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-9073 (SAS)

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM IN OPPOSITION TO DEFENDANT STEFFEN'S MOTION TO DISMISS THE COMPLAINT

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Plaintiff, the U.S. Securities and Exchange Commission ("SEC"), responds as follows to the motion to dismiss the complaint submitted by defendant Herbert Steffen.

PRELIMINARY STATEMENT

Steffen's motion contends (1) that the Court lacks personal jurisdiction over him and (2) that the SEC's claims are time-barred under the five-year statute of limitations set forth in 28 U.S.C. § 2462. The Court should deny the motion on both grounds.

Steffen is subject to personal jurisdiction in this Court because his conduct caused foreseeable consequences in the United States. The complaint alleges that Steffen played a central role in a long-running bribery scheme at Siemens Aktiengesellschaft ("Siemens"); that he coerced a reluctant lower-ranking official to authorize and cover up bribe payments; and that his actions caused Siemens to file annual and quarterly reports with the SEC in the United States that misrepresented the company's financial statements and that included false Sarbanes-Oxley certifications. The exercise of personal jurisdiction over Steffen on these facts is consistent with a long line of Second Circuit case law and entirely reasonable. Because Section 27 of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78aa, provides for nationwide service of process, the Court need not look to New York's long-arm statute, the N.Y. C.P.L.R., as a basis for jurisdiction.

Nor are the SEC's claims time-barred. The plain language of 28 U.S.C. § 2462 provides that the five-year limitations period runs only "if, within the same period, the offender . . . is found within the United States in order that proper service may be made thereon." 28 U.S.C. § 2462. Steffen is a German national who, by his own admission, has lived outside the United States during the entire relevant period. And even if he had spent the last five years in this country, the bribery scheme Steffen was a part of did not conclude until February 6, 2007, when

Siemens realized the scheme's objective, a $217 million arbitration award against the Argentine government. The SEC filed its complaint less than five years later, on December 13, 2011. Finally, as a long line of decisions in the Southern District of New York have recognized, the SEC's claims for equitable relief -- in this case, an injunction and disgorgement -- are not subject to Section 2462 at all.

FACTS ALLEGED IN THE COMPLAINT

In a scheme that lasted from 1996 until early 2007, senior executives at Siemens paid scores of millions of dollars in bribes to top Argentine government officials, including two Presidents, in connection with a $1 billion contract (the "DNI Contract") to produce national identity cards (or *Documentos Nacionales de Identidad*) for Argentine citizens. [Comp. ¶¶ 1, 2, 25] Siemens won the award in 1998. [Comp. ¶ 2] But after a change in administrations resulted in the contract's suspension, and later cancellation, Siemens paid additional bribes in a failed effort to revive the project. *Id*. In 2002, the company filed for arbitration against Argentina with the World Bank's International Centre for Settlement of Investment Disputes ("ICSID") in Washington, D.C. [Comp. ¶¶ 2, 60] In order to prevail in the arbitration, Siemens paid additional bribes to suppress evidence that the contract had been obtained through corruption. *Id*. The last bribe payment under the scheme was made in January 2007. [Comp. ¶ 65] And on February 6, 2007, Siemens received an award from ICSID of $217 million plus interest. [Comp. ¶¶ 3, 62]

Defendant Herbert Steffen played an active and knowing role in the bribery scheme. Between 2000 and 2003, Steffen was the Group President of Siemens Transportation Systems and the former CEO of Siemens Argentina. [Comp. ¶ 12] Because of Steffen's longstanding Latin American connections, defendant and Managing Board member Uriel Sharef, recruited

him to help revive the DNI Contract and to facilitate any associated bribes. *Id*. Steffen met directly with senior government officials in Argentina and offered them bribes on Siemens' behalf. [Comp. ¶ 12] He also pressured a subordinate officer, Bernd Regendantz, to make the bribe payments that Steffen and others had promised. [Comp. ¶¶ 12, 37, 39, 40]

Steffen knowingly participated in a course of conduct, not only to bribe government officials, but also to falsify the books and records and evade the internal accounting controls of a public company registered with the SEC. Steffen was in a position to know that the bribes he coerced Regendantz into paying [Comp. ¶¶ 37, 39, 40] would be falsely recorded in Siemens' general ledger. [Comp. ¶ 15] Steffen also knew that once Regendantz paid the bribes, his certifications under the Sarbanes-Oxley Act would be rendered false. [Comp. ¶¶ 5, 15, 59] As a Divisional Group President, [Comp. ¶ 12] As a top Siemens official, Steffen was in a position to know that the falsified general ledger entries and Sarbanes-Oxley certifications would be incorporated into Siemens' annual and quarterly SEC filings. [Comp. ¶ 21] Steffen would also have known that Siemens' false SEC filings would be relied upon by investors in the United States.

1. The DNI Contract Bribery Scheme

In November 1998, Siemens entered into the DNI Contract with the government of Argentina after having paid bribes to win the award. [Comp. ¶ 25] The following year, Argentina threatened to terminate the contract unless the terms were renegotiated. [Comp. ¶ 26] In December 2000, defendants Steffen and Sharef met with newly elected President De la Rua and other senior government officials. [Comp. ¶27] At the meeting, Siemens acquiesced in substantial price concessions in return for a promise that De la Rua would issue a national decree mandating the purchase of new identity cards, thus re-authorizing the contract. *Id*.

Simultaneously, other Siemens executives were told by intermediaries that the Argentine government would not re-authorize the DNI Contract unless the company paid $27 million in additional bribes. [Comp. ¶ 28] These included payments that had previously been promised to officials in the outgoing Menem administration, as well as new payments to the incoming De la Rua administration, including to President De la Rua himself. *Id*. On January 3, 2001, as a pretext for the payments, Siemens entered into a sham $27 million consulting contract with MFast Consulting AG ("Mfast"). [Comp. ¶ 30] However, on May 18, 2001, before Siemens could process the MFast payments, the Argentine government canceled the contract. [Comp. ¶ 33]

In response to the cancellation, the then-CEO of Siemens and defendant Sharef formed a "crisis management team" and brought Steffen on as a member. [Comp. ¶ 34] Steffen had two roles on the team. First, he continued to serve as an intermediary between Siemens and Argentine officials, assuring the officials that they would receive the $27 million they had been promised. [Comp. ¶ 12] Second, acting under the auspices of Siemens' CEO and a Managing Board member [Comp. ¶ 34], Steffen applied pressure on a reluctant lower-ranking Siemens official to make (and find a way to cover up) the illegal payments. [Comp. ¶¶ 12, 37, 39, 40]

2. Steffen Coerces Regendantz into Making and Covering up $10 Million in Bribe Payments.

Bernd Regendantz became the Chief Financial Officer of Siemens Business Services ("SBS") in February 2002. [Comp. ¶ 39] As soon as he took on that role, Regendantz was approached by Steffen, who pressured him to authorize the $27 million in bribe payments. *Id*. Initially Regendantz resisted. [Comp. ¶ 40] But the pressure Steffen applied was unrelenting. In the Spring of 2002, Steffen urged Regendantz numerous times, in person and over the telephone, to make the payments. *Id*. In April 2002, Steffen told Regendantz that SBS had a

"moral duty" to make at least an "advance payment" of $10 million to the payment intermediaries behind MFast. *Id*. Steffen told Regendantz that he had received threats from Argentine government officials because the long-promised bribes remained unpaid. *Id*.

Regendantz complained to Siemens' Head of Compliance, Chief Financial Officer, Chief Executive Officer, and two members of the Managing Board that the payment demands lacked a legitimate commercial basis. [Comp. ¶ 41] In the end, however, Regendantz did authorize the payments, believing that to be the instruction of his superiors. *Id*. In July 2002, Regendantz made a first tranche payment of $5.2 million, which was routed through an intermediary in Uruguay. [Comp. ¶¶ 44, 47] Regendantz's subordinates generated a series of fictitious documents to obscure the audit trail. [Comp. ¶ 44] These included a backdated consulting agreement with a Uruguayan front company and backdated phony invoices. [Comp. ¶¶ 45, 46] The second tranche, in the amount of $4.7 million, was made in February 2004. [Comp. ¶ 48]

In the first half of 2003, much of the promised $27 million in bribes remained unpaid, and the payment demands from Argentine officials continued. [Comp. ¶ 51] In his role as intermediary, Steffen passed along the demands and urged defendant Sharef to find a way to make the additional payments. *Id*. In mid-2003, Sharef gave instructions for an additional $11.79 million to be paid to the Argentine officials through Siemens' Power Transmission and Distribution ("PTD") operating group. *Id*. Those payments were falsely recorded as expenses incurred in connection with an active PTD project. *Id*.

The final tranche of the $27 million in bribes was paid on January 11, 2007, in the amount of $8.80 million. [Comp. ¶ 65] That payment was made to MFast Consulting in settlement of a sham arbitration proceeding brought by MFast against Siemens under the

auspices of the International Chamber of Commerce ("ICC") in Zurich, Switzerland. [Comp. ¶¶ 63-66]

3. The ICSID Arbitration

In July 2001, once the DNI Contract was canceled, Siemens sought to recover the economic benefit of the bribe scheme through arbitration. That month, the company sent a letter preserving its right to file an ICSID arbitration claim against Argentina and demanding lost profits and out of pocket costs. [Comp. ¶ 35] In May 2002, Siemens filed its arbitration claim with ICSID in Washington, D.C. [Comp. ¶ 43] Steffen knew of the filing. *Id*.

In order to preserve the viability of its ICSID arbitration claim, it was necessary for Siemens to exclude evidence that it had originally obtained the DNI Contract through bribery. [Comp. ¶ 37] Had the Argentine officials not received the $27 million they had been promised, Siemens faced a risk that the officials would retaliate by introducing evidence of corruption in the award of the contract, thus undermining Siemens' claim for damages. *Id*. Steffen continuously applied pressure on Siemens management to funnel more money to Argentine officials for the purpose of suppressing that evidence. *Id*.

Siemens succeeded in keeping any allegation of bribery out of the ICSID arbitration until September 2005, by which time the evidence was deemed too late to be considered. [Comp. ¶ 60] The bribes that Steffen pressured Regendantz to make were instrumental in achieving this result. *Id*. On February 6, 2007, Siemens realized the object of its bribe scheme when ICSID awarded the company $217,838,430 for its loss of investment plus interest. [Comp. ¶ 62]

4. Steffen's Contacts with the United States

Steffen was a senior executive officer [Comp. ¶ 12] of a public company registered with the SEC in the United States. [Comp. ¶ 17] Steffen was in a position to know that Siemens had

obligations both to report on the company's financial results and to certify to the adequacy of its internal controls. Steffen would have been aware that Siemens' public filings were made available to, and relied upon by, investors in the United States. By coercing Regendantz into making bribe payments to Argentine government officials, Steffen took actions that he knew or should have known would result in the falsification of Siemens' SEC filings.

The bribe payments that Steffen coerced Regendantz into making could not be booked as "bribes" on the company's general ledger without running afoul of Siemens' internal accounting controls. Instead, Regendantz had to falsely record the payments as legitimate business expenses, with fictitious supporting paperwork to back up the bookings. [Comp. ¶¶ 44-47] At year-end and at the end of each quarter, SBS, Regendantz's operating group, therefore reported operating expenses and tax liabilities that were false. Illegal bribes were reported as legitimate expenses, and disallowed expenses were reported as tax deductible ones. SBS's false financial results were consolidated into those of Siemens, [Comp. ¶ 21] thereby rendering the parent company's reported operating expenses and tax liabilities equally false. Siemens' tainted financial statements were included in annual and quarterly reports filed with the SEC on Forms 20-F and 6-K. *Id*. To a corporate officer with Steffen's level of seniority, a jury may properly conclude that these consequences of his illegal actions were entirely foreseeable.

By his role in the bribery scheme, Steffen also knowingly caused the falsification of Siemens' Sarbanes-Oxley certifications. Section 906 of the Sarbanes-Oxley Act requires the Chief Executive and Chief Financial Officers of public companies to certify that every periodic SEC filing "fully complies with" the Exchange Act's books and records and internal controls provisions; and that the filing "fairly presents, in all material respects, the financial condition and results of operations of the issuer." 18 U.S.C. § 1350. In making these certifications, Siemens'

CEO and CFO relied upon sub-certifications signed by the CEOs and CFOs of each subordinate operating group, including both Steffen [Comp. ¶ 12] and Regendantz. [Comp. ¶ 59] By coercing Regendantz into making bribe payments, Steffen knew or should have known that he was also, of necessity, forcing Regendantz to falsify his Sarbanes-Oxley sub-certifications. [Comp. ¶ 15] Steffen knew or should have known that this rendered the CEO and CFO certifications in Siemens' annual and quarterly SEC filings equally false.

STANDARD ON A MOTION TO DISMISS

"Defendant's burden on a motion to dismiss pursuant to Rule 12(b)(6) is indeed substantial, as '[i]t has been said that the motion to dismiss for failure to state a claim is disfavored and is seldom granted.'" *Compudyne Corp. v. Shane*, 453 F. Supp. 2d 807, 817 (S.D.N.Y. 2006). *Accord Rothman v. Gregor*, 220 F.3d 81, 92 (2d Cir. 2000). When evaluating a motion to dismiss, the facts in the complaint are presumed to be true and all factual inferences must be drawn in the plaintiff's favor and against the defendant. *ATSI Comm., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). The court's role is limited to "merely assess[ing] the legal feasibility of the complaint, not to assay[ing] the weight of the evidence which might be offered in support thereof." *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 176 (2d Cir. 2004). "At the pleading stage, then, '[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Id*. at 177 (quoting *York v. Ass'n of the Bar*, 286 F.3d 122, 125 (2d Cir. 2002)).

ARGUMENT

1. The Complaint Adequately Alleges that this Court has Personal Jurisdiction over Defendant Steffen.

Steffen argues that the Court lacks personal jurisdiction over him, both under the Constitution and under New York's long-arm statute, set forth at N.Y. C.P.L.R. §§ 301 and 302.

Both positions are untenable. The applicable long-arm provision is not the N.Y. C.P.L.R., but Section 27 of the Exchange Act, 15 U.S.C. § 78aa, which provides for nationwide service of process and has been construed in this Circuit to provide for jurisdiction to the fullest extent of the due process clause. In applying Section 27, courts have routinely held that foreign defendants who knowingly or foreseeably cause the falsification of SEC filings have subjected themselves to jurisdiction in the United States.

A. Standard of Review for Determining Personal Jurisdiction

"Where, as here, no discovery has taken place, the plaintiff need make only a prima facie showing of jurisdiction by pleading in good faith . . . legally sufficient allegations of jurisdiction." *In re Parmalat Securities Litigation*, 376 F. Supp. 2d 449, 452 (S.D.N.Y. 2005). All allegations must be construed in the light most favorable to the SEC "and all doubts resolved in [the SEC's] favor, notwithstanding controverting evidence." *Itoba Ltd. v. LEP Group PLC*, 930 F. Supp. 36, 40 (D.Conn. 1996). "Eventually personal jurisdiction must be established by a preponderance of the evidence, either at an evidentiary hearing or at trial." *A.I. Trade Fin., Inc. v. Petra Bank*, 989 F.2d 76, 79 (2d Cir. 1993).

Section 27 of the Exchange Act, 15 U.S.C. § 78aa, establishes the basis for personal jurisdiction in securities cases. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir.1972); *Landry v. Price Waterhouse Chartered Accountants*, 715 F. Supp. 98, 101 (S.D.N.Y. 1989); *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1250–51 (S.D.N.Y.1984); *In re CINAR Corp. Securities Litigation*, 186 F. Supp. 2d 279, 304-05 (E.D.N.Y. 2002).

Section 27 "permits the exercise of personal jurisdiction to the limit of the due process clause of the Fifth Amendment." *SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990)

(citing *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 998 (2d Cir. 1975); *Leasco*, 468 F.2d at 1339). *Accord Parmalat*, 376 F. Supp. 2d 449 (S.D.N.Y. 2005); *SEC v. Softpoint, Inc.*, No. 95-CV-2951 (GEL), 2001 WL 43611, at *2 (S.D.N.Y. Jan. 18, 2001). "Since . . . Congress meant § 27 to extend personal jurisdiction to the full reach permitted by the due process clause, it is unnecessary to discuss the applicability of the [N.Y. C.P.L.R.], which could reach no further." *Leasco*, 468 F.2d at 1339.

The constitutional limit of the Court's jurisdiction under Section 27 is framed by the minimum contacts analysis set forth in *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny. *Hallwood Realty Partners L.P. v. Gotham Partners L.P.*, 104 F. Supp. 2d 279, 283 (S.D.N.Y. 2000). Under the Exchange Act, the Court's inquiry must focus on the defendant's contacts with the entire United States, rather than those solely with the State of New York. "Second Circuit authority clearly establishes that the constitutionality of in personam jurisdiction in federal question cases where Congress has provided for worldwide service is to be determined by national, rather than local, contacts." *Softpoint*, 2001 WL 43611, at *5. *Accord Parmalat*, 376 F. Supp. 2d 449, 453 (S.D.N.Y. 2005); *Hallwood Realty*, 104 F. Supp. 2d at 286.

Personal jurisdiction under the due process clause depends upon "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). A nonresident defendant need not be physically present in the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). Instead, the Court may exercise jurisdiction upon a showing that defendant has purposefully directed his activities toward the residents of the forum state, or otherwise "purposefully avail[ed him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Where, as here, the cause of action arises out of the defendant's contacts

with the forum, the Court exercises "specific," as opposed to "general," jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8 (1984).

The Court may exercise personal jurisdiction over a foreign defendant who causes an effect in the United States by an act committed elsewhere. *Landry*, 715 F. Supp. at 101 (citing *Leasco*, 468 F.2d at 1341). *Accord Reingold*, 599 F. Supp. at 1259. "[T]his is a principle that must be applied with caution, particularly in an international context." *Leasco*, 468 F.2d at 1341. The defendant, "must know, or have good reason to know, that his conduct will have effects in the state seeking to assert jurisdiction over him." *Id*.

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 320. The factors to be considered are: "(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies." *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996).

"The burden is on the defendant to demonstrate that the assertion of jurisdiction in the forum will 'make litigation so gravely difficult and inconvenient that [he] unfairly is at a severe disadvantage in comparison to his opponent.'" *Softpoint*, 2001 WL 43611, at *5 (quoting *Burger King*, 471 U.S. at 478)). "This prong of the inquiry rarely defeats jurisdiction where a defendant has sufficient forum contacts . . . and is largely academic in non-diversity cases brought under a federal law that provides for nationwide service of process." *Id*. (citing *Asahi Metal Indus. Co.*

v. Superior Court, 480 U.S. 102, 116 (1987)). "In the last analysis, the question is whether the burden on [Steffen] of litigating this case in New York is so severe that the exercise of personal jurisdiction over [him] is arbitrary, shocks the conscience, or offends fundamental principles of ordered liberty, notwithstanding the strong federal interest in efficient and effective enforcement of the securities laws." *Hallwood Realty*, 104 F. Supp. 2d at 286-87.

B. Steffen is Subject to Personal Jurisdiction Because His Conduct Caused Foreseeable Consequences in the United States.

In actions brought under the securities laws, courts routinely uphold personal jurisdiction over foreign defendants whose actions abroad foreseeably result in the falsification of financial statements filed with the SEC. In *SEC v. Stanard*, No. 06-cv-7736 (S.D.N.Y. May 16, 2007) (Lynch, J.) (unpublished transcript, attached as Ex. 1), an executive who manipulated the reported earnings of a public company by engaging in sham reinsurance transactions was properly haled into this Court by virtue of the impact his actions had on the company's SEC filings. "Where an executive of a foreign securities issuer, wherever located, participates in a fraud directed to deceiving United States shareholders in violation of federal regulations requiring disclosure of accurate information" he has caused consequences in the forum. *Id*. at 3. "SEC regulations would be meaningless as applied to foreign issuers of U.S.-traded securities if the United States courts lacked jurisdiction over executives abroad who violate those regulations." *Id*.

Judge Lynch's decision in *Stanard* is consistent with a long line of precedent in this and other courts. *See Parmalat*, 376 F. Supp. 2d 449, 454-55 (S.D.N.Y. 2005) (jurisdiction upheld over Italian auditor in connection with the misleading financial statements filed with the SEC); *Landry*, 715 F. Supp. at 102 (jurisdiction upheld over a Canadian board member who

orchestrated a fraudulent corporate acquisition resulting in misleading financial statements filed with the SEC); *Reingold*, 599 F. Supp. at 1259 (jurisdiction upheld over Australian auditor of fraudulent registration statement); *CINAR*, 186 F. Supp. 2d at 305-06 (jurisdiction upheld over Canadian general counsel for signing a fraudulent registration statement); *In re Royal Dutch/Shell Transport Securities Litigation*, 380 F. Supp. 2d 509, 551 (D.N.J. 2005) (jurisdiction upheld over British corporate official who signed SEC filings containing misleading statements about petroleum reserves); *Derensis v. Coopers & Lybrand Chartered Accountants*, 930 F. Supp. 1003, 1014 (D.N.J. 1996) (jurisdiction upheld over Canadian corporate officers who approved financial statements that overstated the inventory of a gold mining company); *Itoba*, 930 F. Supp. at 40-41 (jurisdiction upheld over British board chairman who approved a fraudulent Form 20-F filing with the SEC).

Steffen's conduct in causing the falsification of Siemens' annual and quarterly filings with the SEC falls squarely within this line of cases. By coercing Regendantz to pay some $10 million in bribes, Steffen caused Siemens to report those illegal payments as legitimate business expenses. Because bribes are not tax deductible, he also caused Siemens to misstate its tax liabilities and after-tax income. Further, Steffen caused the Sarbanes-Oxley certifications in Siemens' annual report on form 20-F to be rendered false as well. A jury may reasonably find that these effects in the United States were, to a corporate executive at Steffen's level of seniority and sophistication, eminently foreseeable consequences of his illegal conduct abroad.

In addition to these contacts, Steffen also discussed the bribery scheme over the telephone with defendant Sharef while Sharef was in the United States, and a portion of the payments that Steffen pressured Regendantz to make were deposited in a New York bank. [Comp. ¶¶ 12, 46, 47]

C. The Exercise of Personal Jurisdiction Over Steffen is Reasonable.

Steffen contends that even if he has established sufficient minimum contacts with the United States, it would be "unreasonable" to exercise jurisdiction over him. [Steffen Br. at 6-7] This argument must be rejected as well. As Judge Lynch held in *Softpoint*, "This prong of the inquiry rarely defeats jurisdiction . . . and is largely academic in non-diversity cases brought under a federal law which provides for nationwide service of process." *Softpoint*, 2001 WL 43611, at *5. The reasons are straightforward. Congress in Section 27 recognized that the United States has a compelling interest in the enforcement of the federal securities laws. *Hallwood Realty*, 104 F. Supp. 2d at 286. And unlike a private diversity action, there is no alternative forum available to the government. If the SEC cannot proceed against Steffen in the federal courts of the United States, then he will effectively have been immunized for the securities violations with which he is charged. Whatever the inconvenience of defending himself in the United States, it does not "shock the conscience" for Steffen to answer the SEC's charges here.

The Court should therefore reject Steffen's personal jurisdiction challenge.

2. The Commission's Claims Are Not Time Barred.

Steffen argues that the SEC's claims are barred by the five-year catch-all limitations period set forth in 28 U.S.C. § 2462. [Steffen Br. at 8-12] This argument fails on both the law and the facts. In its plain language, Section 2462 provides that the limitations period does not run unless the defendant "is found within the United States" within the five-year period. Steffen, a German citizen claiming not even minimal contacts with the United States, fails to satisfy his burden of showing that he was in the United States during the past five years. Further, the bribery scheme alleged in the complaint did not conclude until February 2007, less than five years before the

complaint was filed in December 2011. The two acts that occurred in 2007 -- the final bribe payment of $8.8 million in January [Comp. ¶ 65] and the ICSID arbitration award on February 6 [Comp. ¶ 62] -- were integral elements of a single coherent scheme, of which Steffen was a core member. Finally, Steffen's argument that the SEC's claims for equitable relief are punitive, and thus subject to the five-year limitation of Section 2462, is premature and has been rejected by the overwhelming weight of authority in this Circuit.

A. Standard of Review for Statute of Limitations

Statute of limitations is an affirmative defense, and the defendant bears the burden of proof on this element. Fed. R. Civ. P. 8(c). On a motion to dismiss under Rule 12(b)(6), a claim may be dismissed as time-barred only if the factual allegations in the complaint clearly show that the claim is untimely. *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999). "The determination when a statute of limitations began to run is generally a factual one." *Bild v. Konig*, No. 09-cv-5576 (ARR), 2011 WL 666259, at *3 (E.D.N.Y. Feb. 14, 2011) (citing *Bice v. Robb*, 324 Fed. App'x 79, 81 (2d Cir. 2009) (reversing and remanding because running of the limitations period "turns on a number of unresolved issues of fact that would benefit from discovery.")). Thus, a "motion to dismiss is often not the appropriate stage to raise affirmative defenses like the statute of limitations." *Id. (*citing *Ortiz v. City of New York*, 755 F. Supp. 2d 399, 401 (E.D.N.Y. 2010)). Accordingly, "unless the complaint alleges facts that create an ironclad defense, a limitations argument must await factual development." *Id*. (citing *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323, 354 (D. Vt. 2010)).

B. The Statute of Limitations in Section 2462 Did Not Run as to Steffen, Who Was Not Found Within the United States.

The Exchange Act does not contain a limitations period. Therefore, to the extent the SEC's claims are subject to a statute of limitations, the catch-all period in 28 U.S.C. § 2462 applies. *SEC*

v. Kelly, 663 F. Supp. 2d 276, 288 (S.D.N.Y. 2009).[1] The statute 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 first hurdle Steffen must overcome is to demonstrate that during the five years before the filing of the complaint he was "found within the United States." He cannot meet this burden. Not only does Steffen fail to allege a presence in this country, his entire argument on personal jurisdiction rests on the premise that he has not traveled to the United States or otherwise even established minimal contacts here. [Steffen Br. at 3-4] Steffen therefore cannot show that the limitations period in Section 2462 has started to run against him.

The Supreme Court directs that "statutes of limitations sought to be applied to bar rights of the Government must receive a strict construction in favor of the Government." *Badaracco v. Comm'r IRS*, 464 U.S. 386, 391 (1984) (quoting *E.I. Dupont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924)). Here, the statutory language is unambiguous on its face. The five-year limitations period runs only "if, within the same period, the offender . . . is found within the United States." 18 U.S.C. § 2462. The Court's inquiry should end with the plain language of the statute.

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[1] For the sake of the present motion, the SEC assumes *arguendo* that Section 2462 applies to SEC enforcement claims. We note, however, that other than the Second Circuit's dictum in *SEC v. Gabelli*, 653 F.3d 49, 58 (2d Cir. 2011), *cert. granted*, No. 11-1274, 2012 WL 1410381 (U.S. Sept. 25, 2012), that Section 2462 is "the relevant statute of limitations," the Court of Appeals has not held that SEC enforcement actions are subject to Section 2462. See *SEC v. Leffers*, 289 Fed. App'x. 449, 451 (2d Cir. 2008) ("this Circuit has not held that SEC enforcement actions are subject to the five-year catch-all statute of limitations in 28 U.S.C. § 2462."). Moreover, two circuits have suggested that no statute of limitations applies to SEC enforcement actions. *See SEC v. Wyly*, 788 F. Supp. 2d 92, 102, n. 67, (S.D.N.Y. 2011) (citing *SEC v. Calvo*, 378 F.3d 1211 (11th Cir. 2004); *SEC v. Diversified Corp. Consulting Group*, 378 F.3d 1219 (11th Cir. 2004); *SEC v. Rind*, 991 F.2d 1486 (9th Cir. 1993)).

See United States v. Gayle, 342 F.3d 89, 92 (2d Cir. 2003) (if the statutory terms are unambiguous, the inquiry generally ends there, and the statute is construed according to its plain meaning).

Although Steffen criticizes the statute on policy grounds, [Steffen Br. at 10-11] he does not articulate a plausible alternative reading of Section 2462's tolling provision. Steffen seems to suggest that the five-year limitation should run against him if he is either "found within the United States" or subject to service of process in Germany. But this plainly is not how the statute reads. Steffen's interpretation improperly conflates the tolling provision's *operative language* ("if, within the same period, the offender . . . is found within the United States") with the *statement of purpose* that follows it ("in order that proper service may be made").

The Supreme Court rejected this precise error in *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008), when it interpreted the Second Amendment to the Constitution.[2] Like Section 2462, the Second Amendment "is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose." *Id*. Such a structure was not unusual in the early 1800's, when the predecessor to Section 2462 was drafted. "[L]egal documents of the founding era . . . commonly included a prefatory statement of purpose." *Id*. An explanatory clause may "resolve an ambiguity in the operative clause. . . . But apart from that clarifying function, [it] does not limit or expand the scope of the operative clause." *Id*. By its terms then, Section 2462 did not run as to defendant Steffen if he was not "found within the United States," regardless of whether he was subject to service.

The operative clause, "if found within the United States," has been present in Section 2462 and predecessor statutes since 1839. [Act of Feb. 28, 1839, ch. 36, §4, 5 Stat. 322] [Ex. 2] The clause was understood from the start to toll the limitations period for defendants outside the United

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[2] "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." U.S. Const. amend. II.

States. *See United States v. Brown*, 24 F.Cas. 1263 (D.Ma. 1873) (holding that the 1839 tolling provision did not apply in a criminal prosecution for an assault at sea but would prevent the statute from running in a civil action for money penalties). Since that time, Congress revisited the tolling provision twice, in 1940 and again in 1948.[3] Each time, Congress revised and modernized the statute's phrasing, but left the substance of the tolling provision intact, thus reaffirming its judgment that the provision served a valuable public policy.

The rationale underlying Congress' decision to toll the limitations period for overseas defendants is not at all "nonsensical." [Steffen Br. at 10] The tolling provision prevents a defendant from evading prosecution for violations of 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. *See United States v. Yip*, 248 F. Supp. 2d 970, 974 (D.Haw. 2003) (upholding an analogous extraterritorial tolling provision in 26 U.S.C. § 6531(5)) ("[T]here is no indication that Congress desired to put a burden on the Government with respect to determining … the extent to which a defendant purposefully puts himself outside the reach of the legal process and thereby interferes with the government investigation. Instead, the statute states in clear and certain terms that the time will simply toll for any travel outside of the United States.").

While there is no recent case law interpreting Section 2462's tolling provision, a parallel extraterritorial exception to a limitations period in the U.S. Tax Code, 26 U.S.C. § 6531, has been tested and repeatedly upheld as constitutional, enforceable, and unambiguous. *See United States v. Edkins*, 421 Fed. App'x. 511, 514 (6th Cir. 2010) ("As authorized by 26 U.S.C. § 6531, the court excludes this time outside of the country from the statute of limitations calculation, rendering the indictment timely."); *United States v. Ohle*, 678 F. Supp. 2d 215, 230 (S.D.N.Y. 2010) (citing

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[3] 28 U.S.C. § 791 (1940 ed.); 28 U.S.C. § 2462 (1948 ed.). [Ex. 2]

United States v. Myerson, 368 F.2d 393, 395 (2d Cir. 1966), and *United States v. Marchant*, 774 F.2d 888, 892 (8th Cir. 1985)); *Yip*, 248 F. Supp. 2d at 973.

Because Steffen does not contest that he was outside the United States during the relevant period, the five-year statute of limitations of 28 U.S.C. § 2462, by its clear terms, does not bar the SEC's claims against him.

C. The Bribery Scheme Alleged in the Complaint Continued Until February 2007, Within the Five Year Limitations Period.

The second obstacle to Steffen's proffered limitations defense lies in the facts alleged in the SEC's complaint. The SEC charges Steffen with participating in a continuous integrated scheme to bribe Argentine government officials in connection with the DNI Project, a scheme that did not end until February 6, 2007, less than five years before this action was brought. [Comp. ¶¶ 1-4] "During the relevant 2001-07 time period, . . . Herbert Steffen . . . had a role in authorizing, negotiating, facilitating, or concealing bribe payments in connection with the DNI Contract." [Comp. ¶ 4]

Steffen's role in the scheme was central. As the Group President of Siemens' Transportation Group and former CEO of Siemens Argentina, Steffen was initially brought into the scheme to leverage his longstanding Latin American connections in an effort to salvage the DNI Contract. [Comp. ¶¶ 12, 27] He met directly with senior Argentine officials, including the President, negotiating their demands for bribe payments. *Id*. He formed part of the "crisis management team," whose function was to assume control over and attempt to reinstate the troubled DNI Contract through bribes. [Comp. ¶ 34] Steffen had an active part in the effort, even applying pressure to defendant Regendantz to authorize bribes. [Comp. ¶¶ 12, 37, 39-40] In 2003, Steffen urged defendant Sharef to meet the demands of Argentine officials to make additional payments. [Comp. ¶ 51]

The final illegal payment, made in furtherance of the DNI bribery scheme, occurred in January 2007. [Comp. ¶ 65] That $8.8 million payment, purporting to settle the sham ICC arbitration between Siemens and the payment intermediary MFast, had two purposes. It was the final installment of the $27 million that Siemens had promised Argentine officials as early as 2000. [Comp. ¶¶ 28-30] At the same time, it was meant to keep the Argentine authorities from defeating Siemens' ICSID arbitration claim by revealing the bribery scheme surrounding the contract acquisition. [Comp. ¶37] Largely as a result of the bribes it paid, Siemens prevailed in the ICSID arbitration and received a $217 million judgment on February 6, 2007. [Comp. ¶62]

The bribery scheme alleged in the complaint, beginning in the late 1990's and ending with the ICSID arbitration award in February 2007, was a unified, cohesive enterprise. "Where a violation, occurring outside of the limitations period, is so closely related to other violations, not time-barred, as to be viewed as part of a continuing practice such that recovery can be had for all violations." *Kelly*, 663 F. Supp. 2d at 288. *See also U.S. v. Brown*, 578 F.2d 1280, 1285 (9th Cir. 1978) (in a fraudulent scheme involving factoring land contracts, the mailing of monthly payments to investors constituted an integral, not incidental, part of the fraud). As in *Kelly*, the bribery scheme here was operated by the same group of people, working over a defined period of time, to achieve the same illegal purpose -- the bribery of Argentine officials in order to obtain the profits of the DNI Project. [Comp. ¶¶ 1-3]

The January 2007 payment and the February 2007 ICSID arbitration award represent integrated parts of the bribery scheme, nothing like the "continual ill effect from a single violation," that the court distinguished in *Kelly*. 663 F. Supp. 2d at 288. *See United States v. Salmonese*, 352 F.3d 608, 616-17 (2d Cir. 2003) (distinguishing an overt act in furtherance of a conspiracy, such as the receipt of profits from a pump and dump scheme, from an "indefinite series

of ordinary, typically noncriminal, unilateral actions" falling outside the scheme). An attempt to cover up wrongful acts has long been recognized as an integral part of the scheme itself. *See SEC v. Holschuh*, 694 F.2d 130, 144 n. 24 (7th Cir. 1982) ("Avoidance of detection and prevention of recovery of money lost are within, and often a material part of, the illegal scheme."). Receiving the final payoff from a bribery scheme, in this case the ICSID arbitration award, is equally integral. *Salmonese*, 352 F.3d at 616-17.

Even if the statute of limitations had been running as to defendant Steffen, the clock would not have begun until February 6, 2007, when Siemens received the economic payoff of the bribery scheme. All earlier wrongful acts in furtherance of the scheme were brought within the statute. *Id*. "Where a conspiracy's purpose is economic enrichment, the jointly undertaken scheme continues through the conspirators' receipt of their anticipated economic benefits." *Id*. at 615. *Accord United States v. LaSpina*, 299 F.3d 165, 174 (2d Cir. 2002) (where conduct falls within scope of criminal agreement, conspiracy continues "as long as one or more conspirators" engage in such conduct).

Steffen's retirement from Siemens in 2003 does not excuse him from liability for later payments made in the course of the bribery scheme. The complaint does not allege, nor does it provide any basis for the Court to conclude, that Steffen's involvement in the scheme ended with his retirement.[4] *Cf. SEC v. Boock*, No. 09-cv-8261 (DLC), 2011 WL 3792819, at *4 (S.D.N.Y. Aug. 25, 2011) (finding a defendant jointly and severally liable as an integral participant in scheme to defraud over his arguments that he resigned from the fraudulent enterprise). Further, there is no indication in the complaint, or in Steffen's briefing, that he ever actively withdrew from the scheme, or took any other overt act to disavow, thwart, disclose, defeat, or stop it. Mere cessation

[4] The SEC intends to introduce evidence at trial that Steffen remained actively involved in the bribery scheme for some time after his official Siemens retirement.

of active participation is not enough to end his involvement. *See United States v. Leslie*, 658 F.3d 140, 143 (2d Cir. 2011) ("Mere cessation of the conspiratorial activity by the defendant is not sufficient to prove withdrawal. The defendant must also show that he performed some act that affirmatively established that he disavowed his criminal association with the conspiracy, either the making of a clean breast to the authorities, or communication of the abandonment in a manner reasonably calculated to reach co-conspirators."); *United States v. Detelich*, 351 Fed. App'x. 616, 620 (3d Cir. 2009) (defendant's withdrawal from an illegal scheme must be "complete," accompanied by "some definitive, decisive step indicating a complete disassociation from the unlawful enterprise"). Finally, whenever Steffen's active involvement ended, the scheme continued to run unabated, and Steffen is still responsible for the acts that furthered and covered up his illegal acts. *Holschuh*, 694 F.2d at 144.

The cases that Steffen cites questioning the "continuing violation" doctrine [Steffen Br. at 11-12] do not aid his argument. None involves allegations of a cohesive scheme or conspiracy, such as *Salmonese*, in which defendants engaged in a series of interrelated illegal acts and payments. Second, in two of the cases, the courts denied motions to dismiss for further fact development regarding the causal connection between events within and without the tolling period. *See In re Comverse Tech. Inc. Sec. Litig.*, 543 F. Supp. 2d 134, 155 (E.D.N.Y. 2008) (prudent to defer consideration until factual record further developed); *SEC v. Caserta*, 75 F. Supp. 2d 79, 89 (E.D.N.Y. 1999) ("At this pleading stage of the litigation, the Court will not resolve the issue.").

The only cases Steffen cites in which a court granted a motion to dismiss on statute grounds, *De la Fuente v. DCI Telecomm, Inc.*, 206 F.R.D. 369, 386 (S.D.N.Y. 2002), and *Stoll v. Ardizzone*, 07-cv-608(CM), 2007 WL 2982250, at *5 (S.D.N.Y. Oct. 9, 2007), are readily distinguishable. In *De la Fuente*, the plaintiffs attempted to salvage out-of-time accounting fraud

claims by bootstrapping them to unrelated subsequent acts – namely, the defendant's failure to make a distribution of shares. The court found that "the alleged misrepresentations concerning the Corzon shares have no relationship to the alleged accounting improprieties that occurred years earlier." *De la Fuente*, 206 F.R.D. at 386. Similarly in *Stoll*, shareholder derivative plaintiffs failed both (1) to articulate any common scheme linking proxy statements issued outside the limitations period to those that came later; and (2) even to identify the later proxy statements in their initial complaint. *Stoll*, 2007 WL 2982250, at *4. In contrast, there is no question here that the January 2007 MFast payment and the Feb. 6, 2007, ICSID arbitration award were integral components of the DNI bribery scheme.

For these reasons, even if the Section 2462 limitations period had been running as to defendant Steffen, it would not have begun until February 6, 2007. The SEC's claims were therefore timely filed.

D. The SEC's Claims for Equitable Relief Are Not Subject to the Limitations Period of Section 2462.

Finally, Steffen contends that the SEC's claims for injunctive relief are punitive in nature and thus subject to Section 2462. [Steffen Br. at 8-10] Citing only cases from other circuits, and a few older district court decisions, Steffen fails to apprehend that the "great weight of the case law in this jurisdiction supports the SEC's contention that equitable remedies are exempted from Section 2462's limitations period." *Kelly*, 663 F. Supp. 2d at 286-87 (citing cases). "Disgorgement is an equitable remedy to which Section 2642 does not apply." *SEC v. Pentagon Capital Management PLC*, 612 F. Supp. 2d 241, 267 (S.D.N.Y. 2009) (quoting *SEC v. Power*, 525 F. Supp. 2d 415, 426–27 (S.D.N.Y.2007)). *Accord SEC v. McCaskey*, 56 F. Supp. 2d 323, 325-26 (S.D.N.Y. 1999) (28 U.S.C. § 2462 does not apply to equitable relief, including permanent injunctions, disgorgement of illegal profits, and bars from serving as an officer of a public

company); *SEC v. Lorin*, 869 F. Supp. 1117, 1120-23 (S.D.N.Y. 1994) (finding SEC enforcement action requesting permanent injunction and disgorgement "free from a limitation period"); *Caserta*, 75 F. Supp. 2d at 89 ("There is . . . no statute of limitations in regard to equitable relief.").

The only appellate decision Steffen cites, *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), has been construed even in the District of Columbia not to apply to SEC claims for injunctive relief. In *SEC v. Brown*, 740 F. Supp. 2d 148, 157 (D.D.C. 2010), the court distinguished the SEC's claims for injunctive relief from the administrative bars at issue in *Johnson*. "Equitable relief which is granted upon a showing that it is necessary to prevent future harm to the public is remedial, and not punitive. Thus, the statute of limitations in § 2462 does not apply to the [injunctive relief and officer and director bar] sought by the SEC." *Id*.

While the Second Circuit has not directly ruled on whether an SEC claim for injunctive relief is remedial or punitive for purposes of Section 2462, it has held that officer and director bars are forms of equitable relief "necessary to protect public investors." *SEC v. Posner*, 16 F.3d 520, 521-22 (2d Cir. 1994). *See SEC v. Schiffer*, No. 97 Civ. 5853 (RO), 1998 WL 226101, at *2 (S.D.N.Y. May 5, 1998) (citing *Posner* and distinguishing *Johnson*). In addition, the Supreme Court, Second Circuit, and other appellate courts have long held that SEC civil injunctions are remedial, rather than punitive, in nature. See *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953) (The remedial purpose of the securities laws is to protect the investing public); *Berko v. SEC*, 316 F.2d 137, 141 (2d Cir. 1963) ("[Commission] orders are intended to be remedial rather than penal, a result of the fact that the design of the statute is to protect investors and the general public in this specialized field."); *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993) (Commission enforcement action is designed to expeditiously safeguard the public interest by enjoining securities violations"); *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 680 (10th Cir.

1988) (an injunction protects the integrity of the securities industry).

Examining legislative intent, the fact that Congress does not equate injunctive relief with civil penalties is shown by the statutory structure. Penalties and injunctive relief are authorized in separate provisions of the Exchange Act. *See, e.g.*, 15 U.S.C. § 77t(d) and (e); 15 U.S.C. 78u(d) (1-3) and (e). *See Tull v. United States*, 481 U.S. 412, 425 (1987) (finding that a statute "does not intertwine equitable relief with imposition of civil penalties" when "each kind of relief is separably authorized in a separate and distinct statutory provision.").

The SEC's claims for a civil injunction and disgorgement are therefore not barred by the five year limitations period of Section 2462.

CONCLUSION

For the foregoing reasons, the Court should deny defendant Steffen's motion to dismiss the complaint.

Dated: November 13, 2012

Respectfully submitted,

/s/ Robert I. Dodge
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CERTIFICATE OF SERVICE

I certify that on November 13, 2012, a copy of the foregoing document was served upon all counsel of record via the Court's electronic filing system, which sends notification to the following parties:

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LIST OF EXHIBITS

1. *SEC v. Stannard*, No. 06-cv-7736 (GEL) (S.D.N.Y. May 16, 2007), hearing transcript.

2. 28 U.S.C. § 2462 and predecessor statutes:

   - 28 U.S.C. § 2462 (1948 ed.)
   - 28 U.S.C. § 791 (1940 ed.)
   - Act of Feb. 28, 1839, ch. 36, §4, 5 Stat. 322

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. 06 CV 7736 (GEL)

JAMES N. STANARD, MARTIN J. MERRITT, and MICHAEL W. CASH,

Defendants.

----------x

New York, N.Y.
May 16, 2007
12:00 p.m.

Before:

HON. GERARD E. LYNCH,

District Judge

APPEARANCES

UNITED STATES SECURITIES and EXCHANGE COMMISSION
BY: PREETHI KRISHNAMURTHY

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SCHULTE ROTH & ZABEL, LLP
Attorneys for Defendant Cash
BY: MARTIN L. PERSCHETZ

(Case called)

MS. KRISHNAMURTHY: Good afternoon, your Honor. Preethi Krishnamurthy, for the SEC.

THE COURT: Good afternoon.

MR. PERSCHETZ: Martin Perschetz, for Mr. Cash, your Honor.

MR. MATHIAS: Jim Mathias, for James Stanard.

MR. GRAND: Paul Grand, for Mr. Stanard.

THE COURT: We're here to rule on a motion in this SEC enforcement action. Defendants James Stanard and Michael Cash move to dismiss the claims against them. The motion will be denied.

At the outset, Cash argues that the action should be dismissed for lack of personal jurisdiction over him. To a considerable extent, this motion overlaps with his motion on the merits that the complaint fails to state a claim against him, because to the extent that the complaint does state a claim, his jurisdictional argument verges on the frivolous. The federal securities laws "permit the exercise of personal jurisdiction to the limit of the due process clause of the Fifth Amendment." SEC v. Unifund SAL, 910 F.2d 1028, 1033 (2d Cir. 1990). It is well established that the Constitution permits the exercise of personal jurisdiction over a defendant who "has acted in such a way as to have 'caused consequences' in the forum state." That's from the Unifund case of the same

page, quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980). Where an executive of a foreign securities issuer, wherever located, participates in a fraud directed to deceiving United States shareholders in violation of federal regulations requiring disclosure of accurate information to holders of securities traded in the United States, such direct consequences have occurred. SEC regulations would be meaningless as applied to foreign issuers of U.S.-traded securities if the United States courts lacked jurisdiction over executives abroad who violate those regulations. The complaint here alleges that Cash conceived and implemented a strategy for entering a sham transaction and specifically intended that his work would result in false statements by RenRe in its publicly-filed financial statements in the United States. At least to the extent that this allegation states a claim for violation of the United States securities laws, this Court has jurisdiction over the persons alleged to have committed that violation.

The next overarching argument advanced by both Stanard and Cash is that all of the charges must be dismissed because the misstatements of earnings at the heart of the plaintiff's case are immaterial as a matter of law. This argument is insufficient to require dismissal at the pleading stage.

The sham transaction and resulting distortion of earnings statements alleged in this complaint are somewhat

unusual in that the SEC alleges that the purpose of the transaction was to understate rather than overstate RenRe's profits at the time the transaction was entered. Of course, the Court has seen many more cases in which private plaintiffs or the SEC allege that companies in financial trouble engaged in sham activities in order to increase their apparent profitability, thus falsely luring investors to purchase securities that soon become less valuable. Here, in contrast, the company was making huge profits and is accused of engaging in a transaction to "smooth" its earnings by shifting profits in fact made in 2001 into future years. The motive for such maneuverings and their potential to harm investors is certainly less apparent than in the more conventional cases.

The complaint alleges, however, that the transactions which for purposes of this motion the Court must accept were essentially shams of no economic import, had the effect of misstating RenRe's net income, sometimes reducing it and sometimes increasing it, by percentages ranging from 7 percent to nearly 40 percent in various reporting periods. Defendants would glide past this allegation, emphasizing that the initial impact was to reduce the apparent profitability of the company, noting that the company genuinely made large and dramatically increasing profits in the affected years, and pointing out that the amount of money involved in the transactions amounted to just 2.2 percent of the company's aggregate profits over the

three-year period.

Defendants also point out that the market did not react negatively to the eventual disclosure of the misstatement, suggesting that actual investors did not find the errors material. It is possible that these facts, which are not apparently disputed by the SEC, would ultimately support a conclusion by a fact finder that the alleged misstatements are not material.

But materiality is a mixed question of fact and law and rarely suitable for resolution on the pleadings. As the Second Circuit has held, "a complaint may not properly be dismissed on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance."

The quote is from Ganino v. Citizens Utilities, 228 F.3d 154 at 162 (2d Cir. 2000), in turn quoting Goldman v. Belden, 754 F.2d 1059 at 1067 (2d Cir. 1985). The very facts I have just outlined, as presented by the defendants, are susceptible to different readings, showing how easily reasonable people may differ on the materiality or even the appropriate characterization of these facts.

First, the understatement of profits in one year is simply the flip side of the overstatement of profits in other years. To the extent defendants suggest that understating

profits can't hurt anyone, it is clear that the future overstatement of profits contemplated by the "smoothing" of profitability over a multiyear period could significantly distort a reasonable investor's picture of a company's health and of the trends that might suggest investment potential for future profits.

Second, the amounts of misstatement can easily be regarded as substantial. If, as defendants point out, only a small amount of profit was shifted relative to the overall profits in the relevant years, the effect on reported earnings in particular periods was sometimes quite substantial, rising, as alleged, to nearly a 40 percent overstatement of profits in the third quarter of 2002.

Third, while defendants emphasize that in the end RenRe was genuinely profitable in 2002 and 2003 and, in fact, that profits rose dramatically in those years, it is far from clear that this could have been anticipated in 2001 when the scheme was conceived and implemented. No one could know in 2001 what the company's profits really would be in 2002 or 2003. Had the company done badly in those years, the false appearance created by a $26 million infusion of phony profits from a previous year could have considerably distorted an investor's picture of the company.

Fourth, the lack of market reaction could be seen, given the nature of this scheme, as a post-hoc shrug, given

that by the time the fraud was revealed, the income shifting was in the past and the company's then current profits were no longer being affected. The market might well have responded differently if the fraud had been revealed shortly after the announcement of the 2002 third quarter results, when the announcement would have required a substantial write-down of the company's most recent announced earnings.

Of course, it's premature to reach any conclusion about whether this is the correct explanation for the market's apparent indifference, but that is exactly the point. The significance of these various factors is best addressed in the context of a full factual record. At this point, reasonable people can easily disagree about the meaning and weight of each of these arguments.

Fifth, and finally, in a world in which investors are frequently believed to pay attention to whether profits meet projections or targets, it is not necessarily irrational for a manager seeking to manipulate share prices to consider profits in a given period as essentially excessive, if they exceed such targets, and to seek to save some for a future, potentially rainier day, or for such a manager to expect such a stratagem to have a favorable effect on investors -- that is, an effect that distorts their behavior. Defendants confuse this point by suggesting that squirreling away money for a rainy day is conservative, desirable management. Of course, it is. But a

company saves for the future by reporting its profits accurately and putting some of those actual profits aside for future use. The complaint here charges defendants not with saving actual funds for the future but with lying about profits in one year in order to make it appear that the money was not saved from 2001 profits but, instead, was earned in 2002 and 2003.

Whether this charge can be sustained is for the future, but it cannot be said on the basis of the pleadings that the alleged falsifications were immaterial as a matter of law.

Cash next argues that he cannot be liable as a primary violator of Rule 10b-5 and Section 10-b because no false statement was directly attributable to him, arguing that Second Circuit cases interpreting the Supreme Court's decision in Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, (1994), which held that there was no liability under the securities laws for aiding and abetting violations of those laws, have established a bright-line rule that only the speakers themselves can be liable as primary violators. As so broadly stated, this legal proposition seems to me very likely wrong. The Second Circuit cases are less than fully consistent in this regard. Compare Wright v. Ernst & Young, 152 F.3d 169 (1998) and Lattanzio v. Deloitte Touche, 476 F.3d 147 (2007), on which the plaintiffs rely, with In re Scholastic Corp., 252

F.3d 63, 76 (2d Cir. 2001) and SEC v. First Jersey Securities, 101 F.3d 1450, 1471 (2d Cir. 1996), which are cited by the plaintiff.

This Court has rejected such a bright-line view in the past. See In re Global Crossing, 322 F.Supp.2d 319 (S.D.N.Y. 2004) and In re Salomon Analyst AT&T Litigation, 350 F.Supp.2d 455 (S.D.N.Y. 2004), and nothing in Lattanzio or in defendants' briefs persuades me that I was wrong to do so.

On the other hand, it is not clear that Cash needs to take such a sweeping view in order to prevail on this point. In both Global Crossing and Salomon AT&T, this Court held that the plaintiffs had alleged facts suggesting that the defendants in question were moving forces in the fraud; arguably, the facts alleged here make out a purer case of mere aiding and abetting.

But however interesting is the question whether Cash could be charged as a primary violator, the issue is entirely academic in this case. I see no reason why this debate needs to be resolved in this case now or perhaps ever. This is not a private action for damages but an SEC enforcement action, and the SEC is expressly permitted by statute to move against aiders and abettors. See Exchange Act Section 20(e), 15, United States Code, Section 78t(e). In the complaint, the SEC expressly pleads its charged 10b violations in the alternative as primary violations and as aiding and abetting. See amended

complaint, paragraphs 106 and 107. Cash does not even attempt to suggest that the facts alleged would not make out a claim for aiding and abetting. Indeed, the entire thrust of his argument is to suggest that that is exactly what the SEC has pleaded.

No party has indicated any way in which it matters whether Cash is found to violate these rules as a principal or as an aider and abettor. Nor has any party suggested that whether Cash's name is stricken from paragraph 106, which charges Cash with primary violations, would make the slightest difference to how discovery is conducted or even how the case is tried. It is a well-established principle of criminal law that there is no need for an indictment even to specify whether a charge is laid under 18, United States Code, Section 2, or not. See, for example, United States v. Knoll, 16 F.3d, 1313, (2d Cir. 1994). The same practical principle seems to apply here. Accordingly, the Court declines to decide this question at this time, since the same causes of action will remain in the complaint whether Cash's reading of Second Circuit case law on primary violators is right or wrong.

For the same reason, there is no need to stay these proceedings pending the Supreme Court's resolution of Stoneridge Investment v. Scientific-Atlanta, Inc., a case in which certiorari was recently granted to decide whether claims for deceptive conduct may go forward under Rule 10b-5(a) and

(c) where a defendant engaged in transactions with a public corporation with no legitimate business or economic purpose except to inflate artificially the public corporation's financial statements, but where the defendant himself made no public statements concerning those transactions. See 2007 WL 879583, the order granting certiorari, 2006 WL 1909677, the petition with the question presented. Under the law as it now stands, the complaint adequately states violations of Rule 10b-5(a) and (c). See In re Global Crossing, 322 F.Supp.2d at 335-36, and In re Parmalat, 376 F.Supp.2d 472, 502 (S.D.N.Y. 2005). Even if the Supreme Court's decision in Stoneridge Investments changes the law in such a way that a claim against Cash can no longer be stated under Rule 10b-5(a) and (c), Cash's liability, if any, as an aider and abettor under 10b-5(b) will be unaffected.

Finally, Cash argues that the charges of books and records violations should be dismissed, because Cash did not have primary responsibility for maintaining the books and records. Unlike the argument under Section 10b, which does present interesting questions under the statutory and regulatory language, this claim is completely contrary to the language of the statute and rule. That language does not speak of the person who makes entries or devises accounting procedures. Rather, Section 13(b)(5) applies to anyone who, among other things "knowingly circumvents...a system of

internal accounting controls." The plain language covers someone who knows that internal accounting procedures would require something to be reported in a particular way, and then undertakes deliberately to devise a scheme that would avoid such proper reporting. Similarly, Rule 13b2-1 forbids anyone "directly or indirectly" to "cause to be falsified" the corporate books and records. Again, the plain language covers someone who engages in such a scheme to cause the records to be falsified, even if that person is not directly in charge of making the false entries themselves.

The complaint here clearly alleges that Cash designed the transactions in question with the specific intention of fooling the company's auditors with respect to their true nature. See amended complaint paragraph 70. Whether or not that is so remains to be seen, but the allegation squarely states a violation of the cited books and records provisions.

Accordingly, the defendants' motions will be denied.

All right. That's the ruling on the motions.

Now, as I understand the case management order, discovery is ongoing and is due to end on July 31. Does anybody think we need more time or that there is some problem with that?

MS. KRISHNAMURTHY: Your Honor, the discovery order that your Honor entered asked the parties to hold off on depositions until after the Court had ruled. And we haven't

had a chance, we spoke briefly yesterday, but we weren't sure what your Honor's ruling would be. We would propose that we confer and submit a revised case management plan that would extend out the discovery timetable to take into account the elapsed time.

THE COURT: Okay. Has document discovery been completed now?

MS. KRISHNAMURTHY: It isn't completed, but we have made substantial document production to date.

THE COURT: Let's get it completed and get moving on this. I think many of the same reasons that motivated the denial of this motion make it very unlikely that materiality, if that's going to be the hinge of the case, is going to be decidable by summary judgment motion. So, it would be my expectation that if the parties can't settle the dispute, the case is going to have to be tried. I don't think we need to set a trial date now, unless the defense has a different perspective. I think plaintiff's suggestion is appropriate that there be some consultation or working out of the deposition schedule. And then once those depositions are complete, we'll come back and have a conference at which we'll see what needs to be done thereafter. But do I understand this is solely an injunctive action and basically it's going to be a bench trial, if it's a trial?

MS. KRISHNAMURTHY: We're also asking for disgorgement

and penalties, your Honor.

THE COURT: But that doesn't change that it's a bench trial, does it? Or does it?

MS. KRISHNAMURTHY: We are not requesting a bench trial. Our preliminary discussions with defendants, I think in those preliminary discussions, defendants thought they might not request a bench trial. I'm not sure.

I'm sorry. A jury trial.

THE COURT: So there is a jury trial right on at least some of these things?

MS. KRISHNAMURTHY: Your Honor, there is a right to a jury trial because the SEC's seeking penalties in this case.

THE COURT: Do we know what the parties' position is on this?

MR. MATHIAS: We need to talk about that, your Honor. But it is a distinct possibility that this will be a bench trial in any event, that we won't request a jury trial.

THE COURT: One reason why it's relevant to me in terms of thinking about what lies ahead, if there is going to be a jury trial, the practical import of motions for summary judgment may make some difference. If it's going to be a bench trial, I rarely see the point of trying to figure out whether there's an issue of fact on which I might reasonably disagree with myself; it just doesn't make a lot of sense to me. I don't know why either party would wish to win in a way that

tees up a separate set of issues for the Court of Appeals about whether even though you probably should have won, you can't tell for sure because there are issues of fact. So, in bench trials, it seems to me that it is generally preferrable to proceed directly to the main event, since a lot of what happens is very similar to a summary judgment motion, plus you hear a few witnesses live, and then instead of saying here's what I'm either absolutely sure of, but, or not quite absolutely sure of, here's what I find by a preponderance of the evidence and the case is much, usually, closer to being put to bed.

Now, in a jury trial case, there are more functions that can be served by summary judgment motions. Since there's often considerable expense to a jury trial, sometimes parties find it worthwhile to take a flier on the summary judgment motion. But these are all things we can talk about at a postdiscovery conference. I just wanted to put them on people's agenda, but certainly based on what I've seen so far, if it's not going to be a jury trial, I really don't see a point to summary judgment type motions. Again, I could be wrong, and there are many different claims in the case, and maybe some issues might be more appropriate for summary disposition after there's a full record, but I just wanted to lay that on the table at this point.

It doesn't sound to me like there's anything much more that needs to be done here. I would hope that by the end of

next week, the parties will get back to me with a revised discovery deadline for when we're going to finish with depositions. I hope we can move fairly quickly on this, since, in effect, the plaintiff has had an opportunity to investigate the case and do the kind of things that plaintiffs typically do in discovery. It doesn't mean they're not entitled to do some of it over again, but it makes me less sympathetic to any argument coming from the plaintiff that we need a lot of time here. And the defendants obviously do need a shot at deposing witnesses if they're going to do that. But I would imagine that can be done in a reasonable period of time and get us back here soon after Labor Day, would be my guess. But I'm not dictating that. You'll submit a schedule and so long as it's reasonable, I'll sign off on it, set up a postdiscovery conference, and then we'll move forward.

Anything else I need to do now?

Hearing nothing, have a good lunch. Thank you very much.

(Adjourned)

"FINDINGS AND PURPOSE

"SEC. 2. (a) FINDINGS.—The Congress finds that—

"(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

"(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

"(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

"(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

"(b) PURPOSE.—The purpose of this Act is to establish a mechanism that shall—

"(1) allow for regular adjustment for inflation of civil monetary penalties;

"(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

"(3) improve the collection by the Federal Government of civil monetary penalties.

"DEFINITIONS

"SEC. 3. For purposes of this Act, the term—

"(1) 'agency' means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

"(2) 'civil monetary penalty' means any penalty, fine, or other sanction that—

"(A)(i) is for a specific monetary amount as provided by Federal law; or

"(ii) has a maximum amount provided for by Federal law; and

"(B) is assessed or enforced by an agency pursuant to Federal law; and

"(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

"(3) 'Consumer Price Index' means the Consumer Price Index for all-urban consumers published by the Department of Labor.

"CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

"SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

"(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act; and

"(2) publish each such regulation in the Federal Register.

"COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

"SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

"(1) multiple of $10 in the case of penalties less than or equal to $100;

"(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

"(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

"(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

"(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

"(6) multiple of $25,000 in the case of penalties greater than $200,000.

"(b) DEFINITION.—For purposes of subsection (a), the term 'cost-of-living adjustment' means the percentage (if any) for each civil monetary penalty by which—

"(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

"(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

"SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect."

[Pub. L. 104–134, title III, § 31001(s)(2), Apr. 26, 1996, 110 Stat. 1321–373, provided that: "The first adjustment of a civil monetary penalty made pursuant to the amendment made by paragraph (1) [amending Pub. L. 101–410, set out above] may not exceed 10 percent of such penalty."]

[For authority of the Director of the Office of Management and Budget to consolidate reports required under the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101–410, set out above, to be submitted between Jan. 1, 1995, and Sept. 30, 1997, or to adjust their frequency and due dates, see section 404 of Pub. L. 103–356, set out as a note under section 501 of Title 31, Money and Finance.]

§ 2462. Time for commencing proceedings

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.

(June 25, 1948, ch. 646, 62 Stat. 974.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 791 (R.S. § 1047). Changes were made in phraseology.

§ 2463. Property taken under revenue law not repleviable

All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

(June 25, 1948, ch. 646, 62 Stat. 974.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 747 (R.S. § 934). Changes were made in phraseology.

§ 2464. Security; special bond

(a) Except in cases of seizures for forfeiture under any law of the United States, whenever a warrant of arrest or other process in rem is issued in any admiralty case, the United States marshal shall stay the execution of such proc-

§ 786. Judgment for duties: collected in coin.

In all suits by the United States for the recovery of duties upon imports, or of penalties for the nonpayment thereof, the judgment shall recite that it is rendered for duties, and such judgment, with interest thereon, and costs, shall be payable in the coin by law receivable for duties; and the execution issued thereon shall set forth that the recovery is for duties, and shall require the marshal to satisfy the same in the coin by law receivable for duties; and in case of levy upon and sale of the property of the judgment debtor, the marshal shall refuse payment from any purchaser at such sale in any other money than that specified in the execution. (R. S. § 962.)

DERIVATION

Act Mar. 3, 1865, ch. 80, § 12, 13 Stat. 494.

FEDERAL RULES OF CIVIL PROCEDURE

Execution, see Rule 69, following section 723c of this title.

CROSS REFERENCE

All coins and currencies of United States to be legal tender for payment of duties, see section 462 of Title 31, Money and Finance.

§ 787. Interest; in suits on bonds for recovery of duties.

Upon all bonds, on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of 6 per centum a year, from the time when said bonds became due. (R. S. § 963.)

DERIVATION

Act Mar. 2, 1799, ch. 22, § 65, 1 Stat. 676.

§ 788. Same; in suits for balances due Post Office Department.

In all suits for balances due to the Post Office Department, interest thereon shall be recovered, from the time of the default, at the rate of 6 per centum per year. (R. S. § 964.)

DERIVATION

Act July 2, 1836, ch. 270, § 15, 5 Stat. 82.

§ 789. Same; in suits on debentures.

In suits upon debentures, issued by the collectors of the customs under any act for the collection of duties, interest shall be allowed, at the rate of 6 per centum per annum, from the time when such debenture became due and payable. (R. S. § 965.)

DERIVATION

Act Mar. 2, 1799, ch. 22, § 80, 1 Stat. 687, 689.

§ 790. Final record in equity and admiralty.

In equity and admiralty causes, only the process, pleadings, and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record. (R. S. § 750.)

DERIVATION

Act Feb. 26, 1853, ch. 80, § 1, 10 Stat. 163.

§ 791. Penalties and forfeitures; under laws of United States.

No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: *Provided*, That the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property. (R. S. § 1047.)

DERIVATION

Acts Mar. 2, 1799, ch. 22, § 89, 1 Stat. 695; Mar. 26, 1804, ch. 40, § 3, 2 Stat. 290; Apr. 20, 1818, ch. 91, § 9, 3 Stat. 452; Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322; Mar. 3, 1863, ch. 76, § 14, 12 Stat. 741; and July 25, 1868, ch. 236, § 1, 15 Stat. 183.

JUDGMENTS

§ 811. Interest on judgments.

Interest shall be allowed on all judgments in civil causes, recovered in a district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State. (R. S. § 966; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167.)

DERIVATION

Act Aug. 23, 1842, ch. 116, § 8, 5 Stat. 516.

FEDERAL RULES OF CIVIL PROCEDURE

Execution, see Rule 69, following section 723c of this title.

§ 812. Judgments; liens of.

Judgments and decrees rendered in a district court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State. Whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana before a lien shall attach, this section and section 813 of this chapter shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State. (Aug. 1, 1888, ch. 729, § 1, 25 Stat. 357; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Aug. 17, 1912, ch. 300, 37 Stat. 311.)

§ 813. Indices of judgment debtors to be kept by clerks.

The clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices of all judgment debtors under decrees, judgments, or orders of said courts, and such indices and judgments shall at all times be open to the inspection and examination

parties or any of them may be related to the said judge of the criminal court, then such case and the record thereof may be sent to the next circuit court of the District of Columbia for the county in which the said case shall have arisen, to be there tried and determined, and sentence passed and executed, as if this act and the act to which this is supplemental had never been passed.

any of the parties are related to the judge.

Sec. 9. *And be it further enacted*, That all causes, indictments, writs, process, and proceedings which were pending in the criminal court of the District of Columbia for the county of Washington, at the time appointed by law for holding a session thereof, on the first Monday of December last past, or which were returnable to the session of said court which ought to have been holden on said first Monday of December, shall be, and the same are hereby, revived, reinstated, and continued over to the next stated session of said court for said county, to be holden on the second Monday of March next, in the same manner and condition, and the same further proceedings may be had therein as if a session of the said court had been held, according to law, on the said first Monday of December, and as if a regular continuance of all said causes, indictments, writs, process, and proceedings, had been duly entered upon the records of the said court.

All cases, &c. which were pending in Washington co. revived, &c.

Approved, February 20, 1839.

Statute III.
Feb. 28, 1839.

Chap. XXXIII.—*An Act to prevent the abatement of suits and actions now pending, in which the Bank of Columbia, in Georgetown, may be a party.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no suit, action, judgment, or decree, now pending and unsatisfied, in which the Bank of Columbia, in Georgetown, is party, plaintiff or defendant, shall abate, or be discontinued or dismissed by reason of the expiration of the term for which the said bank is chartered, but all such suits, actions, judgments, and decrees shall be allowed to proceed to final judgment, execution, satisfaction, and settlement; and for that purpose it shall be lawful to use the corporate name, style and capacity, notwithstanding the expiration of the term of its incorporation.

No suit, &c. now pending, shall abate, &c.

Approved, February 28, 1839.

Statute III.
Feb. 28, 1839.

Chap. XXXV.—*An Act to abolish imprisonment for debt in certain cases.* (a)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall be imprisoned for debt in any State, on process issuing out of a court of the United States, where by the laws of such State, imprisonment for debt has been abolished; and where by the laws of a State, imprisonment for debt shall be allowed, under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States; and the same proceedings shall be had therein, as are adopted in the courts of such State.

Imprisonment for debt abolished.

Approved, February 28, 1839.

Statute III.
Feb. 28, 1839.

Chap. XXXVI.—*An Act in amendment of the acts respecting the Judicial System of the United States.* (b)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants

The court may entertain jurisdiction in certain cases.

(a) See notes of acts relating to imprisonment for debt, vol. 1, 265.
(b) An act concerning the Supreme Court of the United States, June 17, 1844, chap. 96.

of or found within the district where the suit is brought or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit, between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer; and the nonjoinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement, or other objection to said suit.

Appointment of clerks—how made.

SEC. 2. *And be it further enacted*, That all the circuit courts of the United States shall have the appointment of their own clerks; and in case of a disagreement between the judges the appointment shall be made by the presiding judge of the court.

Pecuniary penalties, &c. where sued for and recovered.

SEC. 3. *And be it further enacted*, That all pecuniary penalties and forfeitures accruing under the laws of the United States may be sued for and recovered in any court of competent jurisdiction in the State or district where such penalties or forfeitures have accrued, or in which the offender or offenders may be found.

No suits, &c. to be maintained for penalties, &c. unless commenced within five years. Proviso.

SEC. 4. *And be it further enacted*, That no suit or prosecution shall be maintained, for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture accrued; *Provided*, The person of the offender or the property liable for such penalty or forfeiture shall, within the same period, be found within the United States; so that the proper process may be instituted and served against such person or property therefor.

Certain punishments abolished.

SEC. 5. *And be it further enacted*, That the punishment of whipping and the punishment of standing in the pillory, so far as they now are provided for by the laws of the United States, be, and the same are hereby, abolished.

Penalties, for the forfeiture of recognizance, &c. may be remitted.

SEC. 6. *And be it further enacted*, That, in all cases of recognizances in criminal causes taken for, or in, or returnable to, the courts of the United States, which shall be forfeited by a breach of the condition thereof, the said court for or in which the same shall be so taken, or to which the same shall be returnable, shall have authority in their discretion to remit the whole or a part of the penalty, whenever it shall appear to the court that there has been no wilful default of the parties, and that a trial can notwithstanding be had in the cause, and that public justice does not otherwise require the same penalty to be exacted or enforced.

Sec. 2 of act of 29th April 1802, ch. 31, repealed.

SEC. 7. *And be it further enacted*, That the second section of the act of Congress, passed the twenty-ninth day of April, one thousand eight hundred and two, which makes it the duty of the associate justice of the Supreme Court, resident in the fourth circuit, to attend in the city of Washington, on the first Monday of August annually, to make orders respecting the business of the Supreme Court, be, and the same is, hereby, repealed.

In suits and actions in which the judges are in any way concerned, &c.

SEC. 8. *And be it further enacted*, That in all suits and actions in any circuit court of the United States in which it shall appear that both the judges thereof or the judge thereof, who is solely competent by law to try the same, shall be any ways concerned in interest therein, or shall have been of counsel for either party, or is, or are so related to or connected with either party as to render it improper for him or them, in his or their opinion, to sit in the trial of such suit or action, it shall be the duty of such judge or judges, on application of either party to cause the fact to be entered on the records of the court; and also to make an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the most convenient circuit court in the next adjacent State, or in the next adjacent circuit; which circuit court shall, upon such record and order being filed with the clerk there-

of, take cognizance thereof in the same manner as if such suit or action had been rightfully and originally commenced therein, and shall proceed to hear and determine the same accordingly, and the proper process for the due execution of the judgment or decree rendered therein, shall run into and may be executed in the district where such judgment or decree was rendered, and also, into the district from which such suit or action was removed.

Approved, February 28, 1839.

Statute III.
March 2, 1839.

Chap. XXXVII.—*An Act to revise and extend "An act to authorize the issuing of Treasury notes to meet the current expenses of the Government," approved the twenty-first of May, eighteen hundred and thirty-eight.* (a)

Act of May 21, 1838, ch. 82.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury, with the approbation of the President of the United States, is hereby authorized to cause to be issued the remainder of the Treasury notes authorized to be issued by the act to authorize the issuing of Treasury notes to meet the current expenses of the Government," approved the twenty-first day of May, eighteen hundred and thirty-eight, according to the provisions of said act, at any time prior to the thirtieth day of June next, any limitation in the act aforesaid or in the act "to authorize the issuing of Treasury notes," approved the twelfth day of October, eighteen hundred and thirty-seven, to the contrary notwithstanding.

Sec. Treas. to cause to be issued the remainder of the Treasury notes authorized by act of 21st May 1838, ch. 82.

1837, ch. 2.

Approved, March 2, 1839.

Statute III.
March 3, 1839.

Chap. LXX.—*An Act to provide for the erection of public buildings in the Territory of Florida.*

[Obsolete.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the sum of twenty thousand dollars be, and the same is hereby, granted to the Territory of Florida, out of any money in the Treasury not otherwise appropriated, for the purpose of defraying the expenses of erecting a suitable State House or public buildings in the Territory of Florida, for the use and accommodation of the Territorial Legislature of said Territory; and in which building, when erected and completed, the office of the Secretary of said Territory shall be kept, and also the public records and archives of said Territory.

Appropriation to Florida for the erection of public buildings.

Sec. 2. *And be it further enacted,* That the said sum of money appropriated by the first section of this act shall be paid over to the Treasurer of said Territory on the order of the Governor, and shall be expended for the purpose aforesaid, under the direction of the Governor and Legislative Council, and in such way and manner and at such times as they shall, by law or resolution for that purpose, prescribe: *Provided,* That the passage of this law shall not at any time be held as an engagement on the part of the United States for any further appropriation to the objects hereinbefore mentioned.

To be paid to the Treasurer of the Territory on the order of the Governor, &c.

Proviso.

Approved, March 3, 1839.

Statute III.
March 3, 1839.

Chap. LXXI.—*An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with the various Indian tribes, for the year one thousand eight hundred and thirty-nine.*

[Obsolete.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, for the year one thousand eight hundred and thirty-nine, for the purpose of paying the current

(a) Notes of the acts which have been passed relative to the issuing of Treasury notes, vol. 3, 100.