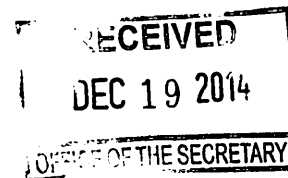


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UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

DAVID G. DERRICK, SR.,

Respondent.

**REPLY TO THE COMMISSION'S
OPPOSITION TO RESPONDENT'S
MOTION FOR A MORE DEFINITE
STATEMENT**

Administrative Proceeding

File No. 3-16213

Pursuant to Rule 200(b)(3) of the Security and Exchange Commission's ("Commission") Rules of Practice, the Respondent, David G. Derrick, Sr., through counsel, hereby files this reply to the Security and Exchange Commission's ("Commission") Opposition To Respondent's Motion For More Definite Statement ("Opposition").

The Commission's Opposition contains significant concessions and admissions, factual errors, and even misstatements of relevant legal standards – but does not make any effort to explain which of the Commission's factual allegations give rise to its allegations against Mr. Derrick. The Commission is attempting to hide from a critical legal issue in this case, namely, what specific alleged offense conduct occurred within the statute-of-limitations period. Rather

than clarifying its allegations so as to permit Mr. Derrick a fair chance to litigate a statute-of-limitations and other defenses, the Commission has further muddied the waters by making factual and legal misstatements. As set forth in more detail herein, those misstatements include the following:

- It appears the Commission has not even read Mr. Derrick's Answer, as it erroneously claims that Mr. Derrick has not raised a statute-of-limitations defense. *See* Opposition at 6 (claiming Mr. Derrick "has not actually asserted the [statute-of-limitations] defense"); *see also id.* at 8 (mischaracterizing Mr. Derrick's statute-of-limitations defense as a "referenced-but-not-raised" defense). Mr. Derrick specifically asserted a statute-of-limitations defense as the First Affirmative Defense in his Answer. *See* Answer at 34 (stating the "OIP is barred by 28 U.S.C. § 2462, which requires a federal action for 'any civil fine, penalty, or forfeiture, pecuniary or otherwise' be brought 'within five years from the date when the claim first accrued.'"). Mr. Derrick also refers to his statute-of-limitation defense throughout his Answer. *See, e.g., id.* at 30-33. To be able to defend himself on statute-of-limitations grounds, Mr. Derrick needs the Commission to explain what specific facts give rise to which alleged violations. This point is lost on the Commission in part because it was not even aware Mr. Derrick has explicitly raised a statute-of-limitations defense because it did not read Mr. Derrick's answer.
- The Commission also made significant concessions and binding admissions in its Opposition that *support* Mr. Derrick's need for a more specific Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934 ("OIP"). The Commission argues its case is

timely based solely and exclusively on a financial statement Mr. Derrick filed in January, 2010. *See* Opposition at 8. Notably, in making this argument, the Commission concedes that violations based on conduct that occurred before January, 2010, are completely barred, at least with respect to civil penalties. The Commission's reliance on January, 2010, as a demarcation point demonstrates why it needs to specifically identify post-January, 2010 facts that support each of the alleged violations listed on pages 9 and 10 of the OIP.

- The Commission has also misstated the status of the law governing statute-of-limitations defenses asserted under 28 U.S.C. § 2462. The Commission argues there is no need for more specificity concerning the timing of violations alleged in the OIP because the case law interpreting § 2462 is entirely in its favor. Opposition at 6-7. In making this argument, the Commission fails to cite well-known on point authority rejecting its interpretation of § 2462. *See SEC v. Graham*, -- F. Supp. 2d --, 2014 WL 1891418 (S.D.Fla. May 12, 2014).

ARGUMENT

I. THE COMMISSION HAS ASSERTED VAGUE ALLEGATIONS AND MISSTATED THE LAW IN AN EFFORT TO IGNORE MR. DERRICK'S STATUTE OF LIMITATIONS DEFENSE.

The Commission erroneously believes it has no obligation to explain which specific facts are connected to which alleged violations, or *when* the conduct that supports the alleged violations occurred. Rule 200(b)(3), however, requires more, especially given that the OIP alleges facts that largely fall outside of the SEC's own position on statute-of-limitations.

To be sure, the Commission asserted many factual allegations in its OIP. It quotes these allegations at length in its Opposition. *See* Opposition at 2-4. However, only one of these allegations relates to events within the SEC's proffered statute of limitations period. The OIP is so vague that it is difficult to determine which factual events the Commission believes fall within the statute of limitations period *and* provide a basis for the alleged violations listed at pages 9 and 10 of the OIP. It appears the Commission is hanging its entire hat on its sole and exclusive allegation that Mr. Derrick allegedly filed a misleading financial statement in January, 2010. *See* Opposition at 6, 8; *see also* OIP at ¶ C34.¹ The Commission, however, fails to acknowledge in its Opposition that Mr. Derrick entered into an Amended Distribution Agreement in April 2008, well before the alleged improper 2010 filing. The Amended Distribution Agreement is a fully integrated agreement that bars the Commission's the post-April 2008 continuing guarantee allegations. *See* Answer at 35-36 (citing the Amended Distribution Agreement as the basis for Mr. Derrick's Third Affirmative Defense). Yet, because the Commission as unfairly asserted vague allegations, it will be difficult for Mr. Derrick to defend himself using the Amended Distribution Agreement (and unnecessarily difficult for this tribunal to adjudicate his statute-of-limitations and other defenses). The Commission should not be allowed to use vague allegations to save an untimely case.

The Commission's Opposition also misstates the law governing Mr. Derrick's statute-of-limitations defense. The Commission argues, in essence, that it should not have to be more

¹ The OIP sets forth a long narrative of factual allegations in paragraphs 4 through 42 of Section C, which the Commission simply titles "Background." Of these paragraphs, only 34 refers to an event occurring after the statute-of-limitations cutoff.

specific in its allegations because Mr. Derrick's statute-of-limitation defense rests on infirm legal grounds. *See* Opposition at 6-8. Indeed, the Commission goes so far as to suggest Mr. Derrick's defense has no legal basis, as it asserts Mr. Derrick's "argument has been raised and rejected by numerous courts, and rehashing already-plowed ground would be an unnecessary sideshow and distraction in this matter." *Id.* at 6.

The Commission's argument lacks candor as to the current state of the law. The Commission argues that, even if Dr. Derrick is successful in establishing a statute-of-limitations defense, that defense would not preclude its claims for disgorgement and injunctive relief. *See* Opposition at 8 ("even if all activity before [January 2010] were somehow found to be outside the limitations period . . . the Respondent still would be subject to injunctive relief and possible disgorgement"). The Commission, however, ignores the reality that the Supreme Court's decision in *Gabelli v. SEC*, 133 S.Ct. 1216 (2013), has created uncertainty over the Commission's ability to obtain disgorgement and injunctive relief beyond the statute of limitations period set forth 28 U.S.C. § 2462. In particular, the Commission does not acknowledge, cite, discuss or even mention that the Court in *SEC v. Graham*, -- F. Supp. 2d --, 2014 WL 1891418 (S.D.Fla. May 12, 2014), relied on *Gabelli* in holding § 2462 applied to claims for disgorgement and injunctive relief. The *Graham* Court held the logic of *Gabelli* applied to injunctive relief, which is "nothing short of a penalty," and disgorgement claims, which are "nothing other than a forfeiture" precluded under the plain language of § 2462. *Id.* at *9. The *Graham* decision has been widely discussed among (government and private) securities practitioners because the Court strongly rejected the Commission's statute-of-limitations argument, reasoning that its interpretation of § 2462 "would make the Government's reach to

enforce [disgorgement, injunction, and declaratory relief] claims akin to its unlimited ability to prosecute murders and rapists.” *Id.* The Commission was less than candid in ignoring this widely known decision.

Despite the fact that *Graham* is well-known among securities practitioners, the Commission does not even bother to cite it in a footnote, let alone address this case in its Opposition. Moreover, the Commission argues the law on this issue is settled, yet it cites only two post-*Gabelli* District Court decisions in its favor. *See* Opposition at 7. In reality, the scope of the Commission’s power to seek injunctive relief and disgorgement is admittedly uncertain after *Gabelli*. There is a lack of authority addressing the issue, and – contrary to the Commission’s attempt to portray the case law entirely in its favor – courts have disagreed as to whether § 2462 applies to forms of injunctive relief after *Gabelli*.

Given the unsettled state of the law post-*Gabelli*, Mr. Derrick should have a fair opportunity to litigate statute-of-limitations issues. The Commission, however, is attempting to deprive him of that opportunity by asserting vague allegations, incorrectly claiming Mr. Derrick has not set forth a statute-of-limitations defense (in his Answer), and mischaracterizing the relevant case law.

II. THE COMMISSION’S CONCESSIONS AND ADMISSIONS LIMIT ITS CASE AGAINST MR. DERRICK – AND SHOW WHY A MORE SPECIFIC OIP IS NEEDED.

In its Opposition, the Commission admitted one of the factual details it has been attempting to hide by asserting a vague OIP. Specifically, the Commission conceded that it is relying entirely on an alleged improper filing in January, 2010 – and that allegations based on conduct prior to this date are barred by § 2462. The Commission’s concession is as follows:

In this case, the Respondent falsely certified the company's financial statements and caused them to [be] filed as late as January 2010. That places his actions within the five year statute of limitations period. Nevertheless, even if all activity before that point were somehow found to be outside the limitations period (which the Division believes would be a legally improper finding), the Respondent still would be subject to injunctive relief and possible disgorgement.

Opposition at 8.

The above-quoted portion of the Commission's Opposition is significant for two reasons. First, for the first time the Commission has admitted in a binding pleading that its entire case turns on an alleged improper filing in January, 2010. The Commission concedes and admits that § 2462 precludes civil fines or other penalties based on the lengthy allegations of alleged conduct that occurred before January, 2010. If Mr. Derrick's interpretation of § 2462 is correct (which it is), the Commission is also precluded from obtaining injunctive relief or disgorgement based on conduct that occurred before January, 2010. In either case, the pre-2010 allegations are irrelevant to any civil penalty alleged violations.

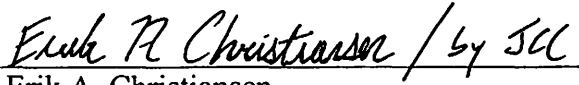
Second, the Commission's concession also shows how much it has not yet explained. The Commission still has not explained which alleged post-January, 2010 facts give rise to which of the six violations alleged at pages 9 and 10 of the OIP. At present, the Commission is still holding back on which alleged violations are based on facts that occurred before January, 2010, and which are based on facts that occurred after January, 2010. It has disclosed its view of the dividing line in the case, but has yet to explain how its allegations fall with respect to that dividing line. A fatal flaw that requires a more definite statement.

If the Commission does not provide more detail, Mr. Derrick will be forced to guess as to the claims against him. For example, he will not know which violations are (at most) subject to only injunctive relief and which are subject to the full range of sanctions because they fall within

the statute-of-limitations period. Without knowing what he is really facing in terms of possible punishment, Mr. Derrick will not be able to strategically prioritize his defense. There is no reason why the Commission should be able to “hide the ball” in this manner. Such obfuscation serves only to give the Commission an unfair advantage and hinder Mr. Derrick’s ability to pursue a legitimate statute-of-limitations and other defenses.

DATED: December 12, 2014.

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