UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. SECURITIES AND EXCHANGE COMMISSION, *Plaintiff*, -v- URIEL SHAREF, *et al.*, *Defendants*.	Case No. 11 Civ. 09073 (SAS) **ORAL ARGUMENT REQUESTED** ECF Case Electronically Filed

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT HERBERT STEFFEN'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND FAILURE TO FILE WITHIN THE STATUTE OF LIMITATIONS

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DEFENDANT'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS THE COMPLAINT[1]

In its opposition, the SEC asks this Court to assert personal jurisdiction over a defendant: (1) who is a German citizen and resident; (2) who conducted no business in the United States; (3) whose only alleged U.S. "contact" resulted from the unilateral actions of another party; (4) whose allegedly improper conduct occurred entirely outside the United States; and (5) whose conduct was not aimed at and caused no injury in the United States. This request should be rejected. Because the SEC has not met its burden to plead legally sufficient allegations establishing personal jurisdiction over Mr. Steffen, its complaint must be dismissed.

In addition, the SEC has failed to explain how its action against Mr. Steffen is not barred by the applicable statute of limitations, 28 U.S.C. § 2462. In addition, although the SEC acknowledges that the purpose of the statutory tolling provision is to ensure that a defendant does not evade U.S. prosecution by "fleeing to another country" where he is "difficult to locate and serve," it ignores that Mr. Steffen did nothing to evade the SEC, and that the SEC *was* able to locate him and obtain an order to serve him by publication in Germany, the country of his nationality and residency. Under these circumstances, accepting the SEC's argument would mean that claims against foreign-national defendants who reside abroad are perpetual, not subject to any time limitations. Finally, even if this Court were to accept a continuing violation theory for securities violations, it does not help the SEC's case because Mr. Steffen did not take any unlawful acts within the limitations period.

For all of these reasons, the motion to dismiss should be granted with prejudice.

[1] During a scheduling conference on September 28, 2012, this Court stated that Mr. Steffen could add pages not used in his opening brief to this reply. (*See* Tr. at 9.) As the opening brief was 12 pages, the remaining 13 pages have been added to this brief.

ARGUMENT

I. THE SEC HAS NOT SATISFIED ITS BURDEN TO PLEAD THAT THE COURT HAS PERSONAL JURISDICTION OVER MR. STEFFEN.

In its opposition to defendant's motion to dismiss, the SEC has substantially abandoned the position suggested in its complaint that jurisdiction exists over Mr. Steffen based on his own contacts with the United States. In the opposition it originally filed, the SEC did not assert that argument at all. As an afterthought, in a corrected brief filed a day later, it reasserts the allegations that Mr. Steffen had telephone conversations with Mr. Sharef while Mr. Sharef was in the United States (omitting the fact that, as pled in the complaint, Mr. Sharef initiated those calls to Mr. Steffen), and further adding that some portion of payments allegedly made by Mr. Regendantz (not Mr. Steffen) were deposited in a New York bank. (*See* Opp'n at 13.) The SEC makes no attempt to rebut the substantial authority cited in support of the motion to dismiss that such isolated contacts will not ground personal jurisdiction. (*See* Mot. at 5 (citing cases).) *See also Weinberg v. Colonial Williamsburg, Inc.*, 215 F. Supp. 633, 639-40 (E.D.N.Y. 1963) ("Certainly the mere existence of a bank account is not conclusive as to the fairness of subjecting defendants to suit in this forum.").

Rather, the SEC relies on an argument that Mr. Steffen's alleged extraterritorial acts constitute sufficient "minimum contacts" to satisfy the constitutional requirements of due process on the ground that it was "foreseeable" that those acts would have consequences in the United States. (*See generally* Opp'n.) The SEC is mistaken. In order to gain jurisdiction over Mr. Steffen based on foreign acts, the SEC must allege: (1) that Mr. Steffen's extraterritorial activity was expressly aimed at the United States; (2) that Mr. Steffen's own acts were a direct and proximate cause of the alleged effects in the United States; and (3) that the brunt of the injury was felt in the United States. *See Calder v. Jones*, 465 U.S. 783, 789-790 (1984); *In re*

Terrorist Attacks on September 11, 2001, 538 F.3d 71, 93 (2d Cir. 2008), *abrogated on other grounds by Samantar v. Yousuf*, 130 S. Ct. 2278 (2010); *Chaiken v. VV Publ'g Corp.*, 119 F.3d 1018, 1029 (2d Cir. 1997). The SEC's complaint is deficient in each respect. Accordingly, this Court lacks personal jurisdiction over Mr. Steffen, and his motion to dismiss should be granted.

A. The SEC Cannot Allege Mr. Steffen's Conduct Was "Expressly Aimed" At The United States.

The SEC acknowledges that, in order for this Court to assert personal jurisdiction over Mr. Steffen, it must establish that Mr. Steffen "***purposefully*** established minimum contacts within the forum State." (Opp'n at 11 (emphasis added).) *See also Asahi Metal Indus. Co., v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987) ("The substantial connection between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State.") (internal quotation marks and citation omitted). In order to meet that requirement, the SEC must show that Mr. Steffen's extraterritorial acts were "expressly aimed" at the United States. *Calder*, 465 U.S. at 789 (jurisdiction in California proper over Florida reporter who authored defamatory article distributed in California because his "intentional and allegedly tortious action were expressly aimed at California"); *see also In re Terrorist Attacks*, 538 F.3d at 95 ("plaintiffs have the burden of showing that the [defendant] engaged in intentional, and allegedly tortious, actions expressly aimed at residents of the United States") (citation and internal quotation marks omitted). This focus on whether the defendant intentionally targeted the forum reflects the due-process concern that the defendant have "fair warning" that he may be subject to suit in a foreign jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

Consistent with these principles, courts have dismissed claims against foreign defendants whose actions were not directed specifically toward the United States. *See, e.g.*, *In re Terrorist*

Attacks, 538 F.3d at 95 (no personal jurisdiction over foreign nationals where plaintiffs could not establish that the defendants "expressly aimed intentional tortious acts at residents of the United States"); *Chaiken*, 119 F.3d at 1029 (insufficient contacts to establish personal jurisdiction where defendant did not "expressly aim" its actions at the forum); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 26 F. Supp. 2d 593, 600 (S.D.N.Y. 1998) (plaintiffs failed to satisfy due-process requirements for jurisdiction based on "foreign acts with forum effects" where they did not show that the "alleged conduct [wa]s 'expressly aimed'" at the forum) (citation omitted).

The application of this principle to foreign defendants in the securities context is illustrated by *In re Royal Ahold N.V. Sec. & ERISA Litig.*, a decision from the District of Maryland. Unlike this case, the defendant there was alleged to have engaged in a fraudulent scheme to defraud U.S. investors by artificially inflating revenues. 351 F. Supp. 2d 334, 347 (D. Md. 2004). The defendant, who was a member of the supervisory board of an SEC-registered issuer, was alleged to have done so by signing a fraudulent control letter and a contradictory side letter as part of the revenue-inflation scheme. *Id.* at 354. Although the court determined that the letters "did have an impact in the U.S." because the company's artificially inflated revenue was "included in its financial statements, which were incorporated into [the company's] SEC filings and relied upon by American investors," the court nonetheless found that the defendant did not have sufficient minimum contacts with the United States for the court to exercise personal jurisdiction over him. *Id.* First, the court explained that because the defendant had "signed no SEC filings," such filings "c[ould] not be the source of personal jurisdiction over" him. *Id.* Second, "despite the fact that [the defendant's] acts ultimately had an impact in the U.S.," the United States was not the "focal point of either [the defendant's] acts or the harm suffered." *Id.*

This was so because the defendant's acts were "directed towards the Netherlands, and globally, but not specifically toward the U.S." *Id.*

The same is true here. The SEC does not contest that Mr. Steffen was never employed in the United States and never travelled to the United States for a business purpose during the entire period alleged in the complaint. Nor does the SEC allege that Mr. Steffen signed any SEC filings or engaged in any other act that was purposefully aimed at the United States. At most, like the defendant in *In re Royal Ahold*, Mr. Steffen's alleged actions, which are not alleged to be fraudulent, were "directed toward[] [Argentina], or globally, but not specifically toward the U.S." Thus, because the SEC has not (and cannot) plead that Mr. Steffen purposefully directed his activities toward the United States such that he should "reasonably anticipate being haled into court" here, this case should be dismissed for lack of personal jurisdiction. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

B. The Extraterritorial Conduct Alleged Was Not A Direct, Proximate Cause Of Any Alleged Injury.

Even if the SEC could somehow show that Mr. Steffen aimed his extraterritorial actions at the United States – and it cannot – this Court would still lack jurisdiction because the SEC has not alleged that Mr. Steffen's conduct was the cause of the asserted U.S. consequences.

1. The SEC's Opposition Misapprehends The Required Standard Of Causation.

In opposing the motion to dismiss, the SEC contends that jurisdiction exists over Mr. Steffen because, the SEC believes, there were "foreseeable consequences" in the United States of Mr. Steffen's alleged conduct abroad. (Opp'n at 12-13.) But that is not the correct standard, and mere "foreseeability" of any asserted consequences in the United States is plainly insufficient. *See Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972), *abrogated on other grounds by Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010)

("We believe, moreover, that attaining the rather low floor of foreseeability necessary to support a finding of tort liability is not enough to support *in personam* jurisdiction."); *In re Terrorist Attacks*, 538 F.3d at 95 ("[F]oreseeability is not the standard for recognizing personal jurisdiction"). An attenuated chain of events, where the alleged U.S. consequences depend on other intervening events or the actions of others, even if foreseeable, is not sufficient to establish jurisdiction. *In re Terrorist Attacks*, 538 F.3d at 95. Rather, the SEC must allege that Mr. Steffen's *own* conduct was the direct and proximate cause of the consequences asserted. *See Burger King Corp.*, 471 U.S. at 475 ("This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or the unilateral activity of another party or a third person. Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant ***himself*** that create a substantial connection with the forum State.") (citation and internal quotation marks omitted).

2. Mr. Steffen's Conduct Was Not A Proximate Cause Of Any U.S. Consequences.

It is clear from the SEC's own opposition why the facts alleged as to Mr. Steffen cannot establish jurisdiction based on the asserted consequences in the United States. In sum, the SEC contends that Mr. Steffen should have foreseen that Mr. Regendantz would falsely record the payments he made and create fictitious paperwork to support them, that other Siemens employees – unnamed in the complaint – would decide to report the alleged bribes incorrectly as tax-deductible business expenses, and that still others would submit false certifications as part of Siemens' financial reporting process. (*See, e.g.*, Opp'n at 13 ("By coercing Regendantz to pay . . . bribes, Steffen caused Siemens to report those illegal payments as legitimate business expenses.").) There are no allegations in the complaint regarding Mr. Steffen's state of mind with regard to any of these intervening events. *See LiButti v. United States*, 178 F.3d 114, 123

(2d Cir. 1999) (no personal jurisdiction where defendant "did not intend to inflict harm on" a resident of the forum). Even if such allegations could be made, they would not be sufficient to establish jurisdiction over Mr. Steffen, as jurisdiction may not be grounded on the theoretically foreseeable acts of others that, in turn, had foreseeable U.S. consequences. Rather, due process requires that the extraterritorial acts alleged to have had U.S.-effects are the defendant's *own* acts. *See, e.g.*, *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."); *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 809 (S.D.N.Y. 2005) (plaintiffs must allege "personal or direct involvement by the Defendants in the conduct giving rise to their claims"). In other words, "[w]here the defendant has had only limited contacts with the [forum] . . . he will be subject to suit in that [forum] only if the plaintiff's injury was ***proximately caused*** by those contacts." *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) (emphasis added); *see also Huang v. Sentinel Gov't Sec.*, 657 F. Supp. 485, 489 (S.D.N.Y. 1987) ("[I]t is clear that there must be a significant causal relation between defendant's jurisdictional contacts and plaintiffs' cause of action.") (citing *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975)).

In accordance with these principles, courts in this circuit have found they lacked jurisdiction over foreign defendants where the relationship between the actions of those defendants and the effects in the United States are attenuated so as to depend on the intervening acts of other, independent actors. For example, in *In re Terrorist Attacks on September 11, 2001*, the plaintiffs brought suit against four foreign defendants, alleging that they "caused money to be given to Muslim charities . . . with the knowledge that the charities would transfer the funds to al Qaeda." 538 F.3d at 77. In arguing that personal jurisdiction over the defendants was proper,

the plaintiffs relied on a "causal chain to argue a concerted action theory of liability" – i.e., that the defendants donated money knowing that it would be used to finance the September 11 attacks. *Id.* at 94. The Second Circuit rejected that argument, explaining that even if the defendants "intended to fund al Qaeda" and "did foresee that recipients of their donations would attack targets in the United States, that would be insufficient to ground the exercise of personal jurisdiction." *Id.* at 94-95. According to the court, even though the harm was foreseeable, the link between the defendants' actions and that harm was "too attenuated" and "indirect" to satisfy due process requirements. *Id*. at 95.

Similarly, in *Charas v. Sand Tech. Sys. Int'l, Inc.*, the court dismissed claims against a corporate director based on allegedly fraudulent registration statements that were filed with the SEC. No. 90 Civ. 5638, 1992 U.S. Dist. LEXIS 15227 (S.D.N.Y. Oct. 7, 1992). Finding that the director, a Japanese resident, "had no contacts with the United States" relating to his status as a director and that he had "not sign[ed] the registration statements at issue," the court held that the false registration statements – the corpus delicti – could not be "deemed the direct and foreseeable result" of the defendant's alleged misconduct in the discharge of his director duties. *Id.* at *16. Thus, because there was no "significant causal relation" between the defendant's allegedly fraudulent activities and plaintiffs' claims, the court had no jurisdiction over him. *Id.*; *see also Alki Partners, L.P. v. Vatas Holding GmbH*, 769 F. Supp. 2d 478, 490 (S.D.N.Y. 2011) (no jurisdiction where complaint "merely allege[d] that '[defendant] . . . had the power, influence and authority and exercised the same to cause [others] to engage in the wrongful conduct and practices complained of'").

This case is no different. Like the defendant in *Charas*, Mr. Steffen did not sign any of Siemens' allegedly false SEC filings and, in any case, such filings are not at the core of the

corrupt conduct alleged here. Nor is he alleged to have falsified any sub-certifications or directed anyone to do so. Indeed, the SEC does not allege that Mr. Steffen *even knew* that any financial records or certifications were falsified. Similarly, the SEC does not contend that Mr. Steffen had any awareness of – much less involvement in – decisions about how the "illegal payments" were treated for tax purposes. Rather, like the plaintiffs in *In re Terrorist Attacks*, the SEC relies on a "causal chain to argue a concerted action theory of liability" – i.e., that Mr. Steffen supposedly "coerced" Mr. Regendantz to make "illegal payments," which in turn "caused" others to behave in ways that resulted in Siemens' submission of false financial statements. (Opp'n at 13.) But that long chain of causal events, even assuming they could be foreseen, is insufficient for jurisdiction, as the courts in *In re Terrorist Attacks* and *Charas* made clear. A court may assert specific personal jurisdiction over a foreign defendant only if the defendant's own actions have a foreseeable *and direct* effect – and not merely an attenuated and indirect one – in the United States. Because there is no direct connection between Mr. Steffen's actions in Argentina and Siemens' eventual, allegedly deficient, filings with the SEC, this standard is clearly not met.

Furthermore, the cases cited by the SEC are in complete accord. In each of those cases, it was patently clear that the actions of the foreign defendants had a "direct" effect in the United States that "proximately caused" the plaintiffs' injuries. In fact, in most of those cases, the foreign defendant was responsible for approving, drafting or signing the documents or SEC filings that directly harmed U.S. investors and gave rise to the suit. *See SEC v. Standard*, No. 06-cv-7736 (S.D.N.Y. May 16, 2007), Opp'n Ex. 1 at 3 (defendant "***conceived and implemented"*** strategy to enter sham transaction that was "***specifically intended***" to result in false financial statements filed in the United States) (emphases added); *In re Parmalat Sec.*

Litig., 376 F. Supp. 2d 449, 452, 455 (S.D.N.Y. 2005) (where member of Board of Statutory Auditors was responsible for "***preparation and review*** of [company's] audited and unaudited financial statements" and had "verified . . . compliance with legal provisions concerning" financial statements, personal jurisdiction proper for claims arising out of those financial statements) (emphasis added); *Landry v. Price Waterhouse Chartered Accountants*, 715 F. Supp. 98, 100 (S.D.N.Y. 1989) (personal jurisdiction over "control person" who "***drafted*** an Amended Exchange Agreement" central to transaction for suit arising out of transaction) (emphasis added); *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1259 (S.D.N.Y. 1984) (personal jurisdiction over auditor who "***signed and issued***" allegedly fraudulent audit opinion where auditor "knew or should have known" that U.S. investors would rely on audit) (emphasis added); *In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 305-306 (E.D.N.Y. 2002) (personal jurisdiction over officer who ***signed*** registration statement and "must have known that the Statement . . . would be used and relied upon by American investors") (emphasis added); *In re Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509, 551 (D.N.J. 2005) (senior executive who "***signed many of the SEC filings that contained the materially false and misleading information***" and attended U.S. conferences where he "assisted in the dissemination of the material misrepresentations" subject to jurisdiction for claims arising out of those misrepresentations) (emphasis added); *Derensis v. Coopers & Lybrand Chartered Accountants*, 930 F. Supp. 1003, 1014 (D.N.J. 1996) (personal jurisdiction over "controlling persons" who "***approved and disseminated financial statements*** that they knew would influence the price" of securities) (emphasis added); *Itoba Ltd. v. LEP Grp PLC*, 930 F. Supp. 36, 41 (D. Conn. 1996) (where plaintiff produced undisputed evidence that defendant "***approved Form 20-F***," personal jurisdiction for claims "based on the ***very same filing***" proper) (emphases added).

C. The SEC Does Not Allege An Impact In The United States That Will Support Personal Jurisdiction Over Extraterritorial Acts.

Even if the SEC could somehow establish that Mr. Steffen "expressly aimed" his conduct at the United States and that that conduct somehow "proximately caused" consequences in the United States, that would still not be enough: the SEC must also show that those consequences amounted to some significant injury in the United States. It simply cannot meet this burden from the facts alleged in the complaint.

As the Second Circuit has explained, "[n]ot every securities law violation involving shares of a United States corporation will have the requisite effect within the United States" to confer jurisdiction over a foreign defendant. *SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990). Rather, the plaintiff must establish that the defendant's actions created "the near certainty that [U.S.-plaintiffs] . . . would be adversely affected." *Id*. Where the effects in the forum of the defendant's actions are insignificant, the "caution" mandated by the Second Circuit precludes an exercise of jurisdiction over the defendant. *Leasco*, 468 F.2d at 1341.

All of the authority that the SEC cites in support of asserting jurisdiction over foreign defendants based on adverse consequences in the United States involves transnational securities frauds that victimized U.S. investors. (*See* Opp'n at 12-13.) That authority is inapposite. No securities fraud is alleged here. On the contrary, the SEC has not alleged that any of the conduct in its complaint resulted in a single materially false or misleading statement to an investor in the United States or elsewhere.[2]

[2] Notably, even in its complaint against Siemens for these same events, which the Company settled without admitting or denying the allegations, the SEC did not allege any violations of either the antifraud or periodic reporting provisions. *See* SEC Litig. Release No. 20829 (Dec. 15, 2008).

In an effort to articulate some U.S.- consequences based on Mr. Steffen's alleged conduct, the SEC contends for the first time in its opposition that Siemens improperly deducted certain payments in calculating its tax liability, and therefore that its after-tax earnings were misstated and that certain management certifications were deficient. (Opp'n at 13.) It makes no effort to quantify the magnitude of such errors or to allege that they were material to the Company's financial statements, a critical element to allege injury to investors in the United States.[3] Similarly, it makes no allegations that the alleged deficiencies in the certifications were material to the market for Siemens securities, or adversely impacted investors in the United States. The SEC cites no authority, and we are aware of none, for the proposition that alleged immaterial breaches of the books and records and certification provisions amount to an injury sufficient to supply grounds for asserting jurisdiction over individuals with no other contact with the forum. Indeed, such an assertion would be contrary to the Second Circuit's instruction that personal jurisdiction based on forum-effects "must be applied with caution, particularly in an international context." *Leasco Data Processing*, 468 F.2d at 1341.

Unlike the investor protection objective that animates most federal securities laws, the objective of the provisions at issue in this case are to advance transparency in international business transactions and prevent adverse consequences experienced in jurisdictions where corruption occurs. *See, e.g.*, S. Rep. No. 95-114, at 3 (1977) (Senate Report on FCPA); U.S. Dep't of Justice & U.S. Sec. and Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt*

[3] It is evident that the impact of such an error on Siemens' after-tax earnings could not have been material. The SEC alleges that $31.3 million in improper payments were made over approximately a six-year period (Compl. at ¶ 3), with the result, one might infer, that after-tax earnings were misstated at most by the amount of tax due on that $31.3 million. During that period, Siemens reported net income of approximately $20 billion. *See* Siemens Aktiengesellschaft, Annual Report (Form 20-F) (Nov. 28, 2007); Annual Report (Form 20-F) (Nov. 29, 2004); Annual Report (Form 20-F) (Jan. 7, 2002).

Practices Act, 2-3 (2012) (describing "costs of corruption" in other jurisdictions). The consequences of the alleged breach of those provisions does not fall primarily on U.S. investors. If anything, the "brunt" of the harm of Mr. Steffen's allegedly improper conduct was felt in Argentina (where government officials allegedly received improper payments), or possibly in Germany (where tax liabilities were allegedly misstated). Thus, Mr. Steffen's conduct simply did not "have the requisite effect within the United States." *Unifund SAL*, 910 F.2d at 1033. Accordingly, the SEC's complaint should be dismissed with prejudice.

D. An Exercise Of Personal Jurisdiction Over Mr. Steffen Would Be Unfair And Unreasonable.

As explained in the opening brief, requiring Mr. Steffen – a 74-year-old retired German citizen with limited English-language skills – to defend this litigation in the United States would be unduly burdensome. The SEC responds that this is of no matter, contending that the reasonableness inquiry of due-process analysis is "largely academic" and "rarely defeats jurisdiction." (Opp'n at 14.)[4] The SEC misconstrues the application of the reasonableness inquiry to this case.

The Supreme Court has repeatedly held that a reasonableness inquiry is a critical component of constitutional due-process analysis. *See, e.g.*, *World-Wide Volkswagen Corp.*, 444

[4] The SEC's reliance on *SEC v. Softpoint, Inc.*, No. 95 CIV. 2951, 2001 WL 43611 (S.D.N.Y. Jan. 18, 2001), is unhelpful. There, the defendant argued that due-process principles could only be satisfied if the SEC established that he had sufficient contacts *with New York*, rather than the United States as a whole. *Id.* at *2. The court disagreed, holding that the defendant, who was "a resident of the United States, the chairman and president of a United States Corporation, [wa]s alleged to have illegally inflated the share price of that corporation, to have sold fraudulently-inflated shares through United States markets, and to have personally made insider trading profits by selling his own stock to defrauded United States investors," clearly had sufficient contacts with the United States to satisfy due process. *Id.* at *6. Notably, the defendant in *Softpoint* presented "no evidence" that litigating in New York would "significantly burden him," and there was no "evidence of competing foreign forums" for the controversy. *Id.* Here, as explained below, just the opposite is true.

U.S. at 292; *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Where there is a "weak showing of minimum contacts," there must be a "stronger showing of reasonableness." *Gmurzynska v. Hutton*, 257 F. Supp. 2d 621, 628 (S.D.N.Y. 2003) (citation and internal quotation marks omitted). In other words, "depending upon the strength of the defendant's contacts with the forum state, the reasonableness component of the constitutional test may have a greater or lesser effect on the outcome of the due process inquiry." *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996); *see also Ellicott Mach. Corp. v. John Holland Party, Ltd.,* 995 F.2d 474, 479 (4th Cir. 1993) (insubstantial nature of defendant's contacts with forum required "a more concerned focus on the second prong of the due process analysis"). This case presents precisely the kind of "rare" situation in which the reasonableness prong *does* defeat jurisdiction: Mr. Steffen's contacts with the United States, to the extent any exist, are attenuated and indirect, and an analysis of the reasonableness component confirms that an exercise of personal jurisdiction would be decidedly unreasonable. *See Metro. Life Ins. Co.*, 84 F.3d at 575 ("Such cases may be unusual, but they remain good candidates for dismissal.").

The SEC disagrees on two grounds, arguing that: (1) the United States' "compelling interest in the enforcement of federal securities laws" requires the court to exercise personal jurisdiction; and (2) if the court fails to exercise jurisdiction, the defendant will "effectively have been immunized" for his alleged wrongdoing. (Opp'n at 14.) Neither argument is persuasive.

In support of its first contention, the SEC relies on *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P*, 104 F. Supp. 2d 279 (S.D.N.Y. 2000). This case hurts, rather than helps, the SEC's argument. In *Hallwood*, the defendant allegedly engaged in a scheme to improperly acquire a controlling interest in the plaintiff-corporation in order to liquidate it. *Id.* at 281. In rejecting the defendant's challenge to personal jurisdiction, the court emphasized the very

substantial contacts that existed, including that the defendant was a "California corporation" that "enjoy[ed] the benefits of a vast and dynamic national market" in conducting its business, and so indisputably had strong U.S. contacts. *Id.* In addition, the defendant did "not allege any extraordinary burden from having to defend th[e] lawsuit in New York," but rather, "advert[ed] only to a modest inconvenience of litigating [in New York] rather than in California." *Id.* Importantly, the court explained that the burden on the defendant was minimal because the defendant was a "business enterprise, not an individual of limited means who could not readily cope with being forced to defend a lawsuit far from home." *Id.*

Here, quite the opposite is true. Mr. Steffen has no contacts (or, at most, extremely limited contacts) with the United States. In addition, he is clearly an "individual of limited means who could not readily cope with being forced to defend a lawsuit far from home." *Hallwood*, 104 F. Supp. 2d at 286. As the court in *Hallwood* made clear, the reasonableness inquiry may defeat jurisdiction even where there is a compelling federal interest: "There doubtless will be defendants who show sufficient hardship from being subjected to the jurisdiction of a geographically remote court to overcome even a strong federal interest." *Id.* at 287. Here, of course, there is no strong federal interest since there is no allegation of fraud and no conduct or injury in the United States.

The SEC's second argument – that dismissal will "effectively . . . immunize[]" the defendant for his alleged improper conduct (Opp'n at 14) – is similarly unavailing. As set forth in defendant's opening brief, both Germany and Argentina have taken or are taking actions to vindicate their own stronger interests in Mr. Steffen's alleged conduct. The German government has already resolved an action against Mr. Steffen individually. (*See* Pl.' Brief in Support of its Mot. to Serve Defs. by Alternative Means, June 15, 2012, ECF No. 7 at 7 (acknowledging that

Mr. Steffen was subject to criminal proceedings in Germany "in connection with the facts at issue here").) The Argentine government is conducting its own investigation in which it has recently sought Mr. Steffen's testimony. The fact that the SEC may be unable to pursue its own separate effort to police the offshore activity of this foreign national does not itself supply a compelling rationale to permit it to do so. *See Softpoint*, 2001 WL 43611, at *6 ("evidence of competing foreign forums" for controversy weighs against finding that jurisdiction is reasonable). Of course, the SEC has already vindicated its interest in addressing the improper payments at issue by obtaining a comprehensive remedy against Siemens, the party in which the U.S. government has the strongest interest since it is the SEC registrant.

For all these reasons, this Court lacks personal jurisdiction over Mr. Steffen, and his motion to dismiss should be granted.

II. THE SEC'S CLAIMS ARE TIME-BARRED BY THE STATUTE OF LIMITATIONS.

Alternatively, this Court should grant defendant's motion to dismiss because the SEC failed to file its complaint within the applicable five-year statute of limitations. As defendant explained in his opening brief, there is a strong judicial policy favoring statutes of limitations. Such limitations serve the important public purpose of protecting both defendants and courts from being entangled in "stale claims" "in which the search for truth may be seriously impaired by the loss of evidence, whether by the death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

The SEC disputes that its claims against Mr. Steffen are time-barred for three reasons. First, the SEC asserts that its claims for a permanent injunction and disgorgement are not subject to any limitations period at all. (Opp'n at 23-25.) Second, it contends that the statute of limitations for SEC enforcement actions should be indefinitely tolled where, as here, it attempts

to exercise jurisdiction over foreign defendants residing outside of the United States. (Opp'n at 15-19.) Third, it argues that it has alleged facts suggesting that Mr. Steffen was engaged in a "continuous integrated scheme" that ended less than five years before the complaint was filed. (Opp'n at 19-23.) For the reasons set forth below, these arguments lack merit, and the Court should dismiss the complaint as time-barred.

A. The Statute Of Limitations Applies To All Of The SEC's Claims.

In its opposition, the SEC argues that "equitable remedies are exempted from Section 2462's limitations period." (Opp'n at 23 (citing *SEC v. Kelly*, 663 F. Supp. 2d 276, 286-87 (S.D.N.Y. 2009).) Mr. Steffen does not contest this. Rather, defendant argues that here, on the facts alleged in *this* case, the SEC's requests for an injunction and disgorgement are not equitable in nature because they seek to punish the defendant, as opposed to merely remedy past wrongs or protect the public from future harm. As such, they are subject to § 2462's limitation period.

As courts in this district have explained, the focus of the inquiry in determining whether § 2462's limitations period applies is not whether the relief the SEC seeks is *nominally* a request for injunctive relief or disgorgement, but rather "whether the remedy at issue is 'punitive' or 'remedial' in nature." *SEC v. Schiffer*, No. 97 Civ. 5853, 1998 WL 226101, at *2 (S.D.N.Y. May 5, 1998); *see also SEC v. Jones*, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007) ("[i]n light of the relevant case law, the ordinary meaning of 'penalty,' and the clear language of § 2462, the Court holds that the limitations period in § 2462 applies to civil penalties ***and equitable relief that seeks to punish***") (emphasis added); *SEC v. Lorin*, 869 F. Supp. 1117, 1121-22 (S.D.N.Y. 1994) ("the label placed on a monetary liability – whether, for example, 'fine,' 'penalty,' 'sanction,' or 'disgorgement' – is not dispositive; instead, the determining consideration concerns whether the amount so labeled serves a remedial or punitive function").

As the SEC concedes, "injunctions are remedial, rather than punitive, in nature" only when they are "necessary to protect public investors" or "prevent future harm to the public." (Opp'n at 24.) The cases cited by the SEC are in accord. *See, e.g.*, *Schiffer*, 1998 WL 226101, at *2, n.6 (officer/director bar that "protect[ed] public against future harm and [wa]s based on a defendant's competence to serve in that capacity" was remedial rather than punitive); *Lorin*, 869 F. Supp. at 1130 (no limitation period for injunction and disgorgement where remedies "operate[d] to vindicate a public interest"); *SEC. v. McCaskey*, 56 F. Supp. 2d 323, 326 (S.D.N.Y. 1999) (declining to apply limitations period to equitable remedies and relying on *Schiffer* and *Lorin*).

Here, the SEC's claims for injunctive relief are punitive, and not remedial. Mr. Steffen is 74 years old, retired almost ten years ago from his position at Siemens and has had no involvement with any public company since that time. Under those circumstances, the requested injunctive relief can do nothing to "protect public investors" or "prevent future harm to the public," but rather is transparently intended to punish with the public brand of an injunction. Similarly, the SEC has alleged no facts suggesting any unjust enrichment of Mr. Steffen, which is a necessary element for an equitable order of disgorgement. *See, e.g.*, *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978) ("Unlike damages, [disgorgement] is a method of forcing a defendant to give up the amount by which he was unjustly enriched."). Thus, § 2462's statute of limitations period bars all of the claims brought by the SEC against Mr. Steffen.

B. The Statute Of Limitations Is Not Indefinitely Tolled Because A Foreign Defendant Resides Outside Of The United States.

To support its position that § 2462 "unambiguously" tolls the statute of limitation indefinitely for any foreign defendant residing outside the United States, the SEC simply ignores half the language in the statutory clause on which it relies. The condition affecting the

limitations period at issue is described in a single unitary clause that expressly provides that the limitations period applies "if the offender or the property is found within the United States *in order that proper service may be made thereon*." The plain language of the statue is that, if a defendant is susceptible to proper service emanating from the United States, the limitations period runs as prescribed by law. *See SEC v. Bartek*, No. 11-10594, 2012 WL 3205446, at *3 (5th Cir. Aug. 7, 2012) ("plain language" of § 2462 "provides that a tolling limitation is applicable if the defendant is outside of the United States, ***precluding service of process***") (emphasis added). The SEC's reliance on *District of Columbia v. Heller*, 554 U.S. 570 (2008), which involved the interpretation of separate clauses in the Second Amendment, is misplaced.

The SEC's proposed interpretation – which is supported by no authority – runs contrary to the great weight of authority under which courts consistently refuse to interpret tolling statutes such that the limitations period within them are indefinitely tolled. *See, e.g.*, *Bancorp Leasing & Fin. Corp. v. Agusta Aviation Corp.*, 813 F.2d 272, 275 (9th Cir. 1987) (refusing to toll limitations period where plaintiffs "d[id] not contend they were unable to locate and serve" the foreign defendants); *McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268, 1276 (M.D. Fla. 2008) (refusing to apply Delaware tolling provision in a way that would "effectively result in the abolition of the defense of statutes of limitation in actions involving non-residents, an absurd result") (citation and internal quotation marks omitted).[5]

The SEC's proposed interpretation would lead precisely to such an absurd result in every

[5] The tax cases the SEC cites are simply not relevant. (*See* Opp'n at 18-19.) First, they rely on an entirely different statute that addresses limitation periods for criminal prosecutions and that is precise in providing for the tolling of the limitations period. *See* 26 U.S.C. § 6531 (expressly providing that the "time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States . . . shall not be taken as any part of the time limited by law for the commencement of such proceedings"). Second, the provision operates as to federal taxpayers, who plainly have substantial U.S. connections.

case where, as here, it attempts to extend jurisdiction over foreign nationals residing abroad. Indeed, the SEC's theory that such persons remain perpetually at risk of being subject to SEC enforcement actions defeats the clear purpose of statutes of limitations: to ensure that an adversary is put on notice within a specified period of time and may be free of stale claims. *See Kubrick*, 444 U.S. at 117; *see also Johnson v. SEC*, 87 F.3d 484, 492 (D.C. Cir. 1996) ("it is a cardinal principle of modern law and of this court, that [statute of limitations] are . . . not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims") (citation and internal quotation marks omitted). Worse, it would also "permit a plaintiff to postpone serving process indefinitely; a plaintiff could await a propitious time when witnesses or parties were unavailable and thereby effectively deprive a defendant of any defense the defendant may have." *Bancorp*, 813 F.2d at 276.

Furthermore, the SEC's extreme and unsupported interpretation is unnecessary to achieve what it concedes is the purpose of § 2462: to "prevent[] a defendant from evading prosecution for violations of the United States laws by fleeing to another country, or from 'riding out' a limitations period in a foreign jurisdiction where he is difficult to locate and serve." (Opp'n at 18.) Here, Mr. Steffen has neither fled nor otherwise made himself unknown to the SEC. Once the SEC decided to file suit, it was able to obtain an order to serve Mr. Steffen by publication in Germany. Thus, Mr. Steffen's residence in Germany was no obstacle.

C. The SEC's Continuing Violation Theory Is Inapplicable.

In a final effort to avoid its statute of limitations problem, the SEC suggests that its claims continued to accrue long after any allegedly wrongful conduct by Mr. Steffen had ceased: "Even if the statute of limitations had been running as to defendant Steffen, the clock would not have begun until . . . Siemens received the economic payoff of the bribery scheme." (Opp'n at 21.) This is clearly wrong. Even if the Court were to import the "continuing violation" doctrine,

which is generally applied only in discrimination cases, to this securities case, the theory would not save the SEC's case. *See, e.g.*, *Figueroa v. City of New York*, 198 F. Supp. 2d 555, 564 (S.D.N.Y. 2002), *aff'd*, 118 F. App'x 524 (2d Cir. 2004) (explaining that the continuing violation doctrine is usually associated with discriminatory policy cases and that "[d]istrict courts in this circuit have consistently looked unfavorably on continuing violation arguments"); *de la Fuente v. DCI Telecommunications, Inc.*, 206 F.R.D. 369, 385 (S.D.N.Y. 2002) ("It is not at all clear that the continuing fraud doctrine applies in securities fraud cases.").

First, the continuing violation doctrine only serves to allow recovery for stale claims when a related violation *by the defendant* falls within the limitations period. *See, e.g.*, *Pratts v. Coombe*, 59 F. App'x 392, 395 (2d Cir. 2003) ("[B]ecause [plaintiff's] pursuit of a continuing violation claim requires him to plead both an ongoing policy of deliberate indifference and some non-time-barred acts taken in furtherance of that policy, he must be able to allege ***as to each defendant named***, facts evidencing deliberate indifference after January 10, 1999.") (citation and internal quotation marks omitted) (emphasis added); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 381 (1982) (applying continuing violation theory where plaintiffs alleged that both defendants engaged in a continuing practice of "racial steering" that manifested itself during the limitations period). Although in its opposition the SEC asserts it has evidence that Steffen's involvement continued after his 2002 retirement from Siemens, its complaint alleges no conduct after the "first half of 2003" (Compl. ¶ 51), and at the scheduling conference, the SEC acknowledged that it "[did not] make any specific allegations as to the specific conduct of Mr. Steffen within five years." (Tr. at 6.) Because the SEC has not made any allegations as to Mr.

Steffen within the limitations period, the continuing violation doctrine cannot be used to pursue recovery for claims outside the limitations period.[6]

Second, the fact that the SEC characterizes its allegations against Mr. Steffen as part of a "cohesive scheme or conspiracy" does not change the result. (Opp'n at 22.) As an initial matter, the SEC has not alleged a conspiracy, nor could it as it has no authority to do so. *Central Bank v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (foreclosing actions alleging civil conspiracy to violate securities laws); *see also SEC v. U.S. Envtl., Inc.*, 897 F. Supp. 117, 120 (S.D.N.Y. 1995) (defendant's "personal involvement in a scheme or plan to violate the Securities Acts" insufficient for liability to attach). In any event, the Second Circuit has made clear that "accrual of a cause of action based on specific acts of which a plaintiff was aware cannot be postponed, nor can a limitations period be tolled, simply by alleging that the acts were taken pursuant to a conspiracy." *Pearl v. City of Long Beach*, 296 F.3d 76, 87 (2d Cir. 2002); *see also Pinaud v. County of Suffolk*, 52 F.3d 1139, 1157 (2d Cir. 1995) (same); *Singleton v. City of New York*, 632 F.2d 185, 192 (2d. Cir. 1980) ("[i]t is the wrongful act, not the conspiracy, which is actionable").[7]

Third, the SEC's contention that the statute of limitations "would not have begun until

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[6] *SEC v. Kelly*, cited in the SEC's opposition, is clearly distinguishable. That case involved four individuals who were at all relevant times employed as senior managers of AOL and who were each individually alleged to have engaged in acts intended to falsify AOL's financial statements, including one filed within the limitations period. 663 F. Supp. 2d at 284, 287-88. As discussed above, there are no such allegations that Mr. Steffen's own conduct resulted in a violation during the limitation period.

[7] The SEC also cites cases discussing a co-conspirator's "receipt of profits" as an indication of a co-conspirator's continuing involvement in a scheme. (*See* Opp'n at 20-22 (citing *United States v. Salmonese*, 352 F.3d 608, 616-17 (2d Cir. 2003), *and SEC v. Boock*, No. 09 CIV. 8261, 2011 WL 3792819, at *3 (S.D.N.Y. Aug. 25, 2011)).) Aside from the fact that there is no conspiracy charge here, these cases are inapposite for a second, independent reason: the SEC does not allege that Mr. Steffen received any profits (or any compensation at all) from Siemens' allegedly improper conduct.

February 6, 2007" when the ICSID arbitration award was made (*see* Opp'n at 23) must also be rejected because the arbitration award is not a violation of the law but is, at mos,t a "continuing effect" of the prior, allegedly improper, conduct. *See SEC v. Jones*, No. 05 CIV. 7044, 2006 WL 1084276, at *5 (S.D.N.Y. Apr. 25, 2006) (receipt of monies during limitation period that resulted from allegedly fraudulent nondisclosure before the limitation period was not a continuing violation); *see also SEC v. Leslie*, No. C 07-3444, 2010 WL 2991038, at *35 (N.D. Cal. July 29, 2010) ("To the extent that the [continuing violation] doctrine applies, it may not be predicated on the continuing ill-effects of the original violation; rather, it requires continued unlawful acts.").

The same is true here. In arguing that the receipt of the arbitration award is "nothing like [a] continual ill effect" from prior wrongful conduct, the SEC relies on *Kelly*, 663 F. Supp. 2d at 288. (Opp'n at 20.) But in *Kelly*, the court's application of the continuing violation theory was based on the date when the "last affirmative misstatement" – "the filing of a false and misleading form 10-Q" – was alleged in the complaint. *Id.* Thus, there was clearly an "unlawful act[]" within the limitations period. Unlike in *Kelly*, the ICSID arbitration award does not reflect an *act* taken by any of the defendants, but rather is precisely the kind of "continued ill effect" that the court distinguished.

For all of these reasons, the continuing violation theory clearly does not apply and, accordingly, all of the SEC's claims against Mr. Steffen are time-barred.

CONCLUSION

For the foregoing reasons, and those set forth in defendant's opening memorandum, the SEC's complaint should be dismissed with prejudice.[8]

[8] The SEC stated that it did not intend to amend the complaint with regard to personal jurisdiction or otherwise. *See* Sept. 28, 2012, Tr. at 3.

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Respectfully submitted,

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