No. 11-1274

IN THE

Supreme Court of the United States

MARC J. GABELLI and BRUCE ALPERT,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF 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
Michael R. Lazerwitz
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
212-225-2000
lliman@cgsh.com

Counsel for Petitioners

September 10, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully file this supplemental brief, pursuant to Supreme Court Rule 15.8, to call to the Court's attention a new Second Circuit case that is supportive of the Petition for Certiorari and that was not available at the time Petitioners filed their Reply Brief in Support of the Petition for Certiorari on August 14, 2012. *Securities and Exchange Commission v. Obus*, No. 10-4749-cv, 2012 WL 3854797 (2d Cir. Sept. 6, 2012), highlights the significance of the issue presented by the Petition and illustrates a central fallacy in the Second Circuit's ruling in *Gabelli* and in the Government's argument: as the district court properly recognized, the deception necessary to establish the violation of an antifraud statute is not equivalent to the concealment necessary to invoke equitable tolling, even assuming that doctrine applies to Section 2462. Under the Circuit's rule, anyone would be at peril of a Securities and Exchange Commission ("SEC") penalty fraud claim years after the fact regardless whether there was concealment.

In its opposition to the Petition, the Government argues that Section 2462 incorporates a discovery rule under which "the commencement of the applicable limitations period in cases involving fraud or concealment," Opp. 9 (emphasis added), does not begin to run until the SEC knew or should have

known of the elements of the claim. The premise of the Government's argument, and the Second Circuit's ruling, is that, unlike other claims, as a categorical matter, "fraud claims by their very nature involve self-concealing conduct." Pet. App. 18a; *see also* Opp. 15 (arguing justification for the discovery rule "is that the fraudulent nature of a defendant's offense prevents a plaintiff from knowing that she has been defrauded"). Petitioners have argued that, even assuming that equitable tolling applies when a defendant takes action to conceal a fraud or commits a fraud in a manner that, in the way it is committed, is self-concealing, *but see* Reply 6, that rule asks the wrong question, is legally flawed, and proves too much. It would make the statute of limitations question turn solely on the Government's diligence (and not on whether the defendant engaged in conduct to prevent the Government from discovering the claim), and it would leave open for "eternity" the statute of limitations in all cases brought under anti-fraud statutes or until the Government discovers or should have discovered the violation, Pet. 16, contrary to the long-settled principle that "it would be utterly repugnant to the genius of our laws, to allow such prosecutions a perpetuity of existence." *United States v. Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) (Story, J.); *see also* Robert G. Morvillo & Robert Anello, *Statute of Limitations in SEC Enforcement Actions,* N.Y. L. J. (Online), Apr. 5, 2011. Petitioners argue that the Second Circuit's rule improperly equates deception (which is an element of many anti-fraud statutes) with concealment (which some

courts have held tolls the statute of limitations but which is not inherent in every fraud case).

Securities and Exchange Commission v. Obus supports Petitioners' argument. There, the Second Circuit held that to establish a violation of Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), the SEC need not make any "showing of 'deception' beyond the tip itself," *Obus,* 2012 WL 3854797, at *12, because in a case involving insider trading by misappropriation theory, "the act of misappropriation itself is deceitful." *Id.* at *8 (citing *United States v. O'Hagan*, 521 U.S. 642, 653 (1997)). The court further held that evidence an alleged tipper disclosed his use of confidential information would not absolve him of liability for insider trading absent evidence he disclosed that use to the source of the information itself. *Id.* at *6, *14 n.5. In other words, under *Obus*, a Section 10(b) violation is complete when a tip is made without disclosure; it is irrelevant whether the tip is concealed either as part of the violation or thereafter.

As *Obus* highlights, claims for violations of antifraud statutes do not, by definition, involve conduct that is self-concealing and, therefore, are not, by definition, more difficult for the Government to discover than claims under scores of other statutes. The Government, and the court below in *Gabelli*, agree that in order to suspend the running of the statute of limitations for claims under other statutes that do *not* "sound in fraud," the Government would have to allege, and prove, that the defendant took some affirmative act to conceal and

frustrate the Government's ability to bring a timely claim—beyond the violation of the statute itself. The Second Circuit's decision in *Obus* demonstrates that, contrary to the decision below, no different rule should apply when liability is alleged to arise under a statute that is deemed to be an "antifraud statute." That the SEC has alleged a "claim . . . made under the antifraud provisions" of the federal securities laws, Pet. App. 19a, even if that claim is pleaded in accordance with "the pleading standards for fraud," Opp. 17, cannot be sufficient to delay the accrual of the statute of limitations because—as the Second Circuit concluded in *Obus*—the deception sufficient to satisfy an antifraud statute does not require concealment. By holding otherwise, the Second Circuit has established a rule of law, contrary to Section 2462 and in conflict with the decisions of other courts, that would indefinitely extend the statute of limitations even where the defendant took no action to conceal the SEC's claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEWIS J. LIMAN
Counsel of Record
MICHAEL R. LAZERWITZ
CLEARY GOTTLIEB STEEN
& HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000
lliman@cgsh.com

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

September 10, 2012.