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

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September 21, 2012

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PETITIONERS' SECOND 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 bring to the Court's attention the Securities and Exchange Commission's ("SEC" or "Commission") Petition for Rehearing En Banc in *Securities and Exchange Commission v. Bartek*, No. 11-10594, 2012 WL 3205446 (5th Cir. Aug. 7, 2012), filed September 20, 2012, which is an intervening matter not available to Petitioners at the time of their last filing. In the Petition for Rehearing, the SEC argues (i) that the question whether a discovery rule should be incorporated into Section 2462 "presents issues of continuing importance to the Commission," and (ii) that the *Bartek* decision holding that a discovery rule should not be incorporated into Section 2462 conflicts with the ruling of the Second Circuit's decision in *Gabelli*, which held—on materially indistinguishable facts—that Section 2462 does incorporate a discovery rule. *See* Petition of the Securities and Exchange Commission, Appellant, for Rehearing En Banc, *Bartek*, 2012 WL 3205446 (No. 11-10594), annexed hereto as supplemental appendix, at 10sa; *see also id.* at 23sa-25sa. Thus, the SEC's Petition for Rehearing in *Bartek* further supports Petitioners' positions that certiorari should be granted in *Gabelli* to allow for review of an important and recurring question and because the decision conflicts with the decisions of other courts of appeals, including the Fifth Circuit, and negates the Government's assertion in its Brief for the Respondent in Opposition that the "decision below does not conflict with any decision of another court of appeals." Opp. 18. For the Court's convenience, a copy of the Petition for Rehearing En Banc is appended to this brief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

No. 11-10594

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant,

v.

DOUGLAS J. BARTEK and NANCY A. RICHARDSON,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas

PETITION OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLANT, FOR REHEARING EN BANC

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Rule 35 Statement of Issues Meriting En Banc Consideration

The panel decision conflicts with the following decisions of the Supreme Court and this Court:

Merck v. Reynolds, 130 S.Ct. 1784 (2010)
Holmberg v. Armbrecht, 327 U.S. 392 (1946)
Exploration Co. v. U.S., 247 U.S. 435 (1918)
Bailey v. Glover, 88 U.S. 342 (1874)

Blaise D'Antoni & Assoc., Inc. v. SEC, 289 F.2d 276 (5th Cir. 1961)
Mitchell v. Pidcock, 299 F.2d 281 (5th Cir. 1962)
Hodgson v. First Federal Savings and Loan Association of Broward County, Florida, 455 F.2d 818 (5th Cir. 1972)
Mitchell v. Bland, 241 F.2d 808 (5th Cir. 1957)
Texas v. Allan Const. Co., Inc., 851 F.2d 1526 (5th Cir. 1988)

Consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions.

This case also involves two questions of exceptional importance because they involve issues on which the panel decision conflicts with the following authoritative decisions of other United States Courts of Appeals that have addressed the issues:

SEC v. Gabelli, 653 F.3d 49 (2d Cir. 2011)
SEC v. Koenig, 557 F.3d 736 (7th Cir. 2009)
SEC v. Tambone, 550 F.3d 106, 148-49 (1st Cir. 2008)

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STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION

A panel of this Court has affirmed dismissal of the Securities and Exchange Commission's claims for civil money penalties and injunctive relief, holding that they were barred by the five-year statute of limitations in 28 U.S.C. 2462 for civil penalties. This decision, which presents issues of continuing importance to the Commission, is contrary to Supreme Court precedent and conflicts with decisions of this Court and other courts of appeals. The decision, although unpublished, is also being cited to the Supreme Court in another case as presenting a conflict warranting a grant of certiorari. *See SEC v. Gabelli,* No. 11-1274, petition for certiorari (pending).

En banc rehearing should be granted to address two panel rulings that would deprive investors of important securities law protection: *First,* acting contrary to this Court's own precedent and alone among the courts of appeals, the panel held that an injunction to obey the law is punitive and not remedial.[1] *Second,* the panel refused to apply the fraud discovery rule to Section 2462, a rule long recognized by the Supreme Court and read into every federal statute of limitations unless Congress spec-

[1] *See Blaise D'Antoni & Assoc., Inc. v. SEC,* 289 F.2d 276 (5th Cir. 1961); *Mitchell v. Pidcock,* 299 F.2d 281, 287 (5th Cir. 1962); *Hodgson v. First Federal Savings and Loan Association of Broward County, Florida,* 455 F.2d 818, 827 (5th Cir. 1972); *Mitchell v. Bland,* 241 F.2d 808, 810 (5th Cir. 1957). *See also* cases *infra,* n.6 and p.8.

ifies otherwise.[2] The panel's refusal conflicts with three recent court of appeals decisions that properly applied the fraud discovery rule to Section 2462 in Commission enforcement actions.[3]

Statement of the Case

The Commission brought this action seeking permanent injunctions, officer and director bars, and civil money penalties for violations of antifraud provisions of the federal securities laws. A panel of this Court affirmed the district court's dismissal on summary judgment of the Commission's claims for relief as barred by the five-year statute of limitations in 28 U.S.C. 2462—a catch-all statute of limitations which provides that an action for a "civil penalty" must be "commenced within five years from the date when the claim first accrued * * *."

Statement of the Facts

This case involves two senior corporate officers who falsified and signed financial statements that overstated corporate income in public filings. From 2000 through 2003, defendant Bartek, Microtune's Chief Executive Officer, and defendant Richardson, Microtune's Chief Financial Officer and General

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[2] *Merck v. Reynolds,* 130 S.Ct. 1784 (2010); *Holmberg v. Armbrecht,* 327 U.S. 392 (1946)*; Exploration Co. v. U.S.,* 247 U.S. 435 (1918); *Bailey v. Glover,* 88 U.S. 342 (1874).

[3] *SEC v. Gabelli,* 653 F.3d 49 (2d Cir. 2011); *SEC v. Koenig,* 557 F.3d 736 (7th Cir. 2009)*; SEC v. Tambone,* 550 F.3d 106, 148-49 (1st Cir. 2008).

Counsel, directed the grant of stock options to company executives without recording the appropriate compensation expense. Defendants falsified the dates that the options were granted, and the resulting failure to record the proper compensation expense overstated the company's reported net income by as much as 77%. This is a well-established form of fraud.[4] The Commission and Microtune's shareholders did not learn of defendants' fraud until 2006 when the company issued a restatement. The Commission filed its complaint in 2008.

ARGUMENT ON ISSUE ONE: An Injunction against Future Violations is Not a Penalty.

A. Congress authorized injunctive relief as part of a remedial, not punitive, regulatory scheme.

The panel's holding that an injunction ordering the defendants to obey securities law provisions in the future was a "penalty" subject to Section 2462 is without precedent. In focusing solely on whether such an injunction would have a "stigmatizing effect" on the defendants, the panel ignored the relevant inquiry as required by the Supreme Court under Section 2462—whether Congress intended injunctions against future violations of the securi-

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[4] *See SEC v. Jasper,* 678 F.3d 1116 (9th Cir. 2012); *United States v. Reyes,* 660 F.3d 454 (9th Cir. 2011); *United States v. Treacy,* 639 F.3d 32 (2d Cir. 2011).

ties laws to be "punitive" or "remedial." This requires an analysis of the nature of the remedy as determined by the statutory scheme. *Meeker v. Lehigh Valley RR Co.,* 236 U.S. 423-34 (1915) (interpreting Section 2462). Under this analysis, injunctions against future violations are remedial and therefore not a penalty under Section 2462.

This is confirmed by decisions of this Court and others. As this Court stated in *Mitchell v. Pidcock,* 299 F.2d 281, 287 (5th Cir. 1962), "The injunction subjects the defendants to no penalty, to no hardship. It requires the defendants to do what the [Fair Labor Standards] Act requires anyway—to comply with the law." *See also Hodgson v. First Federal Savings and Loan Association of Broward County, Florida,* 455 F.2d 818, 827 (5th Cir. 1972) (same). This is consistent with "[t]he historic injunctive process [which] was designed to deter, not punish." *Hecht Co. v. Bowles,* 321 U.S. 321, 330 (1944). "The nature of injunctive relief is that it is prospective, prophylactic, preventative,—not punitive." *Mitchell v. Bland,* 241 F.2d 808, 810 (5th Cir. 1957). *See also American Chicle Co. v. Topps Chewing Gum, Inc.,* 210 F.2d 680, 683 (2d Cir. 1954) ("[A]n injunction is protection for the future and not punishment for the past.").

Congress authorized injunctive relief for securities fraud as part of a remedial, not punitive, scheme. The remedial purpose of the securities laws is to protect the investing public. *SEC v. Ralston Purina Co.,* 346 U.S. 119, 124 (1953). Congress made an injunction a principal remedy under the federal securities laws to ensure future compliance,[5] and Commission enforcement of the securities laws is intended to be remedial, not punitive.[6]

Congress's enactments since introducing the securities laws in the 1930s confirms this understanding. In 1984 Congress authorized the Commission to seek—for the first time—civil money penalties as an additional sanction for insider trading. Before then, "[t]he principal, and often effectively only, remedy available to the Commission against insider trading [was] an injunction against further violations of the securities laws and disgorgement of illicit profits, [which serves] only a *remedial function* and *does not penalize* a defendant for the illegal conduct." H.R. Rep. No. 98-355 at *7-8 (1984) (emphasis added). *See also* H.R. Rep. No. 100-910 at *11 (1988) (same).

That Congress does not equate injunctive relief with civil penalties is also shown by the statutory structure. Penalties and injunctive relief are authorized in separate provisions. *See, e.g.,* 15

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[5] *SEC v. Rind,* 991 F.2d 1486, 1491 (9th Cir. 1993) (Commission enforcement action is designed to expeditiously safeguard the public interest by enjoining securities violations"); *SEC v. Blinder, Robinson* & *Co., Inc,* 855 F.2d 677, 680 (10th Cir. 1988) (an injunction protects the integrity of the securities industry).

[6] *Beck v. SEC,* 430 F.2d 673, 674 (6th Cir. 1973); *Berko v. SEC,* 316 F.2d 137, 141 (2d Cir. 1963); *Associated Securities Corp. v. SEC,* 283 F.2d 773, 775 (10th Cir. 1960)*; Pierce v. SEC,* 239 F.2d 160, 163 (9th Cir. 1956); *Blaise D'Antoni & Assoc., Inc. v. SEC,* 289 F.2d 276 (5th Cir. 1961); *United States v. Naftalin,* 606 F.2d 809, 812 (8th Cir. 1979).

U.S.C. 77t(d) and (e); 15 U.S.C. 78u(d) (1-3) and (e). *See Tull v. United States,* 481 U.S. 412, 425 (1987) (finding that a statute "does not intertwine equitable relief with the imposition of civil penalties" when "each kind of relief is separably authorized in a separate and distinct statutory provision"). Congress has itself noted the distinction between injunctions and civil money penalties, stating that courts have "flexibility to order injunctive or other equitable relief only, injunctive or other equitable relief and a penalty, or a penalty only, depending upon the facts of a particular case." S. Rep. No. 101-337 at 22 (1990).[7]

The panel disregarded this statutory scheme when it focused solely on the "stigmatizing" collateral effect that an injunction would have on defendants. And it misconstrued the statement in *United States v. Halper,* 490 U.S. 435 (1989), that "even remedial sanctions carry the sting of punishment." *Halper's* point was that even remedial sanctions sting and the defendant's perspective does

[7] Due to space limitations, this petition emphasizes the argument that injunctions *against future violations* are not penalties. But the same analysis applies to *officer and director bars,* which are likewise a form of injunction. In explicitly authorizing such bars, Congress believed that courts already had "inherent power" to impose bars as within a court's historic equitable jurisdiction to award injunctive relief. S. Rep. No. 101-337. Congress could not have thought an officer and director bar was a penalty because a court does not have "inherent power" to impose a penalty in the absence of Congressional directive. The panel thus likewise erred in concluding that such bars are penalties.

not provide the dividing line between a punitive sanction and a remedial one.

The panel also relied on *Johnson v. SEC,* 87 F.3d 484 (D.C. Cir. 1996), in which the D.C. Circuit applied Section 2462 to time-bar a suspension from the securities industry. The Commission adheres to its view that *Johnson* was wrongly decided. But *Johnson* provides no support for the panel's decision that enjoining future violations is a punitive sanction. 87 F.3d at 489 (noting that the sanction would less resemble punishment if it focused on current competence or degree of risk petitioner posed in the future). Indeed, in 2010, even the D.C. Circuit rejected the argument that an order to comply with the securities laws in the future is a "penalty" covered by Section 2462. *See Riordan v. SEC,* 627 F.3d 1230, 1234-35 (2010) (holding that a cease-and-desist order, which "simply requires [defendant] not to violate the relevant securities laws in the future," is "purely remedial and preventative" and not a "penalty" covered by Section 2462.).

B. The panel's interpretation is inconsistent with the history of Section 2462 and with traditional principles of equity.

Given that the historical antecedents of Section 2462 date from 1799—when legal and equitable jurisdiction were clearly understood as separate—Congress would not have used "penalty" to connote injunctive relief. Civil penalties exact punishment, a remedy historically available only in courts of law. *Tull,* 481 U.S. at 423 n.7 (1987). In contrast, a court of equity had exclusive jurisdiction to award injunctive relief, and could not impose civil penalties. *Id.* at 424. Congress would not have understood Section 2462's "civil fine, penalty, or forfeiture"—relief available only at law—as encompassing an equitable remedy—an injunction—available only in equity. *See Holmberg,* 327 U.S. at 395 (when Congress leaves to federal courts to formulate equitable relief, it does not expect courts "to break with historical principles of equity in the enforcement of federally-created equitable rights.")

Moreover, there is no basis for concluding that Congress would have enacted a statute of limitations for injunctive relief at all. "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief." *Holmberg,* 327 U.S. at 396. "Equity eschews mechanical rules" and "depends on flexibility." *Id.* The need to protect the public from future misconduct—the predicate for an injunction prohibiting future violations—is not automatically vitiated by passage of time after the fraud (especially when, as here, a successful fraud lies undetected for some years). *See Prevost v. Gratz*, 19 U.S. 481, 498 (1821)(length of time a fraud is undiscovered can be an aggravating factor requiring relief). A statute of limitations prevents equity from considering whether relief is warranted under the circumstances and so "a suit in equity may lie though a comparable cause of action at law would be barred." *Holmberg,* 327 U.S. at 396.

Consistent with the foregoing, Congress did not impose any time limit on the Commission's authority to seek injunctive relief, as three courts of appeals have already concluded. *See Tambone,* 550 F.3d at 148-49 (Section 2462 does not apply to injunctive relief); *Rind,* 991 F.2d at 1492 (no statute of limitations for injunctive relief); *SEC v. Calvo,* 378 F.3d 1211, 1218 (11th Cir. 2004) (same). As these courts recognize, imposing a limitations period on the Commission's actions "would conflict with the underlying policies of the securities laws" to protect the public interest by enjoining securities violations. This purpose negates "any inference that Congress intended a limitations period to apply." *Rind,* 991 F.2d at 1491-92. Moreover, since Congress "clearly devoted its time and attention to limitation issues for private securities law claims," the absence of an express limitation for Commission actions, "therefore, must be interpreted as deliberate." *Id.* at 1490; *see also Calvo,* 378 F.3d at 1218. Applying Section 2462 to bar injunctive relief conflicts with these decisions.

ARGUMENT ON ISSUE TWO:
The Discovery Rule Delays
Section 2462 in Fraud Cases.

Because no statutory language expressly requires application of the fraud discovery rule here, the panel held that the Commission's penalties claims "accrued" under Section 2462 when defendants committed the fraud. This is contrary to Supreme Court precedent, and conflicts with decisions in other circuits.

A. The panel decision conflicts with Supreme Court decisions holding that a fraud claim does not accrue until the time the fraud is discovered.

The Supreme Court recently reaffirmed the rule, now centuries old, that, in a fraud case, "the bar of the statute does not begin to run until the fraud is discovered." *Merck,* 130 S.Ct. at 1794 (quoting *Holmberg,* 327 U.S. at 397). This "venerable principle," *Lampf v. Gilbertson,* 501 U.S. 350, 363 (1990), an "historic exception for suits based on fraud," *TRW, Inc. v. Andrews,* 534 U.S. 19, 37 (2001) (Scalia, J., concurring), derives from "the maxim that no man may take advantage of his own wrong," *Glus v. Brooklyn E. Dist. Terminal,* 359 U.S. 231, 232-33 (1959). The Supreme Court has uniformly applied the fraud discovery rule since 1874. *See, e.g., Bailey v. Glover,* 88 U.S. 342, 349 (1874).[8]

The panel held that the discovery rule does not apply to Section 2462 because "Congress did not include language to toll the statute based on an accrual discovery rule." The governing law, however, is the opposite. The Supreme Court has instructed that the discovery rule is read into statutes of limitations for fraud claims, *unless* Congress specifies otherwise. *Holmberg,* 327 U.S.

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[8] *See also Upton v. McLaughlin,* 105 U.S. 640, 642-44 (1881); *Kirby v. Lake Shore,* 120 U.S. 130, 138 (1887); *Jones v. Van Doren,* 130 U.S. 684,692-93 (1889); *Holmberg,* 327 U.S. at 397; *Exploration Co.,* 247 U.S. at 449; *Merck,* 130 S.Ct. at 1796.

at 397 (explaining that the fraud discovery rule is "read into every federal statute of limitation"). The Supreme Court has applied the fraud discovery rule to limitations periods that did *not* include express discovery language. *See Bailey,* 88 U.S. at 346 (applying discovery rule to a statute of limitations that ran "from the time when the cause of action accrued"); *Exploration Co.,* 247 U.S. at 447 (applying discovery rule to statute of limitations that ran from date that land patent was issued).

The fraud discovery rule was adopted to act "in mitigation of the strict letter of general statutes of limitation" precisely because the relevant statutes of limitations afforded no express exception from their terms. *Bailey,* 88 U.S. 346; *see also Sherwood v. Sutton,* 21 F. Cas. 1303, 1307 (C.C.N.H. 1828) (Story, J.) (fraud "form[s] an implied exception, to be acted upon by courts of law and equity"). There would be no need for an exception if the statute of limitations made explicit provision for fraud claims. The panel's decision conflicts with this authority.

Nor does the statute's term *"first* accrued" (emphasis added) support the panel's conclusion. "First accrues" in a statute of limitations is "unexceptional," and does not mean that suits must be filed on "the earliest possible date." *Franconia Associates v. United States,* 536 U.S. 129, 144-145 (2002). The panel likewise misread the phrase at the beginning of Section 2462, "[e]xcept as otherwise provided by Act of Congress," as foreclosing the discovery rule. Congress's use of this phrase merely indicates that Section 2462 is a "catch-all" statute of limitations for a variety of claims, and that this "general rule" is overridden by a statute of limitations for specific claims. *United States. v. Providence Journal Co.,* 485 U.S. 693, 1509 (1988).[9]

Similarly, the panel erroneously held that no exception other than that explicitly mentioned in Section 2462—when the defendant "is outside of the United States"—operates to delay accrual. But this Court permits a plaintiff to argue that the defendant's absence from the jurisdiction delays accrual of a fraud claim based on explicit statutory language *and* to simultaneously argue that accrual was delayed because the "statute of limitations begins to run from the time the fraud is discovered." *Jackson v. Speer,* 974 F.2d 676, 678-680 (5th Cir. 1992). "The running of a statute of limitation may be suspended by causes not mentioned in the statute itself," *Braun v. Sauerwein,* 77 U.S. 218, 223 (1869).

The panel's belief that this case was controlled by *United States. v. Borin*, 209 F.2d 145 (5th Cir. 1954), and *United States v. Core Labs., Inc.,* 759 F.2d 480 (5th Cir. 1985), rests on an interpretation of those cases that conflicts with Supreme Court precedent.

Citing *Borin,* the panel found that the discovery rule does not apply to Section 2462 because it is "'explicit in commanding' at what moment a suit

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[9] *See, e.g., Restrepo v. Attorney General,* 617 F.3d 787, 800-801 (3d Cir. 2010) (refusing to apply Section 2462's "'catch-all' statute of limitations" to immigration proceedings); *Capozzi v. United States,* 980 F.2d 872, 874-76 (2d Cir. 1992) (same, tax assessments).

must be brought." But the False Claims Act limitations in *Borin* ran from "the commission of the act," and included an express negative cut-off—"and not afterward." 209 F.2d at 147. This Court found that this "emphatic language" rendered the discovery rule inapplicable. *Id.* at 147-48. In contrast, Section 2462 does not run from a specific *event,* but generally from when a claim *"accrues."* As the Supreme Court has repeatedly held, a fraud claim "accrues" only after the fraud is discovered.[10] Nor does Section 2462 include the limiting phrase "and not afterward."

And contrary to the panel's view that this Court in *Core Labs* "already held that the discovery rule does not apply to this statute," *Core* says nothing about the fraud discovery rule because it was not raised in the case. *Core's* comment that courts have construed Section 2462 to accrue upon a violation merely expresses the general principle that accrual ordinarily occurs when a claim comes into existence. The fraud discovery rule is an exception to this general principle. The panel's reading of *Core* thus conflicts with binding and well-settled Supreme Court precedent.

[10] *See Bailey,* 88 U.S. at 346 (applying discovery rule when the action must be brought "within two years from the time when the cause of action *accrued"); Exploration Co.,* 247 U.S. at 449 (finding action not "to have *accrued* until the discovery of the fraud"); *Kirby,* 120 U.S. at 138 (deeming action to *accrue* when the fraud was or should have been discovered).

B. The panel's decision conflicts with other courts of appeals decisions that properly applied the discovery rule to fraud claims under Section 2462.

The panel's decision creates a split with other courts of appeals. *SEC v. Gabelli,* 653 F.3d 49 (2d Cir. 2011), followed *Merck* in holding that the accrual of the Commission's fraud claim under Section 2462 is determined by the "fraud-based discovery rule," which " 'delays accrual of a cause of action until the plaintiff has discovered it.' " *Id.* at 59 *(quoting Merck). Gabelli* found it "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." *Id* at 60. *SEC v. Koenig,* 557 F.3d 736 (7th Cir. 2009), likewise held that the accrual of the Commission's fraud claim under Section 2462 is determined by the "special rule for fraud, a concealed wrong," such that a "claim for fraud accrues only on its discovery." *Id.* at 739. *Koenig* found that the Supreme Court "establish[ed] a norm that federal statutes of limitations do not begin to run until the claim has been discovered." *Id. See also Tambone,* 550 F.3d at 148-49 (Section 2462 did not begin to run until the Commission could discover the fraud).

The panel distinguished *Gabelli* and *Koenig,* and the Supreme Court cases they applied, as relying on "equitable principles"—such as fraudulent concealment or equitable tolling—purportedly to the exclusion of the fraud discovery rule. But those decisions (and *Tambone)* did apply the fraud discovery rule, and held that Section 2462 did not begin to run until the Commission could discover the fraud. *Gabelli,* 653 F.3d at 59 (relying on *Merck); Koenig,* 557 F.3d at 739 (relying on *Bailey, Holmberg* and *Exploration Co.); Tambone,* 550 F.3d at 148-49. As *Merck* makes clear, the discovery rule is an equitable principle for fraud cases "where a defendant's deceptive conduct may prevent a plaintiff from even knowing that he or she has been defrauded." Without such a rule, "'the law which was designed to prevent fraud' could become 'the means by which it is made successful and secure.'" *Merck,* 130 S. Ct. at 1793-94 *(quoting Bailey).*[11]

Nor did the Commission have to demonstrate fraudulent concealment—an act, separate from the fraud, that conceals the fraud. *Bailey,* 88 U.S. at 348 (fraud discovery rule applies "though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it.*")* As this Court has acknowledged, "[f]raud is, by its very nature, self-concealing." *Texas v. Allan Const.*

[11] *Bailey, Holmberg* and *Exploration Co.* do not use the term "discovery rule" in describing the relevant doctrine: "[W]here a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." *Bailey,* 88 U.S. at 348. But *Merck* clearly calls this the discovery rule. Regardless of the label, however, the Commission clearly invoked *Bailey* and its principle applies to this case. *Koenig,* 557 F.3d at 739 (explaining the doctrine, noting that the particular label attached "is unimportant in practice.")

Co., Inc., 851 F.2d 1526, 1529 (5th Cir. 1988).[12] The Commission established that the defendants "committ[ed] a fraud in a manner that it concealed itself" *(Bailey,* 88 U.S. at 349-50), and the panel's suggestion otherwise is incorrect.[13] This deceptive conduct is no more or less concealed than the fraudulent schemes in *Gabelli* (failure to disclose conflict of interest) and *Koenig* (fraudulent accounting schemes).

[12] *See also Gabelli,* 653 F.3d at 59 ("fraud claims by their very nature involve self-concealing conduct"); *SEC v. Tambone,* 550 F.3d at 148-49 (delaying limitations because of the "self-concealing nature of defendants' conduct"); *United States v. Kontny,* 238 F.3d 815, 820 (7th Cir. 2001) ("fraud is by nature self-concealing").

[13] Far from conceding there was no self-concealing fraud, the Commission *affirmatively argued* that the fraud was self-concealing. Oct. 29, 2010 Hearing transcript, R.171 at 17 ("The fraud was self-concealing. It manifested itself in false filings that the SEC has no reason to suspect were not truthful."). *See also* Reply Br. 7 ("In arguing that the fraud here was not self-concealing, defendants ignore that the Commission's action was based on fraud that was inherently concealed: misrepresentations in public reports that materially overstated the company's income and understated expenses.")

CONCLUSION

Rehearing en banc should be granted.

Respectfully submitted,

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September 20, 2012

Certificate of Service

SEC v. Douglas J Bartek and Nancy A. Richardson

No. 11-10594

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