudulently concealed and that had ceased more than five years before the SEC brought suit. In the alternative, Petitioners respectfully request the Court grant this petition for certiorari, vacate the decision below and remand the case to the court of appeals for reconsideration in light of this Court's recent decision in *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. ___, No. 10-1261, slip op. (Mar. 26, 2012).

OPINIONS BELOW

The opinion of the court of appeals is reported at 653 F.3d 49. Pet. App. 1a. The order of the court of appeals denying the petition for rehearing and rehearing *en banc* (Pet. App. 52a) is unreported. The mandate of the court of appeals has not been issued, pending the filing of this Petition. Pet. App. 24a. The opinion of the district court (Pet. App. 26a) is unreported.

JURISDICTION

The decision of the court of appeals was issued on August 1, 2011. A petition for rehearing and rehearing *en banc* was denied on November 22, 2011. Pet. App. 52a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2462 of Title 28 of the United States Code provides:

> 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.

Section 206 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6(1) and (2), provides in relevant part:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> 1. to employ any device, scheme, or artifice to defraud any client or prospective client; [or]

> 2. to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client . . .

The Sarbanes-Oxley Act of 2002, 28 U.S.C. § 1658, provides:

> (a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.
>
> (b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c (a)(47)), may be brought not later than the earlier of—
>
> > (1) 2 years after the discovery of the facts constituting the violation; or
> >
> > (2) 5 years after such violation.

Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m, provides:

> No action shall be maintained to enforce any liability created under section 77k or 77l(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exer-

> cise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(2) of this title more than three years after the sale.

The Securities Act, 15 U.S.C. § 77www(a), provides in relevant part:

> Any person who shall make or cause to be made any statement in any application, report, or document filed with the Commission pursuant to any provisions of this subchapter, or any rule, regulation, or order thereunder, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or who shall omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall be liable . . . . No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

Section 9(f) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(f), provides in relevant part:

> Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. . . . No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

Section 18(c) of the Exchange Act of 1934, 15 U.S.C. § 78r, provides in relevant part:

> (c) Period of limitations
>
> No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

STATEMENT OF THE CASE

This case raises an important and recurring question of statutory construction regarding the accrual of claims governed by 28 U.S.C. § 2462, the statute of limitations applicable to all civil penalty actions brought by the government.

In April 2008, the SEC filed a civil complaint in the United States District Court for the Southern District of New York, asserting against Petitioner Gabelli claims under the Investment Advisers Act ("IAA") and against Petitioner Alpert claims under the IAA as well as under the Securities Act and Exchange Act. On June 15, 2010, the SEC filed an amended complaint asserting the same claims (the "Complaint").

The Complaint sought penalties against Petitioners for conduct that had ended more than five years before the SEC brought suit and of which the SEC had been aware for more than five years before it brought suit. In brief, the Complaint alleged that Gabelli Funds, LLC ("Gabelli Funds"), an investment adviser under the IAA, negligently or intentionally violated Section 206 of the IAA by accepting a small investment in a Gabelli hedge fund in exchange for permitting a customer to engage in allegedly harmful trading in a mutual fund it managed (Gabelli Global Growth Fund or "GGGF"), without disclosing that investment to Gabelli Funds' board of directors. Pet. App. 8a. The Complaint charged Gabelli and Alpert—respectively a GGGF portfolio manager and the Chief Operating Officer of Gabelli Funds—with aiding and abetting that conduct. Pet. App. 8a-9a.[1]

The trading at issue—known as mutual fund market timing—has long been known to the SEC. In fact, the SEC made an affirmative decision not to regulate it as early as the late 1980s and certainly by the end of the 1990s. *See Offers of Exch. Involving Registered Open-End Inv. Cos. & Unit Inv. Trusts*, Release No. 16504, 1988 WL 1000029, at *17 (SEC July 29, 1988); *In re Flanagan*, Release No. 160, 2000 WL 98210, at *5 (SEC Jan. 31, 2000). Gabelli Funds is a registered investment advisor and is subject to regular examinations by the SEC. The Complaint alleged that Gabelli Funds accepted the investment starting in 1999 and permitted the trading until August 2002, when it demanded that the trading stop. Pet. App. 6a; Compl. ¶¶ 20-28. The SEC commenced its investigation one year later, in the Fall of 2003, immediately after the New York Attorney General publicized a widespread investigation of mutual fund market-timing. Compl. ¶ 46. However, despite the fact that the SEC asked petitioners for tolling agreements and those tolling agreements had expired, the SEC waited to file its complaint until April 24, 2008—more than five years after the *last* conduct alleged to be unlawful, even excluding the time period covered under the

[1] In addition, the SEC alleged Alpert misrepresented the activity in a September 2003 online memorandum in violation of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, as well as Rule 10b-5. Pet. App. 8a-9a. Those allegations are not at issue here.

tolling agreements. Pet. App. 32a. Even though the Complaint was filed more than five years after the SEC's claim first accrued, the SEC sought civil monetary penalties as relief, in addition to disgorgement and an injunction. Pet. App. 10a; Compl. ¶¶ 20-28.

Petitioners moved to dismiss the claim for penalties, arguing that the SEC's claim "first accrued" as early as September 1999, when it first could have sued and no later than August 7, 2002, when the conduct ended and that its claim therefore was untimely. Pet. App. 26a. The district court agreed. The court held, in relevant part, that the five-year limitations period in 28 U.S.C. § 2462 governed the civil monetary penalties sought by the SEC and that, in the absence of a statute to the contrary, "the discovery rule does not apply to claims subject to the limitations of § 2462." Pet. App. 36a. Moreover, the court held that the SEC could not seek refuge in the doctrine of fraudulent concealment, as it had failed to "allege with particularity under Rule 9(b) what acts Defendants took, beyond the alleged acts of wrongdoing themselves, or what contrivance or scheme was designed to mask the SEC's causes of action." Pet. App. 39a.[2]

The court of appeals reversed. Pet. App. 1a. The court held, among other things, that a discovery

[2] After the district court dismissed the majority of the claims, the SEC filed a motion to dismiss voluntarily its claim for disgorgement without prejudice to refiling if the SEC were successful on appeal. Pet. App. 11a. *See Purdy v. Zeldes*, 337 F.3d 253, 257-58 (2d Cir. 2003).

rule should be read into Section 2462 for all claims that "sound in fraud," including those brought under the IAA. The court did not identify any statute that on its face provided an exception to Section 2462's command that a penalty claim must be brought within five years of the claim accruing. Rather, it concluded, as a categorical matter, that when a claim sounds in fraud it need not be brought until it is discovered or should have been discovered by the government. The SEC did not argue—and the court did not hold—that Petitioners had engaged in fraudulent concealment.[3] Rather, the court stated that the discovery rule applied even when the defendants did not engage in concealing conduct or conduct to frustrate the bringing of a timely claim. Pet. App. 18a-22a (citing *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010), and *Bailey v. Glover*, 88 U.S. 342 (1874)).

REASONS FOR GRANTING THE PETITION

The court of appeals' decision conflicts with the decisions of at least four other circuit courts, which since 1928 have construed the language of 28 U.S.C. § 2462 to require the government to bring a penalty claim within five years of the date the cause of action arose, and addresses a question raised but not definitively answered by a fifth circuit court. The decision also neglects relevant hold-

[3] The district court had ruled that they did not. On appeal, the SEC dropped its fraudulent concealment argument. Brief of Plaintiff-Appellant at 35, *SEC v. Gabelli*, No. 10-3581 (2d Cir. Oct. 29, 2010).

ings of this Court interpreting the term "accrue"—including the intervening precedent created by this Court in *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. ___, No. 10-1261, slip op. (Mar. 26, 2012), which has legal bearing on this case—and misapprehends this Court's decisions holding that, only under limited circumstances where a defendant has engaged in inequitable conduct, the time for the government to bring a claim for damages or restitutionary relief is tolled.

The decision below is predicated on the notion that, regardless of whether a congressional statute so provides, when a claim for penalties is brought under a statute that "sounds in fraud," the claim does not accrue and the statute of limitations does not begin to run until the government discovers or should have discovered the claim. That interpretation cannot be squared with the plain language of Section 2462 and arrogates to the judiciary a power—defining the statute of limitations—that Congress expressly has reserved to itself. For more than 150 years, this Court has defined "first accrue" to mean the date when a cause of action first arises. An action for civil penalties must be brought within five years from the date of violation. Any intervening time after the violation, and until an action is brought, counts against the government and not against the allegedly offending defendant.

Until the decision of the court below, no appellate court had ever held that the government can maintain the right to bring a penalty claim against a defendant long after the five-year period has expired where the defendant has not frustrated the bringing of a timely claim.[4] The decision of the court below is also inconsistent with this Court's decisions regarding statutes of limitations as a general matter.

For the more than 150 years that Section 2462 and its predecessors have existed, all federal agencies that seek to bring a penalty claim have been subject to a clear rule: unless the defendant has engaged in conduct to conceal his own wrongdoing and thus to frustrate the bringing of a timely claim, or unless Congress provides otherwise, the agency must bring a penalty claim within five years of when the violation first occurred and the agency first had a legal right to sue.

The contrary rule would overturn that clear mandate and the principles of repose that it furthers. This Court has recognized that statutes of limitations are an essential component of a functioning and just legal system. They have been applied to even the most abhorrent of offenses (not at issue here) under the theory that every defendant has a right to defend himself with evidence that has not become stale or gone missing. Under the approach

---

[4] What scant authority might be read to support the court of appeals' decision comes from unreported district court cases with no reasoning or description of the actual conduct at issue, *see, e.g.*, *SEC v. Miller*, No. Civ.A. 1:04CV1655-JEC, 2006 WL 2189697 (N.D. Ga. July 31, 2006), or involves overtly concealing conduct by the defendants, as in *SEC v. Koenig*, 557 F.3d 736 (7th Cir. 2009). *See infra* p. 18.

taken by the SEC and the court below, even when a defendant has not engaged in concealing conduct and equitable tolling does not apply, the SEC would be able to bring an ancient claim on the mere allegation that it did not discover and could not have discovered the violation earlier. If adopted, a federal agency could bring, and sustain, a penalty action for stale, wholly unconcealed, conduct on the sole basis that it chose not to pursue an investigation earlier, unless the defendant makes the showing by a preponderance of the evidence that the agency knew or should have known of the violation earlier. Such a showing could not easily be made on the government's pleadings and would be virtually impossible to make in practice until after the destruction of a defendant's reputation and the expenditure of substantial legal fees. This is an unreasonable burden for a defendant to bear, particularly in cases that do not necessarily involve fraud, but only "sound in fraud" and involve the sort of negligent conduct that is addressed by the SEC's claim under Section 206(2) of the IAA.

The correct application of the statute of limitations in government penalty actions implicates vitally important principles of repose and separation of powers. The question whether a statutory limitations period can be extended by courts without Congress' permission has been addressed by several other courts of appeals, as well as by this Court. Thus, a well developed conflict exists and is ripe for resolution by this Court.

I. CIRCUIT COURTS ARE SPLIT ON THE MEANING OF "ACCRUE" UNDER SECTION 2462

The Second Circuit's holding creates a circuit split with respect to the question of how to interpret the limitations period for government penalty actions set forth in Section 2462. At least four circuit courts have unambiguously read the term "accrual" as used in Section 2462 to refer to the date of the underlying violation, and, thus, have required the government to bring a penalty claim within five years of the earliest date on which it could sue absent a statute expressly providing otherwise. *See 3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994); *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996); *United States v. Core Labs., Inc.*, 759 F.2d 480, 482 (5th Cir. 1985); *United States v. Witherspoon*, 211 F.2d 858, 861 (6th Cir. 1954).[5] The Seventh Circuit has also addressed this

[5] Many more courts have reached analogous conclusions. *See, e.g., Trawinski v. United Techs.*, 313 F.3d 1295, 1298 (11th Cir. 2002); *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 982 n.1 (3d Cir. 1984); *W. Pac. Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1287 (9th Cir. 1984); *United States v. Ancorp Nat'l Servs., Inc.*, 516 F.2d 198, 200 n.5 (2d Cir. 1975); *Smith v. United States*, 143 F.2d 228, 229 (9th Cir. 1944) (construing predecessor statute); *Lancashire Shipping Co. v. Durning*, 98 F.2d 751 (2d Cir. 1938) (same); *The Ng Ka Py Cases*, 24 F.2d 772, 774 (9th Cir. 1928) (same); *United States v. Maillard*, 26 F. Cas. 1140, 1143 (S.D.N.Y. 1871) (construing predecessor statute and holding "[the claim] did so accrue, as against the defendants in this case, when the offenses alleged were committed . . . . [I]gnorance does not prevent the running of the statute or the accruing of the forfeiture.").

issue, suggesting that either the discovery rule or equitable tolling may apply to claims subject to Section 2462 without conclusively ruling which of these two doctrines courts may employ. *SEC v. Koenig*, 557 F.3d 736 (7th Cir. 2009). Only the court of appeals below explicitly has adopted the novel position that the accrual of a penalty claim is deferred until its discovery by a government agency.

This proposition has been squarely rejected.[6] In *3M Co. v. Browner*, the D.C. Circuit held that the Environmental Protection Agency ("EPA") could not bring an action seeking penalties under the Toxic Substances Control Act for conduct that occurred more than five years earlier. The defendant there filed a certification that the Act's requirements were met without providing the required notice to the EPA of a new and imported chemical. 17 F.3d at 1454. The government argued that its belated penalty action was timely because the nature of the violation was such that it could not have been discovered earlier. It argued that a discovery rule should be read into Section 2462, delaying accrual. The D.C. Circuit rejected that argument. It held that under Section 2462, a claim

[6] *See also United States v. Rutherford Oil Corp.*, 756 F. Supp. 2d 782, 788 (S.D. Tex. 2010) (observing that rejection of discovery rule is consistent with the general rule that a cause of action "'accrues when it comes into existence'" (quoting *United States v. Lindsay*, 346 U.S. 568, 568 (1954))); *United States v. Midwest Generation, LLC*, 781 F. Supp. 2d 677, 692-93 (N.D. Ill. 2011) (same).

accrues "when the factual and legal prerequisites for filing suit are in place." *Id.* at 1460. Accordingly, the EPA's action was untimely.

In so holding, the D.C. Circuit rejected the government's argument for a discovery rule, reasoning among other things that the discovery rule is based on the principle "that plaintiffs cannot have a tenable claim for the recovery of *damages* unless and until they have been harmed," and that the rule has "only been applied to remedial, civil claims" where damages or other remedial relief are sought and never to a penalty claim. *Id.* at 1460 (emphasis added) (citing long line of circuit court cases applying the discovery rule to civil remedial claims); *see also William A. Graham Co. v. Haughey*, 646 F.3d 138, 150 (3d Cir. 2011) (holding the discovery rule "is grounded in the notion that it is unfair to deny relief to someone who has suffered an injury but who has not learned of it"). The court noted that the rule has "nothing whatever to do" with penalty claims, since "injuries or damages resulting from the violation are not part of [a punitive] cause of action." *3M*, 17 F.3d at 1460; *see also id.* ("The rationale underlying the discovery [ ] rule—that a claim cannot realistically be said to accrue until the claimant has suffered harm—is completely inapposite" to a punitive claim.).

Likewise, in *United States v. Core Laboratories, Inc.*, the Fifth Circuit held that the Commerce Department could not bring a penalty action for violations of the Export Administration Act ("EAA") more than five years after the last allegedly unlawful act. 759 F.2d at 481. The conduct at issue there was inherently secretive—a violation of the anti-boycott provisions of the EAA. The court held, however, that a claim under Section 2462 "accrues at the time of the underlying violation." *Id.* at 483. Surveying case law reaching as far back as 1904, the court concluded that "[a] review of [cases involving Section 2462 and its predecessors] demonstrates that the date of the underlying *violation* has been accepted without question as the date when the claim first accrued." *Id.* at 482 (citing case law) (emphasis added). The court stated that while "[t]here are exceptions to [the rule that claims accrue at the time of a violation], . . . where the Congress has meant to make such exceptions, it has clearly expressed that intent." *Id.* at 483-84. The court noted that a rule that would not permit the statute to begin running "is in derogation of the right to be free of stale claims, which comes in time to prevail over the right to prosecute them," and that "[r]espondent would leave the statute open for that portion of eternity concurrent with the [defendant's] life, whether he lives three score and ten or as long as Methuselah." *Id.* at 483 n.2 (quoting *Badaracco v. Comm'r*, 464 U.S. 386, 406 (1984) (Stevens, J., dissenting)). The court left open the possibility that equitable tolling might apply if some sort of deceptive conduct were present, and held that the meaning of "accrue" for *all* claims subject to Section 2462 refers to the time of violation. 759 F.2d at 483.

In *FEC v. Williams*, the Ninth Circuit too agreed with *3M* in "reject[ing] the application of the discovery rule to the running of limitations periods under 2462." 104 F.3d at 240. There, the Federal Election Commission ("FEC") sought civil penalties against the defendant for secretly funneling money to a presidential campaign in violation of the Federal Election Campaign Act. Notably, the FEC alleged the defendant had concealed his conduct, and argued that both the discovery rule and fraudulent concealment applied. The court held that the discovery rule was inapplicable to Section 2462. Separately recognizing that the underlying conduct involved false statements to the government that might have frustrated the ability to bring a timely claim, the court held that the impact of such conduct should be determined under the law of fraudulent concealment and not by reading a discovery rule into a statute where Congress had not done so. *Id.* at 241.

Further, in *United States v. Witherspoon*, 211 F.2d 858 (6th Cir. 1954), the Sixth Circuit held that the government was time-barred from bringing a penalty claim for all but one violation of the Surplus Property Act because the other alleged violations occurred more than five years before the government's complaint was filed and no statute suspended the running of the statute of limitations. The underlying statute there, as well as the conduct, explicitly sounded in fraud. In relevant part, it targeted, "[e]very person who shall use . . . any fraudulent trick, scheme, or device, for purpose of securing or obtaining . . . any payment, property, or other benefits from the United States or any Federal agency." *Id.* at 860. Nonetheless, because Section 2462 applied and "[t]he complaint [ ] was filed more than five years after the last alleged act of fraud, . . . the government's action was commenced too late." *Id.* at 861.

Finally, in *SEC v. Koenig*, 557 F.3d 736 (7th Cir. 2009), the Seventh Circuit staked out a third position in this debate, further supporting the need for this Court's review. Considering a claim that an SEC penalty action was untimely where the defendant had misstated his company's biannual statements and thereafter had lied to the company's auditors to conceal this fraud, the court there held that based on principles it stated were "apt to be called equitable tolling," *id.* at 739, but could also be called a discovery rule, the SEC made sufficient allegations of the defendant's concealing conduct to permit the SEC to go forward with its penalty claim.[7]

The court below asserted that its decision did not create a conflict with these cases because it was considering a statute that "sounds in fraud." Pet App. 18a-20a. But that is a distinction without a difference. Each of the cases referenced above involved conduct that could be said to "sound in

[7] Indeed, in *Koenig* the defendant did not argue that a diligent effort by the SEC would have uncovered the alleged fraud which had "fooled . . . outside accountant (Arthur Andersen), which knew a great deal more than the SEC about the firm's finances." 557 F.3d at 740.

fraud" under statutes that sounded in fraud. Indeed, some of them involved explicitly "concealing" conduct. These courts did not reject the government's claim based on the character of the underlying statute, but rather based on the fact that the claim was brought more than five years after the claim arose and, as here, that Congress did not "otherwise provide" a different statute of limitations. The statute in *Witherspoon* explicitly refers to fraud, making the court of appeals' rule even more untenable, and the other underlying statutes involve misleading or secretive conduct considered by each court.

II. THE DECISION OF THE COURT OF APPEALS MISAPPREHENDS THE DECISIONS OF THIS COURT AND RAISES ISSUES OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT

The language of Section 2462, read both in isolation and in context, is clear and unambiguous: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of *any* civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim *first accrued* . . . ." 28 U.S.C. § 2462 (emphasis added).

This Court has held—in a decision the court below ignored—that "[i]n common parlance a right accrues when it comes into existence." *United*

States v. Lindsay, 346 U.S. 568, 569 (1954). This settled definition accords with that of numerous dictionaries.[8] It also was well accepted in the Nineteenth Century when the first predecessor statute to Section 2462 was enacted.[9]

Congress explicitly legislated a discovery rule in the federal securities laws when it wanted the courts to apply such a rule, providing that the discovery rule would apply to "a private right of

---

[8] *See* BLACK'S LAW DICTIONARY 23 (9th ed. 2009) (defining accrue to mean "to come into existence as an enforceable claim or right; to arise"); THE AMERICAN HERITAGE DICTIONARY 12 (3d ed. 1994) (defining accrue as "[t]o come into existence as a claim that is legally enforceable"); Merriam-Webster.com, *available at* http://www.merriam-webster.com (Aug. 7, 2011) (defining accrue as "[t]o come into existence as a legally enforceable claim"); 1 BOUBIER'S LAW DICTIONARY 66 (1897) (defining accrue as "[t]o arise, to happen, to come to pass; as the statute of limitation does not commence running until the cause of action has accrued."); 1 AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 142 (1886) (stating that a "[c]ause of Action shall accrue or shall have accrued. . . . whenever the defendant's liability became perfect and complete.").

[9] *See Meredith v. United States*, 38 U.S. (13 Pet.) 486, 493-94 (1839) (duties accrue to government at time when goods arrive at their port of entry, not when government knows they are there); *Bank of the U.S. v. Daniel*, 37 U.S. (12 Pet.) 32, 56 (1838) ("cause of action to recover the money, (had it been well founded) accrued at the time the mistaken payment was made"); *Evans v. Gee*, 36 U.S. (11 Pet.) 80, 84 (1837) ("A refusal to accept [a good in exchange for payment] is, then, a breach of the contract, upon the happening of which, a right of action instantly accrues to the payee."); *Wilcox v. Plummer*, 29 U.S. (4 Pet.) 172, 181 (1830) (holding that claim accrues at the moment a violation occurs).

action" and not to a governmental penalty action and "[e]xcept as otherwise provided by law, a civil action [under the federal securities laws] may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658. Indeed, it explicitly distinguished between "discovery" and "accrual." *Id.* There is no room in Section 2462 or the federal securities laws to find a discovery rule for penalty actions under the IAA. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-72 (1979) (where a provision "is flanked by provisions of the 1934 Act that explicitly grant private causes of action" it indicates that "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 209-10 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975) (holding that a private securities plaintiff cannot maintain a claim where he neither bought nor sold the security, because "[w]hen Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly"); *see also Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-64 (2008); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so."); *Pinter v. Dahl*, 486 U.S. 622, 650 (1988) ("When Congress wished to create such liability, it had little trouble doing so").[10]

---

[10] Courts have long recognized that IAA claims accrue at the time of violation. *See, e.g., Kahn v. Kohlberg, Kravis,*

The court of appeals also did contortions around Section 2462's structure, which provides that a civil penalty claim cannot be brought more than five years after the claim comes into existence, except where "the offender or the property is" not "found within the United States in order that proper service may be made thereon." 28 U.S.C. § 2462. Where Congress lists exceptions in a statute it is inappropriate for courts to imply any others. *United States v. Johnson*, 529 U.S. 53, 58 (2000); *see United States v. Brockamp*, 519 U.S. 347, 352 (1997).

The court below nonetheless felt compelled to read "discovery" into the meaning of "first accrue" not because of any statute but rather based on a misreading of this Court's decisions in *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1793-94 (2010), and *Bailey v. Glover*, 88 U.S. 342 (1874). *Bailey* and *Merck*

Roberts & Co., 970 F.2d 1030, 1042 (2d Cir. 1992) (holding that cause of action under the IAA accrued "when the agreements were entered into."); *SEC v. Jones*, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007) (SEC's IAA claim time-barred under Section 2462 where claim was filed "six years after the alleged wrongdoing"); *see also Dommert v. Raymond James Fin. Servs., Inc.*, No. 1:06-CV-102, 2009 WL 275440, at *6 (E.D. Tex. Feb. 3, 2009) (IAA claim "accru[ed] from the opening of the IAS Account and execution of the Agreement in May 1998 through the cancellation and closing of that Account"); *Kleinman v. Oak Assocs., Ltd.*, No. 5:07-CV-0698, 2007 WL 2071968, at *3 (N.D. Ohio July 16, 2007) ("[A]n illegal clause in a contract harms an investor at the time the contract is executed."); *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837 (HB), 2006 WL 399396, at *6 (S.D.N.Y. Feb. 21, 2006) ("[A]n action for rescission [under the IAA] accrues when the contract is executed.").

did not involve Section 2462, the discovery rule, or a governmental action for a penalty. Neither case is fairly read to give a court license to read a "discovery rule" into Section 2462 absent a statute expressly providing such a rule.

Bailey v. Glover involved a claim where the government—as a stakeholder—sought a ruling that a common law fraudulent conveyance effected outside the otherwise applicable statute of limitations be set aside under the Bankruptcy Act where the defendant's conduct had frustrated its ability to bring a timely claim. 88 U.S. at 342. The court of appeals and the SEC rely on *Bailey* for one isolated passage describing the appellant's position in that case: "when the object of the suit is to obtain relief against a fraud, the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it." *Id.* at 348. The Court did not create a categorical rule applicable to *all* statutes that sound in fraud. What the Court actually stated was that:

> [W]e hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and *when the fraud has been concealed, or is of such character as to conceal itself*, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.

88 U.S. at 349-50 (emphasis added). Thus, the *Bailey* Court held that the government (sitting in the shoes of a private stakeholder) was entitled to the same rule where, on the particular facts: (1) the defendant has engaged in fraud *and* (2) the particular fraud involves deliberate concealment that prevents the discovery of a claim during the otherwise applicable statute of limitations. *See also Exploration Co. v. United States*, 247 U.S. 435, 449 (1918) (holding that government could obtain equitable relief of rescinding fraudulently obtained land patent after statute of limitations had run, reasoning that "[w]e cannot believe that Congress intended to give immunity to those who for the period named in the statute might be able to conceal their fraudulent action from the knowledge of the agents of the government").

The court of appeals' reliance on *Merck & Co. v. Reynolds*, 130 S. Ct. at 1793-94, is even further afield, and highlights the mischief in the court's construction of Section 2462. *Merck* "concern[ed] the timeliness of a complaint filed in a private securities fraud action" brought by investors alleging that Merck had "knowingly misrepresented the risks of heart attacks accompanying the use of Merck's pain-killing drug, Vioxx." *Id.* at 1789-90. The applicable statute of limitations contained an explicit discovery rule, stating the claim was timely if brought within the earlier of "2 years after the discovery of the facts constituting the violation" and "5 years after such violation." 28 U.S.C. § 1658(b). The primary dispute in the case was whether the "facts constituting the violation" included scienter, an essential element of the claim. Indeed, *Merck* could not have consciously delineated the contours of an implied discovery rule applicable to government penalty claims, as the "discovery rule" at issue in *Merck* bore no relation to such a rule. The case concerned an explicit, statutorily provided discovery rule coupled with a statute of repose that operated to *shorten* the time for a private plaintiff to bring a claim. Thus, as the Court noted, it dealt "with a statute, not a court-created exception to a statute." *Merck*, 130 S. Ct. at 1797. *See Graham*, 646 F.3d at 149 ("*Merck* was not concerned with the precise mechanics of the discovery rule" and "did not turn on 'the difference between tolling and delayed accrual.'").[11]

Even apart from the court of appeals' misapplication of *Bailey* and *Merck*, its decision cannot be reconciled with this Court's intervening decision in *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. ___, No. 10-1261, slip op. (Mar. 26, 2012). In *Simmonds* this Court considered whether the two-year limitations period applicable to actions brought against corporate insiders for realizing profits from the purchase and sale of a corporation's securities under Section 16(b) of the Exchange Act, 15 U.S.C. § 78p(b), began to run upon the filing of the disclosure statement required

[11] *See also Merck*, 130 S. Ct. at 1793 ("The parties and the Solicitor General agree that § 1658(b)(1)'s word 'discovery' refers not only to a plaintiff's *actual* discovery of certain facts, but also to the facts that a reasonably diligent plaintiff would have discovered.").

by Section 16(b) by the insider *or*, as the statute specified, within "two years after the date such profit was realized." *Id.* at 1. This Court held that the plain language of the statutory limitations period was controlling and that the date any profit was "realized" was the controlling date, not the date of a later required filing as the court of appeals had held. *Simmonds* held that the court of appeals' adoption of a novel tolling provision into statutory text was wholly inappropriate:

> Simmonds . . . disregards the most glaring indication that Congress did not intend that the limitations period be categorically tolled until the statement is filed: *The limitations provision does not say so*. This fact alone is reason enough to reject a departure from settled equitable-tolling principles.

Id. at 7 (emphasis added). Thus, the Court rejected a court-created exception to clear statutory text directly analogous to the rule created by the court of appeals below.

The *Simmonds* Court further explained that even if the accepted doctrine of equitable tolling for fraudulent concealment might operate to toll the applicable limitations period, the judicially invented tolling doctrine at issue was "completely divorced from long-settled equitable-tolling principles." *Id.* at 5. These principles require the "litigant seeking equitable tolling [to] *bear[] the burden* of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." *Id.* (emphasis added) (internal citation omitted). Because the court of appeals had adopted an automatic tolling period and not based its decision on Simmond's demonstration that the insiders had fraudulently concealed their unlawful conduct, this Court vacated the decision below and remanded "for the lower courts to consider how the usual rules of equitable tolling apply to the facts of this case." *Id.* at 8. *Simmonds* also explained that the doctrine of fraudulent concealment was the only appropriate basis for avoiding a statutory limitations period where Congress had not specified otherwise, and that this doctrine was fully capable of handling the problem of unavailable evidence or deceit raised by a securities plaintiff. *Id.* at 6-7 (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 368 (1991), and *Bailey*, 88 U.S. at 348). Notably, here, the SEC has not even argued that extraordinary circumstances stood in its way.

III. THE QUESTION WHETHER A DISCOVERY RULE APPLIES TO SECTION 2462 IS OF SWEEPING SCOPE AND IMPORTANCE WARRANTING REVIEW BY THIS COURT

The question whether a discovery rule should be read into Section 2462 is of sweeping scope and importance. That is because Section "2462, is a general statute of limitations, applicable . . . to the entire federal government in all civil penalty cases, unless Congress specifically provides otherwise." *3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994).

The federal securities laws include numerous provisions that could be considered to "sound in fraud," regulating a broad range of economic activity. They range from statutes governing trading to those addressing books and records and securities offerings. *See, e.g.*, 17 C.F.R. § 240.10b-5; 15 U.S.C. §77q; *see also infra* p. 35 note 15. Some require proof of deception and intent; others—such as the IAA statute at issue here—require proof of neither. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92 (1963) (Section 206 of IAA addresses "all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."). An implied discovery rule in enforcement cases would relieve an agency, as a categorical matter, from its obligation to bring a timely case for all these claims and any other claims brought under a statute that "sounds in fraud," regardless of whether the violation was self-concealing or the defendant concealed it, and would place the burden on defendant to prove as a factual matter that the SEC should have discovered the violation earlier. As this Court held, "[t]he potential for such endless tolling in cases in which a reasonably diligent plaintiff would know of the facts underlying the action is out of step with the purpose of limitations periods in general." *Simmonds*, slip op. at 6.

Such a judicially implied rule would defeat the legislative judgment in Section 2462 that there comes a time (whenever that may be) when "the right to be free of stale claims, . . . prevail[s] over the right to prosecute them." *Core Labs.*, 759 F.2d at 483; *see also 3M*, 17 F.3d at 1457. As Chief Justice Marshall observed long ago, the concept that there would in effect be no limitations period for a penalty action "would be utterly repugnant to the genius of our laws . . . where not even treason can be prosecuted after a lapse of three years." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (Marshall, C.J.); *accord United States v. Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) (No. 15755) (Story J.) ("it would be utterly repugnant to the genius of our laws, to allow such prosecutions a perpetuity of existence"). This Court recently, and explicitly, affirmed this view in *Simmonds*. Slip op. at 6 ("Allowing tolling to continue beyond the point at which a §16(b) plaintiff is aware, or should have been aware, of the facts underlying the claim would quite certainly be *inequitable* and inconsistent with the general purpose of statutes of limitations: 'to protect defendants against stale or unduly delayed claims.'") (citation omitted).

The court of appeals decision effectively allows the government to defer the commencement of Section 2462's limitations period indefinitely, until the government chooses to look for—and therefore finds—a violation, reversing the ordinary presumption that one has a right to be free of stale claims and undermining the core purposes of statutes of limitations. This is just the type of issue implicating core principles of repose that the Court has consistently deemed merited review. *See, e.g.*, *id.*; *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 71 (2011); *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2010); *BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006); *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001); *3M*, 17 F.3d 1453.

Statutes of limitations, including Section 2462, also are designed to protect a defendant from having to defend against a claim after "evidence has been lost, memories have faded, and witnesses have disappeared." *See Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944) (explaining that to defend a stale penalty claim is in conflict with core legal principles). It may be that a defendant who personally has concealed her wrongdoing to prevent a claim from being timely brought should not be heard to complain when—after her concealment has ceased to be effective—the claim is brought. She has effectively forfeited her right to rely on the statute of limitations and cannot justifiably complain that she is being subjected to stale claims because the delay is of her own manufacture.

Here, however, the SEC did not claim on appeal that Petitioners concealed their misconduct. The SEC claimed only that it could not have discovered the violation earlier. But the SEC's "failure to detect violations" is not Petitioners' fault and "does not avoid the problems of faded memories, lost witnesses and discarded documents in penalty actions brought decades after alleged violations are finally discovered." *3M*, 17 F.3d at 1461. Yet, under the Second Circuit's discovery rule, claims could be brought—and would need to be defended—regardless of how ancient the evidence unless the *defendant* could show (at summary judgment or trial) that the SEC failed to discover the evidence earlier with reasonable diligence.

The rule adopted by the court below thus focuses the statute of limitations inquiry on the wrong question. Both the equitable tolling and fraudulent concealment doctrines are based on the principle that when a defendant engages in a self-concealing fraud or deliberately frustrates the plaintiff's ability to bring a timely action she may not then use the plaintiff's failure to comply with the statute of limitations offensively to defeat an action after her misconduct is discovered. *See Bailey*, 88 U.S. at 349 ("To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."); *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946) (same); *Ainbinder v. Kelleher*, No. 92 Civ. 7315 (SS), 1997 WL 420279, at *6 (S.D.N.Y. July 25, 1997) (Sotomayor, D.J.) (observing that the "doctrine of equitable tolling developed in the context of fraud actions" exists to protect a "plaintiff who is unaware that he has a cause of action because of defendant's fraudulent acts or concealment") (quotation omitted).[12]

The discovery rule is quite distinct from those equitable doctrines. That rule applies—as here—even where the defendant has not engaged in concealing or inequitable conduct.[13] In latent tort and certain other non-penalty civil cases where injuries are difficult to detect and damages or other remedial relief are an element of the claim itself, some courts and legislatures have suspended the accrual of a claim until the date harm has been felt on the theory "that plaintiffs cannot have a tenable claim for the recovery of damages unless and until they have been harmed." *3M Co.*, 17 F.3d at 1460; *see also William A.*

---

[12] *See, e.g., In re Linerboard Antitrust Litig. Winoff Indus., Inc.*, 305 F.3d 145, 163 (3d Cir. 2002) ("It is the fact of *concealment* that is the polestar in an analysis of fraudulent concealment. It is the camouflage that demands attention, the cover up, the acts of obscuring or masking."), *cert. denied*, 538 U.S. 977 (2003); *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988) (requiring that plaintiff establish "that the defendant concealed from him the existence of his cause of action"); *see also Hennegan v. Pacifico Creative Serv. Inc.*, 787 F.2d 1299, 1302 (9th Cir. 1986) (rejecting fraudulent concealment where plaintiffs "have not alleged specific facts showing that the [defendants] engaged in affirmative conduct that fraudulently conceal[ing] the existence of a cause of action.").

[13] There are important practical differences between the doctrines of tolling and discovery as well. For example, some courts have held that equitable tolling provides only the additional time needed for a plaintiff to file a complaint. It does not delay accrual giving a plaintiff the entire limitations period. *See, e.g.*, *Jay E. Hayden Found. v. First Neighbor Bank, N.A.*, 610 F.3d 382, 387 (7th Cir. 2010).

Graham Co. v. Haughey, 646 F.3d 138, 150 (3d Cir. 2011). *This* discovery rule has no application to government penalty actions, where harm is not an element of the claim and where the government will discover a violation only if and when it undertakes an investigation.

The court of appeals' decision creating a discovery rule under Section 2462 also runs afoul of the separation of powers. Congress, of course, may "Act" by determining that, because a particular claim is sufficiently difficult to discover, or its enforcement is sufficiently important, a longer limitations period should apply. But, as the D.C. Circuit has held, such a judgment necessarily implicates questions of policy and resource allocation that our Constitution assigns for debate in the halls of Congress, not determination in a court of law:

> An agency may experience problems in detecting statutory violations because its enforcement effort is not sufficiently funded; or because the agency has not devoted an adequate number of trained personnel to the task; or because the agency's enforcement program is ill-designed or inefficient; or because the nature of the statute makes it difficult to uncover violations; or because of some combination of these factors and others.

3M, 17 F.3d at 1461. Indeed, the question whether to "strike the balance between remediation of all injuries and a policy of repose" by adding a new discovery rule to a statute of limitations is "properly directed not to [the courts], but to Congress, whose job it is to decide how . . . to strike the balance between remediation of all injuries and a policy of repose." *TRW, Inc. v. Andrews*, 534 U.S. 19, 38 (2001) (Scalia J., concurring); *see Simmonds*, slip op. at 6-7 ("Had Congress intended this result, it most certainly would have said so."); H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 274, at 651 (3d ed. 1901) ("[W]hen the courts engraft upon these statutes [of limitations] exceptions which the statute does not make or warrant, its action is nothing more nor less than an assumption of legislative functions.").[14]

The court of appeals' decision will inevitably involve the courts in intractable—and constitutionally inappropriate—case-by-case policymaking in determining which statutes sound in fraud and fall within the scope of its judicially fashioned discovery rule, and which do not. That question is frequently not susceptible of ready answer. Some statutes administered by government agencies

[14] These concerns are also salient in the Court's implied rights jurisprudence. *See Stoneridge,* 552 U.S. at 773 (The "requirement of congressional intent [for implied rights of action] 'reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes.'") (citing *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990)); *see also Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2301-03 (2011); *Astra USA, Inc. v. Santa Clara Cnty.*, 131 S. Ct. 1342, 1347 (2011).

explicitly use the word fraud; others address conduct that arguably fits within the broad definition of fraudulent or deceptive conduct.[15]

The courts of appeals have issued conflicting decisions over whether a discovery rule applies to delay accrual of a claim subject to Section 2462's five-year statute of limitations and the decision below conflicts with decisions of this Court and raises important questions of federal law. Accordingly, the question this petition presents warrants this Court's review.

---

[15] *See, e.g.*, Internal Revenue Code, 26 U.S.C. § 6700 (imposing penalty on "any person who . . . makes . . . a statement with respect to the allowability of any . . . tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter . . ."); 40 U.S.C. § 123 (empowering the federal government to collect civil penalties where a person "uses or causes to be used, or enters into an agreement, combination, or conspiracy to use or cause to be used, a fraudulent trick, scheme, or device for the purpose of obtaining or aiding to obtain, for any person, money, property, or other benefit from the Federal Government."); 7 U.S.C. § 6c(b) (including certain prohibitions on fraud in commodities transactions); 15 U.S.C. § 78j(b) (Section 10(b) governing fraud in connection with purchase or sale of securities); 15 U.S.C. § 78t(e) (aiding and abetting violation of antifraud provisions of 1934 Act); 15 U.S.C. § 78t(a) (controlling persons liability under 1934 Act); 15 U.S.C. § 77o (controlling persons liability under 1933 Act); 15 U.S.C. § 77q(a) (1933 Act provision governing fraud or deceit in securities transactions); 15 U.S.C. § 78m (1934 Act provision prohibiting, among other things, falsity in certain public company books and records); 15 U.S.C. § 80b-7 (Section 207 of the IAA governing material misrepresentation in reports).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, Petitioners request the petition be granted and the decision below vacated and remanded for reconsideration by the court of appeals in light of this Court's recent decision in *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. ___, No. 10-1261, slip op. (Mar. 26, 2012).

Respectfully submitted,

/s/ Lewis J. Liman
LEWIS J. LIMAN
Counsel of Record
KATHERINE WILSON-MILNE
CLEARY GOTTLIEB STEEN
& HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000

EDWARD A. MCDONALD
KATHLEEN N. MASSEY
JOSHUA I. SHERMAN
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3500

Counsel for Petitioners

April 20, 2012

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2010

(Argued: June 2, 2011 Decided: August 1, 2011)

Docket Nos. 10-3581-cv(L), 10-3628-cv(XAP), 10-3760-cv (XAP)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant/Cross-Appellee,

—against—

MARC J. GABELLI and BRUCE ALPERT,

Defendants-Appellees/Cross-Appellants.

Before: LIVINGSTON and CHIN, *Circuit Judges*, and RAKOFF, *District Judge*.*

Appeal from a final order and judgment of the United States District Court for the Southern District of New York granting in part defendants' motions to dismiss. REVERSED.

DOMINICK V. FREDA (Jacob H. Stillman, Hope Hall Augustini, *on the brief*), Secu-

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

rities and Exchange Commission, Washington, D.C., *for Plaintiff-Appellant*.

LEWIS J. LIMAN (Kimberly C. Spiering, Katherine L. Wilson-Milne, David R. Lurie, *on the brief*), Cleary Gottlieb Steen & Hamilton LLP, New York, New York, *for Defendant-Appellee Gabelli*.

KATHLEEN N. MASSEY (Edward A. McDonald, Joshua I. Sherman, *on the brief*), Dechert LLP, New York, New York, *for Defendant-Appellee Alpert*.

RAKOFF, *District Judge*.

Plaintiff-appellant the Securities and Exchange Commission ("SEC") appeals from a judgment entered August 17, 2010, dismissing the SEC's complaint against Marc J. Gabelli, the portfolio manager of the mutual fund Gabelli Global Growth Fund ("GGGF" or the "Fund"), and Bruce Alpert, the chief operating officer for the Fund's adviser, Gabelli Funds, LLC ("Gabelli Funds" or the "Adviser"). For the following reasons, we REVERSE the District Court's judgment and REMAND for further proceedings consistent with this opinion.[1]

BACKGROUND

Unless otherwise noted, the following facts are taken from the complaint and are presumed to be

[1] Defendants Gabelli and Alpert have each filed cross-appeals, but for the reasons stated herein we do not reach the cross-appeals.

true. In essence, the SEC's complaint charges defendants with failing to disclose favorable treatment accorded one GGGF investor in preference to other investors: specifically, the fact that Gabelli Funds, investor adviser to GGGF, while prohibiting most GGGF investors from engaging in a form of short-term trading called "market timing," secretly permitted one investor to market time the Fund in exchange for an investment in a hedge fund managed by Gabelli. Compl. ¶¶ 1, 20-21, 17, 31, 35-38, 42, 44-45.

A. Market Timing

"Market timing" refers, *inter alia*, to buying and selling mutual fund shares in a manner designed to exploit short-term pricing inefficiencies. *See* Exemptive Rule Amendments of 2004: The Independent Chair Condition (Apr. 2005) ("Staff Report"), *available at* http://www.sec.gov/news/studies/indchair.pdf. A mutual fund sells and redeems its shares based on the fund's net asset value ("NAV") for that day, which is usually calculated at the close of the U.S. markets at 4:00 P.M. Eastern Time. Prior to 4:00 P.M., market timers either buy or redeem a fund's shares if they believe that the fund's last NAV is "stale," *i.e.*, that it lags behind the current value of a fund's portfolio of securities as priced earlier in the day. The market timers can then reverse the transaction at the start of the next day and make a quick profit with relatively little risk.

Mutual funds like GGGF that invest in overseas securities are especially vulnerable to a kind of market timing known as "time zone arbitrage," whereby market timers take advantage of the fact that the foreign markets on which such funds' portfolios of securities trade have already closed (thereby setting the closing prices for the underlying securities) before the close of U.S. markets.[2] Market timers profit from purchasing or redeeming fund shares based on events occurring after foreign market closing prices are established, but before the events have been reflected in the fund's NAV. In order to turn a quick profit, market timers then reverse their positions by either redeeming or purchasing the fund's shares the next day when the events are reflected in the NAV.

---

[2] An illustration of time zone arbitrage is provided in the SEC's complaint:

> For example, a U.S. mutual fund may hold shares of a Japanese company traded on the Tokyo Stock Exchange ("TSE"). Because of the time-zone difference, the TSE may close at 2:00 a.m. EST. If the U.S. mutual fund uses the TSE closing price for the Japanese company's stock to calculate the mutual fund's NAV at 4:00 p.m. EST, that fund's NAV will be based, at least partially, on market information that is fourteen hours old. Positive market movements during the New York trading day, which will later cause the Japanese market to rise when it opens at 8 p.m. EST, will not be incorporated into the fund's NAV, thereby cause the NAV to be artificially low. On such a day, a trader who buys the U.S. fund at the artificially low or "stale" price can realize a profit the next day by selling the U.S. fund's shares.

See Compl. ¶ 17.

Although market timing is not itself illegal, market timing can harm long-term investors in the fund by "rais[ing] transaction costs for a fund, disrupt[ing] the fund's stated portfolio management strategy, requir[ing] a fund to maintain an elevated cash position [to satisfy redemption requests], . . . result[ing] in lost opportunity costs and forced liquidations . . . unwanted taxable capital gains for fund shareholders and [a reduction of] the fund's long term performance." *Id.* at 32-33. *See also Janus Capital Grp. Inc. v. First Derivative Traders*, __ U.S. __, 131 S. Ct. 2296, 2300 (2011) ("Although market timing is legal, it harms other investors in the mutual fund.").

B. The Parties

Gabelli Funds, an investment adviser within the meaning of Section 2(a)(20) of the Investment Company Act of 1940 and Section 202(a)(11) of the Investment Advisers Act of 1940 (the "Advisers Act"), is the investment adviser to GGGF, an open end investment company, or mutual fund, registered under the Investment Company Act. Compl. ¶¶ 12-13. Marc Gabelli was the portfolio manager for GGGF and its predecessor fund from 1997 to 2004 and also managed several Gabelli-affiliated hedge funds. *Id.* ¶ 10. From 1988 to 2003, Bruce Alpert was Gabelli Funds' chief operating officer and the person who directed the Adviser's "market timing police," a group of GGGF employees that monitored trading in the Adviser's mutual funds in order to restrict market timing. *Id.* ¶¶ 1, 11, 31.

Najy N. Nasser was the chief investment adviser to Folkes Asset Management, now called Headstart Advisers Ltd. ("Headstart"). *Id.* ¶¶ 1, 10.

C. The Alleged Misconduct

The complaint alleges that from 1999 until 2002, Gabelli and Alpert permitted Headstart to engage in time zone arbitrage (which defendants referred to as "scalping") that took advantage of stale pricing opportunities in GGGF. *Id.* ¶¶ 17, 36, 42. Initially the amount of such scalping was limited, but on April 7, 2000, Gabelli allegedly agreed to permit Headstart to increase its market timing capacity from $7 million to $20 million, in exchange for a $1 million investment by Headstart in a hedge fund that Gabelli managed. *Id.* ¶ 21. Headstart's $1 million investment, which constituted approximately four percent of Gabelli's hedge fund's assets, was made the day after Headstart's increase in market timing. *Id.* ¶ 23.

Between April 2000 and the Spring of 2002, Headstart's increased market timing in GGGF's shares regularly involved between four and fifteen percent of GGGF's assets. *Id.* ¶ 24. Eventually, however, following instructions from the Fund's parent company, Gabelli and Alpert caused Headstart to reduce its ownership in GGGF and, in August 2002, to cease its market timing activity, whereupon Headstart redeemed its remaining investment in Gabelli's hedge fund. *Id.* ¶¶ 25-28.

Prior to the cessation, however, and during the same period that Gabelli and Alpert were approving Headstart's market timing in GGGF shares, Alpert and Gabelli banned at least 48 other GGGF accounts from market timing and rejected market timing purchases totaling at least $23 million. *Id.* ¶ 35. As early as December 2000, Alpert drafted an internal memorandum that explained that since "Market Timers (scalpers) have been using the International and Global Funds in a way that is disruptive to the Fund and the management of the portfolio," the Adviser was making efforts to "identify each account and restrict them for purchasing the funds." *Id.* ¶ 31. For the next two years, "market timing police"—employees instructed by Alpert to monitor market timing activity within Gabelli Funds—reviewed purchases in global funds: if it appeared that the purchase was a market timing trade, the purchase was rejected and sometimes the account was banned from making future purchases. *Id.* Yet, during the very same period, Alpert instructed the market timing police to ignore Headstart's market timing activity because "it was a Marc Gabelli client relationship," and assured Nasser that Headstart's accounts would not be blocked. *Id.* ¶¶ 33, 35.

According to the complaint, Headstart's market timing unfairly favored Headstart over all other GGGF investors. Thus, while Headstart's three accounts that market timed GGGF shares during the relevant period earned rates of return of 185 percent, 160 percent, and 73 percent, respectively, the rate of return for all other GGGF shareholders over the same period was, at best, negative 24.1 percent. *Id.* ¶¶ 2, 39. Headstart's market timing also caused annual dilution ranging from one to four percent of GGGF's assets. *Id.*

While Headstart was market timing GGGF, the defendants allegedly did not disclose to GGGF's Board of Directors or to the other GGGF shareholders that Headstart was market timing, that it was being given an advantage accorded no other shareholder, and that there was a conflict of interest created by the agreement with Headstart. As a result, the Board was allegedly misled into believing that the Adviser was taking all necessary steps to reduce or ban market timing activity in general. *Id.* ¶¶ 36-38. For example, on February 21, 2001, Alpert and Gabelli attended a GGGF Board meeting where they each addressed the Board. Alpert told the Board about the dangers of market timing and the efforts that Gabelli Funds was undertaking to eliminate this practice, but failed to disclose that Headstart was being permitted to market time GGGF. Immediately after Alpert's report, Gabelli reported on operations of GGGF, but also failed to disclose Headstart's market timing. After the meeting, Alpert and Gabelli continued to allow Headstart to engage in market timing trades.

According to the complaint, even after the market timing ceased, the defendants continued to mislead the Board and GGGF investors. In particular, on September 3, 2003—the same day that the New York Attorney General announced he was investigating market timing in mutual funds—Alpert, in an alleged effort to reassure GGGF investors, posted a memorandum (the "Memorandum") on the website of Gabelli Funds' parent company. *Id.* ¶¶ 43-44. The Memorandum stated that:

> [F]or more than two years, scalpers have been identified and restricted or banned from making further trades. Purchases from accounts with a history of frequent trades were rejected. Since August 2002, large transactions in the global, international and gold funds have been rejected without regard to the past history. While these procedures were in place they did not completely eliminate all timers.

Id. ¶ 44. In light of what Gabelli and Alpert knew and, indeed, had authorized in market timing by Headstart, this Memorandum, the complaint alleges, was materially misleading. *Id.* ¶ 45.

Finally, the complaint alleges that because of the secret nature of the defendants' wrongdoing, as well as the defendants' affirmative misrepresentations to GGGF's Board and shareholders, the SEC did not discover the fraud until late 2003. *Id.* ¶¶ 46-47.

On April 24, 2008, the SEC filed its complaint against the defendants, alleging in its First Claim that Alpert had violated the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, in its Second Claim that Alpert had violated the antifraud provisions of Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), and in its Third Claim that both Alpert and Gabelli had aided and abetted violations by the Adviser of the antifraud provisions of Sections 206(1) and 206(2) of the Advisers Act, 15 U.S.C. 80b-6(1) & (2). As relief for these violations, the SEC sought injunctions against future violations, disgorgement of ill-gotten gains, and civil monetary penalties.

On July 25, 2008, each of the defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. On March 17, 2010, the District Court granted the defendants' motions in substantial part. First, the District Court dismissed the Securities Act and Securities Exchange Act claims against Alpert, finding that Alpert's statement in the Memorandum that "for more than two years, scalpers have been identified and restricted or banned from making further trades" was "literally true" and that because "this statement was not a misrepresentation . . . Alpert had no duty to disclose fully Headstart's market-timing." *SEC v. Gabelli*, No. 08 Civ. 3868 (DAB), 2010 WL 1253603, at *8 (S.D.N.Y. Mar. 17, 2010). Second, while the District Court denied defendants' motion to dismiss the Advisers Act claim, it ruled that the SEC could not seek civil penalties for that claim because: (a) the SEC did not bring the claim within the statute of limitations period applicable to such penalties, and (b) the SEC is not authorized to seek monetary penalties for aiding and abetting violations of the Advisers Act. *Id*. at *4-5, 11-12. Third, the District Court dismissed the SEC's prayer for injunctive relief because the SEC "has not plausibly alleged that Defendants are reasonable likely to engage in future violations." *Id*. at

*11. Thus, the SEC's Advisers Act claim against the defendants survived the motions to dismiss, but the District Court barred all relief other than disgorgement.

Believing that disgorgement would not provide significant relief, the SEC moved to voluntarily dismiss the remaining claim without prejudice to the SEC's refiling this claim if, but only if, the SEC were successful in this appeal. The District Court granted the motion over the defendants' objections and entered judgment accordingly.

The SEC now appeals the District Court's dismissal of its Securities Act and Securities Exchange Act claims against Alpert and the District Court's rejection of the SEC's prayers for civil penalties and injunctive relief for the defendants' aiding and abetting violations of the Advisers Act. In addition to opposing the SEC's appeal, both defendants have cross-appealed, contending that the District Court erred in denying their motions to dismiss the SEC's prayer for disgorgement under the Advisers Act and, more generally, in denying their motions to dismiss with prejudice the SEC's claim for aiding and abetting violations of the Advisers Act.

DISCUSSION

A. Appellate Jurisdiction

We first address whether we have jurisdiction to hear the instant appeals. We generally lack jurisdiction over an "appeal from a dismissal of some of plaintiff's claims when the balance of the claims have been dismissed without prejudice pursuant to a Rule 41(a) dismissal of the action," because permitting such an appeal would allow the parties to "effectively . . . secure[] an otherwise unavailable interlocutory appeal." *Chappelle v. Beacon Comm-c'ns Corp.*, 84 F.3d 652, 654 (2d Cir. 1996). However, in *Purdy v. Zeldes*, 337 F.3d 253, 258 (2d Cir. 2003), we recognized an exception to this rule where "a plaintiff's ability to reassert a claim is made conditional on obtaining a reversal from this court." *Id.* Under these circumstances, a judgment may be deemed "final," because the plaintiff "runs the risk that if his appeal is unsuccessful, his . . . case comes to an end." *Id.*

Given *Purdy*, it is clear that we have jurisdiction to consider the SEC's appeal, since the only dismissal that was without prejudice was expressly conditioned on the SEC's promise not to reassert this claim unless its appeal of this dismissal was successful on appeal. However, given the strong policy against interlocutory appeals, we see no reason to extend the narrow exception announced in *Purdy* to the defendants' cross-appeals. Nor do we think we should exercise pendent appellate jurisdiction over the cross-appeals. The doctrine of pendent appellate jurisdiction—which "allows us, where we have jurisdiction over an interlocutory appeal of one ruling, to exercise jurisdiction over other, otherwise unappealable interlocutory decisions," *see Myers v. Hertz Corp.*, 624 F.3d 537, 552 (2d Cir. 2010) (internal quotation marks omitted)—"should be exercised sparingly, if ever," *Bolmer v. Oliveira*, 594 F.3d 134, 141 (2d Cir. 2010) (internal quotation marks omitted). Assuming the doctrine applies here at all, we see here none of the "exceptional circumstances," *Papineau v. Parmley*, 465 F.3d 46, 65 (2d Cir. 2006) (internal quotation marks omitted), that would warrant its invocation at this juncture. We therefore limit ourselves to the SEC's appeal.

B. Standard of Review

Turning to the merits of that appeal, we review the District Court's grant of the motions to dismiss *de novo*, "accept[ing] all well-pleaded allegations in the complaint as true [and] drawing all reasonable inferences in the plaintiff's favor." *Operating Local 649 Annual Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 91 (2d Cir. 2010). To survive a motion to dismiss, however, a complaint must "allege a plausible set of facts sufficient 'to raise a right to relief above the speculative level.'" *Id*. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

C. The Securities Act and Securities Exchange Act Claims against Alpert

Applying these standards, we first consider whether the District Court erred in dismissing the Securities Act and Securities Exchange Act claims against Alpert that were premised on the theory that his statements in the Memorandum of 2003 were materially misleading. That Memorandum, as noted, stated that "for more than two years, scalpers have been identified and restricted or banned from making further trades" but that the Adviser "did not completely eliminate all timers." The District Court was apparently of the view that because such statements were "literally true," they could not be misleading. *See Gabelli*, 2010 WL 1253603, at *8.

The law is well settled, however, that so-called "half-truths"—literally true statements that create a materially misleading impression—will support claims for securities fraud. *See List v. Fashion Park, Inc.*, 340 F.2d 457, 462 (2d Cir. 1965); *see also* Rule 10b-5, 17 C.F.R. § 240.10b-5. Here, the complaint plausibly alleges that a reasonable investor reading the Memorandum would conclude that the Adviser had attempted in good faith to reduce or eliminate GGGF market timing across the board, whereas, as Alpert well knew but failed to disclose, the Adviser had expressly agreed to let one major investor, Headstart, engage in a very large amount of GGGF market timing, in return for Headstart's investment in a separate hedge fund run by Gabelli. The District Court therefore erred in dismissing the Securities Act and Securities Exchange Act claims.

Alpert further argues, however, that even if the statements in the Memorandum were misleading, the District Court's determination can be affirmed on either of two alternate grounds: a failure to adequately allege materiality or a failure to adequately allege intent.

As to materiality, "a complaint may not properly be dismissed . . . on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162 (2d Cir. 2000) (internal quotation marks omitted). Here, the complaint alleges that, pursuant to an undisclosed agreement between the defendants and Headstart, the latter was permitted to engage in market time trading up to $20 million per transaction and completed 836 such transactions over a three year period. In total, Headstart allegedly traded $4.2 billion in GGGF, approximately 62 percent of the total value of all trading in the Fund during that period, and earned $9.7 million in profits while other GGGF investors, who were not only themselves precluded from such trading but also unaware of its being undertaken by Headstart, suffered annual losses of at least 24.1%. Compl. ¶¶ 21, 40.

Although the negative economic impact of these massive trades on GGGF's assets was less severe, *see* Compl. ¶ 2, it was still sufficient to create a jury issue as to its materiality. And, in any event, the notion that a reasonable investor would regard as immaterial the failure to disclose the secret arrangement by which the Fund and its Adviser, in return for a pay-off to another fund, allowed one GGGF investor to engage in highly profitable market timing while denying this opportunity to all other investors, borders on the frivolous.

As to intent, the complaint alleges that Alpert knew, or was reckless in not knowing, that the statements in the Memorandum were misleading, because, *inter alia*, Alpert—the author of the Memorandum that reasonably gave the impression that the Adviser was making best efforts to eliminate scalping—had himself given the order to the market timing "police" to let Headstart continue its massive market timing, and because, as he also knew, Headstart was being given the preference in return for a secret pay-off in the form of an investment in Gabelli's hedge fund. Also, contrary to Alpert's contention that the complaint fails to allege that he knew market timing was harmful to the Fund, the complaint alleges that Alpert redeemed his own holdings in GGGF because, as he told a fellow Gabelli Funds officer, "Marc Gabelli was allowing the GGGF to be scalped." Compl. ¶ 42. Accordingly, we find that the complaint adequately states claims against Alpert for violations of Section 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act.

D. Civil Penalties

We next turn to whether the District Court erred in dismissing the prayer for civil penalties under the Advisers Act on the alternative grounds that (a) the SEC is not permitted to seek civil penalties in connection with a claim for aiding and abetting violations of the Advisers Act, and (b) the claim for civil penalties is time-barred. The first ground is plainly wrong, for this Court has previously held that civil penalties may be assessed in connection with such a claim. *See SEC v. DiBella*, 587 F.3d 553, 571-72 (2d Cir. 2009) (holding that because a "'violation' of the Advisers Act" includes the aiding and abetting of principal violations of the Advisers Act, "the civil penalty provision encompasses both primary and secondary violators of the Advisers Act").

As for the alternative ground, the relevant statute of limitations is set forth in 28 U.S.C. § 2462, which provides that a claim for civil penalties must be brought within five years "from the date when the claim first *accrued*." 28 U.S.C. § 2462 (emphasis supplied). Because the complaint charges violations of the antifraud provisions of the Advisers Act,[3] the SEC argues that the claim did not "accrue" until September 2003 when, as the complaint alleges, the SEC first discovered the fraud. This, the SEC argues, is because the determination of accrual under § 2462 is subject to the fraud-based discovery rule—"a doctrine that delays accrual of a cause of action until the plaintiff has 'discovered' it," or in the exercise of due diligence, should have discovered it, *see Merck & Co. v. Reynolds*, __ U.S. __, 130 S. Ct. 1784,1793-94 (2010). The defendants respond that since no reference to the discovery rule appears in the plain language of 28 U.S.C. § 2462, the SEC's claim for civil penalties accrued in August 2002, the last instance of Headstart's market timing in GGGF. In addition, defendant Gabelli argues that the discovery

---

[3] Specifically, the Third Claim alleges violations of Section 206(1) of the Advisers Act, which prohibits "any device, scheme, or artifice to defraud," and Section 206(2), which prohibits any practice that "operates as a fraud or deceit."

rule cannot save the SEC's claims against him because he did not take affirmative steps to conceal his misconduct.

As an initial matter, we note that Gabelli's latter argument reflects the all-too-common mistake by which the discovery rule is "sometimes confused with the concept of fraudulent concealment of a cause of action," *see Pearl v. City of Long Beach*, 296 F.3d 76, 80 (2d Cir. 2002), and we take this opportunity to once again clarify that these two doctrines are distinct. Under the discovery rule, the statute of limitations for a particular claim does not accrue until that claim is discovered, or could have been discovered with reasonable diligence, by the plaintiff. As a general matter, this rule does not govern the accrual of most claims because most claims do not involve conduct that is inherently self-concealing. However, since fraud claims by their very nature involve self-concealing conduct, it has been long established that the discovery rule applies where, as here, a claim sounds in fraud. As the Supreme Court recently stated in *Merck*, "[t]his Court long ago recognized that something different was needed in the case of fraud, where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." 130 S. Ct. at 1793 (emphasis in original). *See also TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring) (the discovery rule is a "historical exception for suits based on fraud"). Thus, contrary to Gabelli's contention, the discovery rule applies to fraud claims "though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874). *See also* John P. Dawson, *Fraudulent Concealment and Statues of Limitation*, 31 MICH. L. REV. 875, 880 (May 1933) ("Where undiscovered 'fraud' was the basis of liability, it was universally agreed that no new concealment was necessary.").

The fraudulent concealment doctrine, by contrast, is an equitable tolling doctrine, not an accrual doctrine. Under the fraudulent concealment doctrine, even when a claim has already accrued, a plaintiff may benefit from equitable tolling in the event that the defendant took specific steps to conceal her activities from the plaintiff. Thus, whereas the discovery rule does not ordinarily apply to non-fraud claims (as it is generally expected that a plaintiff will be able to discover the conduct underlying non-fraud claims), the fraudulent concealment doctrine may be used to toll the limitations period for non-fraud claims where the plaintiff is able to establish that the defendant took affirmative steps beyond the allegedly wrongful activity itself to conceal her activity from the plaintiff.

In this case, since the Advisers Act claim is made under the antifraud provisions of that Act and alleges that the defendants aided and abetted Gabelli Funds' fraudulent scheme, we hold that the discovery rule defines when the claim accrues and, correlatively, that the SEC need not plead that the defendants took affirmative steps to conceal their fraud. Although the defendants make much of the fact that Section 2462 does not expressly state a discovery rule, this Court has previously held that for claims that sound in fraud a discovery rule is read into the relevant statute of limitation. *See Dabney v. Levy*, 191 F.2d 201, 205 (2d Cir. 1951) (Hand, J.) ("[I]n cases of 'fraud' . . . when Congress does not choose expressly to say the contrary, the period of limitation set by it only begins to run after the injured party has discovered, or has failed in reasonable diligence to discover, the wrong.") (internal quotations omitted). Indeed, the Supreme Court has recently affirmed that a fraud claim "accrues" only when the plaintiff discovers the fraud. *Merck*, 130 S. Ct. at 1793-94. Thus, while Congress might have to affirmatively include language about a discovery rule in the event that it wanted a discovery rule to govern the accrual of non-fraud claims or wanted to impose a limit on using a discovery rule for certain fraud claims, it would be unnecessary for Congress to expressly mention the discovery rule in the context of fraud claims, given the presumption that the discovery rule applies to these claims unless Congress directs otherwise.[4] *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (the discovery rule for claims of fraud "is read into *every federal statute of limitation*.") (emphasis added).

---

[4] The defendants' reliance on *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), is misplaced, since it did not involve fraud claims but concerned violations of the Toxic Substances Control Act. *Id.* at 1460-63. As the Seventh Circuit recently observed in *SEC v. Koenig*, 557 F.3d 736, 739 (7th Cir. 2009), "[w]e need not decide when a 'claim accrues' for the purpose of § 2462 generally, because the nineteenth century recognized a special rule for fraud, a concealed wrong."

The defendants then argue that even if the discovery rule applies, the SEC's prayer for civil penalties must still fail because the SEC has not pled reasonable diligence. *Cf. SEC v. Koenig*, 557 F.3d 736, 739 (7th Cir. 2009) (pursuant to discovery rule, "a victim of fraud has the full time from the date that the wrong came to light, or would have done had diligence been employed"). They claim that all of the evidence that GGGF was being harmed by market timing was publicly disclosed in periodic reports with the SEC and that, with reasonable diligence, the SEC's claims could have been discovered within Section 2462's five year limitations period. But the entire argument is, at best, premature. The "lapse of a limitations period is an affirmative defense that a defendant must plead and prove," *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 426 (2d Cir. 2008), and dismissing claims on statute of limitations grounds at the complaint stage "is appropriate only if a complaint clearly shows the claim is out of time." *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999). Here, since the complaint expressly alleges that the SEC first discovered the facts of defendants' fraudulent scheme in late 2003, therefore, applying the discovery rule, the claim for civil penalties claims is not clearly time-barred.[5] Finding that at

[5] Indeed, the Seventh Circuit has observed that requiring the SEC to plead why it did not discover a fraud sooner would be "nonsensical" as it would require a plaintiff to "prove a negative" in the complaint. *Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 368 n.2 (7th Cir. 1997) (internal quotation marks omitted).

this stage in the litigation defendants have not met their burden of demonstrating that a reasonably diligent plaintiff would have discovered this fraud prior to September 2003, we conclude that the SEC's prayer for civil penalties survives defendants' motions to dismiss and must be reinstated.

E. Injunctive Relief

Finally, we turn to whether the District Court erred in dismissing the SEC's prayer for injunctive relief. In determining whether injunctive relief is appropriate, "[t]he critical question . . . is whether there is a reasonable likelihood that the wrong will be repeated." *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972). We first observe that where, as here, the complaint plausibly alleges that defendants intentionally violated the federal securities laws, it is most unusual to dismiss a prayer for injunctive relief at this preliminary stage of the litigation, since determining the likelihood of future violations is almost always a fact-specific inquiry.[6] Indeed, the defendants are unable to point to a single case where the SEC's prayer for injunctions against further violations was dismissed at the motion to dismiss stage based upon a finding of non-likelihood of further viola-

[6] For present purposes, we simply assume without deciding that a complaint must include sufficient factual allegations to plausibly allege not only a "claim to relief," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (construing Fed. R. Civ. P. 8(a) (2)), but also a "demand for the relief sought," Fed. R. Civ. P.8(a)(3)).

tions. In any event, since the complaint alleges that for almost three years Gabelli and Alpert intentionally aided and abetted Advisers Act violations and since "fraudulent past conduct gives rise to an inference of a reasonable expectation of continued violations," *see id.*, we conclude that the complaint sufficiently pleads a reasonable likelihood of future violations and thus reverse the District Court's dismissal of the SEC's prayer for injunctive relief.

CONCLUSION

For the foregoing reasons, we grant the SEC's appeal in all respects, dismiss the cross-appeals for want of appellate jurisdiction, and remand to the District Court for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of November, two thousand and eleven.

Before: Debra Ann Livingston,
Denny Chin,
Circuit Judges,
Jed S. Rakoff, *
District Judge.

Docket Nos. 10-3581(L)
10-3628(XAP)
10-3760 (XAP)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellant-Cross-Appellee,

v.

MARC J. GABELLI, BRUCE ALPERT,
Defendants-Appellees-Cross-Appellants.

---

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

ORDER

IT IS HEREBY ORDERED that the motion by Appellees-Cross-Appellants to stay the mandate for 90 days pending the filing of a petition for writ of *certiorari* is GRANTED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/ CATHERINE O'HAGAN WOLFE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed: March 17, 2010
08 Cv. 3868 (DAB)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—against—

MARC J. GABELLI, and, BRUCE ALPERT,

Defendants.

MEMORANDUM AND ORDER

DEBORAH A. BATTS, United States District Judge.

Plaintiff Securities and Exchange Commission (hereinafter "SEC") brings suit against Defendant Bruce Alpert for violations of Section 10(b) of the Exchange Act, Rule 10b-5, and Section 17(a) of the Securities Act. Plaintiff also brings suit against Defendants Alpert and Marc J. Gabelli for Aiding and Abetting Violations of Sections 206(1) and 206(2) of the Investment Advisers Act. Each Defendant now moves to dismiss the Complaint for failure to state a claim under Rule 12(b)(6). For the following reasons, Defendants' Motions are GRANTED in part, and DENIED in part.

I. BACKGROUND

Defendant Marc J. Gabelli ("Gabelli") is a resident of Connecticut and was portfolio manager for the Gabelli Global Growth Fund (hereinafter "GGGF") from 1997 until early 2004, as well as several affiliated hedge funds. (Compl. ¶ 10.) The GGGF was advised by third party Gabelli Funds, LLC ("Gabelli Funds"), a New York limited liability company and investment adviser within the meaning of Section 2(a)(20) of the Investment Company Act and Section 202(a)(11) of the Investment Advisers Act. (Compl. ¶ 12.) Defendant Bruce Alpert ("Alpert") is a resident of New York and has been Chief Operating Officer of Gabelli Funds since 1988. (Compl. ¶ 11.) Third-party Najy N. Nasser, who was the Chief Investment Adviser for Headstart Advisers, Ltd. ("Headstart"),[1] became acquainted with Mr. Gabelli during the Summer of 1999. (Compl. ¶¶ 1, 2, 20.)

Beginning in September 1999, Gabelli permitted Headstart to "market-time" the GGGF. Market-timing is a form of short-term trading that exploits the fact that mutual funds are generally priced only once per day, at 4:00 PM, in order to earn a profit at times when public information is disclosed and has not yet been incorporated into that price. (Compl. ¶¶ 15-17.) One type of market-timing, known as "time-zone arbitrage" is premised on the fact that many mutual funds include shares of international stocks. Market-timers can take

[1] Headstart has also operated under the name Folkes Asset Management (Compl. ¶ 1.)

advantage of the fact that price movements during the "New York trading day" may cause corresponding movements in foreign markets once they open, and thus lead to increases in the price of foreign securities that are part of the mutual fund. However, market-timers know that these increases in foreign security prices will not be incorporated into the mutual fund's price until the following day, enabling them to purchase the fund at an artificially low price and then sell it at a profit the following day when the mutual fund's price is finally adjusted. (Compl. ¶ 17.)

The Prospectus for GGGF reserved the right to "reject any purchase order if, in the opinion of the Fund management, it is in the Fund['s] best interest to do so" and this language was often used in letters sent to brokers whose customers were suspected of market-timing the fund. (Compl. ¶¶ 31, 34.) The letters also explained that "[m]arket timing can negatively affect the mutual fund investment process. Excessive and unpredictable trading hinders a fund manager's ability to pursue the fund's long-term goals." (Compl. ¶ 34.) Gabelli Funds would also occasionally reject individual purchases or ban particular accounts from trading in their funds if those purchases or accounts were suspected of engaging in market-timing. (Compl. ¶ 31.)

Headstart initially conducted its market-timing activities with GGGF utilizing $5,000,000.00 disbursed between two separate accounts. (Compl. ¶ 20.) The account information was communicated to a Gabelli Funds employee, who in turn notified Defendant Gabelli. At some point after Headstart began market-timing, but before April 2000, Alpert communicated to Nasser that Headstart would not be allowed to trade in any fund advised by Gabelli Funds, other than GGGF. (Compl. ¶ 20.) On April 7, 2000, Gabelli allowed Headstart to increase the amount that it was market-timing to $20,000,000.00, in consideration of a $1,000,000.00 investment that Headstart promised to make in a hedge fund that Gabelli managed. (Compl. ¶ 21.) Headstart notified Gabelli that it had opened up a new account with GGGF to allow for this additional market-timing capacity. (Compl. ¶ 21.)

On April 17, 2000, Nasser sent an email to Gabelli, pertaining to the increase in market-timing capacity, in which he stated that he was ". . . looking forward to doing something on [Gabelli's] Hedge Fund especially in the spirit of cooperation which I think we have and are developing. I understand inflows would have a greater value for you businesswise now, near the beginning." (Compl. ¶ 22.) On April 18, 2000, Nasser again emailed Gabelli, advising him that he planned on confirming the $1,000,000.00 investment in Gabelli's hedge fund on April 24, 2000. (Compl. ¶ 23). Nasser eventually confirmed that this investment had been made on April 25, 2000. (Compl.¶ 23.)

On December 15, 2000, Alpert, in an internal memo, stated that "Market Timers (scalpers) have been using the International and Global Funds in a way that is disruptive to the Fund and the management of the portfolio. We are making efforts to identify each account and restrict them from purchasing the funds." (Compl. ¶ 31.) In addition, Alpert had two Gabelli Fund employees, known internally as "market-time police," review certain fund purchases and reject those that appeared to be attempts at market-timing. (Compl. ¶ 31.) These employees were instructed to ignore the Headstart accounts because they were related to "a Marc Gabelli-client relationship." (Compl. ¶ 33.) At least one of the employees was given these instructions directly from Alpert. (Compl. ¶ 33.)

Additionally, in December 2000, Gabelli contacted the Chief Financial Officer of the Gabelli Funds to order that a suspected market-timer be banned from trading in GGGF. (Compl. ¶ 32.) The communication also expressed that any market-timing activity in GGGF would be "only what [he] authorized". (Compl. ¶ 32.)

On February 21, 2001, Alpert made comments at a GGGF board meeting, at which Gabelli was in attendance and also spoke, regarding the harm that "market-timing" or "scalping" was causing, as well as the specific actions that Gabelli Funds was taking to reduce market-timing activities in the fund. (Compl. ¶ 36; Sherman Decl., Ex. D). These comments were similar in substance to the December 15, 2000 internal memorandum. (Compl. ¶ 36.)

On or about April 1, 2002, Alpert advised Headstart to reduce the amount of market-timing in GGGF because the high trading levels were in violation of federal securities laws. (Compl. ¶ 25.) Gabelli subsequently sent an email to Alpert stating, "WHAT IS THE SITUATION WITH MARKET TIMER – I UNDERSTAND YOU TOLD HIM 'I SAID' IT WAS OK . . . VERY PAROCHIAL AND DESTRUCTIVE." (Compl. ¶ 25.) (emphasis and ellipsis in original). Albert responded, "I have always been opposed to the market timers in the fund. I had a discussion with Najy Nassar that he should reduce his market timing activity to no more than 3% of the fund. He was reluctant to do this except he reduced one account to 3% and still is using about 10% or $16 million. I would like him out completely. However, if he continues his participation in other products of the firm we should allow some monies to remain in the Mutual funds." (Compl. ¶ 25.)

Thereafter, Headstart reduced the amount of money that it had invested in the hedge fund that Gabelli managed. (Compl. ¶ 26.) In an email, Gabelli stated that the investment was drawn down because Headstart "was reduced in [market] timing money in mutual funds." (Compl. ¶ 26.) Prior to August 31, 2002, at least 48 accounts were banned from trading in GGGF and at least $23,000,000.00 in purchases were rejected due to suspected market-timing. (Compl. ¶ 35.)

On August 7, 2002, the Chief Executive Officer of Gabelli Funds' parent company instructed that all market-timers playing the "international game" should be stopped. (Compl. ¶ 28.) Alpert then informed Headstart that it would no longer be permitted to market-time GGGF, and Headstart subsequently redeemed the rest of its investment in Gabelli's hedge fund. (Compl. ¶ 28.)

On September 3, 2003, the New York Attorney General announced an investigation into market-timing. (Compl. ¶ 43.) In response, Alpert posted a September 3, 2003 Memorandum to the Gabelli Funds' parent company's website, stating that, "for more than two years, scalpers have been identified and restricted or banned from making further trades. Purchases from accounts with a history of frequent trades were rejected. Since August 2002, large transactions in the global, international and gold funds have been rejected without regard to the past history. While these procedures were in place they did not completely eliminate all timers." (Compl. ¶ 44; Sherman Declaration, Ex. E.)

On May 4, 2007 Alpert, by his attorney, entered into a tolling agreement with the SEC, which was amended on September 14, 2007, extending the statute of limitations in this matter for approximately seven months. (Sherman Decl., Ex. G.) The Complaint in this matter was filed on April 24, 2008.

II. DISCUSSION

A. Legal Standard for a Motion to Dismiss

For a complaint to survive dismissal under Rule 12(b)(6), the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility," the Supreme Court has explained,

> "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a com-

> plaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.' "

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 556-57). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotation marks omitted). "In keeping with these principles," the Supreme Court has stated:

> "a court considering a motion to dismiss can choose to begin by identifying pleadings, that because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Iqbal, 129 S.Ct. at 1950.

In ruling on a 12 (b)(6) motion, a court may consider the complaint as well as "any written instrument attached to the complaint as an exhibit or any statements or documents incorporated in it by reference." *Zdenek Marek v. Old Navy (Apparel) Inc.*, 348 F.Supp. 2d 275, 279 (S.D.N.Y. 2004) (citing

Yak v. Bank Brussels Lambert, 252 F.3d 127, 130 (2d Cir. 2001) (internal quotations omitted)).

Under Rule 9(b), "in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. Pro. 9(b). To satisfy the particularity requirement of Rule 9(b), a complaint must "specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *United States Fire Ins. Co. v. United Limousine Service, Inc.*, 303 F.Supp.2d 432 (S.D.N.Y. 2004) (citing *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir. 1989)).

B. Statute of Limitations

1. The Applicable Limitations Period

While "[a]n 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," *SEC v. Tandem Management Inc.*, 2001 WL 1488218, * (S.D.N.Y. Nov. 21, 2001) (quoting *E.I. Dupont De Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924)), 28 U.S.C. § 2462 "is a general statute of limitations, applicable . . . to the entire federal government in all *civil penalty cases*, unless Congress specifically provides otherwise." *3M Co. (Minnesota Min. and Mfg.) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994) (emphasis added).

Section 2462 provides that "an action, suit or proceedings 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. Therefore, to the extent the Commission's claims are subject to a statute of limitations, the catch-all limitations period in 28 U.S.C. § 2462 applies." *S.E.C. v. Jones*, 476 F.Supp.2d 374, 380 (S.D.N.Y. 2007). However, courts have found that in light of "the ordinary meaning of 'penalty,' and the clear language of § 2462 . . . the limitations period in § 2462 applies to civil penalties and equitable relief that seeks to punish, but does not apply to equitable relief which seeks to remedy a past wrong or protect the public from future harm." *Id.* at 380-81 (citing *Johnson v. SEC*, 87 F.3d 484, 486-92 (D.C. Cir. 1996); *SEC v. Tandem Mgmt. Inc.*, 2001 WL 1488218, at *6 (S.D.N.Y. Nov. 21, 2001)). In particular, "Section 2462's statute of limitations applies to the SEC's request for civil penalties but not to its request for permanent injunctive relief [or] disgorgement." *SEC v. Kelly*, 663 F.Supp.2d 276, 287 (S.D.N.Y. 2009); *see also Johnson*, 87 F.3d at 491 (§ 2462 does not apply to the remedy of disgorgement).

Accordingly, to the extent the SEC seeks to enjoin Defendants Alpert and Gabelli from violating or aiding and abetting the violation of the securities laws, or an order directing Defendants to disgorge profits, (Compl. ¶ 59(A)-(C)), in order to remedy an alleged past wrong and protect the public from future harm, the five-year statute of limitations of § 2462 does not apply. Nevertheless, the SEC also seeks an Order directing Defendants to pay civil monetary penalties, (Compl. ¶ 59(D)), which is clearly subject to § 2462 under the language of the statute.

Plaintiff contends that a claim accrues and the statute of limitations begins to run for purposes of § 2462, when the fraud or misstatement is discovered. The "discovery rule," when applicable, provides that a cause of action accrues when the violation was discovered or should have been discovered by Plaintiff, rather than when the violation occurs. *See, e.g.*, *S.E.C. v. Alexander*, 248 F.R.D. 108, 116 (E.D.N.Y. 2007). Although the Second Circuit has not addressed the issue, other courts both within and outside this jurisdiction have found that the discovery rule does not apply to § 2462. *See, e.g.*, *3M Co. v. Browner*, 17 F.3d 1453, 1463 (D.C. Cir. 1994) (rejecting the discovery rule as "unworkable; outside the language of the statute; [and] inconsistent with judicial interpretations of § 2462"); *Alexander*, 248 F.R.D. at 116 (collecting cases holding that a "claim for penalties subject to Section 2462 accrues at the time the violation giving rise to the penalties occurs"); *S.E.C. v. Jones*, 2006 WL 1084276, *6 (S.D.N.Y. Apr. 25, 2006) (finding the analysis in *Browner* instructive and rejecting the applicability of the discovery rule to claims subject to § 2462). This Court agrees and finds that the discovery rule does not apply to claims subject to the limitations of § 2462.

2. Application of the Limitations Period to the Alleged Violations.

Here, the Exchange Act claims are based upon Alpert's September 3, 2003 Memorandum and an alleged "scheme to defraud" through the hiding of

Headstart's market timing from the GGGF Board. (Compl. ¶ 44; Plt's Mem. of Law, 11-13.) Because the April 24, 2008 Complaint in this matter was filed within five years of September 2, 2003, Plaintiff's request for civil penalties under § 2462 for the alleged September 3, 2003 misrepresentation and omission is not barred, although for the reasons explained, *infra*, those claims are dismissed because Plaintiff cannot plead all the necessary elements of a cause of action. As to Alpert's December 15, 2000 memorandum stating that market-timers were being identified and restricted, (Compl. ¶ 31), his December 2000 instructions to "market-time police" employees to leave Headstart alone, (Compl. ¶¶ 31-33), and his February 21, 2001 report to the GGGF Board that market-timing was being restricted, (Compl. ¶¶ 36-38), the April 24, 2008 Complaint was filed well more than five years and seven months after these alleged violations.

For the Aiding and Abetting claims under Sections 206(1) and 206(2) of the Investment Advisers Act, the Complaint alleges that Headstart's market timing ended on August 7, 2002. (Compl. ¶ 44.) Accordingly, for Defendant Alpert, the statute of limitations on a claim for civil penalties under the Investment Advisers Act had run by March 7, 2008, five years and seven months after the violation occurred, and prior to the filing of the Complaint on April 23, 2008. Similarly, for Defendant Gabelli, the statute of limitations on the Investment Advisers Act claims ran on August 7, 2007, well before the Complaint was filed.

Accordingly, the statute of limitations has run on Plaintiff's claims for civil penalties under the

Investment Adviser Act and the alleged scheme to defraud under the Exchange Act.

3. Fraudulent Concealment

Plaintiff also contends, however, that the statute of limitations was tolled by Defendants' alleged fraudulent concealment, which courts in this jurisdiction have found to apply to claims subject to § 2462. *See S.E.C. v. Power*, 525 F.Supp.2d 415, 424-35 (S.D.N.Y. 2007); *S.E.C. v. Jones*, 2006 WL 1084276, *6 (S.D.N.Y. Apr. 25, 2006).

To invoke the fraudulent concealment doctrine, a Plaintiff must allege: "(1) that the defendants concealed the cause of action; (2) that the plaintiff did not discover the cause of action until some point within five years of commencing the action; and (3) that the plaintiff's continuing ignorance was not attributable to lack of diligence on its part." *Power*, 525 F.Supp.2d at 424 (citing *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988)). "Plaintiff can establish the concealment element by pleading either that the Defendants took affirmative steps to prevent discovery of the fraud or that the wrong itself was . . . self-concealing." *Power*, 525 F.Supp.2d 415 (quoting *Jones*, 2006 WL 1084276, at *6).

The doctrine of fraudulent concealment does not apply "where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff's underlying cause of action." *Abercrombie v. Andrews College*, 438 F.Supp.2d 243, (S.D.N.Y. 2006). Further, "[s]tanding alone, allegations of fraud are generally insufficient to demonstrate that a particular act is self-concealing. Indeed, for a fraud to be self-concealing, the defendant must have engaged in some misleading, deceptive or otherwise contrived action or scheme, *in the course of committing the wrong*, that was designed to mask the cause of action." *SEC v. Jones*, 476 F.Supp.2d 374, 382 (S.D.N.Y. 2007) (emphasis in original) (quoting *Hobson v. Wilson*, 737 F.2d 1, 34 (D.C. Cir. 1984)).

Here, Plaintiff pleads that it "could not have discovered that wrongdoing earlier because Defendants took affirmative acts to conceal it, and because of the self-concealing nature of Defendants' wrongdoing." (Compl. ¶ 46.) Here, Plaintiff does not allege with particularity under Rule 9(b) what acts Defendants took, *beyond the alleged acts of wrongdoing themselves*, or what contrivance or scheme was designed to mask the SEC's causes of action. Nor does Plaintiff meet the third element of fraudulent concealment by alleging how it has engaged in due diligence during the time that the statute of limitations was running.

Accordingly, because the statute of limitations has run on Plaintiff's claims for civil penalties under the Investment Adviser Act and the alleged scheme to defraud under the Exchange Act, these claims are DISMISSED.

C. Section 10(b) & Rule 10b-5 and 17(a) Claims Against Defendant Alpert

To state a cause of action under Section 10(b) and Rule 10b-5, a Plaintiff must allege "(1) material misstatement or omission, (2) scienter, (3) a connection with the purchase or sale of a security, (4) reliance . . . , (5) economic loss, and (6) loss causation, i.e., a causal connection between the material misrepresentation and the loss." *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474, 478 n.1 (2d Cir. 2008) (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005)).

To allege a claim under Sections 17(a)(1), (2), and (3), Plaintiff "must show that the defendant: (1) committed a deceptive or manipulative act, or made a material misrepresentation (or a material omission if the defendant had a duty to speak) or used a fraudulent device; (2) with scienter; (3) which affected the market for securities or was otherwise in connection with their offer, sale or purchase." *SEC v. Power*, 525 F.Supp.2d 415, 419 (S.D.N.Y. 2007) (citing *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999)). However, "[w]hile proof of scienter is a necessary element of liability under . . . § 17(a)(1) and . . . § 10(b) and Rule 10b-5, it is not required for liability under § 17(a)(2) & (3)." *Id.* (citing *Aaron v. SEC*, 446 U.S. 680, 697 (1980)).

Here, Plaintiff alleges that Alpert violated Section 10(b)(5), Rule 10b-5 and Section 17(a) by both misstating and omitting material facts in his September 2003 memorandum and by engaging in a scheme to defraud, which consisted of authorizing Headstart to market-time GGGF in exchange for an investment in Gabelli's hedge fund while hiding these facts from GGGF's Board of Directors. (Compl. ¶¶ 36, 38, 44-45, 49-50, 52-53; Plt's Mem. of Law, 11-14.) In response, Defendant Alpert argues that the SEC's Complaint does not allege with sufficient particularity that Alpert made a misrepresentation or actionable omission, that any such misrepresentation or omission was material, that Alpert engaged in a scheme to defraud, or that Alpert acted with the requisite scienter. (Alpert's Mem. of Law, 12-20.)

Plaintiff alleges that Alpert made a misstatement in his September 2003 memorandum to the Gabelli Fund's parent's website, stating that "for more than two years, scalpers have been identified and restricted or banned from making further trades." (Compl. ¶¶ 43-45.) The Court finds that this statement was literally true, given that for more than two years, scalpers had been identified and restricted from making further trades. (Compl. ¶¶ 30-31, 33-35.)

Further, Plaintiff's sole basis for its material omission claim is Alpert's alleged duty to correct the statement that "for more than two years, scalpers have been identified and restricted or banned from making further trades." (Compl. ¶¶ 43-45.) However, as the Court has found, this statement was not a misrepresentation, and thus Alpert had no duty to disclose fully Headstart's market-timing in the September 3, 2003 memorandum.

Plaintiff also fails to allege that Alpert participated in a fraudulent scheme or artifice. To "participate in a fraudulent scheme" a Defendant must do more than "perform[] purely administrative duties without knowledge of the purpose of the scheme" but must "take . . . concrete steps in furtherance of the violation" by engaging in "actions or statements that were independently deceptive or fraudulent." *SEC v. Collins & Aikman Corp.*, 524 F.Supp.2d 477, 486 (S.D.N.Y. 2007).

Under the securities laws, however, a "market timing agreement . . . standing alone, [can] not be considered *per se* a fraudulent device intended to defraud investors." *SEC v. PIMCO Advisors Fund Management LLC*, 341 F.Supp.2d 454, 468 (S.D.N.Y. 2004). Further" while "[a]rguably . . . [such an] agreement, in which [an investor] received favorable treatment in exchange for its placement of long-term investments in various . . . Funds, violated . . . fiduciary duties towards investors, . . . such potential violations do not by themselves result in violations of Rule 10b-5." *Id.*, 469. Here because Defendant Alpert permitted Headstart to engage in a practice that was not fraudulent, and did not mislead investors, Plaintiff has not adequately alleged a fraudulent scheme or device intended to defraud investors.

Accordingly, because Plaintiff has not pled with particularity a material misrepresentation, omission, or fraudulent scheme or artifice, Defendant Alpert's Motion to Dismiss the Section 10(b), Rule 10b-5 and 17(a) claims is GRANTED.

D. Section 206 Aiding and Abetting Claim Against Defendants Alpert and Gabelli

To state a cause of action for aiding abetting liability under Sections 206(1) and 206(2) of the Investment Advisers Act, Plaintiff must allege (1) an underlying violation of the act; (2) Defendant's knowledge of the fraudulent acts; and (3) Defendant's provision of substantial assistance to the primary violation. *See SEC v. Cedric Kushner Promotions, Inc.*, 417 F.Supp.2d 326, 334 (S.D.N.Y. 2006); *SEC v. Pimco Advisors Fund Management*

LLC, 341 F.Supp.2d 454, 470 (S.D.N.Y. 2004). The elements of a primary violation of Section 206(1) and (2) "have been interpreted as substantively indistinguishable from Section 17(a) of the Securities Act, except that Section 206(1) requires proof of fraudulent intent, while Section 206(2) simply requires proof of negligence by the primary wrongdoer." *Pimco Advisors Fund Management LLC*, 341 F.Supp.2d at 470 (citing *SEC v. Moran*, 922 F.Supp. 867, 896-97 (S.D.N.Y. 1996)).

"As [the Second Circuit] and the Supreme Court have noted, the Advisers Act reflects . . . congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser – consciously or unconsciously – to render advice which was not disinterested." *SEC v. DiBella*, 587 F.3d 553, 567 (2d Cir. 2009) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S 180, 186 (1963)). To that end, Section 206 has been found to "establish federal fiduciary standards to govern the conduct of investment advisers . . . requiring advisers to exercise the utmost good faith in dealing with clients, to disclose all material facts, and to employ reasonable care to avoid misleading clients." *SEC v. Treadway*, 430 F.Supp. at 293, 338 (S.D.N.Y. 2006) (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 44 U.S. 11, 17 (1979); *Moran*, 922 F.Supp. at 895-96)).

Here, the alleged primary violator is Gabelli Funds, LLC, which Defendants do not contest meets the definition of an Investment Adviser to the GGGF Fund under the Investment Advisers Act. Plaintiff has adequately alleged that Gabelli Funds knowingly entered into an agreement with

Headstart permitting it to market-time GGGF in exchange for investment in an affiliated hedge fund, (Compl. ¶¶ 20-24), at the same time that Gabelli Funds had acknowledged that market-timing was harmful to long-term investors in the GGGF, (Compl. ¶¶ 31, 34). Taking these facts as true, Plaintiff has alleged with particularity a violation of Gabelli Funds' fiduciary duty to its investors under both Section 206(1) and (2).

Further, Plaintiff adequately pleads that Defendant Gabelli knew or was reckless in not knowing of Gabelli Funds' violation of the Investment Advisers Act, and provided substantial assistance to that violation. In particular, Plaintiff alleges that Gabelli himself entered into the market-timing agreement with Headstart, permitted Headstart to increase its market-timing trading, made clear that no one would be permitted to market-time GGGF unless he authorized it, was informed by Alpert of Headstart's continued market-timing in GGGF, and was present at Alpert's allegedly misleading presentation to the Board of the GGGF. (Compl. ¶¶ 20-23, 25-26, 32, 36-37.) Similarly, Plaintiff has pled with particularity that Alpert knew of and provided substantial assistance to Gabelli Funds' violation, including by providing the "ground rules" for market-timing to Headstart, directing "market-time police" employees not to monitor Headstart's trades because they were related to Gabelli's client relationship, and omitting the existence of Headstart's market-timing while representing to the Board of Directors of GGGF that management was taking steps to restrict market-timing. (Compl. ¶¶ 20, 31, 36, 43-45.)

Accordingly, Defendants' Motions to Dismiss the Aiding and Abetting claims under Sections 206(1) and (2) of the Investment Adviser Act are DENIED.

E. Available Remedies

Defendants further argue that, separate and apart from their statute of limitations arguments, the remedies of disgorgement, injunctive relief, and civil monetary penalties are unavailable to the SEC as a matter of law.

1. Injunctive Relief

First, Defendants contend that injunctive relief is unavailable because the SEC has not adequately pled scienter or "demonstrated any realistic likelihood of recurrence." (Alpert Mem. of Law, 24; Gabelli Mem. of Law, 15.) As the Court found, *supra*, the SEC has adequately alleged the element of scienter for each of its claims. In determining whether injunctive relief is available in an action under the Exchange Act, "[t]he focus of this inquiry is on the defendant's past conduct." *SEC v. Colonial Investment Management, LLC*, 2008 WL 2191764, *3 (S.D.N.Y. 2008) (quoting *SEC v. Commonwealth Chem. Sec., Ins.*, 574 F.2d 90, 99 (2d Cir. 1978)). "Other factors courts should consider in determining whether there is a reasonable likelihood of future violations include: (1) the egregiousness of the past violations; (2) the degree of scienter; (3) the isolated or repeated nature of the violations; (4) whether defendant has accepted blame for his conduct; and (5) whether the nature of the defendant's occupation makes it likely he will have opportunities to commit future violations." *Id.* (citing *SEC v. Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998)).

Although the SEC has pled that "unless restrained and enjoined" Defendants "will continue to violate" Sections 206(1) and (2) of the securities laws, (Compl. ¶ 57), its allegations do not plausibly allege a reasonable likelihood that the Defendants will engage in future violations. There is no allegation that either Defendant has ever engaged in a breach of fiduciary duty or other fraudulent activity either prior or subsequent to the specific claims brought here. Further, Plaintiff does not allege how Defendants' acts are particularly egregious, and even concedes that any market-timing was not, by itself, fraudulent or illegal. (Plt's Mem. Of Law, 9.) Further, the Court notes that when the Defendants were instructed by their parent company to stop all market-timing, the Defendants ended Headstart's market-timing in August of 2002 and the Attorney General began his investigation into market-timing in September of 2003. (Compl. ¶¶ 28, 45.)

Additionally, the Court finds the facts alleged here to be quite different from those where other Courts have denied motions to dismiss injunctive relief under the securities laws. *See, e.g.*, *SEC v. Colonial Investment Management LLC*, 2008 WL 2191764, *3 (S.D.N.Y. May 23, 2008) (denying Motion to Dismiss where it was alleged that "defendants repeatedly [on eighteen separate occasions] and knowingly engaged in conduct that violated [securities laws] over a period of several years, and engaged in sham transactions to conceal the violative conduct.); *SEC v. Power*, 525 F.Supp.2d 415, (S.D.N.Y. 2007) (denying Motion to Dismiss where it was alleged that defendant "engaged in repeated fraudulent conduct . . . and knowing misconduct over a period of several years" including the creation of sham transactions, improperly writing off assets, improperly valuing inventory, falsely increasing a company's performance through the improper consolidation of revenues, and improperly directing the establishment of reserves on a worst-case basis).

Accordingly, the Court finds that Plaintiff has not plausibly alleged that Defendants are reasonably likely to engage in future violations under the Investment Advisors Act, and that the Defendants' motion for dismissal of Plaintiff's request for an injunction is GRANTED.

2. Disgorgement

Second, Defendants contend that disgorgement is unavailable because the SEC has failed to allege that it is necessary to deter future wrongdoing or that Defendants were unjustly enriched, (Alpert Mem. of Law, 24), and because Gabelli Funds has already paid disgorgement, (Gabelli Mem. of Law, 14.) "In a securities enforcement action, as in other contexts, disgorgement is not available primarily to compensate victims" but "[i]nstead . . . to prevent wrongdoers from unjustly enriching themselves through violations, which has the effect of deterring subsequent fraud." *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006). Thus, the fact that

Gabelli Funds has already disgorged profits does not prevent the SEC from seeking disgorgement from Alpert and Gabelli for purposes of preventing any unjust enrichment accruing to them and for deterrence. The SEC adequately alleges that the remedy of disgorgement is necessary to prevent Defendants from enriching themselves through their "ill-gotten gains from their illegal conduct . . ." (Compl. ¶ 59(c)).

3. Civil Penalties

Finally, Defendants contend that the SEC cannot seek civil monetary penalties from aiders and abettors under the Investment Advisers Act. (Gabelli Mem. of Law, 15.) Although the Court has found that Plaintiff may not seek civil penalties for its Investment Advisers Act claims under the statute of limitations, in the alternative, the Court also agrees that the Investment Advisers Act does not provide for civil penalties for aiders and abettors. Section 209(e) of the Investment Advisers Act provides that:

> Whenever it shall appear to the Commission that any person has violated any provision of [the Act] . . . the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person *who committed such a violation*.

15 U.S.C. § 80b-9(e)(1) (emphasis added).

Where the "statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Reves v. Ernset & Younq*, 507 U.S. 170, 177 (1993). Here, the statutory language is unambiguous that civil penalties in judicial proceedings may be imposed only upon a "person who committed" a violation of the Investment Advisers Act.

Further, "[w]here Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S*, 464 U.S. 16, 23 (2000). Here, Section 209(e) of the Investment Advisers Act as it now exists was amended by Section 402 of the Securities Enforcement Remedies and Penny Stock Act of 1990 (the "Remedies Act"), Pub. L. No. 101-429, 104 Stat. 931, 949-51. (*See* Gabelli Mem. of Law, 16 n.17). An additional provision of the Remedies Act – Section 401 – provides that in *administrative proceedings*, "the Commission may impose a civil penalty if it finds . . . that such person . . . has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person." 15 U.S.C. § 80b-3(I). Consequently, it is apparent that had Congress wished to provide for civil monetary penalties for aiders and abetters in judicial proceedings under the Investment Advisers Act, it would have done so through the use of similar language as it used to provide for such penalties in administrative proceedings under the Act.

Further, Plaintiffs's argument for why the Court should disregard both the ordinary meaning of the statutory language of Section 209(e) and the express provision of civil penalties for aiders and abetters under Section 401 of the Remedies Act is not based upon a "clearly expressed legislative intent to the contrary," *Reves v. Ernset & Young*, 507 U.S. at 177. Instead, the SEC relies upon the legislative history of the entirely distinct Exchange Act to argue by analogy that the term "violation" as used in Section 209(e) of the Investment Advisers Act should be interpreted as including both primary and aiding and abetting violations.

As the Court in *SEC v. Bolla*, 550 F.Supp.2d 54, (D.D.C. 2008) stated, the "SEC's argument fails, however, because . . . [it] does not discuss the Advisers Act at all, and thus does not directly bear upon Congress' view of the SEC's ability to seek monetary penalties against aiders and abetters in enforcement actions under the Advisers Act." *Id.*, 61.

The Court agrees with the Court in *Bolla*, which found that because "the SEC offers no convincing rationale for ignoring the Supreme Court's instructions and the canons of statutory construction . . . Section 209(e) does not authorize the SEC to seek, or grant this Court jurisdiction to impose, monetary penalties upon Defendant . . . for his aiding and abetting of the Advisers Act." *Id.*, 62-63.

Accordingly, Defendants' Motions to Dismiss the request for disgorgement is DENIED, while Defendants' Motions to Dismiss the request for an injunction, and for civil penalties under the Investment Advisers Act is GRANTED.

III. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss the Complaint are GRANTED in part, and DENIED in part. Plaintiff's claims under Section 10(b) and Rule 10b-5, as well as Section 17 of the Exchange Act are DISMISSED, with prejudice. Plaintiff's requests for an injunction and for civil monetary penalties under the Investment Advisers Act are DISMISSED, with prejudice. Defendants shall Answer the remaining claim for disgorgement under the Investment Advisers Act within 30 days of the date of this Order.

SO ORDERED.

DATED: New York, New York
March 17, 2010

/s/ DEBORAH A. BATTS
Deborah A. Batts
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 22nd day of November, two thousand eleven,

---

Docket Nos. 10-3581 (Lead)
10-3628 (XAP)
10-3760 (XAP)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant-Cross-Appellee,

v.

MARC J. GABELLI, BRUCE ALPERT,

Defendants-Appellees-Cross-Appellants.

ORDER

Appellee-Cross-Appellant Marc J. Gabelli filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. By letter filed on October 14, 2011, Appellee-Cross-Appellant Bruce Alpert joined in the petition. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the

Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ CATHERINE O'HAGAN WOLFE