No. 12-1000

In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

DOUGLAS J. BARTEK AND NANCY A. RICHARDSON

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Securities and Exchange Commission (SEC or Commission) brought this action against respondents for alleged violations of the securities laws arising from a scheme to falsify a company's financial statements. As relevant here, the Commission sought civil monetary penalties, as well as injunctions that would prohibit respondents from committing future violations and from serving as officers or directors of publicly traded companies. The court of appeals held that all of those claims for relief were barred by the five-year limitations period in 28 U.S.C. 2462. The questions presented are as follows:

1. Whether, with respect to the SEC's claims for civil monetary penalties, the limitations period in Section 2462 began to run before the Commission discovered, or reasonably could have discovered, respondents' alleged fraudulent scheme.

2. Whether the SEC's remaining claims, which request injunctions against future violations and against further service as officers or directors, seek a "civil fine, penalty, or forfeiture" and thus are subject to the limitations period in Section 2462.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Securities and Exchange Commission (SEC or Commission), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is not published in the Federal Reporter but is reprinted at 484 Fed. Appx. 949. The ruling of the district court (App., *infra*, 71a-84a) denying the Commission's motion for summary judgment is unreported. The opinion and order of the district court (App., *infra*, 22a-70a) granting respondents' motion for summary judgment is reported at 783 F. Supp. 2d 867.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2012. A petition for rehearing was denied on

November 15, 2012 (App., *infra*, 20a-21a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2462 of Title 28 states:

> 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.

STATEMENT

1. From 2000 to 2003, respondents Douglas J. Bartek, Chief Executive Officer of Microtune, Inc. (Microtune), and Nancy A. Richardson, Microtune's Chief Financial Officer and General Counsel, backdated stock options that the company granted to newly hired and existing employees and executives. Because respondents falsified the dates that the options were granted, the company failed to properly record the expenses for those options, resulting in overstatements of Microtune's reported net income in financial statements signed by respondents. In August 2003, the SEC discovered one instance of respondents' backdating, but was informed that the backdated option was the result of delayed paperwork. The SEC discovered the full scheme in 2006 when the company announced an internal investigation into its previous option-granting practices. Microtune eventually restated its financial results for the 1999-2006 period and recognized an additional $9.1 million in previously unreported expenses. App.,

infra, 2a-3a, 44a-46a; see 08-cv-1105 Docket entry No. 1, at 37 (June 30, 2008 N.D. Tex.).

In June 2008, within five years of learning of any backdating at Microtune (but more than five years after the backdating itself), the Commission brought the present action. It alleged that respondents had violated antifraud and recordkeeping provisions of the federal securities laws. As relevant here, the SEC sought civil monetary penalties, injunctions against future violations, and bars on respondents' serving as officers or directors of publicly traded companies. Respondents contended that all of the Commission's claims for relief were untimely under 28 U.S.C. 2462, which states that, unless Congress provides otherwise, "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture" must be "commenced within five years from the date when the claim first accrued." The parties filed cross-motions for summary judgment on the timeliness of the SEC's claims under Section 2462. App., *infra*, 2a-3a.

2. a. The district court denied the Commission's motion for summary judgment. App., *infra*, 71a-84a. At the outset, the court deferred ruling on whether the SEC's claims for equitable relief—*i.e.*, injunctions against future violations and against further service as officers or directors—were subject to Section 2462's limitations period. See *id*. at 74a. The court then held that the SEC's remaining claim for monetary penalties had "first accrued" for purposes of Section 2462 when respondents committed their various fraudulent acts, not when the Commission discovered or reasonably could have discovered respondents' fraud. See *id*. at 75a-83a. The court relied in part on *SEC* v. *Gabelli*, No. 08-cv-3868, 2010 WL 1253603 (S.D.N.Y. Mar. 17, 2010). See

App., *infra*, 80a-81a. That decision was subsequently reversed by the Second Circuit, see *SEC* v. *Gabelli*, 653 F.3d 49 (2011), and this Court granted review, see *Gabelli* v. *SEC*, No. 11-1274 (argued Jan. 8, 2013).

b. The district court subsequently granted respondents' motion for summary judgment. App., *infra*, 22a-70a. The court first rejected the SEC's argument that the limitations period was suspended in this case because respondents' conduct involved both fraud and concealment. The court held "that the SEC's claims are not, by virtue of their fraud-based nature, self-concealing as a matter of law." *Id.* at 37a. The court further held that there was a genuine issue of material fact whether respondents had "concealed their alleged wrongdoing through affirmative acts." *Id.* at 39a-40a. The court found, however, that the Commission had not diligently pursued its claims after August 2003, when it discovered evidence of backdating. See *id.* at 40a-51a. Finally, the court accepted respondents' argument that the SEC's claims for injunctive relief seek "penalt[ies]" within the meaning of Section 2462. See *id.* at 57a-58a. The court therefore dismissed both the monetary penalty claims and the injunctive claims as time-barred. See *id.* at 58a.

3. The court of appeals affirmed in an unpublished opinion. App., *infra*, 1a-17a. The court held that Section 2462's limitations period had commenced to run when respondents falsified the option grants—not when the SEC actually or constructively discovered respondents' fraudulent scheme. See *id.* at 8a-13a. The court distinguished the Second Circuit's decision in *Gabelli* as "involv[ing] an inherently self-concealing fraudulent scheme, circumstances that are not found in this case." *Id.* at 13a. The court then held that the SEC's claims for

equitable relief, which sought injunctions against future violations and against further service as officers or directors, were penal rather than remedial in nature. See *id.* at 13a-17a. Although the court recognized that those types of relief are traditionally remedial sanctions, see *id.* at 15a, the court reasoned that they are punitive in this case "[b]ased on the severity and permanent nature of the sought-after remedies," *id.* at 17a.

REASONS FOR GRANTING THE PETITION

The SEC brought this action against respondents for alleged violations of the securities laws arising from a scheme to falsify a company's financial statements. As relevant here, the Commission sought civil monetary penalties, as well as injunctions that would prohibit respondents from committing future violations and serving as officers or directors of publicly traded companies. The court of appeals held that all of those claims for relief were barred by the five-year limitations period in 28 U.S.C. 2462.

1. The first question presented by this case is whether, with respect to the Commission's claims for civil monetary penalties, the limitations period in Section 2462 began to run before the Commission discovered, or reasonably could have discovered, respondents' alleged fraudulent scheme. On September 25, 2012, this Court granted the petition for a writ of certiorari in *Gabelli* v. *SEC*, No. 11-1274 (argued Jan. 8, 2013), which presents the same issue. If the Court concludes in *Gabelli* that the limitations period in Section 2462 does not begin to run until the Commission has actually or constructively discovered securities fraud, then the Commission's claims for civil monetary penalties in this case were timely and the court of appeals erred in holding otherwise. The lower courts attempted to distinguish *Gabelli*

on the ground that the fraudulent scheme in that case was self-concealing, see App., *infra*, 11a-12a & nn.6-7, but that distinction is unavailing. In both *Gabelli* and in this case, the defendants' fraud kept the SEC from learning of their violations of the securities laws. Accordingly, the Court should hold this petition pending its decision in *Gabelli*, and then dispose of the petition as appropriate in light of that decision.

2. The second question presented by this case is whether the Commission's claims for injunctive relief are subject to the limitations period in Section 2462. Section 2462 applies to "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." The term "penalty" in that context naturally refers to a monetary penalty. See *United States* v. *Mann*, 26 F. Cas. 1153, 1154 (C.C.N.H. 1812) (No. 15,717) (Story, J.). To the extent the term reaches beyond monetary penalties, it is limited to sanctions that are punitive in nature. See *Meeker* v. *Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915). Injunctions, however—including officer-and-director bars—traditionally have been treated as remedial sanctions rather than punitive ones. See, *e.g.*, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 330 (1944) (injunctions); *Hudson* v. *United States*, 522 U.S. 93, 103-105 (1997) (officer-and-director bars). Such equitable relief is remedial in nature because its purpose is to protect investors in the future from unfit professionals. See 522 U.S. at 105 (explaining that banking debarment sanctions, although "intended to deter future wrongdoing," are a civil remedy that "serve[s] to promote the stability of the banking industry"). The courts below therefore erred in holding that those forms of equitable relief are "penalt[ies]" governed by Section 2462.

Petitioners in *Gabelli* have correctly recognized that Section 2462 does not apply to claims for equitable relief, including claims for injunctive relief like those at issue here. See Tr. of Oral Arg. 3, 13, 19. This Court's decision in *Gabelli* could clarify the meaning of the term "penalty" in Section 2462. That possibility provides an additional reason why the Court should hold this petition pending its decision in *Gabelli*, and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Gabelli* v. *SEC*, No. 11-1274 (argued Jan. 8, 2013), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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FEBRUARY 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 11-10594

SECURITIES AND EXCHANGE COMMISSION,
PLAINTIFF-APPELLANT

v.

DOUGLAS J. BARTEK; NANCY A. RICHARDSON,
DEFENDANTS-APPELLEES

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

[Aug. 7, 2012]

Before REAVLEY, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:[*]

Plaintiff-Appellant, United States Securities and Exchange Commission ("SEC" or the "Commission"), brought this action against Defendants-Appellees,

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Douglas J. Bartek ("Bartek"), and Nancy A. Richardson ("Richardson," collectively the "Defendants") for alleged violations of securities laws and regulations stemming from an options backdating scheme which occurred between 2000-2003. In addition to civil penalties, plaintiff also sought permanent injunctions and officer and director bars against the defendants. Defendants' motion for summary judgment was granted when the district court determined that the statute of limitations had run on the plaintiff's asserted claims. The Plaintiff now appeals that decision. For the reasons stated herein, we AFFIRM.

I. Factual and Procedural Background

The company Microtune was co-founded by Bartek in 1996. Microtune developed silicon tuners to be used in media applications. By early 2000, Microtune was beginning preparation for a public offering. At the time Bartek was Chief Executive Officer and Richardson was Chief Financial Officer and General Counsel. The SEC alleges that from 2000 to 2003, the Defendants improperly backdated stock options that the company granted to newly hired and existing employees and executives. Allegedly, Microtune failed to properly expense those options and Bartek allegedly selected grant dates using a two-week look-back procedure to find and use dates of the lowest stock price as the supposed option grant date. Bartek and Richardson backdated grants to newly hired executives and employees; backdated large "block" grants to officers and rank-and-file employees; and granted backdated options, cancelling those options when the company's stock price dropped, and subsequently regranted the same options at a lower exercise price.

The SEC filed its original Complaint on June 30, 2008. It alleged that Microtune, Bartek, and Richardson had violated both the antifraud and books and records provisions of the federal securities statutes and related SEC regulations through a stock option backdating scheme.[1] The SEC alleged that the Defendants committed fraud. In its First Amended Complaint, the SEC alleged that Bartek and Richardson violated: 17(a) of the Securities Act [15 U.S.C. § 77q(a)], Sections 10(b), 13(b)(5), and 14(a) of the Exchange Act [15 U.S.C. §§ 78j(b), 78m(b)(5) and 78n(a)], and Exchange Act Rules 10b-5, 13a-14, 13b2-1, 13b2-2, and 14a-9 [17 C.F.R. §§ 240.10b-5, 240.13a-14, 240.13b2-1, 240.13b2-2, and 240.14a-9]. The Defendants allegedly aided and abetted Microtune's violations of Sections 13(a), 13(b)(2)(A), 13(b)(2)(B), and 14(a) of the Exchange Act [15 U.S.C. §§ 78m(a), 78(m)(b)(2)(A), 78(m)(b)(2)(B), and 78n(a)] and Exchange Act Rules 12b-20, 13a-1, 13a-13, and 14a-9 [17 C.F.R. §§ 240.12b-20, 240.13a-1, 240.13a-13, and 240.14a-9].

The parties filed cross-motions for summary judgment on various issues including a statute of limitations defense, which is the crux of the appeal here. The district court granted summary judgment to the Defendants on statute of limitations grounds. It also rejected the SEC's fraudulent concealment and equitable tolling claims.[2] The court also denied the reme-

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1 Microtune settled shortly after the Complaint was filed.

2 The court found that the alleged fraud contained no self-concealing conduct. The equitable tolling argument was denied

dies sought by the SEC for the alleged violations. The sought-after relief included: permanent injunctions, civil penalties, and officer/director bars ("O/D bars"). All forms of relief were found to be penalties under § 2462, and thus subject to its time limitations.

II. Standard of Review

"Our review of the district court's ruling on the cross-motions for summary judgment is de novo." *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 228 n.1 (5th Cir. 2006) (citation omitted). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "Summary judgment is appropriate when the pleadings, affidavits and other summary judgment evidence show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Lincoln Gen. Ins. Co., v. Reyna*, 401 F.3d 347, 349 (5th Cir. 2005) (citing FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

III. Discussion

A. The Application of the Discovery Rule to 28 U.S.C. § 2462

According to the SEC, the alleged backdating scheme resulted in Microtune's failure to record and report over $22.5 million of gross compensation ex-

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because the SEC failed to diligently pursue its claims. The SEC does not appeal the district court's determination that § 2462 is not tolled based on the equitable claim of fraudulent concealment.

penses, thus understating expenses and overstating income in various filings made with the Commission. The Defendants point out that the Accounting Principles Board Opinion No. 25 ("APB 25"), which governed the accounting for stock-based compensation, did not clearly show how to treat backdating practices, such as Microtune's, at the time. The statute of limitations at issue is codified in 28 U.S.C. § 2462 and states:

> 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.

28 U.S.C. § 2462. In an oral ruling, the court held that the Commission's claims first accrued when the alleged violation occurred, not when the SEC alleges that it discovered the violation. Thus, the court rejected the SEC's argument that the discovery rule applies.

The SEC maintains that it did not have notice of the grant options backdating practice until its 2003 investigation of revenue recognition practices at Microtune. Contrastingly, Bartek contends that the SEC should have discovered the backdating practice during the SEC's staff review of Microtune's registration statement in connection with the company's initial public offering in May 2000. According to the SEC, it first learned of the practice in August 2003 when it received a particular email. In response to a subpoena, the SEC received Bartek's July 26, 2001 email, which discusses backdated option grants ("tricks on timing email").[3] The Defendants claim that the company's option granting procedure was never hidden and was approved by the company board after consultation with outside counsel and accountants. Thus, the SEC should have discovered the backdating practice in 2000, after the SEC reviewed and identified a significant problem with Microtune's stock option accounting. Defendants contend that the SEC never inquired further into Microtune's backdating process in 2000. Had it done so, they allege, the SEC would have found that many options in this case had been selected with hindsight.

The parties dispute whether the discovery rule applies. The SEC argues that the discovery rule applies to § 2462 for fraud cases and the five-year limitations for civil penalties began to run in 2003, when the SEC discovered the fraud. The district court determined that the fraudulent concealment or equitable tolling claims are without merit under these facts. As mentioned earlier, the SEC abandoned its fraudulent con-

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[3] "Per our discussion at the salary reviews, we are putting option grants in for [names of employees deleted] . . . You should get the details on vesting so that you can communicate to each of the grantees their new grants. They will be pleased with the price. Barbara pulled some tricks on timing, and we are documenting that this grant was done on May 2, and therefore the closing price on May 1 is the option price: $12.35. So, they're already almost $8 in the money!!"

cealment and equitable tolling claims on appeal but maintains that the Defendants are guilty of fraud. We discuss fraudulent concealment and equitable tolling hereinbelow because the SEC cites to cases employing these doctrines to support their position that the discovery rule is applicable.

When interpreting § 2462, we must first resort to a plain reading of the statutory language. *United States v. Pruett*, 681 F.3d 232, 242 (5th Cir. 2012) (citation omitted); *see also Safety Nat. Cas. Corp. v. Certain Underwriters At Lloyd's, London*, 587 F.3d 714, 718 n.9 (5th Cir. 2009) (citation omitted). A plain reading of § 2462 reveals no discovery rule exception. Congress specified the exceptions it wanted to adopt by stating at the beginning of the statute: "Except as otherwise provided by Act of Congress . . . " § 2462. Nothing else has been provided by Congress in this particular statute except one condition: "if . . . the offender or the property is found within the United States in order that proper service be made thereon." *Id.* Thus, § 2462 provides that a tolling limitation is applicable if the defendant is outside of the United States, precluding service of process. Congress did not include language to toll the statute based on an accrual discovery rule. "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc*. 447 U.S. 102, 108 (1980).

We have held that the discovery rule does not apply to this statute. In *United States v. Core Labs., Inc.*, we analyzed and interpreted § 2462 in a non-fraud action, where the government sought civil penalties for violation of the Export Administration Act. 759 F.2d 480 (5th Cir. 1985). The principal issue there was whether § 2462's five-year limitations began to run at the end of the alleged violation or at the conclusion of the administrative proceedings. *Core* examined § 2462's language, "the date when the claim first accrued." *Id.* at 481. Upon reviewing the history of the statute and the "respectable body of decisional law," we held that case law "clearly demonstrates that the date of the underlying violation has been accepted without question as the date when the claim first accrued, and therefore, as the date on which the statute began to run." *Id.* at 482 (citing supporting cases). *Core* concluded, "[i]t is abundantly clear that both the courts and Congress have construed the 'first accrual' language of § 2462 to mean the date of the violation." *Id.* Other circuits have similarly held that § 2462 does not incorporate a discovery rule. *See 3M Co. (Minn. Mining and Mfg.) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994); *see also Trawinski v. United Techs.*, 313 F.3d 1295, 1298 (11th Cir. 2002); *Fed. Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996).

3M examined the historical context of the "accrued" language and looked at the term as it first appeared in the 1839 version of the statute. 17 F.3d at 1462. The statute was later codified in 28 U.S.C. § 791 (1911) and slightly modified in the 1948 version to read as it does today. *Id.* The *3M* court asserted that, "when Congress used the word 'accrued,' it could not possibly have intended the word to incorporate any discovery of violation rule." *Id.* (citing Supreme Court cases of the era (1839) to assert that the Court consistently used the phrase "claim accrued" to mean the time where a cause of action first came into existence, not when the violation was first discovered). Indeed, the Supreme Court has held that the general meaning of when a right "accrues" is when that claim "comes into existence." *See United States v. Lindsay*, 346 U.S. 568, 569 (1954) (examining the accrual language of the Commodity Credit Corporation Act and determining that the normal meaning of "accrued" is when a claim comes into existence.). "Th[e] discovery rule, which might be applicable to statutes of limitations in state tort actions, has no place in a proceeding to enforce a civil penalty under a federal statute. The statute of limitations begins with the violation itself—it is upon violation, and not upon discovery of harm, that the claim is complete and the clock is ticking." *Trawinski*, 313 F.3d at 1298 (applying § 2462 and finding that plaintiff's EPCA violation occurred at the time the heating and air conditioning system was installed, not when plaintiff discovered the violation) (citation omitted); *Williams*, 104 F.3d at 240 (agreeing with the D.C. Circuit that the accrual discovery rule does not apply to the running of limitations periods under § 2462).

The Commission's reliance on the following cases is misplaced. The SEC relies on cases such as *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010), *S.E.C. v. Koenig*, 557 F.3d 736 (7th Cir. 2009), and *S.E.C. v. Gabelli*, 653 F.3d 49 (2d Cir. 2011) to argue that the courts have applied the discovery rule to fraud cases for centuries. The Supreme Court in *Merck* made no mention of § 2462. At issue there was 28 U.S.C. § 1658(b)(1). In discussing the discovery rule of

§ 1658(b)(1), the Court explained that the rule delays the accrual of a cause of action until the plaintiff has "discovered" it. *Merck,* 130 S. Ct. at 1793. The relevant statute in *Merck* contains a discovery rule. *See* 28 U.S.C. § 1658(b)(1). The Court did not examine the "first accrued" language, which is found in § 2462. "Cases dealing with other limitations statutes are of extremely limited value." *Core Labs.*, 759 F.2d at 481 (citing *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967)). Further, *Merck* cites to cases applying equitable principles. *See* 130 S. Ct. at 1794 (citing *Bailey v. Glover*, 88 U.S. 342, 349-50 (1874);[4] *Holmberg v. Armbrecht,* 327 U.S. 392, 397 (1946));[5] *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (explaining *Bailey* and *Holmberg* as applying "the equi-

[4] In discussing the fraudulent concealment principle in the context of a bankruptcy statute, the court asserted: "[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.

[5] "Equity will not lend itself to such fraud and historically has relieved from it. . . . [T]his Court long ago adopted as its own the old chancery rule that where 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, 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.'" 327 U.S. at 397 (citing *Bailey*, 88 U.S. at 348). "This equitable doctrine is read into every federal statute of limitation." *Id.*

table tolling doctrine"); *3M*, 17 F.3d at 1461 n.15. *Bailey* was a suit at equity where defendants kept secrets and concealed their fraudulent actions. 88 U.S. at 348. No such conduct concealing fraud was found in the instant case.[6] *Koenig* determined that it did not need to decide when a "claim accrues under § 2462 because "the nineteenth century recognized a special rule for fraud, a concealed wrong." *Koenig*, 557 F.3d at 739 (citing *Bailey,* 88 U.S. 342; *Holmberg*, 327 U.S. 392). The "special rule" *Koenig* refers to is fraudulent concealment as it relates to equitable tolling. *Id*. Notably, *Koenig* correctly asserted that the Supreme Court has not adopted a general blanket discovery rule with respect to interpreting federal statutes of limitations: "TRW concludes that some periods of limitations start with discovery and others not, with the difference depending on each provision's text, context, and history." *Id*. (citing *TRW, Inc. v. Andrews*, 534 U.S. 19, 27 (2001)); *see also United States v. Midwest Generation*, LLC, 781 F. Supp. 2d 677, 692 (N.D. Ill. 2011).

The SEC next relies on *Gabelli*. *Gabelli* held that a claim "first accrues" under § 2462 when the government discovers the violation, rather than when the

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[6] "The SEC has failed to establish that the 'very essence' of the defendants' backdating scheme itself prevented its discovery. Accordingly, the Court finds that, as a matter of law, there is no genuine dispute of material fact as to whether Bartek's and Richardson's alleged fraudulent acts were self-concealing." Feb. 2011 Order at 14. As noted earlier, the SEC does not appeal the court's ruling on its equitable claims. SEC Initial Brief at p.19 n.31, p.28 n.33.

violation occurs. 653 F.3d at 60. "[I]t 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." *Id.* (citing *Holmberg*, 327 U.S. at 397). *Gabelli* chiefly relied on authority such as *Bailey* and *Holmberg.* The court asserted that the discovery rule does not govern the accrual of most claims because they "do not involve conduct that is inherently self-concealing." 653 F.3d at 59.[7] The application of *Bailey* and *Holmberg* fit the

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[7] *Gabelli* noted that it is all-too-common that the discovery rule is confused with fraudulent concealment. It wrote that "[u]nder 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." 653 F.3d at 59. "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." *Id.*

The district court in this case found no conduct concealing fraud. And, to the extent that the SEC argues for the discovery rule's application whenever fraud is alleged, we have rejected an automatic application of a fraud discovery rule into a federal statute when the statute is "explicit in commanding" at what moment a suit must be brought. *See United States v. Borin*, 209 F.2d 145, 147-48 (5th Cir. 1954). In rejecting the government's "discovery of fraud" argument in a False Claims Act action, *Borin* reasoned that facts under *Gabelli* as that case involved an inherently self-concealing fraudulent scheme, circumstances that are not found in this case. *Core* is applicable here because it grappled with § 2462's relevant language to conclude that the "first accrued" language means the date of the violation. *Core*, 759 F.2d at 482; *see also 3M*, 17 F.3d at 1462 ("In 1839, when Congress used the word "accrued," it could not possibly have intended the word to incorporate any discovery of violation rule."); *Williams*, 104 F.3d at 240.

B. Whether or not Permanent Injunctions and O/D Bars are Equitable Remedies

On appeal, the SEC reasserts that permanent injunctions and O/D bars are equitable remedies and not penalties under § 2462. Equitable remedies would not be subject to § 2462's time limitations. The SEC requested that the district court permanently enjoin the Defendants from violating any securities laws and bar the Defendants from serving as officers or directors at any public company. The court denied the request finding that injunctive relief and O/D bars, as a matter of law, are construed as penalties because: (1) these remedies would have significant collateral consequences to the Defendants; (2) they do not address the past harm caused by the Defendants; and (3) the remedies do not focus on preventing future

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the "emphatic language must have been employed [by Congress] with full recognition of the fact that in most cases the falsity of the claim would remain concealed for a long time. The intention seems clear that the time would not be extended on account of any fraud or concealment." *Id.* (citations omitted).

harm due to the low likelihood that the Defendants would engage in similar harmful behavior in the future.

A "penalty" is defined as "[p]unishment imposed on a wrongdoer, usu[ally] in the form of imprisonment or fine . . . " Black's Law Dictionary 1247 (9th ed. 2009). A "penalty" is "[] punishment imposed by statute as a consequence of the commission of an offense." *Johnson v. S.E.C.*, 87 F.3d 484, 487 (D.C. Cir. 1996) (citing Black's Law Dictionary 1020 (5th ed. 1979)). Other legal sources similarly define "penalty" as "[a] punishment; a punishment imposed by statute as a consequence of the commission of a certain act." *Id.* (citing 2 Burrill's Law Dictionary (1871)). The words "'penalty of forfeiture, pecuniary or otherwise, accruing under the laws of the United States' . . . refer to something imposed in a punitive way for an infraction of a public law . . . " *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915) (interpreting the predecessor statute to § 2462). The D.C. Circuit in *Johnson* examined the meaning of "penalty" under § 2462. 87 F.3d at 487. It concluded that "a 'penalty,' as the term is used in § 2462, is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action." *Id.* at 488. The court agreed with the SEC that the "test for whether a sanction is sufficiently punitive to constitute a 'penalty' within the meaning of § 2462 is an objective one . . . " *Id.*

The SEC cites various authority to argue that § 2462 is limited to a sanction that involves the collecting of money or property.[8] These authorities do not limit the term "penalty" to the narrower definition that the SEC suggests. In fact, even within the SEC's own argument, it shows that the term "penalty" is used in the broader sense of the word:

> "As Justice Story explained in *United States v. Mann*, 26 F. Cas. 153, 1154 (C.C.D.N.H. 1812) (involving the district court's "exclusive original jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States"), although the "words" 'penalty and forfeiture' are often used in a broad sense, as including every description of punishments," they are often used in statutes and treatises in "a more restrained and narrow sense."

SEC Initial Brief at p.37. By the SEC's own admission, the term "penalty" may encompass both a broad and narrow meaning. The term "penalty" is not strictly used for monetary or property sanctions but rather encompasses a variety of punishments (e.g. death penalty). The SEC's narrow interpretation is incorrect.

The Commission asserts that a permanent injunction and O/D bars are remedial, thus are not punishment. Although traditionally remedial, the Supreme Court has recognized that "even remedial sanctions carry the sting of punishment." *United States v. Hal-*

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[8] On appeal, the SEC construes the term "penalty" under § 2462 narrowly and disagrees with *Johnson's* application. At the district court, however, the SEC cited to *Johnson* to define the term.

per, 490 U.S. 435, 447 n.7 (1989)[9] (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551 (1943)). And, determining whether an injunction here is a "penalty" or simply remedial requires a look at the nature or characteristic of the injunction. *See United States v. Telluride Co.*, 146 F.3d 1241, 1245-46 (10th Cir. 1998). *Johnson* employed an objective test to determine the punitive nature of a sanction under § 2462. 87 F.3d at 488. "[I]n determining whether the sanction is a penalty [under § 2462,] a court must objectively consider "the degree and extent of the consequences to the subject of the sanction . . . as a relevant factor." *Id.* at 488. Under *Johnson's* test, the court should consider the nature of the remedies sought by the SEC—here, the permanent injunctions and O/D bars to working at public companies. The district court considered the extent of the collateral consequences that would result from the O/D bars and injunctions, how this relief would remedy the alleged damage caused by the Defendants' conduct, and whether the remedies focus on preventing future harm. We agree with the court's determination.

The SEC's sought-after remedies would have a stigmatizing effect and long-lasting repercussions. Neither remedy addresses past harm allegedly caused by the Defendants. Nor does either remedy address the prevention of future harm in light of the minimal likelihood of similar conduct in the future. Further, relief sought in the instant case is more severe than

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[9] *Halper* was invalidated on other grounds by *Hudson v. United States*, 522 U.S. 93, 98 (1997).

that in *Johnson*. The petitioner in *Johnson* was censured and suspended from working with any broker or dealer for six-months. 87 F.3d at 486. Here, the SEC is essentially seeking a lifetime ban against the Defendants. Courts have held that such long term bans can be construed as punitive.[10] Based on the severity and permanent nature of the sought-after remedies, the district court did not error in denying the SEC's request on grounds that the remedies are punitive, and are thus subject to § 2462's time limitations.

VI. Conclusion

For the reasons stated above, we AFFIRM the district court.

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[10] Various cases hold that excluding a person from their chosen profession is considered a penalty or punitive in nature. *See e.g. United States v. Lovett*, 328 U.S. 303, 313, 316 (asserting that the purpose of Section 304 was to permanently bar the petitioners from government service and that a "permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type."); *see also Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 229 (5th Cir. 1998) ("Although disbarment is intended to protect the public, it is a 'punishment or penalty imposed on the lawyer.'") (citing *In re Ruffalo*, 390 U.S. 544, 550 (1968)).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-10594

D.C. Docket No. 3:08-CV-1105

SECURITIES AND EXCHANGE COMMISSION,
PLAINTIFF-APPELLANT

v.

DOUGLAS J. BARTEK; NANCY A. RICHARDSON,
DEFENDANTS-APPELLEES

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

[Aug. 7, 2012]

Before: REAVLEY, HAYNES, and GRAVES, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE:

A true Copy
Attest

Clerk, U.S. Court of appeals, Fifth Circuit

By: ____________________
Deputy

New Orleans, Louisana

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10594
SECURITIES AND EXCHANGE COMMISSION,
PLAINTIFF-APPELLANT

v.

DOUGLAS J. BARTEK; NANCY A. RICHARDSON,
DEFENDANTS-APPELLEES

[Nov. 15, 2012]

ON PETITION FOR REHEARING EN BANC

(Opinion: 08/07/12, 5 Cir., ____, ____, F.3d ____)

Before REAVLEY, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ JAMES E. GRAVES, JR.
JAMES E. GRAVES, JR.
United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:08-CV-1105-B

SECURITIES AND EXCHANGE COMMISSION,
PLAINTIFF

v.

MICROTUNE, INC., DOUGLAS J. BARTEK AND
NANCY A. RICHARDSON, DEFENDANT

Feb. 15, 2011

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant Douglas J. Bartek's ("Bartek") Motion for Summary Judgment filed June 4, 2010 (doc. 115). Following a hearing on November 19, 2010, the Court denied Bartek's motion in part, reserving ruling on his argument that the SEC's claims are barred by the five-year limitations period found in 28 U.S.C. § 2462 ("Section 2462").[1] Order Nov. 23, 2010. The precise questions reserved for further consideration were: 1) whether the doctrine of fraudulent concealment, relied on by the SEC, operates to toll the running of the five-year limitations period under the facts of this case, and 2) which of the SEC's proposed remedies were penalties subject to Section 2462. Having provided the parties an opportunity to submit additional briefing and having now reviewed all of the materials submitted in connection with not only Bartek's motion but also Defendant Nancy A. Richardson's Motion for Summary Judgment and the SEC's Motion for Partial Summary Judgment, these issues are ripe for review. For the reasons set forth below, the Court finds that there is no genuine issue of material fact as to whether the SEC met all the requirements of the fraudulent concealment doctrine, and therefore its claims are not tolled. The Court also finds that all of the SEC's proposed relief is properly characterized as penalties subject to Section

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[1] Although Defendant Nancy A. Richardson did not formally move for summary judgment as to her limitations defense, she did argue that she was entitled to that defense in her response to the SEC's Motion for Partial Summary Judgment. Richardson Br. Opp'n 7-19. She also argued in her Supplemental Briefing on the SEC's motion that the Court should not only deny the SEC's motion but also grant summary judgment for her on limitations based on *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388, 393 (5th Cir. 1989). Richardson Supplemental Br. 10. The Court previously denied the SEC's motion but did not determine whether summary judgment on the issue of limitations for Richardson, as a nonmovant, was appropriate. The Court finds that this issue is now ripe for determination.

2462's statute of limitations, with the exception of disgorgement of Richardson's "in-the-money" profits from the exercise of backdated stock options.

I.

BACKGROUND

The SEC filed this enforcement action against Microtune, Inc., a publicly traded company, and two of its former executives, Richardson and Bartek, accusing them of engaging in a fraudulent stock-option backdating scheme between 2000 and mid-2003. According to the SEC, Richardson, Microtune's former Chief Financial Officer and General Counsel and Bartek, its former Chief Executive Officer, fraudulently backdated stock options granted to certain executives and company employees to ensure the options were "in the money" or profitable for the grantees.[2] The two defendants are further charged with failing to record and report the corresponding expense—

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[2] More fully described in the SEC's First Amended Complaint ("FAC"), the SEC maintains that the backdating scheme operated as follows:

> Bartek and Richardson's stock option misconduct fell into three categories: (i) backdating grants to newly hired executives and other employees; (ii) backdating large "block" grants to officers and rank-and-file employees; and (iii) granting (backdated) options, cancelling those options when the company's stock price dropped precipitously, and subsequently re-granting the same options at substantially lower exercise prices, all without recognizing the appropriate compensation expense, and without disclosing the executive options' in-the-money value when granted as executive compensation.

FAC ¶ 4.

resulting from the "in-the-money" transactions—on the company's financial statements and in Commission filings, an omission that purportedly resulted in overstated income and understated expenses. By manipulating stock options and thereafter failing to properly record and recognize the transactions, the SEC maintains that Richardson and Bartek violated a litany of federal securities laws.[3] Among its requested remedies, the SEC seeks civil monetary penalties, officer-and-director bars, a permanent injunction, disgorgement and reimbursement for ill-gotten bonuses and stock profits.[4] Bartek and Richardson deny the SEC's allegations and, in turn, have raised a number of affirmative defenses to the charges, including and most pertinent here, 28 U.S.C. § 2462's five-year limitations bar.[5]

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[3] These include: Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)]; Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)]; Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)]; Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)]; Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)]; Section 13(b)5 of the Exchange Act; and Section 14(a) of the Exchange Act [15 U.S.C. § 78n(a)]. FAC ¶ 15.

[4] The remedies are sought pursuant to: Section 20(d) of the Securities Act [15 U.S.C. § 77t(d); Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]; Section 20(e) of the Securities Act [15 U.S.C. § 77t(e)]; Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)]; and Section 304 of the Sarbanes-Oxley Act [15 U.S.C. § 7243]. FAC ¶ 212.

[5] The crux of Bartek's and Richardson's limitations defense is that most of the acts forming the basis of the SEC's case occurred between 2001 and mid-2003. They argue that because the SEC

Summary judgment motions by the SEC, Richardson, and Bartek were filed in June 2010. All three motions have been denied, Order Oct. 29, 2010 and Order Nov. 23, 2010, save and except that portion of Bartek's motion regarding limitations, the subject of this order. A brief dissection of the Court's summary judgment rulings relevant to this analysis is elucidating. The SEC moved for partial summary judgment on Bartek's and Richardson's affirmative defenses, its primary focus being the defendants' limitations defense. SEC Mot. 9-17. The Commission argued that it was entitled to judgment as a matter of law on Richardson's and Bartek's statute of limitations defense because the "discovery rule" and certain equitable tolling principles including "fraudulent concealment" and the "continuing violations doctrine" applied and salvaged claims that would otherwise be barred by the five-year statute of limitations. The SEC also argued that its requested remedies, with the exception of civil monetary penalties, were equitable remedies not subject to limitations. As set forth in this Court's Order dated November 23, 2010 and for the reasons detailed on the record at the hearing held November 19, 2010, Hr'g Tr. Nov. 19, 2010 at 109-13, the Court denied the SEC's Motion for Partial Summary Judgment in its entirety, specifically rejecting the applicability of the discovery rule and the continuing violations doctrine to its claims.

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did not file suit until June 30, 2008, the bulk of its claims are barred by the applicable five-year limitations period found in 28 U.S.C. § 2462.

Separately, Richardson and Bartek filed voluminous motions for summary judgment. As set forth in this Court's Order dated October 29, 2010 and for the reasons detailed on the record at the hearing on the same day, Hr'g Tr. Oct. 29, 2010 at 83-86, Richardson's motion was denied in its entirety. Bartek's motion, at issue here, was later denied in part, Order Nov. 23, 2010 and Hr'g Tr. Nov. 19, 2010 at 157-60, the Court reserving ruling and calling for additional briefing on Bartek's limitations defense as it relates to the SEC's reliance on the doctrine of fraudulent concealment. The Court also left open the issue of which remedies sought by the SEC were "penalties" subject to Section 2462. The briefing is now complete on these issues and the motion is ripe for determination.[6]

II.

LEGAL STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that, as a matter of law, the movant is entitled to judgment. *Hart v. Hairston*, 343 F.3d 762, 764 (5th Cir. 2003). In a motion for summary judgment, the burden is on the movant to prove that no genuine issue of material fact

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[6] Although the Court did not request additional briefing regarding whether the SEC's requested relief constituted penalties under Section 2462, this issue was briefed by all parties in connection with the motions for summary judgment and also discussed at the November 19, 2010 hearing.

exists. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). To determine whether a genuine issue exists for trial, the court must view all of the evidence in the light most favorable to the non-movant, and the evidence must be sufficient such that a reasonable jury could return a verdict for the non-movant. *See Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 371-72 (5th Cir. 2002).

When the party with the burden of proof is the movant, it must establish each element of its claim as a matter of law. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). If the nonmovant bears the burden of proof at trial, the summary judgment movant need not support its motion with evidence negating the non-movant's case. *Latimer v. SmithKline & French Labs.*, 919 F.2d 301, 303 (5th Cir. 1990). Rather, the movant may satisfy its burden by pointing to the absence of evidence to support the non-movant's case. *Id.; Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

Once the movant has met its burden, the burden shifts to the non-movant, who must show that summary judgment is not appropriate. *Little*, 37 F.3d at 1075 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). "This burden is not satisfied with 'some metaphysical doubt as to the material facts,' . . . by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (citations omitted). A non-moving party with the burden of proof must "identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim," *Johnson v. Deep E.*

Tex. Reg'l Narcotics Trafficking Task Force, 379 F.3d 293, 301 (5th Cir. 2004) (citation omitted), and "come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis in original) (citation omitted). *See also John G. Mahler Co. v. Klein Karoo Landboukooperasie DPK*, 58 F.3d 636, 1995 WL 371037, at *3 n.2 (5th Cir. June 5, 1995) (explaining that *Celotex*, 477 U.S. at 324 and Fed. R. Civ. P. 56(e) require that the burden of proving the discovery rule remains with the party seeking to use it, even on summary judgment when that party is the non-movant).

In appropriate cases, the Court may also grant summary judgment against the movant even though the opposite party has not actually filed a motion for summary judgment. *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388, 393 (5th Cir. 1989) (*citing Landry v. G.B.A.*, 762 F.2d 462, 464 (5th Cir. 1985). *See also* 10A Wright & Miller Fed. Prac. & Proc. § 2720 (3d ed.) (granting summary judgment in favor of nonmoving party may be appropriate in certain cases as "the judge already is engaged in determining whether a genuine issue of material fact exists and the parties have been given an opportunity to present evidence designed either to support or to refute the request for the entry of judgment").

III.

ANALYSIS

A. Section 2462

There is no express statute of limitations for enforcement claims brought by the SEC under the Securities Act of 1933 or the Exchange Act of 1934, though 28 U.S.C. § 2462 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.

28 U.S.C. § 2462 (emphasis added). The parties correctly agree that the provision applies to the SEC's claims for civil penalties, but they part ways on its applicability to the claims at hand. Specifically, Bartek and Richardson maintain that "the date when the claim first accrued" language in the statute means the "date of the violation" and, accordingly, most of the SEC's claims are untimely because the Commission filed its case more that five years after the alleged violations occurred. Richardson Br. Opp'n at 7-10; Bartek Br. Opp'n 15-17. The SEC, on the other hand, argues that its claims are not barred under the statute because the doctrine of fraudulent concealment applies

and tolls the running of Section 2462's five-year term.[7] Bartek, framing the issue now before the Court, contends that the SEC may not seek tolling relief through the doctrine of fraudulent concealment because the Commission cannot meet its burden of proof to establish that fraudulent concealment occurred in this case.

Bartek and Richardson further argue that all the forms of the SEC's requested relief are penalties under Section 2462. Richardson Br. Opp'n 16-19, Bartek Br. Opp'n 12-15. The SEC counters that even if it is not entitled to tolling under the fraudulent concealment doctrine, all forms of the relief it seeks, aside from the civil monetary penalties, are equitable remedies not subject to Section 2462. SEC Br. Supp. Mot. 10-11.

B. *Fraudulent Concealment*

The parties do not dispute that the doctrine of fraudulent concealment, if established, would toll the running of Section 2462's five-year limitations period. The parties disagree, however, both as to how the fraudulent concealment doctrine operates as well as to whether its principles apply to the facts of this case. For the reasons that follow, the Court finds that in order to show that the statute of limitations should be tolled, a plaintiff must show 1) the defendant's wrongdoing was concealed from the plaintiff, either through active concealment by the defendant or because the

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[7] The SEC also argues that the discovery rule and the continuing violations doctrine apply to its claims, a contention this Court has already rejected.

nature of the wrongdoing was such that it was self-concealing; 2) the plaintiff acted diligently once he had inquiry notice, i.e., once he knew of or should have known of the facts giving rise to his claim, and 3) the plaintiff did not have inquiry notice within the limitations period. A plaintiff seeking to defeat a motion for summary judgment on limitations through the doctrine of fraudulent concealment must therefore show, at a minimum, that a genuine issue of material fact exists as to each of these elements. Applying this test to this case, the Court finds that there is no genuine issue of material fact as to whether the SEC acted diligently nor as to whether the SEC discovered the alleged wrongdoing within the limitations period. Accordingly, Section 2462's statute of limitations is not tolled by the fraudulent concealment doctrine.

At the outset, the Court notes the confusion in the case authority regarding fraudulent concealment and other tolling doctrines, much of which is reflected in the parties' disagreements and merits some discussion.[8] Courts sometimes use terms such as fraudulent concealment, the discovery rule, equitable tolling, and equitable estoppel interchangeably, which all operate to allow plaintiffs to continue with claims that may otherwise be barred by statutes of limitations, either by postponing the accrual of the claims or tolling the running of the statute of limitations. *See*, *e.g.*,

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[8] Indeed, Judge Posner, midway through a discussion of various tolling doctrines, explained "[w]e said that statute of limitations law is confusing, and now you'll believe us! And we're not through." *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996).

Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450, 452-53 (7th Cir. 1990) (discussing and distinguishing tolling doctrines); Carli McNeill, *Seeing the Forest: A Holistic View of the RICO Statute of Limitations*, 85 Notre Dame L. Rev. 1231, 1250-59 (2010) (examining courts' application of tolling doctrines). Each doctrine operates under the same general principle—something prevented the plaintiff from filing his case within the normal limitations period.[9] However, courts vary widely in their application of these doctrines. The Seventh Circuit's version of fraudulent concealment requires that the defendant do something to conceal the fraud itself, beyond committing the actual fraud which underlies the plaintiff's claims. *Cada*, 920 F.2d at 451. Also, fraudulent concealment under Seventh Circuit law postpones the accrual of the claim, rather than toll the limitations period, and it has no requirement of diligence as to the plaintiff.[10] *Id.* The Seventh Circuit considers fraudulent concealment a doctrine distinct from equitable tolling—equitable

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[9] The plaintiff may be prevented from filing his case by the nature of the alleged wrongdoing itself or by additional steps taken by the defendant to prevent the plaintiff from filing in time, such as actions to conceal the wrongdoing or dilatory tactics such as promising not to plead the defense of statute of limitations.

[10] The Seventh Circuit's version of fraudulent concealment appears to be the functional equivalent of the discovery rule. *See SEC v. Koenig*, 557 F.3d 736, 739 (7th Cir. 2009) (under either discovery rule or equitable tolling, "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") (Easterbrook, J.) (citation omitted).

tolling under Seventh Circuit law requires that the underlying fraud be self-concealing and also requires that the plaintiff bring his claim as soon as reasonably practicable after he has inquiry notice. *Id.* at 452-53.

The Fifth Circuit, in contrast, appears to apply a different version of fraudulent concealment, which is also referred to as equitable tolling.[11] The parties are in agreement that under the fraudulent concealment doctrine, the SEC must establish, at a minimum, that (1) the defendant's wrongdoing was concealed **AND** (2) the plaintiff failed to discover the facts that form the basis of his claim and acted diligently. *See*, *e.g.*, *In re Energy Transfer Partners Natural Gas Litig.*, 2009 WL 2633781, at *13 (S.D. Tex. Aug. 26, 2009) (citing *Texas v. Allan Constr. Co.*, 851 F.2d 1526, 1528 (5th Cir. 1988)) (other citations omitted); *SEC v. Jones*, 476 F. Supp. 2d 374, 382 (S.D.N.Y. 2007). The parties dispute the operation of these elements, whether there is an additional element the SEC must prove, and how the doctrine applies to the facts of this case.

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[11] The Court uses the terms fraudulent concealment and equitable tolling interchangeably, although it recognizes that these are distinct terms as used by the Seventh Circuit. At least one court within the Fifth Circuit distinguishes between an act of concealment by the defendant which conceals the plaintiff's cause of action, which could trigger *equitable tolling*, and action by the defendant to cause the plaintiff to miss the filing deadline, even though the plaintiff knows his cause of action exists, which could trigger *equitable estoppel*. *In re Enron Corp. Secs., Derivative, & ERISA Litig.*, 310 F. Supp. 2d 819, 856 (S.D. Tex. 2004) (citing *Lekas v. United Airlines, Inc.*, 282 F.3d 296, 301 (4th Cir. 2002); *Grace v. Rosenstock*, 228 F.3d 40, 53 (2d Cir. 2000)).

First, the parties disagree whether under Fifth Circuit law the concealment element may be proven by showing that the wrong itself was self-concealing, either because of the inherent nature of the wrongdoing or under the facts of the case.[12] Second, the parties dispute what showing of diligence the SEC must provide: the SEC argues that it only has to show that it was diligent up until it had inquiry notice of Microtune's backdating, while Richardson and Bartek argue, in essence, that the SEC's duty of diligence encompassed its actions from inquiry notice until and including the filing of the suit. Third, the parties dispute whether the fraudulent concealment doctrine contains a third element: that the plaintiff did not discover the alleged wrongdoing during the limitations period. Fourth, the parties dispute whether the facts show that Bartek and Richardson concealed their alleged wrongdoing and when the SEC first had inquiry notice. The Court will now examine these arguments and apply the applicable law to the facts of this case. Overall, the Court finds that there is no genuine issue of material fact as to whether the SEC acted diligently nor any issue as to whether the SEC had inquiry notice during the limitations period. As such, the SEC is not entitled to tolling under the fraudulent concealment doctrine.

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[12] Of course, this element may also be shown through affirmative acts by the defendant to conceal his wrongdoing.

i. Concealment

The concealment element may be shown through evidence that the wrong itself was self-concealing or that the defendant took affirmative steps to conceal its existence. *SEC v. Gabelli*, 2010 WL 1253603, at *6-7 (S.D.N.Y. March 17, 2010) (citing *Jones*, 476 F. Supp. 2d at 382) (other citations omitted)). The SEC insists that fraud-based claims are inherently self-concealing as a matter of law, based on its misreading of the Fifth Circuit's holding in *State of Texas v. Allan Construction*. SEC Br. Opp'n at 6-8 (citing *Allan Constr.*, 851 F.2d at 1529, 1531-32 and *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 341 n.2 (5th Cir. 1971)). But in *Allan Construction*, a case involving an antitrust bid-rigging conspiracy, the issue before the court was whether bid-rigging, a non-fraud cause of action, was by its nature "always self-concealing." *Allan Constr.*, 851 F.2d at 1529-31 (citing *Prather*, 446 F.2d at 341 n.2). In concluding that bid-rigging was not inherently self-concealing, the court referenced "the general rule" that fraud is by nature self-concealing and thus sufficient alone to trigger equitable tolling under the doctrine of fraudulent concealment. *Id.* at 1529. But the Fifth Circuit's holding that bid-rigging was not inherently self-concealing did not rest upon or even implicitly incorporate a determination that fraud claims—grounded in either federal or state law—are *always* self-concealing. At best, the reference to the "general rule" was *dicta*, a conclusion supported by a subsequent opinion of the court. In *Liddell v. First Family Financial Services, Inc.*, the Fifth Circuit rejected the plaintiffs' attempt to extend *Allan Con-*

struction's reference to the self-concealing nature of fraud to a case involving fraud claims grounded in Mississippi state law. 146 Fed. Appx. 748, 750-51 (5th Cir. 2010). The Court distinguished *Allan Construction* as a case interpreting the doctrine of fraudulent concealment "*under Texas law*" indicating that it was not binding precedent for fraud claims not subject to the Texas fraudulent concealment doctrine. *Id.* at 750, 750 n.9 (rejecting plaintiffs' argument that *Texas* precedent should control the *Mississippi* fraud claims). As such, the Court rejects the proposition that all claims grounded in the federal securities statutes are inherently self-concealing. *See also OBG Technical Servs., Inc., v. Northrop Grumman Space & Mission Sys. Corp.*, 503 F. Supp. 2d 490, 507 (D. Conn. 2007) ("[n]ot every fraud is self-concealing").

Having found that the SEC's claims are not, by virtue of their fraud-based nature, self-concealing as a matter of law, this Court now examines whether the claims are otherwise self-concealing based on a case-specific review of the factual allegations. The theory that a fraud can be "self-concealing" finds its roots in the Supreme Court's decision of *Bailey v. Glover*, 88 U.S. 342 (1874), where the concept was described as follows:

> [W]here the party injured by the fraud 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, 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.

OBG, 503 F. Supp. 2d at 506-07 (quoting *Bailey*, 88 U.S. at 348). Since *Bailey*, this federal common law concept has been the subject of "considerable criticism" because of "the loose language that some courts use when applying the concept." *Id.* at 507. One court provided insight by observing that "[t]he requirement that the fraud 'conceal itself' must mean more than that the plaintiff is ignorant of the deception." *Long v. Abbott Mortgage*, 459 F. Supp. 108, 120(D. Conn. 1978). The *Long* court further noted:

> A better reading of the phrase is that it encompasses an enterprise where the particular fraud is, by its nature, unknowable. A fraud "conceal(s) itself" when a plaintiff, even by the exercise of due diligence, could not uncover it. It is distinguishable from "affirmative concealment" because that doctrine requires some conduct of the defendant directed at the objective of keeping the fraud concealed. By contrast, a fraud conceals itself when the defendant does only what is necessary to perpetrate the fraud, and that alone makes the fraud unknowable, without additional efforts at concealment. In other words, the very essence of the fraudulent practice itself prevents discovery.

Id. at 120.

Other than the fraud-based nature of the claims themselves, the only other facts the SEC relies on in maintaining that the defendants' acts were inherently self-concealing is that there were no "red flags" apprising the Commission of possible back-dating violations at Microtune before 2005 and therefore the SEC had no reason to doubt Microtune's actions or suspect the company of any wrongdoing. SEC Br. Opp'n at 8. But the SEC supplies no authority that the "absence of red flags" as to the fraud constitutes any indicia of a fraud's self-concealing nature. Moreover, the "absence of red flags" in no way equates to a finding that the fraud was hidden or incapable of being known as those terms are described in *Long* or *Bailey*. Instead, the absence of red flags is more akin to arguing that the defendants' silence prevented the SEC from discovering the backdating scheme. Concealment by silence or the simple fact that a fraud was unknown to the plaintiff is not enough to establish that a fraud itself is self-concealing. *Long*, 459 F. Supp. at 120; *Jones,* 476 F. Supp. 2d at 382. Rather, as addressed by the court, the fraud must be incapable of being known even in the exercise of diligence by the plaintiffs. *Long*, 459 F. Supp. 120. The SEC has failed to establish that the "very essence" of the defendants' backdating scheme itself prevented its discovery. Accordingly, the Court finds that, as a matter of law, there is no genuine dispute of material fact as to whether Bartek's and Richardson's alleged fraudulent acts were self-concealing.

Having found that the Defendants' acts were not self-concealing, the Court must determine if there is a fact issue as to whether Bartek and Richardson *actively* concealed their alleged wrongdoing, which the parties hotly dispute. The Court has examined the voluminous and conflicting evidence submitted by the parties and finds that a genuine issue of material fact has been raised as to whether the Defendants concealed their alleged wrongdoing through affirmative acts, such that summary judgment *on the concealment element* of fraudulent concealment is precluded. However, this finding is not determinative as to whether the SEC may defeat Bartek's Motion for Summary Judgment, as the SEC must show that there remains a fact issue as to whether it acted diligently and whether it had inquiry notice within the limitations period.

ii. Diligence

A party seeking to toll the statute of limitations through the fraudulent concealment doctrine must also show that it acted diligently. Under the fraudulent concealment doctrine, the statute of limitations may be tolled until "'the plaintiff either acquires actual knowledge of the facts that comprise his cause of action or should have acquired such knowledge through the exercise of reasonable diligence after being apprised of sufficient facts to put him on notice.'" *Long*, 459 F. Supp. at 113 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 461 (2d Cir. 1974)). To determine whether the plaintiff knew or should have known of the defendants' conduct, or had "inquiry notice," the Court must determine first, "whether plaintiff was aware of any facts sufficient to put him on notice, thereby creating an obligation of diligence," and second, if there is an obligation of diligence, "whether plaintiff fulfilled that duty of diligence." *Id.*

Accordingly, the SEC, in order to toll the statute of limitations under fraudulent concealment, must show that it acted diligently in discovering and then further developing the facts forming the basis for its claims against Richardson and Bartek.[13] Also, given that fraudulent concealment allows the court to toll the statute of limitations under principles of equity, the Court gleans from this doctrine a requirement that the SEC must have acted diligently in filing its complaint in a timely manner once it had inquiry notice.[14] *See*, *e.g.*, *Jay E. Hayden Found. v. First Neighbor Bank, N.A.*, 610 F.3d 382, 387-88 (7th Cir. 2010) (in private plaintiffs' RICO case, "the plaintiff must both use due diligence to discover that he has been injured and by whom even if the defendant is engaged in fraudulent

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[13] *Cf.* Hr'g Tr. Oct. 29, 2010 at 34 (counsel for SEC explains with respect to the requirements of the fraudulent concealment doctrine, "[d]iligence comes in after we are on inquiry notice").

[14] The SEC argues in its supplemental briefing "[i]t is black letter law that a plaintiff can establish the diligence element of fraudulent concealment by demonstrating the absence of any 'storm warning' putting a plaintiff on notice of a need to inquire or investigate." SEC First Supplemental Br. 7, *citing Cetel v. Kirwan Fin. Group*, 460 F.3d 494, 507 (3rd Cir. 2006); *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008); *Koenig*, 557 F.3d at 739-40; *SEC v. Kearns*, 691 F. Supp. 2d 601, 612-13 (D.N.J. 2010). While perhaps there were no "storm warnings" that would have alerted the SEC to backdating at Microtune prior to receipt of the tricks on timing email, this analysis is more relevant to the issue of when the SEC had inquiry notice, not whether the SEC is required to show diligence *after* it became apprised of backdating at Microtune. The Court also notes that the SEC's cited cases generally apply the discovery rule, which this Court has already found inapplicable to Section 2462. *See*, *e.g.*, *Cetel*, 460 F.3d at 507 ("In determining when a RICO claim accrues, we apply an injury discovery rule whereby a RICO claim accrues when plaintiffs knew or should have know of their injury.") (citation omitted).

concealment, and *diligently endeavor to sue within the statutory limitations period or as soon thereafter as feasible*.") (emphasis added).[15] Contrary to the SEC's contention, the Court finds that equity would not be served by allowing the SEC to wait a full five years to file its case after being apprised of Microtune's prac-

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[15] The Court in *Jay E. Hayden Foundation* explained the need for plaintiffs to file their complaints promptly and the problems caused by delays in filing:

> [W]e said that the defendants' obstructive behavior may have prevented the plaintiffs from obtaining enough information before 2005 to know they'd sustained a legal injury and by whom it had been inflicted. But that did not automatically give them four more years to sue. Tolling doctrines need not extend the date on which the statute of limitations begins to run; for as soon as the tolling events cease . . . the plaintiffs should get to work and file suit as soon as is practicable, in order to minimize the inroads that dilatory filing makes into the policies served by statutes of limitations. . . . To litigate a claim so long after the events giving rise to it is bound to be difficult because of lost evidence and faded memories, and the difficulty would be needlessly augmented had the plaintiff no duty of alacrity once the facts that the defendants had improperly concealed are at last in the open. By 2005 the plaintiffs knew *so* much that they did not need three more years to complete their precomplaint investigation and file suit.

610 F.3d at 387-88. The Court recognizes that the afore-mentioned case involves civil RICO claims brought by a private plaintiff, but the principles expressed are equally applicable to this case. Here Bartek and Richardson both argue that their defenses have been prejudiced by the passage of time, a point not disputed by the SEC, and it also appears that a considerable amount of facts "were in the open" by at least mid-2004, such that the SEC should not have needed until mid-2008 to file its complaint.

tices, if the SEC did not act diligently during this five-year period.[16]

Bartek argues that the SEC is not entitled to equitable tolling because the SEC was aware of, or should have been aware of, Microtune's backdating practices in 2000, when the SEC investigated Microtune's "cheap stock" practices in connection with the company's initial public offering, triggering a duty to inquire which was not met.[17] Alternatively, Bartek argues that the SEC knew or should have known of Microtune's backdating practices as of August 26, 2003, and the SEC failed to act diligently after this inquiry notice. At that time the SEC, in connection with an investigation into Microtune's revenue reporting, received an email from Bartek to William Housley dated June 26, 2001, entitled "new options" and stating, in pertinent part,

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[16] Judge Posner has explained that "[s]tatutes of limitations are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application. They protect important social interests in certainty, accuracy, and repose." *Cada*, 920 F.2d at 452-53. After quoting this statement, the Eighth Circuit explained that "[h]ence, while it is inherently difficult to predict when resort to the saving grace of equitable modification is appropriate, it is important to remember that such relief is an exception to the rule, and should therefore be used only in exceptional circumstances." *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1330 (8th Cir. 1995).

[17] In essence, Bartek argues that the SEC's cheap stock investigation focused on Microtune's stock option practices, Microtune was backdating stock options in 2000, and a diligent inquiry by the SEC would have discovered backdating at that time.

> Per our discussion at the salary reviews, we are putting option grants in for [certain employees] . . . . You should get the details on vesting so that you can communicate to each of the grantees their new grants. They will be pleased with the price. Barbara pulled some tricks on timing, and we are documenting that this grant was done on May 2, and therefore the closing price on May 1 is the option price: $12.35. So, they're already almost $8 in the money!!

SEC Br. Supp. Mot. 9 and App. 296 (Harris Dec. ¶ 13) (hereafter "the tricks on timing email"). In response, the SEC argues that backdating was neither at issue nor should it have been in the 2000 cheap stock investigation such that it had no duty to inquire regarding Microtune's backdating practices in 2000. The SEC concedes that the 2003 tricks on timing email put it on notice of backdating at Microtune but argues it acted diligently up until receipt of the email, and no further diligence was required other than filing its complaint within five years of inquiry notice.

Based on the parties' arguments and the conflicting evidence they submitted, the Court finds that there is a genuine issue of material fact as to whether the SEC had inquiry notice of option backdating practices at Microtune in 2000 as a result of the SEC's cheap stock investigation such that the SEC would be required to show its diligence at that time.[18] The Court reaches a

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[18] The Court expresses no opinion as to whether the SEC's argument, that it did not have inquiry notice in 2000, is more persua-

different conclusion, however, with respect to the effect of the tricks on timing email the SEC received on August 26, 2003. The SEC concedes that this email gave the SEC inquiry notice of at least some of Microtune's backdating practices.[19] Therefore, the Court must examine whether the SEC acted diligently upon receipt of this email. The SEC's initial actions after receipt of the email show that, at a minimum, the SEC was aware, or should have been aware, of Microtune's practice of backdating options granted to new employees in 2003. After receiving the tricks on timing email, the SEC proceeded to question at least two Microtune employees, Barbara Ureste and William Housely, in late 2003 (as well as Bartek in early 2004) regarding Microtune's practice of backdating grants to newly hired executives and other employees by picking the lowest stock price on any day within a "two-week window" of the employee's start date. Bartek Mot. App. 812-14 (doc. 117-8 at 154-156)

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sive than Richardson's and Bartek's argument that the SEC did have such notice at that time.

[19] *See*, *e.g.*, Hr'g Tr. Oct. 29, 2010 at 14 ("So on August 26th, 2003, in our revenue recognition investigation, we stumbled upon an e-mail that referred to tricks on timing. And at that point we were on inquiry notice, and we embraced that."); *id.* at 31 ("That's why we say that we were on inquiry notice on August 26, 2003," referring to fact that tricks on timing email alerted SEC to backdating). The SEC also received several other emails in 2003 and 2004 discussing Microtune's option practices in connection with the revenue recognition investigation. *See*, *e.g.*, Bartek Mot. App. 1681-92 (doc. 117-13 at 120-131) (SEC response to Bartek's first set of requests for admission, discussing emails produced to SEC in 2003 and 2004).

(Ureste testimony); Bartek Mot. App. 816-17 (doc. 117-8 at 159-160) (Housley testimony); Richardson Mot. App. 658-659 (doc. 120-22 at 10-11) (Bartek testimony). Despite this evidence, the SEC apparently took no more action to investigate backdating at Microtune until the company brought its option granting practices to the SEC's attention in 2006,[20] even though the terms of the SEC's 2003 revenue recognition subpoena expressly requested documents regarding Microtune's option granting practices and even though the SEC continued to receive documents discussing Microtune's backdating after the tricks on timing email.[21]

In 2006, the SEC once again began to investigate Microtune's option granting practices in response to the company's public announcement on or about July

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[20] Hr'g Tr. Oct. 29, 2010 at 23 (counsel for SEC explains that after Microtune reported backdating issues to SEC in 2006, "[t]hat's when we launched our investigation and brought our suit, within a couple of years of that."); *see also* Am. Compl. ¶¶ 160-61 (SEC discovered "the backdating scheme on or about July 27, 2006, when Microtune publicly announced that its audit committee had commenced an internal review of the company's stock option grant practices," and "[w]ithin weeks of this initial public disclosure of backdating practices at Microtune, the Commission staff opened an informal inquiry into Microtune's option granting practices").

[21] Bartek Opp'n App. 63 (doc. 135-1 at 77). The SEC's August 4, 2003 subpoena issued to Microtune requested, *inter alia*, "[a]ll items in personnel files and any other files maintained during the relevant period, including documents relating to compensation arrangements such as bonus plans, stock option grants, [and] incentive packages . . . " for several employees, including Bartek and Richardson. *Id.*

27, 2006 that it was commencing an internal review of these practices, FAC ¶¶ 160-61, though the SEC did not file its suit until June 30, 2008. When asked about the SEC's diligence and the 2006 Microtune internal investigation, counsel for the SEC explained that "we, often for resource reasons, wait until the company does its own investigation before we complete ours." Hr'g Tr. Oct. 29, 2010 at 34-36. While perhaps an understandable method of allocating Commission resources, such justification does not excuse the SEC's apparent inactivity from mid-2004 to mid-2006,[22] when further investigation would have uncovered the full extent of Microtune's backdating and would have allowed the SEC to bring a complaint against Microtune much earlier than 2008.[23] As such, the Court concludes that the SEC has failed to raise genuine issue of material fact as to whether it diligently pursued its claim once it received the tricks on timing email on August 26, 2003, and the SEC is therefore not entitled to tolling under the fraudulent concealment doctrine.

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[22] At the October 29, 2010 hearing the SEC stated "[t]he diligence . . . is simply that we were on inquiry notice August 26th [2003], and we brought a case within five years. That's it." Hr'g Tr. Oct. 29, 2010 at 35. The Court rejects this interpretation of equitable tolling.

[23] The Court does not determine the time period during which the SEC, acting diligently after receiving inquiry notice, should or would have filed suit against Bartek and Richardson.

iv. Discovery of the Violation Within the Limitations Period

Richardson and Bartek seek to apply a third requirement of fraudulent concealment imposed by some courts: "failure of the plaintiff to discover the operative facts that are the basis of its cause of action within the limitations period." *See*, *e.g.*, Bartek Br. Supp. Mot. 27-29(quoting *FEC v. Williams*, 104 F.3d 237, 241 (9th Cir. 1996); *Galvan v. Caviness Packing Co.*, 546 F. Supp. 2d 371, 377 (N.D. Tex. 2008) (applying Texas law)). They claim there is no genuine issue of material fact as to whether the SEC discovered the operative facts within the limitations period, and this constitutes additional grounds that preclude equitable tolling in this case. To meet this requirement, a party seeking to toll the statute of limitations must show that it did not have inquiry notice of the alleged wrongdoing before the statute of limitations period had run. The SEC argues that this requirement is not present in the Fifth Circuit's version of fraudulent concealment, citing to *Allan Construction*, 851 F.2d at 1528, and *SEC v. Cochran*, 1999 WL 33292713, *4 (W.D. Okla. Jan. 28, 1999). SEC Reply Br. Supp. Mot. 20-21; *see also In re Energy Transfer Partners Natural Gas Litig.*, 2009 WL 2633781, at *13 (S.D. Tex. Aug. 26, 2009) (citing *Allan Constr.*, 851 F.2d at 1528) (other citations omitted). However, as previously explained, *see* Section III(B)(i), *supra*, the Fifth Circuit in *Liddell*, 2005 WL 2044555, at *2 & n.9, distinguished *Allan Construction* as a case interpreting the doctrine of fraudulent concealment "*under Texas law*" indicating that it was not binding precedent for fraud claims not subject to the Texas fraudulent concealment doctrine. The Court therefore adopts the "three prong test" for fraudulent concealment requiring the plaintiff to have discovered the violation after the statute of limitations had run, which appears to be the version adopted by a majority of courts. *See*, *e.g.*, *Hamilton County Bd. Comm'rs v. Nat'l Football League*, 491 F.3d 310, 315 (6th Cir. 2007); *Tran v. Alphonse Hotel Corp.*, 281 F.3d 23, 36 (2d Cir. 2002), *overruled on other grounds*, *Slayton v. Am. Express Co.*, 460 F.3d 215 (2d Cir. 2006)); *Williams*, 104 F.3d at 241; *Berkson v. Del Monte Corp.*, 743 F.2d 53, 55 (1st Cir. 1984); *King & King Enters. v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154-1155 (10th Cir. 1981). The Court is aware of justifications for and against this version of the fraudulent concealment doctrine. The SEC argues, and the *Cochran* court found, that to impose this requirement would allow "a party who fraudulently concealed a violation of law [to] benefit in the form of a shorter limitation period." *Cochran*, 1999 WL 33292713, at *5. However, if a plaintiff discovers his claims within the limitations period, especially if he still has two years or more remaining in which to file his complaint (as is this case here), there is obviously a lesser need, if any, to toll his claims. *See*, *e.g.*, *Roberts v. Barreras*, 484 F.3d 1236, 1242 (10th Cir. 2007) ("[I]f a plaintiff discovers the injury within the time limit, fraudulent concealment does not apply because the defendant's actions have not prevented the plaintiff from filing the claim within the time period and the equitable remedy is not necessary.") (citation omitted) (applying N.M. state law).[24]

The Court concludes that there is no genuine issue of material fact as to whether the SEC discovered the operative facts that are the basis of its cause of action within the limitations period. The SEC concedes that it was on inquiry notice of backdating at Microtune as of August 26, 2003 because of its receipt of the tricks on timing email. The SEC also alleged that Bartek and Richardson "caused Microtune, Inc. to engage in a fraudulent stock-option backdating scheme" from at least August 4, 2000 through mid-2003, *see* FAC ¶ 1,[25] meaning that Section 2462's five-year limitations period had not yet run by the time the SEC had inquiry notice in 2003. The SEC clearly discovered the operative facts that are a basis of its claim within the limitations period, and the lack of a fact issue on this ele-

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[24] In the context of a civil RICO suit, Judge Posner discussed the plaintiffs' need to sue within the limitations period if possible: "Armed with the information obtained [midway through the limitations period] they should have been able to complete well within the four-year statutory period an investigation that would have unearthed enough facts to enable them to file a suit that would withstand dismissal. They could then have used pretrial discovery to beef up their claim." *Jay E. Hayden*, 610 F.3d at 386 (citations omitted). Here, the SEC's subpoena power should have enabled the SEC to obtain enough facts to file a suit, before the end of the limitations period, that would withstand dismissal.

[25] The Court finds that even if this element is not part of the Fifth Circuit's version of fraudulent concealment, there is no genuine issue of material fact as to the SEC's diligence under the fraudulent concealment doctrine, *see* Section III(B)(ii), *supra*, and the SEC's claims are therefore not tolled.

ment constitutes additional grounds precluding tolling under the fraudulent concealment doctrine.

Due to the Court's determination that there is no fact issue as to whether the SEC acted diligently upon receiving inquiry notice nor whether it discovered the operative facts within the limitations period, the SEC is not entitled to tolling under the fraudulent concealment doctrine. As the Court has already determined that other tolling doctrines do not apply, the five-year statute of limitations of Section 2462 is not tolled. However, Bartek and the SEC reached a tolling agreement on October 30, 2007, which expressly preserved all claims the SEC had against Bartek as of that date, and this agreement was extended to June 30, 2008, the date the complaint was filed. *See* Bartek Mot. App. 1676-1678 (tolling agreement and extension to June 30, 2008). Therefore all claims seeking penalties as to Bartek which accrued before October 30, 2002, five years before Bartek signed the tolling agreement, are hereby **DISMISSED**. Also, all claims seeking penalties as to Richardson which accrued before June 30, 2003 are also **DISMISSED**.[26]

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[26] The Court dismisses these claims with respect to both Richardson and Bartek even though only Bartek moved for summary judgment as to the issue of limitations, given that the SEC moved for summary judgment on the issue in its Motion for Partial Summary Judgment, such that it has been fully briefed and evidence on the issue has been presented by all parties. *See In Re Caravan*, 864 F.2d at 393.

C. Penalty under Section 2462

The parties agree that Section 2462 applies to any relief sought by the SEC that is a penalty,[27] though they disagree on which forms of relief constitute penalties subject to Section 2462's five-year bar.[28] The SEC argues that the injunctive relief, disgorgement, officer-and-director bars, and reimbursement it seeks are equitable remedies not subject to Section 2462, while Bartek and Richardson argue that all these forms of relief are penalties as they seek to punish them for their alleged wrongdoing, rather than merely remedy the harm caused by their actions. As conceded by the SEC, the civil monetary penalties it seeks are subject to Section 2462's five-year statute of limitations. Therefore all claims against Richardson which accrued before June 30, 2003, to the extent they seek civil monetary penalties, are hereby **DISMISSED**. Also, all claims against Bartek which accrued before October 30, 2007, to the extent they seek civil monetary penalties, are also **DISMISSED**. This holding

[27] The SEC contends, however, that various tolling doctrines apply such that Section 2462's statute of limitations had not yet run when it filed its complaint, an argument that the Court has already rejected.

[28] The Court at this time considers whether summary judgment, on the issue of whether the SEC's requested relief constitutes penalties under Section 2462, is appropriate as to either Bartek *or* Richardson. Richardson did not move for summary judgment on limitations, but the SEC and Bartek moved for summary judgment on the issue, such that it has been fully briefed and evidence on limitations has been presented by all parties. *See In Re Caravan*, 864 F.2d at 393.

does not end the Court's inquiry, however, as it must determine whether other forms of relief sought by the SEC are penalties subject to Section 2462.

As explained by the D.C. Circuit in *Johnson v. SEC*, "a 'penalty,' as the term is used by Section 2462, is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action." 87 F.3d 484, 488 (D.C. Cir. 1996). The Court further explained that the test is objective, "not measured from the subjective perspective of the accused (which would render virtually every sanction a penalty)," but "the degree and extent of the consequences to the subject of the sanction must be considered as a relevant factor in determining whether the sanction is a penalty." *Id.* Under this test, the *Johnson* court found that a Commission censure and six-month suspension sought against a stockbroker were penalties, due to their collateral consequences on her ability to earn a living both during and after the suspension and also the SEC's failure to focus its findings on the defendant's current competence or the degree of risk she posed to the public. *Id.* at 488-90. Under the *Johnson* test, courts have found that even equitable relief may be penalties subject to Section 2462 in certain cases. *See*, *e.g.*, *SEC v. DiBella*, 409 F. Supp. 2d 122, 127-28, 128 n.3 (D. Conn. 2006) (finding that requests for permanent injunction and officer-and-director bar sought to punish defendant for role in alleged backdating and were penalties subject to Section 2462 but finding disgorgement was not penalty). Determining whether proposed remedies are penalties subject to Section 2462 requires a "fact-intensive inquiry." *See SEC v. Alexander*, 248 F.R.D. 108, 115-16 (E.D.N.Y. 2007) (citing *Johnson*, 87 F.3d at 488).

Bartek argues, and the SEC does not dispute, that the requested relief will have substantial collateral consequences to him:

> If the SEC prevails here, then Bartek will forever be forced to disclose the imposition of any injunction or O&D bar to future employers and regulatory authorities, and it will "become[] part of [his] permanent public file," creating "long[]-lasting repercussions" to his reputation and career. *Johnson*, 87 F.3d at 489. In the investment community, the collateral consequences of any kind of injunction "are quite serious," effectively "stigmatiz[ing]" the defendant for the rest of his life. *Jones*, 476 F. Supp. 2d at 385.

Bartek Br. Supp. Mot. 22. While the *Johnson* court made clear that collateral consequences alone are not sufficient to render relief sought a penalty, the extent of collateral consequences that would result from the SEC's requested relief here weighs in favor of characterizing the various forms of relief as penalties.

The Court must also evaluate the extent to which the relief sought focuses on remedying the damage caused by Bartek's conduct and the extent to which the relief seeks to prevent future harm. Bartek argues:

> [T]he SEC's case against Bartek is focused entirely on his *past* alleged misconduct rather than any risk of a future violation. *See Johnson*, 87 F.3d at 489;

> *see also Jones*, 476 F. Supp. 2d at 384. All of the stock option grants at issue in this case occurred in 2001 and 2002 and were made with the guidance and approval of legal and accounting experts. There is no evidence—nor any allegation—that Bartek has engaged in any misconduct since he left Microtune in 2003, and nothing demonstrates that he is likely to do so in the future. In fact, the evidence shows that Bartek is no longer in a position to commit any securities violations because he has not served as an officer or director of a public company since his departure from Microtune.[29]

Bartek Br. Supp. Mot. 22-23 (internal references omitted). Bartek also argues that the SEC's 2006 Guidance Letter clarified the SEC's rules with respect to option backdating such that future stock option accounting errors and related securities reporting errors are highly unlikely. Bartek Br. Opp'n at 13 (citing Bartek Mot. App. 1323-1324 (Epstein Decl.); 1509-1510 ¶¶ 71-73 (Ostiller Decl.); 1577-1578 ¶¶ 21-25 (Ostiller Rebuttal Decl.); 1253-1256 (Anderson Dep.)).

In response, the SEC argues that injunctive relief, disgorgement, and officer-and-director bars are all remedial. SEC Br. Opp'n 5 (citing *SEC v. Leslie*, 2008 WL 3876169, at *8 (N.D. Cal. Aug. 19, 2008); *SEC*

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[29] Richardson makes similar arguments in her briefing. *See* Richardson Br. Opp'n at 17-19. The Court notes the different factual circumstances as to Bartek and Richardson but finds that the collateral consequences are similarly severe for both Richardson and Bartek, and it is also unlikely that either Bartek or Richardson would engage in similar misconduct in the future.

v. Harden, 2006 WL 89864, at *1 (W.D. Mich. Jan. 12, 2006); *SEC v. Quinlan*, 2008 WL 4852904, at *12 (E.D. Mich. Nov. 7, 2008); *SEC v. Berry*, 580 F. Supp. 2d 911, 919 (N.D. Cal. 2008); *SEC v. Fisher*, 2008 WL 2062699, at *2 n.5, 8 (N.D. Ill. May 13, 2008)) (all finding these types of relief in respective SEC enforcement actions remedial). The SEC also argues that repayment of profits from stock sales under Section 304 of the Sarbanes-Oxley Act of 2002("Section 304") is not punitive, as "it restores the *status quo ante* by returning equity-based compensation to Microtune." *Id.* at 5-6 (*citing Miss. Dep't Econ. & Cmty. Dev. v. U.S. Dep't Labor*, 90 F.3d 110, 113 (5th Cir. 1996) for the proposition that "debt 'repayment action does not involve a claim for a civil fine, penalty or forfeiture under Section 2462'"). As a remedy "more akin to the general equitable remedy of disgorgement—to which Section 2462 does not apply—than a statutorily quantified civil money penalty," the SEC argues that Section 2462 does not apply to its Section 304 claim. *Id.* at 6. In reply, Bartek argues that the SEC, instead of offering evidence as to collateral consequences and likelihood of recurrence, simply cites case law for its contention that Section 2462 does not apply to its requested remedies. Bartek Reply Supp. Mot. 4. Bartek also distinguishes the cases cited by the SEC, explaining that four of the cases cited by the SEC "are inapposite because they were decided at the motion to dismiss stage, before development of the record" while the fifth case found that the claims were not penal "only because there was overwhelming evidence that the defendant posed a significant risk to the investing public, including that he had been convicted and sought 'to return to the investment industry upon his release from prison.'" *Id.* at 4 n.1 (citing *Quinlan*, 2008 WL 4852904, at *12). Bartek also argues that since he did not exercise backdated stock options he has no "ill-gotten" gains to disgorge, and the SEC has not identified what profits he gained from stock sales or bonuses that would be subject to Section 304's reimbursement remedy. Bartek Br. Supp. Mot. 49-50.

i. Injunctive Relief and Officer-and-Director Bars

The Court finds that injunctive relief and officer-and-director bars in this case are properly construed as penalties as a matter of law, as it is clear that these remedies would have significant collateral consequences to Richardson and Bartek, neither remedy addresses past harm caused by the Defendants, and neither remedy is focused on preventing future harm due to the low likelihood that Richardson and Bartek would engage in similar behavior in the future.[30] As

[30] The Court finds an examination of *SEC v. Quinlan*, 2008 WL 4852904 (E.D. Mich. Nov. 7 2008) instructive. In *Quinlan*, the defendant had previously pled guilty to "conspiring to obtain funds from investors by means of false and fraudulent pretenses, representations, and promises and making false statements," and the defendant, in his plea agreement, admitted that he knew about and approved of the false representations, admitted that he participated in and presided over the committee that decided to deliberately engage in fraudulent business and accounting practices, admitted that his company's true financial condition was materially worse that it was represented to be in SEC filings, and admitted that these filings included materially false statements and omitted material facts about his company's true financial condition. *Id.* at *2. The court found that a permanent injunction and officer-and-

penalties, they are subject to Section 2462's statute of limitations. Therefore all claims, to the extent they seek injunctive relief or officer-and-director bars as to Richardson, which accrued before June 30, 2003 are hereby **DISMISSED**. Also, all claims to the extent they seek injunctive relief or officer-and-director bars as to Bartek, which accrued before October 30, 2007, when Bartek signed the tolling agreement, are also **DISMISSED**.

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director bar were appropriate given that the defendant "knowingly and deliberately engaged in fraudulent business and accounting practices" over six years, "repeatedly made false financial statements and misrepresented material facts with the intention to mislead investors" and "lied to auditors," showed no remorse "for the tremendous loss suffered by the investors," was convicted in both state and federal court for securities violations in connection with the same conduct underlying the civil suit, and was reasonably likely to engage in future violations of federal securities laws if allowed to once again serve as a corporate officer or director. *Id.* at 9, 12. In contrast, in this case the parties dispute Richardson's and Bartek's scienter (and indeed, it is not clear that the business community was even aware that backdating was unlawful at the time), there have been no related criminal cases nor convictions in connection with the backdating, the parties dispute whether Microtune investors have suffered any significant losses directly related to backdating, and there appears to be a very low likelihood that Richardson and Bartek will engage in these practices again.

ii. Reimbursement under Sarbanes-Oxley Act Section 304[31]

The Court finds that the relief sought by the SEC is properly construed as a penalty to the extent that it seeks reimbursement under Section 304 of any bonuses or profits from stock sales by Bartek and Richardson. The SEC argues that Section 304 is not subject to Section 2462's statute of limitations because it is, in its view, an "equitable remedy akin to disgorgement," and courts generally find that disgorgement is not subject to Section 2462's statute of limitations. The SEC cites to, *inter alia*, *SEC v. Jenkins*, 718 F. Supp. 2d 1070 (D. Ariz. 2010), for this proposition, but this very case highlights the difference between Section 304's statutory reimbursement remedy and equitable

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[31] Section 304(a) of the Sarbanes-Oxley Act provides:

> (a) Additional Compensation Prior to Noncompliance With Commission Financial Reporting Requirements.
>
> If an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws, the chief executive officer and chief financial officer of the issuer shall reimburse the issuer for—
>
> (1) any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the Commission (whichever first occurs) of the financial document embodying such financial reporting requirement; and
>
> (2) any profits realized from the sale of securities of the issuer during that 12-month period.

15 U.S.C. § 7243.

disgorgement—Section 304 contains no *personal* wrongdoing element, in contrast to disgorgement, that would require scienter or misconduct on behalf of the officers in order to trigger reimbursement. *Id.* at 1078.[32] *See also SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993) ("Disgorgement wrests ill-gotten gains from the hands of a wrongdoer" and is "meant to prevent the wrongdoer from enriching himself by his wrongs" rather than "aim to compensate the victims of the wrongful acts, as restitution does.") (citation omitted). Given that Section 304 does not require that the officer's gains be "illgotten," *Jenkins*, 718 F. Supp. 2d at 1078, its reimbursement remedy is not the equivalent of disgorgement.

Having found that reimbursement under Section 304 is not a form of disgorgement, the Court must still analyze whether reimbursement is properly characterized as a penalty under Section 2462.The *Johnson* court explained "where the effect of the SEC's action is to restore the *status quo ante*, such as through a proceeding for restitution or disgorgement of ill-gotten profits, Section 2462 will not apply." 87 F.3d at 491 (citations omitted). The SEC argues that reimbursement seeks to restore the *status quo ante* in that

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[32] The *Jenkins* court explained that "Section 304 provides an incentive for CEOs and CFOs to be rigorous in their creation and certification of internal controls by requiring that they reimburse additional compensation received during periods of corporate non-compliance regardless of whether or not they were aware of the misconduct giving rise to the misstated financials." 718 F. Supp. 2d at 1077.

it that returns equity-based compensation to Microtune—in essence, a statutory form of restitution.[33] SEC Br. Opp'n 5-6; *see also SEC v. AMX, Int'l, Inc.*, 7 F.3d 71, 74-75 (5th Cir. 1993) (distinguishing disgorgement from restitution, which "has the goal of making the aggrieved party whole") (citing *First Penn. Corp. v. Fed. Dep. Ins. Corp.*, 793 F.2d 270, 272 (10th Cir. 1986)). This argument fails because the amount of reimbursement is not limited to the amount of harm caused to the company, nor are the stock profits and bonuses required to be causally related to the alleged wrongdoing. Instead, Section 304 requires reimbursement of *all* stock profits and bonuses received within a twelve-month period after specified filings. This absence of a link between the amount of reimbursement and the actual harm caused by the defendant weighs in favor of characterizing Section 304's reimbursement remedy as a penalty. As a penalty, it is subject to Section 2462's statute of limitations. Accordingly, all claims seeking reimbursement under Section 304 and which accrued prior to June 30, 2003 are time-barred with respect to Richardson and

[33] At oral argument, the SEC argued that reimbursement under Section 304 was a form of statutory *disgorgement*, but instead of focusing on Bartek's ill-gotten gains, it also discussed the harm to shareholders: "[i]n this case, we think that [disgorgement] may be particularly appropriate because the shareholders have been on the hook for tens of millions of dollars related to the internal investigation and defense costs, and the shareholders have definitely been a victim here." Hr'g Tr. Nov. 19, 2010 at 156. This type of remedy seems more properly characterized as restitution, not disgorgement.

are hereby **DISMISSED**. Also, all claims seeking reimbursement under Section 304 and which accrued prior to October 30, 2002 are time-barred with respect to Bartek and are hereby **DISMISSED**.

iii. Disgorgement

With respect to disgorgement,[34] the SEC acknowledges that Bartek did not exercise any backdated stock options. Thus Bartek has no profits from backdated options to disgorge. Also, the SEC does not identify which, if any, profits from his stock sales or bonuses are attributable to his wrongdoing such that disgorgement would be appropriate.[35] *See SEC v. Seghers*, 2010 WL 5115674, at *1 (5th Cir. Dec. 13, 2010) ("the party seeking disgorgement must distinguish between gains that were legally and illegally obtained" and affirming district court's order denying disgorgement due to SEC's failure to distinguish gains) (*citing Allstate Ins. Co. v. Receivable Fin. Co.*, 501 F.3d 398, 413 (5th Cir. 2007); *First City*, 890 F.2d at 1231; *DiBella*, 409 F. Supp. 2d at 127 ("Disgorgement . . . is remedial in the sense that if there were no profits earned as a result of the illegal conduct, disgorgement would not be an available reme-

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[34] The Court notes that while disgorgement is generally equitable relief not subject to statutes of limitations such as Section 2462, the *Johnson* decision makes clear that *any* relief which is properly characterized as a penalty is subject to Section 2462.

[35] Instead, the SEC contends that the portion of Bartek's stock gains attributable to any inflation in Microtune's stock price caused by backdating should be established through experts at trial. Hr'g Tr. Nov. 19, 2010 at 156.

dy."). As such, all claims against Bartek, to the extent they seek disgorgement, are **DISMISSED**. The Court makes this determination with respect to all of the SEC's claims, not merely those which accrued prior to October 30, 2002.

The Court notes, however, that Richardson appears to have exercised backdated stock options, and therefore disgorgement of the "in-the-money" profits she enjoyed from exercising these options is not a penalty barred by Section 2462. Accordingly, the Court declines to grant Richardson summary judgment *sua sponte* as to the issue of disgorgement of in-the-money profits gained from the exercise of backdated options. However, the SEC does not identify which, if any, profits from her stock sales or bonuses are attributable to her wrongdoing such that disgorgement of these funds would be appropriate. As such, all claims against Richardson, to the extent they seek disgorgement of bonuses received and profits from stock sales not directly related to any backdated stock options are **DISMISSED**. The Court makes this determination with respect to all of the SEC's claims, not merely those which accrued prior to prior to June 30, 2003.

D. Accrual of Claims

Having found that the SEC's claims are not tolled, the Court must determine when the Commission's claims accrued. Richardson argues that the claims accrued when the backdated options were granted, or alternatively, on the dates of the challenged SEC filings. Bartek argues that the claims accrued at the latest on the date of filing. The SEC does not clearly discuss which of its claims in the First Amended Complaint apply to which particular acts, i.e., grants of backdated options, representations made to Ernst & Young, representations made in various SEC filings, or failure to maintain proper records, though the SEC appears to focus primarily on Microtune's SEC filings.

The SEC's first count, "Violations of Exchange Act Section 10(b) ["Section 10(b)"] and Exchange Act Rule 10b-5," states:

> By engaging in the conduct described [in the First Amended Complaint], Microtune, Bartek, and Richardson, with scienter, directly or indirectly, by use of the means or instruments of interstate commerce or of the mails, or of the facility of a national securities exchange, in connection with the purchase or sale of securities: (a) employed devices, schemes or artifices to defraud; (b) made untrue statements of material fact or omitted to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading; and/or (c) engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon other persons, including purchasers and sellers of securities.

FAC ¶ 175. Section 10(b) claims may be based on both the act of granting backdated options and also SEC filings that do not properly disclose the backdating. *See*, *e.g.*, *In re Affiliated Computer Servs. Derivative Litig.*, 540 F. Supp. 2d 695, 701 (N.D. Tex. 2007). "A claim under Section 10(b) that is based upon the backdating itself accrues on the date the option grant was made," while "[a] claim under Section

10(b) and Rule 10-5 based on dissemination of false financial statements accrues when the allegedly false or misleading statement was made." *Id.* (citations omitted). Some of the SEC's other counts also appear applicable to both the act of backdating grants or some other event such as deficient SEC filings, such as the second count, "Violations of Securities Act Section 17(a)(1)," which alleges that "[b]y engaging in the conduct described [in the First Amended Complaint], Microtune, Bartek, and Richardson, directly or indirectly, by use of the means or instruments of interstate commerce or of the mails, in connection with the offer or sale of securities, with scienter, employed devices, schemes or artifices to defraud." FAC ¶ 182. Given the ambiguity in the First Amended Complaint, the Court at this time determines which specific events may underlie the SEC's claims in light of the Court's determinations regarding tolling, instead of determining which specific "counts" survive.

The SEC's claims are based in part on grants or regrants of backdated options occurring in Apri1 2001, October or November 2001, June or July 2001, January 2002, and March 2002. FAC ¶¶ 36-37, 48-50, 66-67, 71, 74-75, and 80-81. The SEC also claims that Bartek and Richardson signed false management representation letters to Ernst & Young, and Richardson falsified an "APB checklist" relied upon by Ernst & Young in its audit of Microtune's 2002 Form 10-K. FAC ¶¶ 92-93. Additionally, the SEC claims that several of Microtune's SEC filings did not properly disclose backdating and had false certifications signed by either Bartek or Richardson. FAC ¶¶ 106-139.[36]

The Court notes that the identified instances of backdating all occurred more than five years before the SEC signed its tolling agreement with Bartek in 2007 and more than five years before the SEC filed its complaint. Accordingly, Section 2462's statute of limitations has run with respect to any claims based specifically on Microtune's backdating. The Court also notes that every SEC filing made while Bartek was still at Microtune was filed more than five years before he signed the tolling agreement, with the exception of the Form 10-Q filed November 14, 2002.[37]

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[36] The SEC also claims that Bartek and Richardson "knowingly falsified books, records, or accounts of Microtune, or knowingly circumvented or knowingly failed to implement a system of internal accounting controls at Microtune" and "knowingly or recklessly provided substantial assistance to Microtune in (i) its failure to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflected the transactions and dispositions of the assets of Microtune; and (ii) its failure to devise and maintain a sufficient system of internal accounting controls." FAC ¶¶ 188, 209; *see also* ¶¶ 135-37. As with claims based on Section 10-b, these claims appear applicable to both Bartek's and Richardson's backdating and representations they made or signed that omitted backdating.

[37] The SEC also claims that Microtune's Form 10-K filed July 31, 2003 is actionable against Bartek even though he had left Microtune one month prior to its filing, as "his conduct during 2002 and prior years caused the 2002 filing to be materially false and misleading." FAC ¶¶ 122-25. The Court notes that this interpretation, carried to its logical extension, would impose liability on Bartek and Richardson for every Microtune SEC filing until Microtune disclosed the backdating that had occurred. The Court

As such, Section 2462's statute of limitations has run with respect to any claims asserted against Bartek based on other SEC filings.[38] The Court also notes that only four SEC filings at issue in this complaint were filed less than five years before the SEC filed its complaint on June 30, 2008: the 2002 Form 10-K filed July 31, 2003; the first quarter 2003 Form 10-Q filed July 31, 2003, the second quarter 2003 Form 10-Q filed August 14, 2003, and proxy materials dated August 11, 2003.[39] FAC ¶¶ 106-139; SEC Mot. App. 254-279. As such, Section 2462's statute of limitations has run with respect to any claims asserted against Richardson based on any SEC filings with the exception of the four above-mentioned filings.

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rejects this interpretation. *See*, *e.g.*, *SEC v. Rose*, 2006 WL 6549489, at *2 (S.D. Tex. Jan. 17, 2006) (dismissing claims based on SEC filings filed after defendant had left company).

[38] The SEC requests reimbursement of Bartek's stock profits and any equity-based or incentive-based compensation he received between August 14, 2002 and August 14, 2003, based on Microtune's second quarter 2002 Form 10-Q filed on August 14, 2002. SEC Br. Opp'n Bartek Mot. 41-42. The SEC does not point to any other filings that would support Section 304's reimbursement remedy as to Bartek. Given that the Court has already found that claims against Bartek based on SEC filings made before October 30, 2002 are timebarred, all claims seeking reimbursement under Section 304 with respect to Bartek are hereby **DISMISSED**.

[39] The SEC also claims that Richardson also should be liable for the nondisclosure of backdating in proxy materials dated September 17, 2003. FAC ¶ 118. Richardson contends, and the SEC does not dispute, that no proxy materials were filed with the SEC on that date, and Richardson should not be liable for statements not actually made. Richardson Br. Opp'n 10 n.7. The Court agrees.

Regarding representations made to Ernst & Young, the Court finds that claims based on these representations accrued on the date the representations were made or conveyed. Given the Court's previous findings regarding the inapplicability of any tolling doctrines to this case, the only actionable representations to Ernst & Young identified by the SEC with respect to Bartek are contained in the letter dated October 25, 2002. FAC ¶ 92. With respect to Richardson, the only actionable representations to Ernst & Young identified by the SEC may be found in the July 28, 2003 letter, the August 14, 2003 letter, the October 29, 2003 letter, and the APB checklist relied upon by Ernst & Young in its audit of Microtune's 2002 Form 10-K.[40] FAC ¶ 93.

IV.

CONCLUSION

For the reasons stated above, the Court finds that Section 2462's five-year statute of limitations is not tolled by the fraudulent concealment doctrine. Fur-

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[40] The First Amended Complaint does not identify the date this checklist was conveyed to Ernst & Young, and the cover page of the checklist does not show clearly the date it was prepared by Richardson, though it appears to read "4/28/03" or "7/28/03." Richardson Mot. App. 833 (doc. 120-30 at 29). The SEC represents that this questionnaire was completed by Richardson in July 2003. SEC Br. Opp'n Richardson Mot. 27. Richardson states that this questionnaire was completed in March 2003. Richardson Reply 14. Given the ambiguity here, the Court finds that there is a fact issue as to whether claims based on the representations made in this checklist are barred by the statute of limitations.

ther, all forms of relief sought by the SEC against Douglas J. Bartek are properly construed as penalties subject to Section 2462. All forms of relief sought by the SEC against Nancy A. Richardson, with the exception of disgorgement of Richardson's in-the-money profits resulting from the exercise of backdated options, are also properly construed as penalties. Accordingly, all claims against Bartek which accrued prior to October 30, 2002 are barred by Section 2462 and hereby **DISMISSED**. Also, all claims against Richardson which accrued prior to June 30, 2003 are barred by Section 2462 and hereby **DISMISSED**, with the exception of those claims that seek disgorgement of Richardson's in-the-money profits obtained through her exercise of backdated options. The Court further **DISMISSES** all claims by the SEC to the extent they seek disgorgement of profits from stock sales and bonuses not directly attributable to the exercise of back-dated stock options. The Court also **DISMISSES** all claims by the SEC to the extent they seek reimbursement under Sarbanes-Oxley Section 304 from Bartek.

Also, any claims against Bartek, except to the extent they request relief based on Microtune's Form 10-Q filed November 14, 2002 and the letter to Ernst & Young dated October 25, 2002 are **DISMISSED**. Any claims against Richardson, except to the extent they request relief based on the the 2002 Form 10-K filed July 31, 2003; the first quarter 2003 Form 10-Q filed July 31, 2003; the second quarter 2003 Form 10-Q filed August 14, 2003; proxy materials dated August 11, 2003; the letters to Ernst & Young dated July 28, 2003, August 14, 2003, and October 29, 2003; and the APB checklist sent to Ernst & Young in 2003, are **DISMISSED**. While noting the Court's holdings in prior Orders and in this Order, particularly the determination that no tolling doctrines applied in this case, the Court makes no finding at this time as to which "counts" of the SEC's First Amended Complaint survive.

SO ORDERED.

SIGNED: Feb. 15, 2011.

/s/ JANE J. BOYLE
JANE J. BOYLE
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3:08-cv-1105-B

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF

v.

MICROTUNE, INC., DOUGLAS J. BARTEK AND
NANCY A. RICHARDSON, DEFENDANTS

Nov. 19, 2010

SUMMARY JUDGMENT MOTION
BEFORE THE
HONORABLE JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

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* * * * *

[105] the defendant's ability to raise these issues, since they are elements the Commission must prove as part of its case."

So as far as those other affirmative defenses that are really not affirmative defenses, but really just pleading, I don't think that summary judgment is the proper context to address them.

And I'm not even sure that it's worth the Rule 12 motion to strike. Because in essence, what's going to be ultimately submitted to the jury, if we get there in this case, will be the proper affirmative defenses.

And obviously, the other defenses can come out through the testimony and the arguments, but won't necessarily be submitted in the Court's charge. But that's for another day, another time for argument.

In any event, I don't see those as affirmative defenses, and I don't think they are properly subject to a motion for summary judgment.

Okay. Moving then to centering the focus on the limitations defense and the summary judgment of the SEC, the crux of Richardson's and Bartek's limitations defense is that most of the acts forming the basis for SEC's case occurred between 2001 and [106] mid-2003.

I know with Ms. Richardson, that there are other acts, maybe three or so. But other than those that the SEC has pointed out, and with Mr. Bartek, other than the one conceded to, essentially the affirmative defenses, they're barred by limitations.

Because the SEC did not file suit until June 30th of '08, they argue that the bulk of its claims are barred by the applicable five-year limitations period found in 28 U.S.C. Section 2462.

The SEC challenges the applicability of 2462 to its claims, maintaining that the 2462 five-year bar applies only to its claims for civil monetary penalties which, according to the SEC, constitute only a fraction of the suit.

As to those claims for civil penalties that are subject to 2462's five-year limitations period, the SEC argues that they are nonetheless timely on the discovery rule and certain equitable tolling principles.

Finally, the SEC argues that regardless of 2462's effect on its claims filed outside the five-year limit, again, as I mentioned, at least three of Richardson's claims are timely and the one of Bartek.

[107]

In response, as I understand it, Richardson and Bartek—and I'm saying "both of them," but I know the hearing here is for Bartek today—in response, don't take issue so much with the SEC's argument that certain of its claims filed outside the window are not subject to the affirmative limitations defense—there seems to be no argument there on Richardson's or Bartek's part—nor do the defendants deny that 2462 applies only to the SEC's claim for civil penalties.

And I note on this point as follows: There is little common ground between the parties on which of the SEC's claims involve civil penalties and which do not. At this point, in this juncture in the case, the Court declines the parties' invitation to settle this dispute at this time today, in this hearing.

At a minimum, determining whether a particular form of equitable relief sought by the SEC constitutes a civil penalty, subject to Section 2462's limitation period, requires a fact-intensive inquiry, something this Court need not undertake to resolve the SEC's motion for partial summary judgment here today, what I'm focusing on.

[108]

Citing to SEC v. Alexander, 248 F.R.D. 108, 115 and 16, out of the Eastern District of New York, 2007; citing to the case cited most often for this point, Johnson v. SEC, 87 F.3d 484, 488, D.C. Circuit 1996, it may well be that this issue of which are penalties and which aren't can be resolved short of trial in a separate motion or hearing.

But I just want to make clear I'm not doing that today. And don't imply, by what I do here, that I consider certain of those subject to civil penalties and certain not. We have to figure that out later.

Moving then to the analysis of the SEC's motion for partial summary judgment, first of all, there is no express statute of limitations for enforcement claims brought by the SEC under either the Securities Act of '33 or the Exchange Act of '34. Nevertheless, the parties correctly agree that Section 2462 applies to the SEC's claims for civil penalties.

Thus, the Court begins the analysis with a review of that provision. Briefly, Section 2462 provides, except as otherwise provided by an act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or [109] 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 property is found within the United States in order that proper service may be made thereon, which that last portion doesn't apply here to the circumstance. That's 2462.

While the parties agree that the provision applies, they part ways on the meaning of the statutory language, "the date when the claim first accrued."

Bartek maintains that a claim accrues for tolling purposes within the meaning of the statute on the date of violation. The SEC, on the other hand, argues that the discovery rule applies to 2462, meaning that the accrual date begins on the date the plaintiff, with the exercise of reasonable diligence, should have discovered the violation.

Thus, the first question the Court will undertake is whether the discovery rule applies to 2462. And we've discussed this.

But formally, for the record, the Court finds as follows: The 5th Circuit, construing Section 2462 in a case involving the Export [110] Administration Act, found at 50 United States Code 2401, held that the discovery rule did not apply to 2462.

Instead, the appeals court found that the "date when the claim first accrued" language should be interpreted to mean that a claim accrues for purposes of 2462's five-year period at the time of the underlying violation.

We're all familiar with these cases. But for the record, United States v. Core, 759 F.2d 480, 481, 83, 5th Circuit, 1985, the Core holding has not been overturned or abrogated by the 5th Circuit. In fact, a wealth of case authority since Core has concluded that the discovery rule does not apply.

And I'm going to cite to some cases for the record now: 3M Company—a very thorough analysis of this statute in another context—v. Browner, 17 F.3d 1453, 1460, 63, D.C. Circuit, 1994.

Again, a new case by Judge Rosenthal out of the Southern District, U.S. v. Rutherford. It is Case Number G-08-0231, 2010 Westlaw 3433146, at pages 4 to 6, Southern District of Texas, August 31, 2010.

SEC v. Huff, and that is going to be an F. Supp. case not published yet. But it's at 2010 [111] Westlaw 3860721, at 40 to 41, out of the Southern District of Florida, September 30, 2010.

SEC v. Gabelli, 08-3868, 2010 Westlaw 1253603 at 5, Southern District of New York, March 17th, 2010; and SEC v. Jones, Number 057044, 2006 Westlaw 10884276, at pages 3 to 6, Southern District of New York, April 25th of 2006.

I know at least in part of the briefing the SEC attempts to carve out an exception, as they did today, because of the fraud component of the claim here. Again, I haven't seen anything directly on point or binding on this Court in that regard. And Jones, Gabelli and Huff are all fraud cases, where they found it did not apply.

So moving then to the other doctrine that the SEC relies on to toll the statute, the 2462 five-year period, would be the continuing violations exception. And I'm not going to spend much time on that.

But my review of the cases—and I know even SEC v. Huff went a different direction on this. I understand they found continuing violations applied.

But my review of the cases and the analysis of the statute in a very, very thorough, [112] very good analysis by Judge Rosenthal in the Rutherford Oil Corporation case. And that is again, so you have it, 2010 Westlaw 3433146, Southern District of Texas. And it's at pages 6—and she goes on through page 9, and finds and concludes that the statutory purpose of 2462 is not thwarted by finding that neither the discovery rule nor the continuing violation exception applies.

The five-year limitation period here is longer than for most civil penalties or damages, and it does not apply. Again, she goes into that. It doesn't apply to the claims that aren't for civil penalties.

So another case that found—at least found great skepticism, looked at the continuing violation doctrine's application to 2462 with great skepticism, but decided not to resolve it in their order, was SEC v. Brown. And that is 2010 Westlaw 3786563, out of the D.C. District, September 27, 2010. And it is way into that long case, at pages 6 and 7.

So for those reasons—again, we're looking at summary judgment. The question is whether or not—and just to quote directly from Rule 56, "Whether or not a party claiming relief may [113] move with or without supporting affidavits for summary judgment on all or part of a claim. A party against whom relief is sought may move with or without supporting affidavits for summary judgment on all or part of the claims," and then it goes into the specifics.

What we are looking for ultimately here is that the judgment sought, the summary judgment should be granted if the pleadings, the discovery and the disclosure materials on file in any affidavits show that there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law.

Obviously, this applies in certain ways when the party moving has the burden of proof on the claim versus the party moving does not, and they are going after of the party that does have the burden of proof. Here, the SEC is moving on something that clearly the defendants have the burden of proof on, these affirmative defenses.

But the question at this point is, I find as a matter of law that the discovery rule and the continuing violations rule does not apply. I also find that it should be denied with regard to the argument as to fraudulent concealment. Let me talk [114] about that for a minute.

The SEC seeks to avoid the application of 2462 to its claims based on several doctrines, two of which we have covered. But right now, I'm focusing on the Doctrine of Fraudulent Concealment.

Now, when you get to the Doctrine of Fraudulent Concealment, and that is the way that the SEC is seeking to avoid the affirmative defense of limitations, which at least we know in part applies, the burden is squarely upon the SEC to establish all the elements of fraudulent concealment.

And in this context, the summary judgment context, what they have to show is that on the undisputed record, there are no fact issues that could support the defendants' defense, and that they are entitled, as a matter of law then, to summary judgment on those affirmative defenses.

In so doing, they have to show that there is sufficient evidence in the record undisputed that establishes this fraudulent concealment exception. So let me talk about that for a minute.

The Fraudulent Concealment Doctrine is addressed in several cases, and I'm not here deciding, as a matter of law, the precise burden. I know I mentioned clear and convincing, and I'm of [115] the mind that that may be the burden of proof. But right now, I don't think that needs to be decided as a matter of law as far as establishing an exception to the Fraudulent Concealment Doctrine.

But just to cite from the cases, looking at SEC v. Leslie—and SEC v. Leslie is at 2010 Westlaw 2991038, out of the Northern District of California, July 29, 2010, at pages 36 through 38, I believe, as well as—I'm going to cite to all the cases that address this burden.

SEC v. Jones, 476 F. Supp. 2d 374. It's out of the Southern District of New York, and it's at page 381 and 82, 83; SEC v. Gabelli, 2010 Westlaw 1253603, Southern District of New York, March 17th, 2010. Those are the three cases I am going to rely on primarily here. They all basically say the same thing, as far as what the burden is.

"To invoke the Fraudulent Concealment Doctrine," right now I'm quoting from Gabelli, "a plaintiff must allege that the defendants"—and here, that would be the SEC—"the defendants concealed the cause of action; that the plaintiff did not discover the cause of action until some point within five years of commencing the action; and third, that the plaintiffs' continuing ignorance [116] was not attributable to its own lack of diligence."   And that's the Gabelli case.

Citing to the Power case, 525 F. Supp. 2d at 424, and that is the full cite, SEC v. Power, 525 F. Supp. 2d 415, 424 to 435, Southern District of New York 2007.

Again, some of the limitations on this Fraudulent Concealment Doctrine are that it does not apply where the misrepresentation or act of concealment, assuming there is one, is the same act which forms the basis of the plaintiff's underlying cause of action.

"Indeed," the case goes on, "for a fraud to be self-concealing, the defendant must have engaged in some misleading, deceptive, or otherwise contrived action in the course of committing the wrong that was designed to mask the cause of action."

Here, in that case, the plaintiff found that there was insufficient evidence or argument or pleadings that would establish that this was more than just concealment acts beyond the act of underlying violations.

So not to take too much more of our time on this, but again, we're talking about fraudulent [117] conduct by the defendant that resulted in concealment of the operative facts, failure of the plaintiff to discover the operative facts that are the basis of the claim within the limitations period, and due diligence by the plaintiff until the discovery of those facts.

I cannot find, based upon the record as it is presented right now—and I'm talking about the SEC's motion—that there are no fact issues on this Doctrine of Fraudulent Concealment. I think it applies, and I think there are fact issues that are raised by the record.

And right now, I'm talking about this in the context of the SEC's motion on the issue of diligence and on the issue of fraudulent concealment.

Was it fraudulent concealment? Was it self-concealing? Was it concealed at all? Were there facts of concealment beyond what is the underlying violations charged?

And much of what I've heard so far in the arguments, at least in the pleadings by the SEC with regard to this, is that it's the acts themselves, the fact that backdating was in fact going on quite a bit, that helps to show their concealment. And I [118] don't think they can rely on that.

So for those reasons, I deny the SEC's motion for summary judgment as to limitations as to the affirmative defenses first on those that are not limitations, because I think it's more pleading matters; secondly, because there are—although I've resolved what I think, as a matter of law, what tolling doctrines apply and what don't, there are fact issues on the record right now that preclude me from finding that they are entitled to judgment as a matter of law in the defendants' affirmative defenses.

And finally, just to be clear, because it is a major point in the briefing, this issue of the penalties versus equitable relief is, in my view, clearly something that is not automatically or per se based upon the title or label given the relief itself.

I agree with the Jones opinion that that has to be looked at more carefully in the context of either summary judgment or perhaps the trial. So I hope that answers the SEC's questions on their motion for summary judgment.

Are there any questions on that before we move to the final arguments on the rest of the [119] Bartek motion?

MR. GALLOWAY: No, Your Honor.

THE COURT: Okay. Mr. Breaux, go ahead.

MR. BREAUX: Next, Judge, I would like to address our Bartek's motion for summary judgment on the issue of materiality.

Materiality is an essential element of most of the SEC's claims here. If the SEC does not prove materiality, seven of its nine claims fail, all but the fourth and ninth claim.

And the materiality standard in a securities fraud lawsuit is very different than GAAP material. It's investor materiality. And the Supreme Court has clearly stated what the materiality test is in securities fraud.

And it did so in the Basic v. Levinson case, 485 U.S. 224, where the Court said, "A misstatement or omission is material if there is a," quote, "substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information available."

The Supreme Court, also in the TSC Industries v. Northway case, said that the test for materiality in a securities fraud lawsuit is whether * * *

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