Erik A. Christiansen, USB 7372
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone: 801.532.1234
Facsimile: 801.536.6111
EChristiansen@parsonsbehle.com

Attorneys for David G. Derrick, Sr.

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of DAVID G. DERRICK, SR., Respondent.	**MOTION FOR PARTIAL SUMMARY DISPOSITION** Administrative Proceeding File No. 3-16213

Pursuant to Rule 250 of the Security and Exchange Commission's ("Commission") Rules of Practice, the Respondent, David G. Derrick, Sr., through counsel, hereby moves the Commission for partial summary disposition.

SUMMARY OF ARGUMENT

The Commission is overreaching in this case, as it is seeking monetary penalties far beyond what the law allows – and far beyond what is appropriate given the facts of this case. The Commission is attempting to establish a precedent in this case that would allow an "end run" around the Supreme Court's decision in *Gabelli v. SEC*, 133 S.Ct. 1216 (2013), and the applicable statute of limitations, 28 U.S.C. § 2462. Notwithstanding *Gabelli* and § 2462, the Commission is requesting that this tribunal impose monetary penalties for conduct that falls far outside of the statute of limitations period.

The Commission's efforts to circumvent the limitations placed on it by Congress and the U.S. Supreme Court would be troubling in any case, but are especially suspect here. Mr. Derrick did not receive any financial or personal gain from the transactions at issue in this case, which occurred more than seven years ago. On October 24, 2014, the Commission issued an Order Instituting Cease-and-Desist Proceedings ("OIP") alleging that Mr. Derrick violated securities laws by failing to disclose personal guarantees allegedly made in conjunction with transactions he and others negotiated on behalf of SecureAlert, Inc. Significantly, the transactions and personal guarantees at issue allegedly occurred *in 2007*. The Commission's entire case is based on its allegation that Mr. Derrick's personal guarantees were not properly accounted for in SecureAlert's 2008 financial statements. Mr. Derrick did not personally gain from the accounting errors and they were not made with any fraudulent intent. Moreover, the allegedly erroneous 2008 financial statements did not result in harm to any investor, the company, or anyone else.

As a matter of law, this tribunal should limit the Commission's overreaching outside the statute of limitations and the degree to which it may present evidence at the April 20-24, 2015 hearing in this matter. Specifically, Mr. Derrick requests the following legal rulings to define the scope of what the Commission can place in evidence at the April, 2015, administrative hearing:

First, Mr. Derrick requests that this tribunal deny the Commission's request for financial penalties based on alleged conduct that pre-dates October 24, 2009, on the grounds that, as a matter of law, the Commission is precluded from obtaining financial penalties based on conduct that occurred outside of the statute of limitations period. Even if there were an equitable basis for such penalties (which there is not, as Mr. Derrick will demonstrate at the hearing), the Commission cannot circumvent *Gabelli* and § 2462.

In its December 16, 2014 Order denying Mr. Derrick's Motion for a More Definite Statement ("Order"), however, this tribunal erroneously suggested the statute of limitations period is irrelevant to a *financial* penalty determination: "As to any sanction that may be subject to the statute of limitations, acts outside the statute . . . . may be considered in determining the appropriate sanction if violations are proven." Order at 1. This ruling is legal error.

Post-*Gabelli*, the Commission cannot obtain financial penalties based on alleged conduct that falls outside of the statute of limitations period. To hold otherwise would eviscerate *Gabelli*. Given that the OIP seeks such financial penalties, this tribunal should clarify that, as a matter of law, it cannot "consider" any facts that pre-date October 24, 2009, in determining what, if any, financial penalty is appropriate. If the tribunal declines to do so, it will have ignored binding U.S. Supreme Court precedent – a reversible error.

Second, the Commission should be precluded from presenting time barred evidence at the April, 2015, hearing for purposes other than to show "motive, intent, or knowledge in committing violations that are within the statute of limitations." Order at 1. Although this tribunal has adopted evidentiary standards that follow Rule 404(b) of the Federal Rules of Evidence, those standards do *not* allow limitless presentation of evidence. Given the language in this tribunal's December 16, 2014, Order, the Commission might believe it has a free license to present any evidence that falls outside of the statute of limitations period. That is not a proper reading of the applicable evidentiary standards or *Gabelli*.

To ensure the Commission does not use the narrow 404(b) exceptions as another way of making an end run around § 2462 and *Gabelli*, this tribunal should issue an order (1) clarifying the limits of those exceptions, and (2) scheduling a hearing prior to April 20, 2015, for the Commission to prove how every piece of evidence falling outside of the statute of limitations

period that it intends to introduce at the hearing is admissible under one of the narrowly-defined "motive, intent, or knowledge" categories. Otherwise, the hearing will be conducted in violation of *Gabelli* – a reversible error.

FACTUAL BACKGROUND

SecureAlert is a company centered around the commercialization of GPS products combined with cellular transmissions. In the mid-2000s, SecureAlert developed advanced tracking devices for use by criminal justice and probation systems around the world. The devices, which are worn on the ankles of offenders, are used to track individuals in real time and, using algorithms and software developed by SecureAlert, can allow authorities to monitor when those individuals violate parole mandates. Today, SecureAlert (which now does business under the name Track Group), has revenues from clients around the world of approximately $20 million annually, holds 15 patents, and has a market value of over $150 million.

Mr. Derrick served as SecureAlert's Chief Executive Officer from February 16, 2001, until June 30, 2011. Prior to working at SecureAlert, Mr. Derrick had a successful career as a businessman, teacher, entrepreneur, and philanthropist. He has been involved with several high tech public companies that have received numerous patents. He has also donated millions of dollars to charities, particularly in the areas of science and science education. He sits on Brigham Young University's President's Leadership Council, has been honored by the Smithsonian Institution, and has held leadership positions in his church.

Mr. Derrick's laudable and unblemished track record includes his involvement with SecureAlert. He helped build the company into a success and there is no evidence of any fraudulent conduct on his part. There is no evidence that any of the accounting errors alleged in the OIP were made with the scienter necessary to sustain a fraud charge. Indeed, there is no

evidence of scienter whatsoever. Nor is there any evidence that Mr. Derrick gained a pecuniary or other personal benefit as a result of the alleged accounting errors. There is also no evidence that any investor, SecureAlert, or anyone else was harmed by the alleged errors.

Even if the Commission is able to establish any violations occurred (a major barrier, given the lack Mr. Derrick's scienter and his reliance on the advice of counsel with respect to the transactions at issue), it is not entitled to financial penalties based on conduct that pre-dates the statute of limitations period.

The OIP's allegations are based almost exclusively on agreements that SecureAlert reached with Puerto Rican businessman Hector Gonzalez in the latter half of 2007. Pursuant to September 20, 2007 and December 13, 2007 distribution agreements, Mr. Gonzalez agreed to purchase a total of $2 million worth of tracking devices from SecureAlert. Mr. Derrick facilitated the 2007 transactions by assisting in securing third-party financing. Mr. Derrick, along with SecureAlert's co-founder, James Dalton, allegedly provided Mr. Gonzalez with personal guarantees that, according to the Commission's allegations, required Mr. Derrick and Mr. Dalton to reimburse Mr. Gonzalez for unused devices under certain circumstances. Like all the other transactions at issue in the matter, the personal guarantees are alleged to have been executed in 2007.

The Commission's entire case against Mr. Derrick is based on SecureAlert's 2008 financial statements. The Commission has alleged that SecureAlert was unaware of the personal guarantees and, as a result, did not properly classify the $2 million proceeds of the sales in financial statements filed with the Commission in 2008. SecureAlert's 2008 financial statements classified the $2 million in proceeds variously as revenue and deferred revenue. Even if the Commission can prove SecureAlert's 2008 financial statements improperly classified revenue

stemming from its agreements with Mr. Gonzalez, there is no question that the 2008 statements fall outside of the § 2462 statute of limitations period.

In an effort to avoid § 2462 and breathe new life into an allegedly improper 2008 financial statement, the Commission cites a single financial statement filed by SecureAlert in 2010 as the sole basis for seeking financial penalties based on conduct that occurred more than seven years ago. Specifically, the OIP alleges that on January 13, 2010, Mr. Derrick, in his capacity as SecureAlert's CEO, submitted a Form 10-K for the 2009 fiscal year that included, as an attachment, the allegedly erroneous 2008 financial statement. *See* OIP ¶ 34. Even assuming, solely for the purposes of this motion, that the 2010 statement provides a non-time-barred basis for a claim, it does *not* open the door to *financial* penalties based on conduct that occurred prior to the filing of the 2010 statement. Rather, as detailed below, as a matter of law, the Commission's case for financial penalties must be based entirely on conduct that occurred on or after October 24, 2009. Alleged conduct in 2007 and 2008 is time barred, and cannot be used to assess civil penalties without violating *Gabelli*.

ARGUMENT

I. THIS MOTION RAISES LEGAL ISSUES BASED ON UNDISPUTED FACTS THAT ARE APPROPRIATE FOR SUMMARY DISPOSITION, AND THAT, IF DECIDED, WOULD STREAMLINE THE ADMINISTRATIVE HEARING.

Mr. Derrick is requesting that this tribunal summarily dismiss part of the Commission's claims, namely, its claim for financial penalties to be imposed based on alleged conduct that pre-dates October 24, 2009. The Commission's OIP provides no limit to the civil penalty it seeks. Rather, it asserts violations based on conduct in 2007 and 2008 and asks this tribunal to consider assessing a civil penalty "in view of the allegations," including the allegations for those earlier years. *See* OIP § III, at 10.

A ruling on the legal issues raised herein is entirely appropriate under Rule 250 of the Commission's Rules of Practice. "A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact." *In the Matter of Gary L. McDuff*, Initial Decision Release No. 663 at 3 (Sept. 5, 2014) (citing 17 C.F.R. § 201.250(b)). For purposes of this motion, "[t]he facts of the pleadings of the party against whom the motion is made shall be taken as true except as modified by stipulations or admissions made by him, by uncontested affidavits, or by facts officially noticed pursuant to Rule 323." Rule 250(a).

Here, there is no dispute regarding the relevant facts. It is undisputed that the Commission is seeking financial penalties against Mr. Derrick based on conduct that far pre-dates the statute of limitations period. The Commission also intends to introduce evidence regarding pre-October 24, 2009 conduct that far exceeds applicable precedent and the analogous limits of Rule 404(b) of the Federal Rules of Evidence. This motion raises narrow legal questions based on the undisputed procedural posture of this matter. As such, the issues raised herein are appropriate for summary disposition.

II. THIS TRIBUNAL CANNOT "CONSIDER" AWARDING FINANCIAL PENALTIES BASED ON CONDUCT THAT OCCURRED OUTSIDE OF THE STATUTE OF LIMITATIONS PERIOD.

The five-year statute of limitations set forth in 28 U.S.C. § 2462 limits the financial penalties that can be awarded against Mr. Derrick in this matter.[1] Section 2462 states as follows:

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[1] Notably, the five-year statute of limitations in § 2462 is not limited to financial penalties. It extends to "any penalty" sought by the Commission, including its claim for disgorgement. *See SEC v. Graham*, 21 F. Supp. 3d 1300, 1310-11 (S.D. Fl. 2014) (holding disgorgement "can truly be regarded as nothing other than a forfeiture (both pecuniary and otherwise), which remedy is expressly covered by § 2462."). Mr. Derrick is not in this motion asking this tribunal to rule on whether the Commission may obtain non-financial penalties based on conduct that allegedly occurred outside of the statute of limitations period. Mr. Derrick has asserted a statute of limitations defense to all relief sought by the S.E.C.

> 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.

The Supreme Court recently made clear in *Gabelli* that, for purposes of § 2462, "a claim accrues – and the five-year clock begins to tick – when" the conduct giving rise to the claim occurs. 133 S.Ct. at 1220. Significantly, the Court in *Gabelli* rejected the Commission's attempt to graft a discovery rule on to § 2462 that would prevent the five-year limitations period from beginning until the government "discovered" its factual basis for bringing an enforcement action. The *Gabelli* Court explained that the Commission's interpretation of the statute would give the Commission virtually limitless authority over citizens, as it "would leave defendants exposed to Government enforcement action not only for five years after their [alleged] misdeeds, but for an additional uncertain period into the future." *Id.* at 1223. In rejecting the Commission's expansive interpretation, the Supreme Court made clear that § 2462 places a real check on government power, as it "sets a fixed date when exposure to the specified Government enforcement effort ends, advancing the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* at 1221.

Given the clear mandate of *Gabelli*, this tribunal – contrary to its December 16, 2014, Order – cannot "consider" acts occurring prior to October 24, 2009, in determining whether any financial penalty against Mr. Derrick is warranted. Based on the language in the December 16, 2014 Order, it is clear that this tribunal intends to give weight to acts occurring before October 24, 2009, in evaluating the Commission's request for a financial penalty. The December 16, 2014, Order states that acts outside of the statute of limitations "may be

considered in determining the appropriate sanction if violations are proven." Order at 1. The Order cites one pre-*Gabelli* authority in support of this proposition, namely, *Terry T. Steen*, Exchange Act Release No. 34-40055, 1998 SEC Lexis 1033, at *14-17 (June 2, 1998).

To the extent this tribunal meant that it may "consider" acts occurring outside the statute of limitations in determining whether a *financial* penalty is appropriate and the amount of any such penalty, its Order was contrary to law. As *Gabelli* makes clear, § 2462 means what it says, i.e., this tribunal "shall not entertain" any "action, suit or proceeding for the enforcement of any civil fine . . . unless commenced within five years from the date when the claim first accrued." Here, that prohibition means this tribunal cannot "entertain" or "consider" claims for penalties based on facts that pre-date October 24, 2009. By law, events occurring prior to October 24, 2009 must be irrelevant to any financial penalty assessment. They cannot even be "considered as" an explanatory or secondary factor supporting a penalty. Rather, any financial penalty imposed by this tribunal must rest entirely on facts occurring within the statute of limitations period.[2]

A contrary interpretation would completely eviscerate the function of § 2462 and *Gabelli*. The entire purpose of § 2462, as the Court made clear in *Gabelli*, is to prevent citizens from

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[2] As Mr. Derrick will demonstrate at the April, 2015 administrative hearing in this matter, there are no facts supporting imposition of a financial penalty. This is especially true when the tribunal appropriately limits its analysis to events occurring within the statute of limitations period. The 2010 republication of the 2008 financial statements were not material under the law, did not result in harm to any party, did not contain any misstatements given the revocation of the earlier guarantees, and were later voluntarily disclosed to the Commission. To state "an actionable claim for securities fraud, the alleged misstatements must be material." *In re AMDOCS Ltd. Sec. Litig.*, 390 F.3d 542, 547 (8th Cir. 2004) (citation omitted); *see also, e.g.*, 17 C.F.R. § 240.13b2-2. At the time the January 2010 filing republished the 2008 financial results, the 2008 information had already been known for well over a year – and did not materially add to the information in the marketplace. Moreover, the mere republication of the 2008 information in 2010 did not harm any investor or significantly impact the company's stock price. That stock price remained unchanged even after the company publicly disclosed that it had reclassified the transactions at issue in this case. Moreover, the guarantees were revoked by a later agreement.

being subject to endless enforcement action by the government. This case provides a good example of the concerns detailed in *Gabelli*. The OIP is based on conduct that is alleged to have occurred on September 20, 2007. The Commission issued its OIP on October 24, 2014. If this tribunal considers 2007 conduct in awarding financial penalties, it will have effectively rewritten § 2462 to grant the Commission power to bring "an action, suit or proceeding for the enforcement of any civil fine," so long as the Commission brings such an action within seven years, one month, and four days of when the claim first accrues. Such a rewriting of the statute would also grant the Commission enormous power to base civil penalties on events far in the past, so long as it could tie those events to some other conduct within the statute of limitations period. If the Commission is permitted to "reach back" beyond the five-year statute of limitations period in this manner, the entire purpose of § 2462's statute of limitations period will be thwarted. Statutes of limitations "rest[], in large part, upon evidentiary concerns – for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable." *Stogner v. California*, 539 U.S. 607, 615-616 (2003); *see also United States v. Kubrick*, 444 U.S. Ill, 117 (1979) (noting statutes of limitations "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise").

Steen, the lone authority cited in the December 16, 2014, Order in support of such "consideration" does not support consideration of conduct outside of the statute of limitations period for purposes of determining a financial penalty. *Steen* involved an appeal by a registered representative of a broker-dealer who was found to have violated securities laws by selling unregistered securities. *Terry T. Steen*, Exchange Act Release No. 40055, 1998 WL 278994

(June 2, 1998). On appeal, the respondent did not deny that he had violated securities laws. Instead, his only argument was that his punishment – a six month suspension and disgorgement of over $68,000 – was excessive because the ALJ considered conduct that occurred outside of the applicable statute of limitations period in fashioning the sanction. 1998 WL 278994 at *4. On appeal, the respondent's sanctions were upheld on the grounds that § 2462 did not apply to disgorgement and the ALJ was allowed to consider acts occurring outside of the statute of limitations to establish motive, intent, and knowledge. *Id.* at *4-5.

Significantly, the holding in *Steen* did not address whether conduct occurring prior to the statute of limitations period could be "considered" in determining whether a civil penalty was appropriate. Indeed, there was no civil penalty at issue in the case. *Steen* is inapposite to the issue raised in this motion. The Supreme Court's more recent decision in *Gabelli* directly addresses why the Commission cannot seek civil penalties based on events occurring before the statute of limitations period. Accordingly, this tribunal should issue an order (1) denying the Commission's request for imposition of any financial penalties based on events that occurred before October 24, 2009 and (2) clarify that, to the extent it allows the Commission to present evidence of conduct outside the statute of limitations period, that evidence will not play any factor in a financial penalty determination. To hold otherwise is reversible error.

III. THE COMMISSION CAN ONLY PRESENT EVIDENCE PRE-DATING THE STATUTE OF LIMITATIONS PERIOD IF THAT EVIDENCE IS NARROWLY TAILORED TO ATTEMPT TO SHOW MR. DERRICK'S ALLEGED MOTIVE, KNOWLEDGE, OR LACK OF MISTAKE.

The Commission's OIP indicates that virtually all of its evidence falls outside of the statute of limitations period. The Commission will attempt to base its case on witness testimony regarding conversations and circumstances that are *more than seven years old*. This evidence is

likely to be impacted by fading memories and other consequences stemming from the passage of time.

This tribunal should not permit wholesale introduction of testimony and other evidence that pre-dates the statute of limitations period. Rule 320 states that the hearing officer "may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial, or unduly repetitious." What is relevant must be determined by § 2462. Because the Commission is not entitled to *any* form of penalty based on conduct falling outside of the statute of limitations period, evidence of such conduct should only be admitted for limited purposes.[3]

To be sure, the Rule 404(b) standard is a well-recognized exception to the rule that conduct falling outside of the statute of limitations period is irrelevant. This tribunal correctly recognized that exception in its December 16, 2014, Order: "As to any sanction that may be subject to the statute of limitations, acts outside of the statute of limitations may be considered to

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[3] *Gabelli* did not address whether disgorgement or injunctive relief claims were also subject to the five-year statute of limitations in § 2462. *Gabelli*, 133 S. Ct. at 1220 n.1. However, for the reasons set forth in *SEC v. Graham*, 21 F. Supp. 3d 1300 (S.D. Fl. 2014), § 2462 prohibits *all* claims outside of the statute of limitations period. Mr. Derrick acknowledges that this tribunal rejected the *Graham* interpretation of § 2462 in its December 16, 2014, Order. Mr. Derrick respectfully disagrees with this tribunal's decision in rejecting *Graham*, and for purposes of preserving the record for an appeal, objects to the tribunal allowing wholesale admission of evidence pre-dating October 24, 2009, on the grounds it is admissible for consideration of disgorgement or injunctive relief. The OIP asserts a disgorgement claim, but not an injunctive relief claim. *See* OIP at 10. There is no factual basis for a disgorgement claim, as Mr. Derrick did not profit off of the alleged accounting errors at issue in this matter. The Commission knows that the Supreme Court's *Gabelli* decision limits the evidence it can introduce for purposes of a financial penalty but will likely cite its disgorgement claim as an excuse to introduce evidence from the 2007 and 2008 time frame – i.e., as an excuse to justify making an "end run" around *Gabelli* and § 2462. This tribunal should reject the Commission's efforts to use a non-factually-supported disgorgement claim as a pretext for trying to avoid *Gabelli* and § 2462. Such a rejection is warranted not only as a matter of law for the reasons expressed in *Graham*, but also as a factual matter because there is no factual basis for a disgorgement claim in this case. A sham disgorgement claim does not justify introduction of irrelevant evidence going as far back as 2007.

establish a respondent's motive, intent, or knowledge in committing violations that are within the statute of limitations." Order at 1 (citing authorities, including Fed. R. Evid. 440(b)).

The "motive, intent, or knowledge" standard, however, is not limitless. Rather, it requires the Commission to show how evidence of events falling outside of the statute of limitations period has a bearing on Mr. Derrick's motive, intent, or knowledge. Given the vast volume of evidence potentially subject to this standard, this tribunal should enter an order scheduling a hearing prior to the April 20, 2015, administrative hearing. At that hearing, the Commission should be required to proffer all the evidence it intends to introduce that falls outside of the statute of limitations period – and show how that specifically identified evidence directly relates to Mr. Derrick's motive, intent, or knowledge. Absent such a preliminary hearing, the administrative hearing scheduled to begin on April 20, 2015, may have to be disrupted by repeated objections and proffers, so the record is clear as to what evidence is admissible under the narrow 404(b) standard. Mr. Derrick is proposing what would be, in essence, the equivalent of a *motion in limine* hearing to establish the scope of what the Commission may present starting on April 20, 2015. If this tribunal does not give advance consideration to this evidentiary issue and instead allows wholesale admission of evidence dating as far back as September, 2007, it will have rendered the 404(b) standard irrelevant, contrary to established precedent. Such action is reversible error.

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PARSONS BEHLE & LATIMER

Erik A. Christiansen
Attorneys for David G. Derrick, Sr.