No. 12-____

IN THE

Supreme Court of the United States

JOSEPH F. APUZZO,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For a Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Civil aiding-and-abetting actions for securities fraud were developed in the courts long before 1995, when Congress codified that jurisprudence in Section 20(e) of the Securities Exchange Act, 15 U.S.C. § 78t(e). Courts across the nation had reached consensus that one element of a civil aiding-and-abetting claim was the "substantial assistance" of the alleged aider and abettor. That phrase, drawn from the Restatement of Torts, entails a showing of proximate cause—that the defendant's actions were a substantial causal factor in the primary violation of the securities laws. Well aware of this history, Congress expressly required "substantial assistance" when it enacted Section 20(e), which authorized only civil aiding-and-abetting suits brought by the SEC. The courts continued to read the "substantial assistance" requirement to require proximate causation of the primary violation. The Second Circuit here, however, jettisoned this text and history and considerably lightened the burden on the SEC. It held that the SEC need not allege proximate causation, and that it may show "substantial assistance" by alleging conduct that would satisfy the generic *criminal* aiding-and-abetting statute, 18 U.S.C. § 2(a)—even though § 2(a) has no "substantial assistance" requirement, either textually or substantively.

The question presented is whether, to satisfy the "substantial assistance" requirement of Section 20(e), the SEC must allege and prove that the defendant's conduct was a proximate cause of the primary violation.

PARTIES TO THE PROCEEDINGS BELOW

Joseph F. Apuzzo was the defendant in the district court, and the appellee in the court of appeals.

The Securities and Exchange Commission was the plaintiff in the district court, and the appellant in the court of appeals.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES

TABLE OF AUTHORITIES—Continued

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Petitioner Joseph F. Apuzzo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit (App., *infra*, 1a-25a) is reported at 689 F.3d 204 (2012). The opinion of the United States District Court for the District of Connecticut (App., *infra*, 29a-59a) is reported at 758 F. Supp. 2d 136 (2010).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on August 8, 2012. App., *infra*, 28a. That court denied rehearing *en banc* on November 13, 2012. *Id.* at 26a. Justice Ginsburg extended the time within which to file a petition

for a writ of certiorari to and including March 13, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 20(e) of the Securities Exchange Act, 15 U.S.C. § 78t(e), provides:

> Prosecution of persons who aid and abet violations
>
> For purposes of any action brought by the Commission under paragraph (1) or (3) of section 78u(d) of this title, any person that knowingly or recklessly[1] provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

18 U.S.C. § 2(a) provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

PRELIMINARY STATEMENT

This case presents a single question of law: To satisfy the "substantial assistance" element of a civil action for aiding and abetting securities fraud under Section 20(e) of the Securities Exchange Act, 15 U.S.C. § 78t(e), must the government allege that the defendant's conduct was a

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[1] The Dodd-Frank Wall Street Reform and Consumer Protection Act amended Section 20(e) in 2010 by adding the phrase "or recklessly" after "knowingly." Pub. L. No. 111-203, § 929*O*, 124 Stat. 1376, 1862. That amendment does not apply here, see App., *infra*, 13a n.6, and would not be relevant to the narrow question presented even if it did.

proximate cause—a substantial causal factor—of the primary violation? Applying long-settled law, the district court held that the government must make such a showing. Because the SEC's complaint did not, the court granted Apuzzo's motion to dismiss.

The court of appeals reversed in an opinion by District Judge Rakoff, ruling that because the generic *criminal* aiding-and-abetting statute does not require proximate cause, neither should any *civil* aiding-and-abetting statute. The court reasoned that "if the conduct of an aider and abettor is sufficient to impose criminal liability, *a fortiori* it is sufficient to impose civil liability," App., *infra*, 14a.

That logic might hold if the texts of the criminal and civil statutes were identical. Here, however, the textual divergence is striking. Tellingly, the panel never once quoted *the text* of 18 U.S.C. §2(a), the criminal statute that it found dispositive. By avoiding the text, it adroitly finessed accounting for the very different language of Section 20(e), and in particular the civil statute's express requirement of "substantial assistance" in the primary violation—a requirement nowhere found in §2(a). Notably, Congress *has* copied §2(a) in drafting *other* civil aiding-and-abetting statutes, such as the Investment Advisers Act and the Commodities Exchange Act. The Second Circuit did not explain why, if Congress intended to achieve the same result here, it chose to express itself so differently in Section 20(e).

Nor was the Second Circuit writing on a blank slate. Courts have long held, and recently reaffirmed, that "substantial assistance" in this context requires proximate cause of the primary violation. That phrase was enacted into law with a well-established meaning. The Second Circuit gave the law an entirely different mean-

ing, making it easier for the SEC to hale third parties into court. The judgment below divides the circuits, contradicts legislative intent, and engenders confusion in the district courts.

The Second Circuit expressed various policy reasons to excuse the SEC from the statutory requirement. Policy preferences of the panel, however, do not justify altering the text of the statute. Yet the Second Circuit—the most important court for securities regulation—has by judicial fiat replaced the statute Congress passed with its own impostor statute. The question presented is one of pure law, and it arises in precisely the posture that any case testing the legal sufficiency of a complaint arises—on a motion to dismiss. It is thus ripe for review, and this Court should grant the petition and restore the law by reversing the judgment below.

STATEMENT

I. BACKGROUND

This case arises from transactions in December 2000 and December 2001 and ensuing false financial statements by United Rentals, Inc. (URI) and Michael Nolan, URI's chief financial officer.[2] The false statements incorrectly recognized revenue and profit from the sale of used equipment to General Electric Capital Corporation (GECC) to allow URI to "make its numbers" for both years. See App., *infra*, 32a. Petitioner Joseph F. Apuzzo worked neither for URI nor for GECC. He was the chief financial officer for Terex Corporation, an equipment-manufacturing company unrelated to either URI or GECC. Nolan incorrectly accounted for, or directed the incorrect accounting for, transactions between Terex and

[2] Because Apuzzo sought relief under Rule 12(b)(6), the factual description accepts the SEC's allegations. See App., *infra*, 43a.

URI to help disguise URI's fraudulent reporting of its financial results.

In December 2000 and 2001, URI sold used equipment to GECC at inflated prices; URI then leased the equipment back for a short time. To induce GECC to participate in these transactions, URI paid GECC a fee and arranged "a third party agree[ment] to remarket the equipment at the end of the lease period," with a guaranteed minimum payment from the remarketing for GECC. App., *infra*, 34a; see *id.* at 30a, 42a-43a.

Terex was the "third party" which agreed to remarket the equipment at the end of the lease period. It guaranteed GECC at least 96% of the original purchase price that GECC had paid to URI. In a separate agreement, URI agreed to indemnify Terex for any losses Terex incurred in remarketing GECC's equipment. This included URI's purchasing more equipment than usual from Terex, and reimbursing Terex in advance for at least part of Terex's anticipated losses by paying more for that equipment than the equipment was worth.

URI initiated and structured these transactions so that it could immediately recognize profit from the equipment sales to GECC. App., *infra*, 31a. Under Generally Accepted Accounting Principles, this immediate recognition was impermissible because two conditions were not met—that GECC had accepted the risks and rewards of ownership and that the sales price was fixed and determinable. *Ibid.*; *id.* at 49a. Because of the backup remarketing agreement in which URI indemnified Terex, URI itself ultimately retained the risks of ownership. Similarly, because "commitments related to the sale remain[ed] unsettled, the sale price [was] not deemed to be fixed and determinable." *Id.* at 31a. By structuring the transactions via multiple agreements

which did not cross-reference each other, the SEC alleged, URI "conceal[ed] the true structure of [both years'] transactions from URI's auditor" as "part of the fraudulent scheme" to prematurely recognize revenue. *Id.* at 30a. This led to "materially false and misleading" information being "disseminated to the investing public." *Id.* at 32a.

II. PROCEEDINGS BELOW

A. Proceedings in the trial court

1. *The SEC's suit against Apuzzo*

The SEC sued Apuzzo in the District of Connecticut for aiding and abetting URI's and Nolan's securities fraud. Under Section 20(e) of the Securities Exchange Act, 15 U.S.C. § 78t(e), the government cannot prevail without alleging (1) a primary violation of the securities law; (2) the alleged aider and abettor acted "knowingly"; and (3) his actions "provide[d] substantial assistance" in achieving the primary violation. 15 U.S.C. § 78t(e); see also *SEC* v. *DiBella*, 587 F.3d 553, 566 (2d Cir. 2009). Only the third of those requirements is in play here.

The complaint alleged that Apuzzo aided and abetted URI's fraud first by signing the remarketing agreement with GECC and the backup remarketing agreement with URI. Second, the SEC alleged, Apuzzo issued invoices from Terex to URI that failed to disclose that URI's payment was not merely for equipment, but included indemnification of Terex for Terex's anticipated losses under Terex's remarketing agreement with GECC. The SEC did not allege that Apuzzo concealed any information from URI's auditors or provided them with any false information. App., *infra*, 57a-58a.

Nowhere did the SEC contend that Apuzzo's conduct proximately caused the violation. Its allegations of

Apuzzo's "substantial assistance" instead included the following:

- Apuzzo "sign[ed] agreements with URI that he knew or was reckless in not knowing were designed to hide URI's continuing risks and financial obligations," and
- He "direct[ed] or approv[ed] the issuance of inflated invoices" that he knew (or was reckless in not knowing) that URI "would use to inflate URI's gain on the transactions."

Compl. ¶2. Apuzzo filed a motion to dismiss under Rule 12(b)(6) which argued that these allegations were insufficient as a matter of law to "demonstrate [that] Mr. Apuzzo 'substantially assisted' in the alleged fraudulent conduct." Mot. to Dismiss, *SEC* v. *Apuzzo*, No. 3:07-CV-01910 (D. Conn.), at 1 (filed Sept. 29, 2008).[3]

2. *The trial court grants the motion to dismiss*

Both longstanding and recent precedent holds that conduct amounts to "substantial assistance" under Section 20(e) only if it proximately caused the primary violation. See *infra* pp. 15-20 (describing case law). Indeed, at the outset of this case, the SEC acknowledged its burden to meet "a proximate cause standard such that to prevail, a plaintiff must allege that the defendant's substantial assistance proximately caused the harm on which the primary liability is predicated." SEC Opp. to Mot. to Dismiss, *SEC* v. *Apuzzo*, No. 3:07-CV-01910 (D. Conn.), at 19 (filed Nov. 28, 2008). The district court agreed with Apuzzo that the SEC's complaint failed to allege that Apuzzo's conduct was a proximate cause of any securities-law violation by URI. In a lengthy opinion, it

[3] Apuzzo also raised other grounds, *e.g.*, statute of limitations, which were not reached by the district court and are not relevant here.

granted Apuzzo's motion. App., *infra*, 29a-59a.

The district court found that the SEC had alleged the first two elements of a civil aiding-and-abetting offense—a primary violation (here, URI's fraud) and Apuzzo's knowledge of it. App., *infra*, 29a-43a, 48a-49a.

Turning to the final element, the district court held that the SEC had not sufficiently alleged that Apuzzo provided "substantial assistance" because it had failed to plead that his conduct was a proximate cause of the violation. Citing the case law establishing the proximate-cause standard, App., *infra*, 53a-56a, the district court concluded that "the complaint contains factual allegations which taken as true support a conclusion that there was a 'but for' causal relationship between Apuzzo's conduct and the primary violation, but do not support a conclusion that Apuzzo's conduct proximately caused the primary violation." *Id.* at 57a.

Unlike examples from case law, nothing in this complaint suggested "that Apuzzo caused the primary violation by creating the structure for" the 2000 and 2001 violations; the allegations instead showed that Nolan did that. App., *infra*, 57a. Nor were there "allegations * * * that Apuzzo was * * * responsible for bringing the respective parties to the three-party agreements to the transactions"—again, the work of Nolan. *Ibid.* Unlike in other cases, "Apuzzo was not responsible for the accounting decisions at URI" which gave rise to the primary violation; Apuzzo was responsible only for Terex's accounting and financial statements. *Id.* at 58a. Nolan, not Apuzzo, sent URI's accounting department any "inflated invoices for the new equipment," *ibid.* And no allegations suggested "that Apuzzo concealed information from URI's auditor." *Ibid.*

Rather than conduct that could constitute "substantial

assistance," the complaint portrayed Apuzzo as participating in business transactions where he allegedly knew that another party would mislead *its* auditor and thereby cause a primary violation of the securities laws. App., *infra*, 58a-59a. But "[a]s the chief financial officer of Terex, not URI, Apuzzo had no duty to disclose the true structure of the transactions to URI's auditor," *id.* at 59a. "'[M]ere awareness and approval of the primary violation,'" *ibid.* (quoting *SEC* v. *Power*, 525 F. Supp. 2d 415, 422 (S.D.N.Y. 2007)), cannot constitute proximate cause. Accordingly, the district court held that the complaint did not allege that Apuzzo "substantially assisted the primary violation," App., *infra*, 59a. Consequently, "the SEC has failed to allege that Apuzzo aided and abetted the primary violation of the securities laws by Nolan and others." *Ibid.* The district court dismissed the SEC's action with prejudice. *Id.* at 60a.

B. Proceedings on appeal

1. *The SEC's appeal*

On appeal, consistent with its position in the district court, the SEC "agree[d] that an aider and abettor's conduct must be a substantial causal factor in the fraud," SEC Br. (2d Cir.) at 30, which it acknowledged was identical to a "proximate cause" standard, *id.* at 31. The SEC argued that it had satisfied that burden. *Id.* at 21.

2. *The panel opinion*

The court of appeals reversed, in an opinion authored by District Judge Rakoff. App., *infra*, 1a-25a.

The court recognized that "the only disputed question on appeal is whether the facts alleged plausibly plead that Apuzzo substantially assisted the primary violator in committing the fraud." App., *infra*, 13a. Rather than address the SEC's main contention—that it *did* ade-

quately allege proximate cause, and therefore alleged Apuzzo's "substantial assistance"—the panel held that "the SEC is not required to prove proximate causation" in the first place. *Id.* at 21a; see *id.* at 3a, 15a.

The court framed its analysis of the sufficiency of a civil aiding-and-abetting complaint by turning to *criminal* aiding-and-abetting standards:

> In assessing this issue, we draw guidance from the well-developed law of aiding and abetting liability in criminal cases; for if the conduct of an aider and abettor is sufficient to impose criminal liability, *a fortiori* it is sufficient to impose civil liability in a government enforcement action.

App., *infra*, 14a. The court then quoted the standard applied to the general criminal aiding-and-abetting statute, holding that ("*a fortiori*") no *civil* aiding-and-abetting standards can be more onerous. To show "substantial assistance," the SEC must therefore only

> prove "that [the defendant] in some sort associate[d] himself with the venture, that [the defendant] participate[d] in it as in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed."

Ibid. (quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.)). The opinion did not, however, quote the text of the statute that Judge Hand was interpreting, which is now codified at 18 U.S.C. §2(a). Nor did it mention that the text of §2(a) is markedly different from the text of the statute at issue in this case, 15 U.S.C. §78t(e) (Section 20(e)).

The Second Circuit rationalized its deletion of the SEC's duty to prove proximate cause *of a violation* by asserting that the government does not have to prove *in-*

jury (*i.e.*, loss causation):

> "Proximate cause" is the language of private tort actions * * * . But, in an enforcement action, civil or criminal, there is no requirement that the government prove injury, because the purpose of such actions is deterrence, not compensation.

App., *infra*, 15a. Loss causation, the court noted, was an element of private aiding-and-abetting actions before this Court's decision in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), precluded such private-plaintiff suits. App., *infra*, 15a-16a. "[T]here is no reason," the Second Circuit stated, "to carry this requirement over to the context of SEC enforcement actions." *Id.* at 16a. The court did not explain why the irrelevance of *loss* causation to an enforcement action also rendered irrelevant proximate causation of the *violation*.

Only three years before the judgment below, the panel acknowledged, the Second Circuit itself had required proximate cause in a civil aiding-and-abetting case brought by the SEC. See App., *infra*, 16a-17a (citing *DiBella*, 587 F.3d 553). There, the appeals court specifically noted that it was applying the causation requirement *to the SEC*. *DiBella*, 587 F.3d at 566 n.9. Nonetheless, the panel below sought to dismiss the *DiBella* precedent on grounds that a case that *DiBella* cited, *Bloor* v. *Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 62 (2d Cir. 1985), had involved only a private plaintiff, not the SEC. App., *infra*, 17a.[4]

Framing its decision as simply a "clarifi[cation]," the

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[4] The panel did not explain how *DiBella*'s holding could be distinguished by distinguishing *the case from which it drew its proximate-cause requirement.*

appeals court thus held that "the SEC is not required to plead or prove that an aider and abettor proximately caused the primary securities law violation." App., *infra*, 17a. It opined that the "statutory mandate would be undercut if proximate causation were required for aider and abettor liability in SEC enforcement actions." *Ibid.*

The court further emasculated the statute's substantial-assistance element by allowing the SEC's stronger allegations on the knowledge element to compensate for deficiencies in its weaker substantial-assistance allegations. Thus, "when evaluating whether Apuzzo rendered substantial assistance, we must consider his high degree of actual knowledge of the primary violation (the second component of aiding and abetting)." App., *infra*, 19a. If the SEC "plausibly alleges a high degree of actual knowledge, this lessens the burden it must meet in alleging substantial assistance." *Id.* at 19a-20a. Indeed, this approach "is particularly appropriate," the court below believed, "in light of the test for substantial assistance that we have laid out above." *Id.* at 20a. Having eliminated proximate cause from the analysis, a high degree of knowledge could allow a jury to infer that "actions, which perhaps could be viewed innocently in some contexts, were taken with the goal of helping the fraud succeed." *Ibid.* Because the complaint "alleges, in detail, a very high degree of knowledge," Apuzzo's actions must be viewed "as an effort to purposely assist the fraud and help make it succeed." *Id.* at 20a-21a.

The court rejected the rest of Apuzzo's arguments. App., *infra*, 21a-25a. Thus, under the general criminal-law aiding-and-abetting test that now applied to civil aiding and abetting, the Second Circuit found that the complaint adequately alleged that Apuzzo provided substantial assistance: "Apuzzo associated himself with the ven-

ture, participated in it as something that he wished to bring about, and sought by his action to make it succeed." App., *infra*, 18a.

3. *The denial of* en banc *review*

On November 13, 2012, the Second Circuit denied Apuzzo's petition for rehearing *en banc*. App., *infra*, 26a.

REASONS FOR GRANTING THE PETITION

The judgment below introduces a serious error of law into a previously settled and unquestionably important area of federal securities regulation. For the first time, the SEC is excused from alleging or proving that an aiding-and-abetting defendant's conduct was a proximate cause of the primary violation. This holding was the consequence of an unusually egregious misapplication of the rules of statutory construction, whereby one statute has been held to define the scope of another statute that was consciously written to require far more. It dramatically alters the legislative scheme and creates conflict among the lower courts. Plenary review by this Court is necessary to settle the conflict and resolve the confusion resulting from the badly flawed judgment below. For the reasons stated, the Court should reverse.

I. THE JUDGMENT BELOW DIVIDES THE CIRCUITS AS TO WHAT CONSTITUTES "SUBSTANTIAL ASSISTANCE" UNDER SECTION 20(e)

Civil claims for aiding and abetting a securities fraud have had a complicated history. But what has never been controversial, until now, is the requirement that the complaint allege that the aider and abettor's conduct was a proximate cause (or, alternatively stated, a substantial causal factor) of the primary violation.

A. The term "substantial assistance" has always included proximate cause—until the judgment below

The term "substantial assistance" has long been used in civil aiding-and-abetting securities-fraud cases. Taken from the Restatement of Torts, courts uniformly regarded that phrase as an element of the judicially implied cause of action that required a showing of proximate cause. In 1994, this Court held in *Central Bank* that the Securities Exchange Act did not reach aiding and abetting. The next year, Congress enacted Section 20(e), which allows the SEC (but not private plaintiffs) to pursue civil aiding-and-abetting claims. Section 20(e) for the first time statutorily required "substantial assistance," because that requirement was what the courts had always required, and (as to SEC claims only) Congress intended to restore the jurisprudence as it stood before *Central Bank*. It used "substantial assistance" as a term of art derived from prior case law, thereby reinvesting otherwise abrogated cases with precedential value.

The Second Circuit has wrenched that phrase from its historical moorings, and replaced it with a judicial gloss fashioned from an unrelated criminal statute whose text in no way requires that an aider and abettor's assistance be "substantial." It provided no evidence that Congress intended "substantial assistance" to be coterminous with the criminal statute's entirely different language. The judgment below dramatically changes the law and creates not only a split among the circuits but also substantial confusion for the district courts, where the pre-trial sufficiency of allegations is routinely assessed.

1. *"Substantial assistance" was used in pre-*Central Bank *cases as a term of art that required proof of proximate cause*

Federal courts entertained aiding-and-abetting suits in the securities-fraud context long before Congress enacted what is now Section 20(e) of the Securities Exchange Act. Pre-*Central Bank* aiding-and-abetting cases applied the same elements that are now codified in Section 20(e): proof of a primary violation, the secondary defendant's knowledge of that violation, and the secondary defendant's substantial assistance in that violation. See, *e.g.*, *Metge* v. *Baehler*, 762 F.2d 621, 624 (8th Cir. 1985); *Bloor* v. *Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 62 (2d Cir. 1985); *Cleary* v. *Perfectune*, 700 F.2d 774, 777 (1st Cir. 1983); *Harmsen* v. *Smith*, 693 F.2d 932, 944 (9th Cir. 1982); *Investors Research Corp.* v. *SEC*, 628 F.2d 168, 178 (D.C. Cir. 1980); *SEC* v. *Coffey*, 493 F.2d 1304, 1316 (6th Cir. 1974); *Landy* v. *FDIC*, 486 F.2d 139, 162-163 (3d Cir. 1973).

As this Court's opinion recognized, courts across the nation derived that tripartite test, and drew the term "substantial assistance," from section 876(b) of the original Restatement of Torts. See *Cent. Bank*, 511 U.S. at 168, 171, 181; *id.* at 193-194, 197 n.8 (Stevens, J., dissenting). The Restatement, in turn, made clear that proximate causation was a minimum requirement for "substantial assistance."

Section 876(b) provided for secondary liability (like aiding and abetting) if a defendant "knows that the [third party's] conduct constitutes a breach of duty and gives substantial assistance or encouragement to" the third party. Restatement of Torts § 876(b) (1939). As the Restatement explained, if a defendant's "assistance is a substantial factor in *causing the resulting tort*," then the de-

fendant will be held liable. *Id.* § 876, cmt. b (emphasis added). It went on to state that the liability "factors are the same as those used in determining the existence of legal causation," the Restatement's term for "proximate cause."[5] *Ibid.*

Unsurprisingly, therefore, the substantial-assistance prong as applied across the country required a proximate-cause showing for the plaintiff to prevail. "It is well settled in this circuit," the Seventh Circuit reiterated, "that but-for causation is not sufficient to state a claim for aiding and abetting." *Robin* v. *Arthur Young & Co.*, 915 F.2d 1120, 1125 (7th Cir. 1990). Only if the defendant's "assistance is a substantial factor in causing the resulting tort," can the defendant be held liable. *Landy*, 486 F.2d at 163. Or, stated from the other perspective, plaintiffs' "burden" is to "show[] that the secondary party proximately caused the violation." *Metge*, 762 F.2d at 624. Accord *Bloor*, 754 F.2d at 62 ("In alleging the requisite 'substantial assistance' by the aider and abettor, the complaint must allege that the acts of the aider and abettor proximately caused the harm * * * on which the primary liability is predicated.").

So far as petitioner is aware, the judgment below is the first time that any court has expressly held that an aiding-and-abetting defendant's conduct may constitute "substantial assistance" of a securities fraud *without* an allegation or demonstration that the questioned conduct proximately caused the primary violation.[6]

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[5] "Legal cause" is a term that means "proximate cause," and was regarded as more precise by the legendary tort-law scholars Prosser and Keeton. See, *e.g.*, *Norfolk S. Ry. Co.* v. *Sorrell*, 549 U.S. 158, 179-180 (2007) (Ginsburg, J., concurring in judgment).

[6] The panel below cited an early Second Circuit case, which the panel claimed "applied [the criminal] standard in a civil securities fraud

2. *Congress codified the term "substantial assistance" to retain its pre-*Central Bank *meaning*

Central Bank did not address *how* the lower courts had adjudicated civil aiding-and-abetting cases, but ruled simply that they could not do so at all, absent congressional authorization. In 1995, Congress responded by leaving in place *Central Bank*'s preclusion of private-plaintiff aiding-and-abetting actions, while enacting what is now Section 20(e) of the Securities Exchange Act, 15 U.S.C. § 78t(e), to allow the SEC to carry on as before. See *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 158 (2008). To make clear that the legal regime—at least for the SEC—should not change, "Congress employed language identical to that used by lower federal courts in articulating the elements of aiding and abetting * * * before *Central Bank* eliminated private causes of action for aiding and abetting." *SEC* v. *Fehn*, 97 F.3d 1276, 1288 (9th Cir. 1996).

After considerable deliberation, Congress codified the

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case." App., *infra*, 15a n.9 (citing *IIT, an Int'l Inv. Trust* v. *Cornfeld*, 619 F.2d 909 (2d Cir. 1980)). To the contrary, *IIT* (while observing that "'substantial assistance' is still being delineated by the courts") merely "wonder[ed]" in dicta "whether the elaborate discussions [of the traditional three-part civil test] have added anything except unnecessary detail" to Judge Hand's criminal test. 619 F.2d at 922. Wondering aside, its analysis followed the three-part, not the criminal test: "[W]e shall discuss the question [of liability] in the terms that have become conventional." *Ibid.* Later Second Circuit cases did not read *IIT* as substituting the criminal test for the proximate-cause requirement; they affirm that a defendant "cannot be liable as an aider and abettor unless his [action] was a proximate cause of the [primary violation]." *Armstrong* v. *McAlpin*, 699 F.2d 79, 92 (2d Cir. 1983). Accord *Bloor*, 744 F.2d at 62; *DiBella*, 587 F.3d at 566-567 (citing the criminal test as a starting point before applying the three-part test that is "specific to securities violations"—including the proximate-cause requirement).

same tripartite test described above and cited in *Central Bank* itself, see 511 U.S. at 168. Most importantly, Congress expressly included "substantial assistance" as a requirement for aiding-and-abetting liability. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 104, 109 Stat. 737, 757 (1995). Section 20(e)'s elements "mirror the elements * * * traditionally used to define aiding and abetting under Section 10(b)." *Fehn*, 97 F.3d at 1288. As the Ninth Circuit noted, this "symmetry * * * is a strong indication that Congress intended [Section 20(e)] to preserve the definition of aiding-and-abetting as it existed pre-*Central Bank*." *Ibid.* (describing legislative history in detail).

Accordingly, the ample pre-*Central Bank* case law remains authoritative today, because that jurisprudence is precisely what Congress intended to revive. The courts have recognized that Section 20(e) "simply restores the pre-*Central Bank* status quo" as applied to SEC aiding-and-abetting cases, *Fehn*, 97 F.3d at 1288, and that pre-*Central Bank* cases remain valid, *e.g.*, *DiBella*, 587 F.3d at 566 n.9.

3. *Following Section 20(e)'s enactment, courts continued to define "substantial assistance" to require proximate cause of the violation*

Although the SEC became the only plaintiff able to bring aiding-and-abetting suits, federal courts have had no difficulty understanding their marching orders from Congress, including the requirement of an allegation that the aider and abettor's conduct was a proximate cause of the violation.

a. The First Circuit has made it unmistakably clear that the proximate-cause requirement remains intact. In *SEC* v. *Tambone*, the court found the substantial-assistance element satisfied because defendant's actions

"caus[ed] Columbia Advisors' primary violation," 550 F.3d 106, 145 (1st Cir. 2008), reinstated in relevant part on reh'g, 597 F.3d 436, 450 (2010) (*en banc*). *Tambone* then emphasized that this causation was essential by citing two pre-*Central Bank* cases for that purpose alone. It quoted *Metge*, the Eighth Circuit case, saying that it "requir[ed] a showing that 'the secondary party [has] proximately caused the violation,'" *Tambone*, 550 F.3d at 145 (quoting *Metge*, 762 F.2d at 624). And it quoted a district court case which *Metge* had cited for the same proposition: "[P]laintiff[s] must show 'substantial causal connection between the culpable conduct of the alleged aider and abetter and the harm.'" *Tambone*, 550 F.3d at 145 (quoting *Mendelsohn* v. *Capital Underwriters, Inc.*, 490 F. Supp. 1069, 1084 (N.D. Cal. 1979)). District courts within the First Circuit follow this principle.[7]

b. So, too, had the proximate-cause requirement been honored within the Second Circuit prior to the judgment below, as the SEC conceded in both lower courts. See *supra* pp. 7, 9. The Second Circuit, only four years ago, stated that "[s]ubstantial assistance * * * requires a showing that the aider and abettor proximately caused the harm to [the victim] on which the primary liability is predicated." *DiBella*, 587 F.3d at 566. *DiBella* specifically explained that the pre-*Central Bank* proximate-cause requirement "is still controlling and relevant" in SEC cases under Section 20(e). *Id.* at 566 n.9.

That was the established practice in that circuit's district courts—most importantly, the Southern District of New York. Indeed, the decision below, "articulat[ing] * * * a new standard for pleading and proving 'substantial

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[7] "[T]he aider and abettor's substantial assistance must be a proximate cause of the primary violation." *SEC* v. *Patel*, No. 07-cv-39-SM, 2009 WL 3151143, at *22 (D.N.H. Sept. 30, 2009).

assistance,'" was literally breaking news: "For years, district courts within the Second Circuit have relied on the now-defunct 'proximate cause' standard in aiding and abetting cases." Trencher & O'Hegarty, *'Apuzzo' Invites Aiding and Abetting Securities Fraud Enforcement Actions*, N.Y.L.J. (Sept. 19, 2012). Antedating *DiBella*, for example, the Southern District of New York recognized that a defendant's "substantial assistance must be a proximate cause of the primary violation." *SEC* v. *Treadway*, 430 F. Supp. 2d 293, 339 (S.D.N.Y. 2006). See also, *e.g.*, *SEC* v. *Cedric Kushner Promotions, Inc.*, 417 F. Supp. 2d 326, 336 (S.D.N.Y. 2006) (granting motion to dismiss where SEC "could not show that [a defendant's] conduct was a substantial causal factor in the alleged primary violation").

Only because of the judgment below have the district courts within the circuit retrenched. In one case, the district court had confidently asserted that "the complaint must allege that the aider and abettor's conduct was a substantial causal factor in the perpetuation of the underlying violation," *SEC* v. *Espuelas*, 579 F. Supp. 2d 461, 471 (S.D.N.Y. 2008), but in a subsequent proceeding, it has emphasized that "the Second Circuit has recently held that to establish aiding and abetting liability, the SEC need *not* show 'that an aider and abettor proximately caused the primary securities law violation.'" *SEC* v. *Espuelas*, No. 06 Civ 2435, 2012 WL 5288740, at *9 (S.D.N.Y. Oct. 20, 2012) (quoting App., *infra*, 17a).

B. The question presented is an important and recurring pure question of law, and this case provides an ideal vehicle to decide it

This case presents a narrow but important question of law, and it arises in precisely the posture most conducive for immediate resolution. Moreover, it comes from the Second Circuit, which is of outsize importance in securities law and thus can least afford erroneous decisions on the proper application of Section 20(e). This case is the ideal vehicle to resolve the division and confusion within the circuit and district courts.

1. This case presents a pure question of law. The only question before the Second Circuit was whether the complaint adequately pleaded substantial assistance. See App., *infra*, 13a. Its resolution of the question—declaring, as a matter of law, that proximate cause need not be alleged—further narrows the question. This Court's role will simply be to reverse if the Second Circuit enunciated an improper legal standard or to affirm if that court got it right.

Nor is it conceivable that further proceedings in this case would make it a better vehicle for addressing the question presented. Given that the legal question is one that concerns *what must be alleged*, it is to be expected that the question will crystallize, as here, in a challenge to the complaint. The purpose of a motion to dismiss is to avoid a trial when the complaint is deficient. Forcing further proceedings can generate nothing that might lead to a better understanding of the adequacy of the complaint's allegations. This Court has frequently granted certiorari at the motion-to-dismiss stage to establish pleading standards in securities actions. See *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309 (2011) (materiality); *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308

(2007) (scienter); *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336 (2005) (loss causation).

2. Upon the release of the decision below, it was immediately recognized that its provenance and subject matter combine to endow it with unique influence. "The impact of *Apuzzo* likely will be amplified by the fact that courts within the Second Circuit serve as the venue for the majority of securities fraud actions filed by the SEC." Trencher & O'Hegarty, *supra*. Plus, "courts outside of this circuit routinely look [to the Second Circuit] for guidance." *Ibid.* Even Congress has recognized the Second Circuit as "the leading circuit in th[e] area" of securities litigation. S. Rep. No. 104-98, at 7 (1995). Justices of this Court have acknowledged the same point, referring to the Second Circuit as "the Mother Court of securities law," *Morrison* v. *Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2889-2890 (2010) (Stevens J., concurring in judgment) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting)). A Second Circuit decision that works a sea change in securities law warrants immediate review.

3. The judgment below "may result in the SEC bringing more aiding and abetting cases." Trencher & O'Hegarty, *supra*. Indeed, because the SEC is the *only* plaintiff authorized to bring such claims, it has a special incentive to bring cases with weak proximate-cause showings primarily in the Second Circuit; no case can be brought, or grant of a motion to dismiss appealed, in any other court without the SEC choosing to do so.

At the very least, because the bulk of such cases, including the most sophisticated ones, arise within the Second Circuit's geographic scope, the opinion below justifies plenary review. If, as petitioner submits, the judgment below is fatally flawed, correcting it now will save

substantial public and private resources, which otherwise may be wasted if the Court reaches that conclusion later. This Court has previously noted the substantial civil and criminal authority of the SEC to pursue aiders and abettors of securities fraud. "The enforcement power is not toothless. Since September 30, 2002, SEC enforcement actions have collected over $10 billion in disgorgement and penalties * * *." *Stoneridge*, 552 U.S. at 166. Indeed, given the times, the SEC's enforcement authority is all the more important and the stakes are noticeably higher. There is an urgent need for a reliable and consistent judicial construction of the law.

II. THE JUDGMENT BELOW IS WRONG AND SHOULD BE REVERSED

The pivotal passage of the Second Circuit's opinion is its adoption of the generic criminal aiding-and-abetting test to supplant the proximate-cause requirement: "[I]f the conduct of an aider and abettor is sufficient to impose criminal liability, *a fortiori* it is sufficient to impose civil liability," App., *infra*, 14a. The rest of its analysis flows from and depends upon this premise, which is without any authoritative support whatsoever. That load-bearing "*a fortiori*" foundation cannot withstand the most basic set of undisputed—yet, in the opinion below, mostly unmentioned—facts:

- The longstanding general criminal aiding-and-abetting statute, 18 U.S.C. §2(a), has broad scope and no requirement of substantial assistance.
- When it has seen fit to do so, Congress has copied that criminal statute's text in specific civil contexts, providing them the same scope as the criminal law.
- In Section 20(e), Congress elected not to copy the text of the general criminal statute, but to adopt a

substantively different textual formulation.

- Specifically, beyond using wholly different language, Section 20(e) adds a heightened requirement of "substantial assistance."

The Second Circuit could perhaps obscure some of this by ignoring it—hence the absence of any comparison of the texts of §2(a) and Section 20(e). But because each point is objectively true—and, further, because the phrase "substantial assistance" has a long history in this very context—the Second Circuit's judgment is plainly wrong.

A. The judgment below depends upon treating vastly different texts as having identical meaning

Everything in the Second Circuit's opinion rests on the premise that *no* civil aiding-and-abetting statute may be more demanding than the generic criminal aiding-and-abetting statute. If that premise fails, and it does, then Congress must have meant something by expressly inserting "substantial assistance" into the civil, but not the criminal, statute. And what Congress meant is what the federal courts, following the Restatement of Torts, have always meant: that the SEC must allege that the defendant's conduct was a proximate cause of the primary violation.

1. *The opinion's logical fallacy is that different text is irrelevant in the aiding-and-abetting context*

The Second Circuit's "*a fortiori*" line of reasoning—that "conduct * * * sufficient to impose criminal liability" must be "sufficient to impose civil liability," App., *infra*, 14a—might find traction in a common-law context (where there is no statutory text) or where criminal and civil

statutes have identical texts. But the carefully unstated minor premise of the Second Circuit's "*a fortiori*" syllogism is that it must hold *even when, as here, the civil and criminal statutory texts are undeniably different.*

A reader of the opinion below would not know just how different the two texts are, because the Second Circuit fails to disclose the statutory text that Judge Hand construed. It simply announces Judge Hand's construction of the criminal statute, as if that settled the matter.

The statutory text construed by Judge Hand reads simply:

> Whoever commits an offense against the United States or *aids, abets, counsels, commands, induces or procures its commission*, is punishable as a principal.

18 U.S.C. § 2(a) (2000) (emphasis added).[8]

Given the breadth of that language, it is apparent that Judge Hand's test is faithful to the text, requiring only

> that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

Nye & Nissen v. *United States*, 336 U.S. 613, 619 (1949) (quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.)).

Under § 2(a)'s text, no one could reasonably maintain

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[8] The statute in 1938, when Judge Hand interpreted it, was materially indistinguishable, listing the same six verbs in the same order: "Whoever directly commits any act constituting an offense defined in any law of the United States, or *aids, abets, counsels, commands, induces, or procures its commission*, is a principal." 18 U.S.C. § 550 (1934) (emphasis added).

that a proximate-cause requirement lurks within it; accordingly, Judge Hand's test has no such requirement. Indeed, nothing in Judge Hand's test even requires that any assistance be "substantial" under any definition of that word. It requires merely that a defendant "in some sort associate himself" with a criminal undertaking. *Peoni*, 100 F.2d at 402.

But Section 20(e) is different. It is longer and imposes a greater burden on the plaintiff. In relevant part, it provides that

> any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision[.]

15 U.S.C. § 78t(e).

Given that the criminal statute requires neither proximate cause nor even conduct that is "substantial," and given Section 20(e)'s *express* requirement of "substantial assistance" in the primary violation, one would expect the panel below to have something unusually persuasive to justify delimiting Section 20(e) by Judge Hand's construction of § 2(a). But the panel offered nothing beyond its "*a fortiori*" approach. The proper Latin term is "*non sequitur*." The Second Circuit's conclusion simply does not follow from its premise because the statutory texts are different, and the judgment below cannot survive a side-by-side comparison.[9]

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[9] It is hardly unknown for legislatures to use different textual provisions to impose a higher burden for civil liability than analogous criminal liability. Compare Cal. Penal Code § 646.9(a) with Cal. Civ. Code § 1708.7 (additional elements for civil stalking liability), and Tex. Penal Code § 42.072 with Tex. Civ. Prac. & Rem. Code § 85.003

2. *Contrary to the Second Circuit's view, Congress is deliberate about whether and how to extend civil aiding-and-abetting liability*

The Second Circuit's assumption that *any* civil aiding-and-abetting statute "must" be no more demanding in any respect than § 2(a), App., *infra*, 14a, implies a relationship between civil and criminal aiding-and-abetting liability that is unsupported by history or law. As this Court noted in *Central Bank*, while "[a]iding and abetting is an ancient criminal law doctrine," 511 U.S. at 181, it has no such pedigree in civil litigation, *ibid.* Although § 2(a) is "a general aiding and abetting statute applicable to all federal criminal offenses," *ibid.*, "Congress has not enacted a general civil aiding and abetting statute—either for suits by the Government * * * or for suits by private parties." *Id.* at 182. When it chooses to impose it at all, "Congress has instead taken a statute-by-statute approach to civil aiding and abetting liability." *Ibid.*

Given that Congress is cautious about creating civil aiding-and-abetting liability at all, it follows that it would also be cautious about its extent when it *does* impose liability. This is another flaw in the Second Circuit's breezy "*a fortiori*" analysis. Nothing justifies its implicit assumption that Congress would simultaneously resist widespread civil aiding-and-abetting liability, yet, when it did elect to impose it, would invariably make its scope identical to the capacious criminal statute. This Court has already explained the proper methodological approach: "The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a

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(same), and Mo. Ann. Stat. § 565.253.1(1) with *Sofka* v. *Thal*, 662 S.W.2d 502, 510 (Mo. 1983) (higher scienter standard for civil invasion of privacy).

deliberate congressional choice with which the courts should not interfere." *Cent. Bank*, 511 U.S. at 184.

In some cases, Congress has indeed adopted the expansive criminal standard for civil aiding-and-abetting liability. For instance, the Investment Advisers Act has multiple secondary-liability provisions that literally copy the six verbs from § 2(a) and list them in the same order. See, *e.g.*, 15 U.S.C. § 80b-9(d) (liability if "any person has aided, abetted, counseled, commanded, induced, or procured" a primary violation); *id.* §§ 80b-3(e)(6), 80b-3(e)(8)(C), 80b-3(i)(1)(A)(ii), 80b-9(f) (all using the same verbs in the same order).[10] The Commodities Exchange Act similarly mimics the criminal statute's coverage. 7 U.S.C. § 13c(a) (liability if "[a]ny person * * * willfully aids, abets, counsels, commands, induces, or procures" a primary violation).

Thus, if Congress wishes to duplicate the scope of § 2(a), it not only knows how, but has actually done it—*by using § 2(a)'s text*. In such instances, it is perfectly appropriate to apply the substantive criminal standard for liability. *Bosco* v. *Serhant*, 836 F.2d 271, 279 (7th Cir. 1987) (citing Judge Hand's opinion in *Peoni* and observing that "the legislative history of [the Commodities Exchange Act] shows that the aiding and abetting provision was modeled on, and was intended to be interpreted consistently with, the federal statute that makes aiding and abetting a crime"); *Abrahamson* v. *Fleschner*, 568 F.2d 862, 871 n.16 (2d Cir. 1977) (stating the criminal standard for civil aiding-and-abetting liability under the IAA).

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[10] The IAA's legislative history confirms Congress's intent to "borro[w] the concepts of aiding and abetting from the criminal law and * * * insure that persons will be liable in administrative actions by the Commission, as well as in criminal actions." S. Rep. No. 86-1760, at 8-9 (1960).

Section 20(e) is quite different, and not at all a duplication of §2(a)'s text or scope. Responding to *Central Bank*, Congress deliberated not solely about whether to provide for SEC authority to bring civil aiding-and-abetting complaints, but about what standards to require. See, *e.g.*, *Fehn*, 97 F.3d at 1288 (describing legislative history). Because Congress decided to retain the judicially developed aiding-and-abetting jurisprudence, *ibid.*, Section 20(e) conditions aiding-and-abetting liability on something wholly absent from §2(a)—"substantial assistance" in the primary violation, 15 U.S.C. §78t(e), which has always required proof of proximate cause.[11]

3. *The panel's approach violates principle after principle of sound statutory construction*

The Second Circuit violated principle after principle of this Court's statutory-construction jurisprudence. Different language must mean something different. "[W]here words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 63 (2006) (quotation omitted).

By ignoring the principle that different words have different meanings, the court also drained the word "substantial" of *any* meaning. The opinion purports to define "substantial assistance" to require nothing more than what criminal aiding and abetting requires—the Judge Hand definition that has *never* been thought to require *anything* "substantial." This Court, by contrast, takes

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[11] The Dodd-Frank Act further reflects Congress' ability to specify the aiding-and-abetting standard it prefers. Under that statute, much as under Section 20(e), the Bureau of Consumer Financial Protection may bring a civil action against "any person who knowingly or recklessly provides substantial assistance to a covered person or service provider in violation of" the act. 12 U.S.C. §5536(a)(3).

statutory text seriously. "In construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). The Second Circuit felt no such "oblig[ation]," and defined "substantial assistance" to mean virtually *any* assistance.

The panel's approach is not even a misinterpretation of text—it is a *disregard* of text. Under the panel's "*a fortiori*" logic, *it does not matter* what the text might say. So long as a given statute covers civil aiding-and-abetting, it "must" abide by the criminal standard, because *any* criminal conduct "must" be sufficient to meet *any* civil test. App., *infra*, 14a.[12] If there is any legitimate basis for the Second Circuit's result, it surely cannot be the "*a fortiori*" chain of reasoning.

Accordingly, the Court should grant review and vindicate Section 20(e)'s meaning. The requirement of "substantial assistance" was included for a reason—to cover only defendants who substantially contribute to causing the securities fraud.

B. The Second Circuit's policy preferences do not justify rewriting the text

Although the only logical basis for the Second Circuit's opinion is its "*a fortiori*" fallacy, it also suggested that it reached the "right" result. But even if there were good policy reasons to expand civil aiding-and-abetting liability, that is not for the Second Circuit to decide. In any event, its explanation does not fare well under scrutiny.

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[12] Just as this Court "decline[d] to rely only on 18 U.S.C. § 2 as the basis for recognizing a private aiding and abetting right of action under § 10(b)" in *Central Bank*, 511 U.S. at 191, so should it reject the Second Circuit's "rel[iance] only on 18 U.S.C. § 2" for the *scope* of the limited civil action authorized by Congress in Section 20(e).

1. The Second Circuit first argued that Section 20(e) "was passed * * * precisely to pursue aiders and abettors who * * * were not the [*sic*] themselves involved in the making of the false statements that proximately caused the plaintiffs' injuries." App., *infra*, 17a. True—but *which* such aiders and abettors? Congress did not want to cover the waterfront; it imposed a limitation of "substantial assistance." That may not require a showing of proximate cause of a private party's "injuries," as discussed below, for there need not be any monetary "injury" for the SEC to pursue legal violations. See *infra* pp. 32-33. But the panel offered no reason to believe that Congress excused the SEC from proving that an aider and abettor's conduct was a proximate cause of the primary *violation of the law*. And it certainly identified no warrant to eliminate altogether the requirement that assistance be "substantial."

While the Second Circuit worries that under any other view of the law the "statutory mandate would be undercut," App., *infra*, 17a, it fails to acknowledge that the substantial-assistance requirement is just as much a part of the statutory mandate as the parts that the panel prefers. "It is [a court's] function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve." *Morrison*, 130 S. Ct. at 2886.

Confronting a similar policy argument in *Central Bank*, this Court explained that a ratchet-like expansion of liability does *not* necessarily serve the underlying "objectives of the statute," 511 U.S. at 188; see *id.* at 188-189. Here, it was hardly irrational for Congress to be wary of allowing the SEC to invoke the civil preponderance-of-the-evidence standard and its lower scienter requirements to sweep in even those who play a minor role.

Congress could rationally have decided to require the government to satisfy the no-reasonable-doubt standard and criminal scienter standard if it wishes to target those who play a minor role. These are policy choices for Congress to make. And even if the Second Circuit feels strongly about them, "[p]olicy considerations cannot override our interpretation of the text and structure of the [Securities Exchange] Act," *id.* at 188.

There is good reason to believe that Congress does not share the Second Circuit's vision of boundless SEC civil enforcement. Congress recently lowered Section 20(e)'s scienter standard,[13] but left untouched the substantial-assistance requirement. It did so *after* both *DiBella* and *Tambone* had reiterated the longstanding doctrine that "substantial assistance" requires proximate causation. Congress hardly needs the Second Circuit's help to steer the policy undergirding Section 20(e). Cf. *Gabelli* v. *SEC*, 568 U.S. ___, ___ (2013) (slip op. at 11) (declining to "graft a discovery rule onto the statute" "given the lack of textual, historical or equitable reasons" to do so), reversing, 653 F.3d 49 (2d Cir. 2011) (Rakoff, D.J.).

2. The Second Circuit also sought to portray its policy preferences as flowing from the distinction between private and governmental actions. The court asserted that while proximate cause may be a requirement appropriate for private plaintiffs, government regulators should not be so bound. App., *infra*, 15a-16a. This view misapprehends what is required of private plaintiffs and the SEC in the first place, and ignores statutory text and history.

First, the Second Circuit is correct that the SEC need not prove "injury" or "harm" if those terms are defined to be the money damages that private plaintiffs must

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[13] See *supra* note 1 (describing the Dodd-Frank Act).

show. App., *infra*, 15a-16a. Similarly, the panel's observation that "reliance" need not be shown by the SEC in Section 10(b) enforcement actions refers to transaction causation—whether a third party relied on fraudulent statements in purchasing stock—not on whether the alleged aider and abettor's actions were a proximate cause *of the primary violation*. See *id.* at 16a.[14]

The source of the proximate-cause requirement in civil aiding-and-abetting suits is the text of Section 20(e) itself. It requires proof of "substantial assistance to another person in violation [of securities laws]." That textual requirement has nothing to do with reliance or loss causation, but rather limits the scope of liability to those who proximately caused the primary violation. This has always been an essential component of the substantial-assistance element, and it is one that Congress expressly codified in Section 20(e).[15]

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[14] The court below sought to distinguish *DiBella*'s citation of *Bloor* on the similar ground that "*Bloor* addressed the lack of a causal link between the primary violation and injury to investors, not the lack of a distinct causal link between the aider's substantial assistance and the primary violation." App, *infra*, 16a n.10. This cannot be squared with either *Bloor*'s plain language or *DiBella*'s express adoption of its proximate-cause requirement for SEC cases. Moreover, other Second Circuit cases made clear that a private plaintiff was required to show that the aider's actions were "a proximate cause of the [primary violation]." *Armstrong*, 699 F.2d at 92. Accord *Rolf* v. *Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 48 (2d Cir. 1978).

[15] Thus, while some cases, such as *DiBella*, state the proximate-cause requirement in terms of causing "the harm to [the victim] on which primary liability is predicated," 587 F.3d at 566 (alteration in original), there is no reason to read this as requiring loss causation in an SEC case. To the contrary, where the SEC is "the victim," the "harm" is the primary violation itself. Cf. *Gabelli*, 568 U.S. at ___ (slip op. at 8) ("The SEC * * * is not like an individual victim who relies on apparent injury to learn of a wrong.").

Second, the panel leapt to unsupported conclusions about the statutory history by asserting that "substantial assistance" must mean something different now that the SEC is the only plaintiff allowed. App., *infra*, 17a. This gets the matter entirely backward. If ever the SEC could have claimed exemption, it would have been *before* Section 20(e) incorporated the substantial-assistance requirement into law. After that, the argument is impossible—Congress knew that the SEC was the "only" plaintiff from that point on, but it *still codified* "substantial assistance" as understood pre-enactment. As described above, that term required proximate causation of the primary violation before enactment, and therefore requires it still.

Section 20(e) adopted the "substantial assistance" requirement from case law precisely to ratify the requirement that a defendant's actions must be a proximate cause of the primary fraud. The Second Circuit's conclusion that no such proximate cause was required is error grounded in misplaced policymaking, which abjures a textual analysis of the statute grounded in law. That holding creates a sword for enforcement against minor players that Congress denied to the SEC.

* * *

Apuzzo was allegedly involved in "a business transaction * * * , which foreseeably permits one of the parties to it * * * to independently engage in illegal action as to other parties." *Landy*, 486 F.2d at 163. This does not constitute "substantial assistance" under decades of case law. The Second Circuit's judgment, however, subjects Apuzzo—and anyone else—to liability without regard to the attenuation or insubstantial nature of his conduct. A decision by this Court on the narrow legal question presented would provide much needed clarity to the courts,

the SEC, and private citizens alike.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 2013

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

11-696-cv

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellant

v.

JOSEPH F. APUZZO,
Defendant-Appellee

(August 8, 2012)

Before:

WINTER, RAGGI, *Circuit Judges*, and RAKOFF, *District Judge*[*]

Appeal from the judgment of the United States District Court for the District of Connecticut (Thompson, J.) granting the motion of Defendant-Appellee Joseph Apuzzo to dismiss the Complaint. The Securities and Exchange Commission alleges that Apuzzo aided and abetted securities laws violations through his role in a fraudulent accounting scheme. The district court granted Apuzzo's motion to dismiss on the ground that the Complaint did not meet the "substantial assistance"

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[*] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

component of aiding and abetting liability because it failed to adequately allege that Apuzzo proximately caused the harm on which the primary violation was predicated. We hold that, in SEC civil enforcement actions, the test for substantial assistance is that the aider and abettor "in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed." *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). Applying that test, we hold that the Complaint plausibly alleged that Apuzzo aided and abetted the primary violation. **REVERSED and REMANDED**.

JOHN W. AVERY, Senior Litigation Counsel (Mark D. Cahn, General Counsel, Anne K. Small, Deputy General Counsel, Jacob H. Stillman, Solicitor, *on the brief*), United States Securities and Exchange Commission, *for Plaintiff-Appellant*.

SETH TAUBE (Aaron M. Street, Mauren P. Reid, *on the brief*) Baker Botts LLP, *for Defendant-Appellee*.

RAKOFF, *District Judge*:

The Securities and Exchange Commission ("SEC") alleges that defendant Joseph Apuzzo aided and abetted securities laws violations through his role in a fraudulent accounting scheme. In order for a defendant to be liable as an aider and abettor in a civil enforcement action, the SEC must prove: "(1) the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party; (2) 'knowledge' of this violation on the part of the aider and abettor; and (3) 'substantial assistance' by the aider and abettor in the achievement of the

primary violation." *SEC v. DiBella*, 587 F.3d 553, 566 (2d Cir. 2009) (quoting *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 62 (2d Cir. 1985)). After Apuzzo moved to dismiss the Complaint, the district court, Thompson, J., granted Apuzzo's motion to dismiss. Although the district court found that the Complaint plausibly alleged that Apuzzo had actual knowledge of the primary violation, it concluded that the Complaint did not adequately allege "substantial assistance." Specifically, the district court held that the "substantial assistance" component required that the aider and abettor proximately cause the harm on which the primary violation was predicated, and that the Complaint did not plausibly allege such proximate causation.

For the reasons set forth below, we hold that to satisfy the "substantial assistance" component of aiding and abetting, the SEC must show that the defendant "in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed." *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). Applying that test, we hold that the Complaint plausibly alleged that Apuzzo aided and abetted the primary violation, and we therefore reverse the district court.

FACTUAL ALLEGATIONS

We review *de novo* a district court's dismissal of a complaint under Rule 12(b)(6). *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 715 (2d Cir. 2011). We accept as true all well-pleaded factual allegations in the Complaint and we draw all reasonable inferences in favor of the plaintiff. *Id.* To survive a motion to dismiss, "a complaint must plead enough facts to state a claim to relief that is plausible on its face." *Id.* (quoting *ECA, Local 134*

IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co., 553 F.3d 187, 196 (2d Cir. 2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The following facts are drawn from the allegations in the Complaint, together with those "documents . . . incorporated in it by reference" and "matters of which judicial notice may be taken." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002) (internal quotation marks omitted).

The Terex Corporation ("Terex") manufactures equipment primarily for use in the construction, infrastructure, and surface to mining industries. Apuzzo was the Chief Financial Officer of Terex from October 1998 to September 2002. United Rentals, Inc. ("URI") is one of the largest equipment rental companies in the world. Michael J. Nolan was URI's Chief Financial Officer from its inception in September 1997 until December 2002.

In late December 2000, and again in late December 2001, URI and Nolan, with Apuzzo's assistance, carried out two fraudulent "sale-leaseback" transactions. These transactions were designed to allow URI to "recognize revenue prematurely and to inflate the profit generated from URI's sales." Compl. ¶ 11.

Briefly stated, the scheme worked as follows: URI sold used equipment to General Electric Credit Corporation ("GECC"), a financing corporation, and leased the equipment back for a short period. In order to obtain GECC's participation in these transactions, URI convinced Terex to agree with GECC to resell the equipment for GECC at the end of the lease periods. Terex and URI also agreed that Terex would provide a residual

value guarantee (the "Residual Value Guarantee") to GECC. That guarantee provided that after resale, GECC would receive no less than 96% of the purchase price that GECC had paid URI for the used equipment. However, to secure Terex's participation in the transactions, URI secretly agreed to indemnify Terex for any losses Terex incurred from the Residual Value Guarantee. URI also agreed to make substantial purchases of new equipment from Terex to improve Terex's year-end sales.

Under Generally Accepted Accounting Principles ("GAAP"), URI could immediately recognize the revenue generated by the sale of equipment to GECC if several criteria were met. These criteria included 1) that the "risks and rewards of ownership" had been fully transferred to GECC and 2) that the sale price was "fixed and determinable," or, in other words, that there were no unsettled commitments related to the sale. Compl. ¶ 13. Because URI had secretly agreed to indemnify Terex for any losses that Terex would incur, URI had not fully transferred the risks and rewards of ownership and there were unsettled commitments associated with the sale. Therefore, URI was prohibited under GAAP from recording revenue from the sales, and Apuzzo knew that if the full extent of the three party transactions was transparent, URI would not be able to claim the increased revenue. Apuzzo therefore executed various agreements that disguised URI's continuing risks and financial obligations, and he also approved inflated invoices from Terex that were designed to conceal URI's indemnification payments to Terex.[1]

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[1] The Complaint alleges that Apuzzo approved inflated invoices relevant to the first transaction described below. With respect to the second transaction, also described

The Complaint also elaborates the scheme in more detail:

The Terex I Transaction. In late 2000, URI was looking for a way to meet its announced earnings expectations for fiscal year 2000. URI, through its CFO Nolan, decided to set up a sale-leaseback transaction (the "Terex I" Transaction) that would allow URI to record an immediate revenue from the sale of used equipment in its year-end financial statements.

On December 29, 2000, URI and GECC entered into a contract for GECC to buy a fleet of used equipment (the "Equipment") from URI for $25.3 million; GECC would then lease that equipment back to URI for eight months. Before GECC would participate in this deal, it required a third party to agree to resell the Equipment at the end of the lease period and to guarantee GECC a high residual value for the Equipment.[2] Nolan discussed the proposed transaction with Apuzzo, and Apuzzo agreed that Terex would participate as the third-party on two conditions: (1) URI would indemnify Terex for all losses that Terex incurred from any residual value guarantee, and (2) URI would make additional new equipment purchases from Terex in the 2000 calendar year in order to improve Terex's year-end financial results.

After Terex and URI agreed to Terex's role in the transaction, URI and GECC signed a contract to sell and

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below, the Complaint alleges that Apuzzo knew about the inflated invoices, and that he was in charge of the transaction, but it does not specifically allege that he approved those invoices.

[2] GECC also required that URI pay it a fee to participate in the transaction.

leaseback the Equipment, and GECC and Terex simultaneously entered into a remarketing agreement (the "Terex I Remarketing Agreement"). Pursuant to the Terex I Remarketing Agreement, which Apuzzo signed on behalf of Terex, Terex agreed to resell the Equipment at the end of the eight-month lease period. Terex also gave GECC a residual value guarantee (the "Residual Value Guarantee") that the Equipment would be resold for at least 96% of the price that GECC had paid, and that if it was not, Terex would refund any shortfall between the actual resale price and the Residual Value Guarantee price. Terex also agreed that it would purchase at the Residual Value Guarantee price any Equipment that remained unsold at the end of the remarketing period.

To consummate the URI-Terex portion of the transaction, Apuzzo and Nolan agreed that URI would purchase $20 million of new equipment from Terex before the end of the 2000 calendar year. URI also agreed to pay Terex $5 million immediately to cover the anticipated losses that Terex would suffer from the Residual Value Guarantee. URI and Terex executed a "backup" remarketing agreement (the "Terex I Backup Remarketing Agreement"), which Apuzzo negotiated and signed on behalf of Terex. Under this agreement, URI agreed to indemnify Terex for any losses that it suffered from the Residual Value Guarantee that exceeded the $5 million advance payment. Apuzzo and Nolan further agreed that URI's indemnification payments to Terex would be made as undisclosed "premiums" that would be paid on URI's purchase of new equipment from Terex. Compl. ¶ 28. Apuzzo knew that if URI's indemnification payments were disclosed, URI's auditors would object to URI recognizing any revenue from the sale-leaseback transaction

in its year-end financial statements.

Apuzzo therefore signed a version of the Terex I Backup Remarketing Agreement that did not reference GECC and did not mention that the equipment that Terex was reselling was the same equipment that URI had sold to GECC. The Terex I Backup Remarketing Agreement also did not mention URI's agreement to take over Terex's remarketing obligations and to indemnify Terex for any losses. Although Apuzzo had inserted references to these side-arrangements in the initial draft of the agreement, after Nolan and others at URI deleted those references, Apuzzo knowingly signed the disguised agreement.

The initial $5 million indemnification payment from URI to Terex was made in conjunction with URI's purchase of $20 million of new equipment from Terex. On December 29, 2000, Apuzzo approved two Terex invoices that listed the value of the equipment as $25 million rather than $20 million. Nolan forwarded the inflated invoices to URI's accounting department, "knowing that the accounting department would enter the incorrect prices in URI's books and records"; in so doing, Nolan hoped to conceal the $5 million indemnification payment from URI to Terex. Compl. ¶¶ 29-30.

Before agreeing to the Residual Value Guarantee, Apuzzo received an internal appraisal of the Equipment that URI was selling to GECC. Based on that appraisal, Apuzzo knew that URI sold the Equipment to GECC at a price above fair market value. Apuzzo also knew that Terex's agreement to guarantee GECC at least 96% of the inflated price that GECC paid to URI (i.e., the Residual Value Guarantee) would likely cause Terex to suffer "substantial losses" when the Equipment was resold. Compl. ¶¶ 24-25. Later, Apuzzo was asked to provide

URI's auditor with a valuation letter stating that URI had assigned fair market value to the equipment. In response to this request, Apuzzo did not reveal the results of Terex's appraisal that had concluded that URI had overstated the value of the equipment. Instead, he offered to provide a letter to URI's auditor that stated that "nothing has come to [his] attention" to cause him to believe that URI's valuations were incorrect. Compl. ¶ 26 (alteration in original). (Although Apuzzo offered to provide this letter, he did not in fact ever provide it.)

On December 31, 2002, once it was clear how much money Terex owed GECC for the Terex I transaction, and therefore how much money URI owed to Terex, Apuzzo signed another contract between URI and Terex. Under this contract, URI agreed to make an $8 million "prepayment" on the purchase of additional equipment from Terex in the first six months of 2003. Compl. ¶ 32. Terex would keep this prepayment even if URI did not make any additional equipment purchases. Apuzzo knew that the contract he signed with URI was intended to disguise the real purpose of the prepayment, which was to indemnify Terex for the losses it suffered because of the Residual Value Guarantee.

The Terex II Transaction. In December 2001, Apuzzo caused Terex to participate in a second three-party transaction ("Terex II"). Like Terex I, Terex II was designed to allow URI to meet its earnings goals and to allow Terex to make a large sale of new equipment to URI. Terex II was structured similarly to Terex I. Specifically, URI sold used equipment to GECC and leased it back for several months; Terex agreed to resell the equipment and it provided GECC with the same 96% Residual Value Guarantee; and URI, in turn, secretly agreed to indemnify Terex for the losses it incurred because of the Re-

sidual Value Guarantee. As with Terex I, the Terex II documents concealed the "interlocking nature" of the three-party transaction. Compl. ¶ 41. Apuzzo understood that URI wanted the agreements between URI and GECC and URI and Terex to be kept separate, because on December 19, 2001, a Terex sales manager emailed Apuzzo to ensure that Apuzzo kept the transactions "on two separate documents." Compl. ¶ 42. Apuzzo signed the Terex II Remarketing Agreement with GECC even though he knew that it did not disclose URI's commitment to indemnify Terex and even though he knew that the agreement committed Terex to resell the equipment at 96% of the purchase price that GECC had paid URI.

As with Terex I, Apuzzo knew that URI had inflated the price of the equipment it was selling to GECC in Terex II,[3] and he knew that Terex was likely to lose money under the Residual Value Guarantee. Therefore, Apuzzo again insisted that URI indemnify Terex for these anticipated losses. To disguise the indemnification payments for Terex II, URI paid Terex a $4 million "premium" on the purchase of $24 million in new equipment; this premium was designed to conceal the indemnification payment. Compl. ¶ 43. Additionally, Terex, with Apuzzo's knowledge, issued invoices inflating the value of the equipment to $28 million in order to avoid disclosure of the $4 million indemnification payment.

Although Terex's sales managers negotiated directly with their URI counterparts regarding many of the details of the Terex II transaction, Apuzzo was involved

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[3] As with Terex I, Terex had conducted its own appraisal for Terex II and determined that URI had overvalued the equipment it was selling to GECC.

throughout the process; he engaged in discussions and negotiations with Nolan, monitored email communications related to the three-party transaction, and had control over the final terms of the agreements.

PROCEEDINGS BELOW

Apuzzo moved to dismiss the Complaint in the district court. He argued that the Complaint failed to allege adequately the second and third elements of aiding and abetting securities fraud under *DiBella*, *supra*, i.e., that the defendant had actual knowledge of the fraud and that he rendered substantial assistance to the primary violator.[4]

The district court concluded that the SEC had adequately alleged actual knowledge of the violation. The district court found that:

> The [C]omplaint contains factual allegations which, taken as true, support a conclusion that Apuzzo knew URI was inflating the profits generated by URI's sales of the used equipment to GECC and also knew the material details as to the true structure of each of Terex I and Terex II; Apuzzo knew that the transactions were being documented in a manner that concealed the interlocking nature of the three-party agreements and thus failed to dis-

[4] Apuzzo also argued that most of the SEC's claims were barred by the applicable statute of limitations, and that the Complaint failed to satisfy the specificity requirement of Federal Rule of Civil Procedure 9(b). Because the district court found that the Complaint did not adequately allege that Apuzzo was an aider and abettor, it did not reach these alternate grounds for dismissal and they are not before us. *See SEC. v. Apuzzo*, 758 F. Supp. 2d 136, 146 (D. Conn. 2010).

> close the true structure of the transactions; Apuzzo knew that the results from the transactions would be inaccurately reflected in URI's financial statements if the true structure of the transactions was not known to URI's auditor; and Apuzzo knew that URI's auditor was being misled.

SEC v. Apuzzo, 758 F. Supp. 2d 136, 148 (D. Conn. 2010).

But, the district court found that the SEC had not adequately alleged substantial assistance. Specifically, the court held that "the [C]omplaint contains factual allegations which taken as true support a conclusion that there was a 'but for' causal relationship between Apuzzo's conduct and the primary violation, but do not support a conclusion that Apuzzo's conduct proximately caused the primary violation." *Id.* at 152.[5] Concluding that such proximate causation was required to satisfy the "substantial assistance" component of aider and abettor liability, the district court granted the motion to dismiss. *Id.* The SEC timely appealed.

DISCUSSION

Section 20(e) of the Securities Exchange Act of 1934 allows the SEC, but not private litigants, to bring civil actions against aiders and abettors of securities fraud. 15 U.S.C. § 78t(e). The SEC may bring such an action against "any person that knowingly provides substantial assistance" to a primary violator of the securities laws.

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[5] Although the SEC's opposition to the motion to dismiss asked for leave to amend if the district court granted the defendant's motion to dismiss, the district court dismissed the complaint with prejudice and entered judgment.

15 U.S.C. § 78t(e).[6] Specifically, as noted above, the SEC must prove: (1) the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party; (2) knowledge of this violation on the part of the aider and abettor; and (3) "substantial assistance" by the aider and abettor in the achievement of the primary violation. *DiBella*, 587 F.3d at 566. Apuzzo conceded below that the SEC had adequately pleaded the existence of a primary violation, and he does not contest on appeal the district court's finding that the SEC adequately pleaded his actual knowledge of the fraud. Therefore, the only disputed question on appeal is whether the facts alleged plausibly plead that Apuzzo substantially assisted the primary violator in committing the fraud.[7]

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[6] The Dodd-Frank Act of 2010 amended Section 20(e) to add the words "or recklessly" after "knowingly." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 929O (codified at 15 U.S.C. § 78t(e)). This amendment does not apply in this case.

[7] Specifically, the SEC alleged that Apuzzo aided and abetted URI's violations of 15 U.S.C. §§ 78j(b) (prohibiting persons from using manipulative device in connection with purchase or sale of security), 78m(a) (requiring issuers to file periodic reports as required by SEC regulations), (b)(2)(A) (requiring issuers to make and keep books and records that accurately and fairly reflect the transactions of the issuer), 17 C.F.R. §§ 240.10b-5 (prohibiting any person from, inter alia, making any untrue statement of material fact, or omitting to state material fact necessary to make any statement not misleading), 240.13a-1 (requiring issuer to file annual reports), and Nolan's violation of 15 U.S.C. § 78m(b)(5) (prohibiting

In assessing this issue, we draw guidance from the well-developed law of aiding and abetting liability in criminal cases; for if the conduct of an aider and abettor is sufficient to impose criminal liability, *a fortiori* it is sufficient to impose civil liability in a government enforcement action. Nearly seventy-five years ago, Judge Learned Hand famously stated that in order for a criminal defendant to be liable as an aider and abettor, the Government—in addition to proving that the primary violation occurred and that the defendant had knowledge of it (the equivalent of the first two elements of *DiBella*)—must also prove "that he in some sort associate[d] himself with the venture, that [the defendant] participate[d] in it as in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed." *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). The Supreme Court later adopted Judge Hand's formulation. *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). In fact, as the Seventh Circuit has recognized, Judge Hand's standard is "[t]he classic formula for aider and abettor liability." *United States v. Irwin*, 149 F.3d 565, 569 (7th Cir. 1998).[8] Judge Hand's standard

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persons from knowingly circumventing or failing to implement a system of internal accounting controls, or falsifying books and records) and 17 C.F.R. § 240.13b2-1 (prohibiting persons from directly or indirectly falsifying or causing the falsification of any book or record).

[8] In recent years, we have summarized Judge Hand's definition in the criminal context by stating that a defendant is liable as an aider and abettor if, in addition to knowing of the primary violation, he "consciously assisted the commission of the specific crime in some active way." *United States v. Ogando*, 547 F.3d 102, 107 (2d Cir. 2008); *see DiBella*, 587 F.3d at 566 (quoting this standard

has thus survived the test of time, is clear, concise, and workable, and governs the determination of aider and abettor liability in securities fraud cases.[9]

While Apuzzo argues that substantial assistance should, instead, be defined as proximate cause, his argument ignores the difference between an SEC enforcement action and a private suit for damages. "Proximate cause" is the language of private tort actions; it derives from the need of a private plaintiff, seeking compensation, to show that his injury was proximately caused by the defendants' actions. But, in an enforcement action, civil or criminal, there is no requirement that the government prove injury, because the purpose of such actions is deterrence, not compensation.

Thus, in *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57 (2d Cir. 1985), a private securities fraud action that alleged aiding and abetting fraud (and that was decided prior to the Supreme Court's outright

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from *Ogando*). *Ogando* and *Peoni* simply use different words to set forth the same requirements.

[9] As we have previously explained in another civil securities fraud case, Judge Hand's definition is likely the clearest definition possible, and the elaborate discussions of the aiding and abetting standard in other securities law cases may not "have added anything except unnecessary detail" to that definition. *IIT, an Int'l Inv. Trust v. Cornfeld*, 619 F.2d 909, 922 (2d Cir. 1980) *abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010). In *Cornfeld*, after recognizing that Judge Learned Hand's definition was the clearest definition of the substantial assistance aspect of aiding and abetting, we applied that standard in a civil securities fraud case. *Id.* at 925.

prohibition of private plaintiff claims for aiding and abetting securities fraud in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)), we stated that the complaint "must allege that the acts of the aider and abettor proximately caused the harm to the corporation on which the primary liability is predicated," *id.* at 62. But there is no reason to carry this requirement over to the context of SEC enforcement actions. Indeed, this distinction is already implicit in some of the case law. Thus, while a plaintiff must prove reliance (a concept closely akin to causation) in a private securities fraud suit, *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341-342 (2005), there is no such requirement in an SEC enforcement action, *see SEC v. KPMG LLP.*, 412 F. Supp. 2d 349, 375 (S.D.N.Y. 2006).[10]

In fairness to the district court, our case law has not always made this distinction with clarity. In particular, the opinion in *DiBella* quotes the proximate cause language from *Bloor*, which may have led the district court to assume that the SEC was required to plead that the

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[10] Further, in *Bloor*, we affirmed a judgment on the pleadings for defendants, who were alleged primary violators and aiders and abettors, because the plaintiff had not alleged facts sufficient to show that the primary securities violation identified in the complaint had proximately caused the investors' loss. 754 F.2d at 62. Thus, *Bloor* addressed the lack of a causal link between the primary violation and injury to investors, not the lack of a distinct causal link between the aider's substantial assistance and the primary violation. Because Apuzzo does not argue that there is any requirement that the SEC prove that the primary violation caused harm to investors, *Bloor* is inapposite.

aider and abettor proximately caused the primary securities law violation. But *Bloor* only explained that the private plaintiff in that case had failed to plead that the alleged primary securities law violation proximately caused the plaintiff any harm. *Bloor* did not require the plaintiff to plead that the alleged aider and abettor had proximately caused the primary violation.

We now clarify that, in enforcement actions brought under 15 U.S.C. § 78t(e), the SEC is not required to plead or prove that an aider and abettor proximately caused the primary securities law violation. In fact, the statute under which the SEC here proceeds, 15 U.S.C. § 78t(e), was passed in the wake of *Central Bank* precisely to allow the SEC to pursue aiders and abettors who, under the reasoning of *Central Bank*, were not the themselves involved in the making of the false statements that proximately caused the plaintiffs' injuries. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 158 (2008). This statutory mandate would be undercut if proximate causation were required for aider and abettor liability in SEC enforcement actions.

Indeed, because only the SEC may bring aiding and abetting claims for securities law violations, many if not most aiders and abettors would escape all liability if such a proximate cause requirement were imposed, since, almost by definition, the activities of an aider and abettor are rarely the direct cause of the injury brought about by the fraud, however much they may contribute to the success of the scheme. We therefore welcome the opportunity to clarify that the appropriate standard for determining the substantial assistance component of aider and abettor liability in an SEC civil enforcement action is the

Judge Hand standard set forth above.[11]

Applying the test we have laid out above, it is clear that the Complaint plausibly alleges that Apuzzo provided substantial assistance to the primary violator in carrying out the fraud, and therefore we must reverse the district court. Apuzzo associated himself with the venture, participated in it as something that he wished to bring about, and sought by his action to make it succeed. Specifically, Apuzzo agreed to participate in the Terex I & Terex II transactions;[12] negotiated the details of those transactions, through which he extracted certain agreements from URI in exchange for Terex's participation; approved and signed separate agreements with GECC

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[11] This is not to suggest that evidence of proximate cause may not be relevant to identifying when an aider and abettor has provided substantial assistance to a primary violator. One who proximately causes a primary violation with actual knowledge of the primary violation will inherently meet the test we have set forth above. Therefore, the SEC *may* prove substantial assistance by demonstrating that the aider and abettor was a proximate cause of the violation. Our recognition of 'proximate cause' as a factor relevant to identifying substantial assistance, however, does not establish proximate cause as a distinct element of an aiding and abetting claim.

[12] Although Apuzzo took on more of a supervisory role for Terex II and was less involved in some of the day to day communication with URI, his actions were more than sufficient to meet the substantial assistance standard set forth above. He retained ultimate control over the transaction, negotiated its key terms with Nolan and URI, approved the agreements with URI and GECC, and knew about the issuance of inflated invoices.

and URI, which he knew were designed to hide URI's continuing risks and financial obligations relating to the sale-leaseback transactions in furtherance of the fraud; and approved or knew about the issuance of Terex's inflated invoices, which he also knew were designed to further the fraud.

Apuzzo argues that his participation in the transactions alone is insufficient to demonstrate substantial assistance because, he contends, "there is simply no allegation in the Complaint that these transactions were unusual." Appellee's Br. at 30. This, however, is doubly erroneous, both because Apuzzo's substantial assistance extended beyond his agreement to participate in the transactions and because the well-pleaded allegations of the Complaint aver that these transactions were hardly ordinary transactions. Thus, for example, the Complaint alleges that the agreements detailed in the Complaint "were *designed* to hide URI's continuing risks and financial obligations" Compl. ¶ 2 (emphasis added), and that "Apuzzo *knew* . . . that the three-party transaction was *designed* to inflate the gain that URI would recognize from the sale-leaseback transaction by *disguising* the indemnification payment to Terex," Compl. ¶ 45. (emphases added). At this stage, we must view the SEC's plausible allegations as true.

Moreover, when evaluating whether Apuzzo rendered substantial assistance, we must consider his high degree of actual knowledge of the primary violation (the second component of aiding and abetting). As we have repeatedly held, the three components of the aiding and abetting test "cannot be considered in isolation from one another." *DiBella*, 587 F.3d at 566 (quoting *Cornfeld*, 619 F.2d at 922). Where, as here, the SEC plausibly alleges a high degree of actual knowledge, this lessens the burden

it must meet in alleging substantial assistance.

Apuzzo argues that while a high degree of substantial assistance lowers the SEC's burden to prove scienter, the converse is not true. A close look at our case law, however, reveals that Apuzzo is incorrect. In *DiBella*, when discussing the knowledge factor of the aiding and abetting test, we stated that "'there may be a nexus between the degree of knowledge and the requirement that the alleged aider and abettor render substantial assistance.'" *Id.* at 566 (quoting *Cornfeld*, 619 F.2d at 922) (brackets omitted). And, in *Cornfeld*, we explained that we "must consider" the issue of substantial assistance in light of the allegations that the defendants "actually knew" of the fraud. 619 F.2d at 925. Therefore, a high degree of knowledge may lessen the SEC's burden in proving substantial assistance, just as a high degree of substantial assistance may lessen the SEC's burden in proving *scienter*.

It is particularly appropriate to consider the degree of scienter in evaluating substantial assistance in light of the test for substantial assistance that we have laid out above. When determining whether a defendant sought by his actions to make the primary violation succeed, if a jury were convinced that the defendant had a high degree of actual knowledge about the steps he was taking and the role those steps played in the primary violation, they would be well justified in concluding that the defendant's actions, which perhaps could be viewed innocently in some contexts, were taken with the goal of helping the fraud succeed.

As quoted above, the district court found that the Complaint here alleges, in detail, a very high degree of knowledge of the fraud on Apuzzo's part. Considered in light of those allegations, the allegations of substantial

assistance can no longer be viewed, as Apuzzo argues, as "business as usual," but rather as an effort to purposely assist the fraud and help make it succeed.

It remains only to note that Apuzzo makes several additional arguments in support of his position that the Complaint was properly dismissed, but none is persuasive:

First, as part of his proximate cause argument, Apuzzo argues that Nolan's actions were superseding and intervening causes that vitiate Apuzzo's liability for the fraud. As we have stated above, the SEC is not required to prove proximate causation in this case. Moreover, Apuzzo's argument is without merit for the independent reason that URI's acts were entirely foreseeable, indeed the SEC has plausibly pleaded that Apuzzo knew that URI structured the three-party agreements to allow it to make false and misleading statements about its revenue. Of course, "'[i]f the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from defendant's conduct, it may well be a superseding act which breaks the causal nexus.'" *Stagl v. Delta Airlines, Inc.*, 52 F.3d 463, 473 (2d Cir. 1995) (quoting *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315 (1980)). But here, the primary violator's acts were entirely foreseeable. The primary violator will often be the one to take the final actions necessary to consummate the fraud, and a primary violator's *foreseeable* acts are not superseding and intervening causes of the fraud.

Second, Apuzzo argues that "this case is quite unlike typical substantial-assistance cases where an in-house officer or employee oversees fraudulent transactions or accounting entries *by his company*." Appellee's Br. at 27 (emphasis in original). The standard suggested by

Apuzzo would essentially require that the aider and abettor be a staff member of the same company or government entity as the primary violator. Even if it were true that aiders and abettors are typically employees of the same company or government entity as the primary violator, that is certainly not a requirement of our case law. See, *e.g.*, *DiBella*, 587 F.3d at 567. To create such a requirement would mean ignoring prior precedent, and it would also impose an overly narrow reading of the aiding and abetting test that would unduly hinder the SEC's ability to exercise its statutory mandate. *See Stoneridge*, 552 U.S. at 158.[13]

Third, at oral argument, Apuzzo repeatedly relied on *Edwards & Hanly v. Wells Fargo Sec. Clearance Corp.*, 602 F.2d 478, 484 (2d Cir. 1979). That case, however, is inapposite. As an initial matter, the portion of *Edwards & Hanly* that discussed aiding and abetting liability was dictum. In that case, we said that we did not need to decide the aiding and abetting question, because we could "dispose of the appeal" without considering that issue. *Id.*

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[13] The district court also found it significant that various allegations were absent from the Complaint; specifically, it noted that the SEC had not alleged that Apuzzo "creat[ed] the structure" of the transactions, that Apuzzo "was the person responsible for bringing the respective parties to the three-party agreement," or that Apuzzo "was the person who caused the modifications to the transaction documents so as to conceal the interlocking nature of the three-party agreements." *Apuzzo*, 758 F. Supp. 2d at 152. While these allegations may be necessary to support an allegation of primary liability, they are not necessary to adequately plead an aiding and abetting violation.

at 485. We reversed the district court's decision on the grounds that defendant was entitled to an affirmative defense because the plaintiff's "failure to act was the effective cause of its loss." *Id*; *see also Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 575 (2d Cir. 1982) (recognizing that this portion of *Edwards & Hanly* is dictum).

Moreover, *Edwards & Hanly*'s discussion in dictum of the defendant's liability for aiding and abetting focused on whether the defendant's agent, Joseph Werba, had a duty to speak and failed to do so.[14] Although we discussed Werba's other acts, we explicitly stated that the plaintiff's aiding and abetting claim was premised on Werba's "silence in the face of alleged 'knowledge'" of the primary violator's actions. *Id.* at 484. We then noted that Werba likely had no fiduciary duty to speak. *Id.* Apuzzo correctly conceded at oral argument, however, that cases involving silence in the face of an alleged duty to speak are different from those where affirmative acts are at the core of the aiding and abetting claims. As we stated in *Armstrong v. McAlpin*, 699 F.2d 79 (2d Cir. 1983), mere "[i]naction on the part of the alleged aider and abettor ordinarily should not be treated as substantial assistance, except when it was designed intentionally to aid the primary fraud or it was in conscious and reckless violation of a duty to act." *Id.* at 91. If the allegations were merely that Apuzzo failed to report the fraud, that would present an entirely different case, and if Apuzzo lacked a duty to report, he would not be liable. But, the Complaint here is premised on affirmative acts

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[14] The defendant was actually Wells Fargo Securities Clearance Corporation, which was allegedly liable due to the acts of Werba, its agent and former president. *Edwards & Hanly*, 602 F.2d at 482-83.

that Apuzzo took in support of the fraudulent scheme.

Fourth, Apuzzo also spent significant time at oral argument and in his briefs arguing that the inflated invoices were not relevant, since, according to Apuzzo, there was no allegation in the Complaint that URI's auditors ever saw those invoices.[15] Even if the invoices were never seen by URI's auditors, they are still evidence of Apuzzo's substantial assistance. The invoices provide strong evidence that Apuzzo associated himself with the venture, participated in it as something that he wished to bring about, and sought by his action to make it succeed. And, in any event, at this stage of the case, drawing all reasonable inference in favor of the SEC, it is certainly a reasonable inference from the Complaint that the in-

[15] The Complaint alleges that "Nolan forwarded the inflated invoices to URI's accounting department, knowing that the accounting department would enter the incorrect prices in URI's books and records." Compl. ¶ 45. The invoices were important to the coverup of the fraudulent scheme, and a plausible inference at this stage is that they were important in the decision of Nolan, the primary violator, to proceed with the primary violation. Because Apuzzo assisted in the formation of a scheme, and it is reasonable to infer that Nolan relied on the invoices in making his determination as to whether to go forward with the scheme, it is not necessary for the SEC to allege that the invoices that Apuzzo provided were ultimately used to convince another person of the mischaracterizations that were part of the fraudulent scheme. If this were not the case, then there would be a huge loophole in the statute, making liability dependent on proving that auditors looked at a particular document.

voices were actually used.[16] The SEC represented at oral argument that it had no reason to believe that the invoices were not used. Moreover, discovery was ongoing when the motion to dismiss was decided, and the SEC stated at oral argument that the question of whether invoices were used by URI and its auditors has not yet been the focus of discovery inquiries. Of course, invoices are normally necessary when dealing with a transaction of this magnitude, and there is no dispute that the $25 million was in fact entered on URI's books. Therefore, at this stage, it would be inappropriate to dismiss the case on the theory that the invoices were not in fact used.

CONCLUSION

In sum, applying the standard we have set forth for evaluating substantial assistance, we conclude that the Complaint should not have been dismissed because it adequately alleged that Apuzzo aided and abetted the primary violator in carrying out his fraudulent scheme. We therefore reverse the district court's Opinion and remand for further proceedings consistent with this opinion.

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

[Signature of Clerk]

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[16] Apuzzo makes a similar argument with regard to the agreements he signed, namely that they were not disclosed to URI's auditors. As discussed above with respect to the invoices, even if the agreements were not disclosed, it would not affect Apuzzo's liability.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

(11-696)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellant

v.

JOSEPH F. APUZZO,
Defendant-Appellee

(November 13, 2012)

ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 13th day of November, two thousand twelve,

Appellee Joseph F. Apuzzo filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk
[Signature of Clerk]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

(11-696)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellant

v.

JOSEPH F. APUZZO,
Defendant-Appellee

(August 8, 2012)

JUDGMENT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of August, two thousand twelve.

Before: RALPH K. WINTER, REENA RAGGI, *Circuit Judges*, JED S. RAKOFF,[*] *District Court*.

The appeal in the above captioned case from a judgment of the United States District Court for the District of Connecticut was submitted on the district court's re-

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[*] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

cord and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the District Court is REVERSED and the case is REMANDED in accordance with the opinion of this court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

[Signature of Clerk]

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:07CV1910 (AWT)

SECURITIES AND EXCHANGE COMMISSION, *Plaintiff*,

v.

JOSEPH F. APUZZO, *Defendant*.

(December 20, 2010)

RULING ON MOTION TO DISMISS

The Securities and Exchange Commission (the "SEC") brings this action pursuant to §§ 21(d) and 21(e) of the Exchange Act, 15 U.S.C. § § 78u(d) and (e), against Joseph F. Apuzzo ("Apuzzo"), the former chief financial officer of Terex Corporation ("Terex"), alleging that he aided and abetted a fraudulent accounting scheme involving two sale-leaseback transactions and carried out between 2000 and 2002 by United Rentals, Inc. ("URI") and its former chief financial officer Michael J. Nolan ("Nolan") and others. Apuzzo has moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, the motion is being granted.

I. FACTUAL BACKGROUND

Terex manufactures equipment primarily for the construction, infrastructure, and surface to mining industries. Apuzzo was the chief financial officer of Terex

from October 1998 to September 2002, when he left the company to become president of Terex Financial Services, a division of Terex. He was president of Terex Financial Services until August 2005. Apuzzo was a licensed CPA during part of the time that he worked at Terex, has an MBA in Public Accounting, and had previously worked at a public accounting firm.

URI is one of the largest equipment-rental companies in the world. During the relevant time period, URI regularly purchased equipment from Terex and rented it to other companies. Nolan was URI's chief financial officer from its inception in September 1997 until December 2002.

The SEC alleges that URI and Nolan committed securities fraud by improving URI's 2000 and 2001 financial results by inflating the profit generated from the sale of used equipment and recognizing prematurely revenue from those sales of equipment to General Electric Capital Corporation ("GECC") and that concealing the true structure of the two transactions from URI's auditor was part of the fraudulent scheme. The two transactions at issue involved equipment sale-leasebacks, with remarketing agreements and residual value guarantees related to the equipment.

The SEC alleges that Nolan and others purported to structure the deals as "minor sale-leasebacks" so that URI could take advantage of certain favorable accounting treatment. According to the SEC, URI sold used equipment to GECC at prices in excess of its fair market value and then leased it back. To induce GECC to participate in the transactions, URI paid it a fee and arranged with Apuzzo to have Terex enter into remarketing agreements with GECC pursuant to which Terex agreed to resell the equipment at the end of the lease pe-

riod and guaranteed that GECC would receive no less than 96% of the purchase price it had paid URI for the equipment (the "residual value guarantee"). In consideration for the residual value guarantees for the benefit of GECC, URI entered into backup remarketing agreements with Terex, under which URI assumed Terex's remarketing obligations and guarantees to GECC and agreed to indemnify Terex for any losses, and URI also agreed to make additional purchases of new equipment over and above the historical level of URI's purchases from Terex. The indemnification payments by URI to Terex were concealed through the use of inflated invoices that disguised the indemnification payments as undisclosed premiums on URI's purchase of new equipment from Terex. Thus, each transaction involved a series of interlocking agreements between URI and GECC, GECC and Terex, and Terex and URI. The first of the two sets of transactions ("Terex I") took place in December 2000. The second ("Terex II") took place in December 2001.

Because Nolan and others purported to structure the transactions on behalf of URI as minor sale-leasebacks, under Generally Accepted Accounting Principles ("GAAP") URI was allowed to recognize immediately the profit generated by the sales of the used equipment to GECC only if, among other criteria, the risks and rewards of ownership were transferred to GECC. In addition, GAAP requires that before revenue from the sale of equipment can be recognized, the sale price must be fixed and determinable. If any commitments related to the sale remain unsettled, the sale price is not deemed to be fixed and determinable, and any gain from the sale must be deferred until the commitments are settled.

The SEC alleges that because URI, acting through Nolan and others who dealt with Apuzzo, had agreed to indemnify Terex for losses it would incur under its remarketing agreements with GECC, URI's obligations relating to the sale-leaseback agreements were not complete in the reporting period in which the agreements were executed. As a result, URI was prohibited under GAAP from recording revenue from the sales in each of those reporting periods. "Nolan and others were able to prevent discovery of URI's continuing obligations under the three-party agreements because they engaged in a concerted effort to hide the interlocking [nature of the] agreements from URI's independent auditor." Complaint (Doc. No. 1) ("Compl.") ¶ 14. "In addition, Nolan and others were also able to inflate the gains that URI recorded because they were able to hide the indemnification payments URI made to Terex." *Id.* As a result of the fraudulent accounting, the financial statements and results that URI incorporated into its periodic filings and other materials disseminated to the investing public were materially false and misleading. By fraudulently characterizing the Terex I and Terex II transactions as minor sale-leasebacks and inflating the profit on each transaction, Nolan and others materially overstated URI's profits and allowed the company to meet its earnings guidance and analyst expectations for the fourth quarter and full year 2000 and for the fourth quarter and full year 2001.

The complaint in this action against Apuzzo alleges that he substantially assisted URI, Nolan and others in their efforts to disguise the interlocking nature of the agreements and to conceal the indemnification payments URI made to Terex. In both 2000 and 2001, Apuzzo signed agreements with URI and/or GECC that dis-

guised URI's continuing risks and financial obligations under the three-party transactions. In addition, with Apuzzo's knowledge and/or approval, Terex issued inflated invoices in connection with URI's purchase of new equipment from Terex that concealed URI's indemnification payments to Terex and thus allowed URI to inflate its profits on the sale-leaseback transactions.[1]

Terex I

In the later part of 2000, Nolan contacted GECC about a short-term sale-leaseback transaction that would allow URI to record an immediate gain. GECC advised Nolan that it would not enter into a sale-leaseback transaction

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[1] Also, the SEC alleges in paragraph 2 of the Complaint that:

> Apuzzo substantially assisted URI and Nolan in implementing the fraudulent scheme by, among other things, signing agreements with URI that he knew or was reckless in not knowing were designed to hide URI's continuing risks and financial obligations relating to the sale-leaseback transactions, directing or approving the issuance of inflated invoices that he knew or was reckless in not knowing URI, through Nolan and others, would use to inflate URI's gain on the transactions, and facilitating URI's concealment of fee payments to a third-party through undisclosed financial arrangements between Terex and the third-party.

Compl. ¶ 2. However, there is no factual allegation that Apuzzo issued inflated invoices to URI in connection with URI's sale of the used equipment to GECC, as opposed to inflated invoices in connection with Terex's sale of new equipment to URI.

with URI unless a third party agreed to remarket the equipment at the end of the lease period and to provide a guarantee with respect to the residual value of the equipment. Nolan was also informed that GECC would charge URI a fee for participating in the transaction.

Nolan and others initiated discussions with Terex, which was one of URI's vendors. Nolan explained the terms of the proposed transaction to Apuzzo, who expressed a willingness to participate as long as URI (1) agreed to indemnify Terex with respect to any losses Terex might incur as a result of providing a residual value guarantee to GECC, and (2) made additional new equipment purchases from Terex in the current fiscal year in order to boost Terex's year-end financial results.

On December 29, 2000, URI executed a Master Lease Agreement with GECC pursuant to which URI sold a fleet of used equipment to GECC for $25.3 million and leased the equipment back for a period of eight months. Simultaneously, GECC and Terex entered into a remarketing agreement, signed on behalf of Terex by Apuzzo, pursuant to which Terex agreed to remarket the equipment at the end of the lease period and to pay GECC the amount of any shortfall between the residual value guarantee (which was no less than 96% of the price paid by GECC) and the proceeds generated by the resale of the equipment. Terex also agreed that, at GECC's option, Terex would buy, at its guaranteed residual value, any equipment that remained unsold at the end of the remarketing period. In addition, as a result of negotiations between Apuzzo, Nolan and others, URI agreed to purchase from Terex approximately $20 million of new equipment before the end of the 2000 calendar year, and to pay Terex approximately $5 million immediately to cover Terex's anticipated losses on account of the resid-

ual value guarantee. In accordance with the agreement between Apuzzo, Nolan and others, URI and Terex also executed a "backup" remarketing agreement, which Apuzzo also signed on behalf of Terex, under which URI effectively assumed Terex's remarketing obligations and residual value guarantee to GECC and agreed to cover any losses to Terex exceeding the $5 million advance payment by means of guaranteed future purchases.

Apuzzo sent Nolan an initial draft of the proposed backup remarketing agreement. That initial draft explicitly described Terex's residual value guarantee to GECC. It also recited URI's agreement to remarket the equipment as well as indemnify Terex for any losses it incurred as a result of the residual value guarantee. However, in response to Apuzzo's initial draft of the backup remarketing agreement, Nolan and others sent Apuzzo a revised draft that deleted all explicit references to GECC and to URI's agreement to remarket the equipment. Instead, URI's revised draft referred to URI's obligation to remarket equipment "which is typically in United Rentals rental fleet and is then owned by a leasing company which is not less than investment grade, and is required to be remarketed by Terex from such leasing company for a period commencing in August, 2001." Compl. ¶ 21. Nowhere in URI's revised draft was there any language identifying the leasing company or mentioning the fact that the equipment to be remarketed was equipment URI had sold to GECC. Instead of referring to the residual value guarantee from Terex to GECC, URI's revised draft referred to URI's guarantee to pay Terex "the total cost incurred or that would be incurred by Terex to purchase such equipment . . . ." *Id.*

Before committing Terex to the residual value guarantee, Apuzzo obtained an internal appraisal of the used

equipment URI was selling to GECC. Based on that appraisal, Apuzzo knew that Terex's agreement to guarantee GECC at least 96% of the valuation URI had placed on the equipment would likely cause Terex to incur substantial losses when the equipment was resold. Consequently, Apuzzo insisted that URI agree to indemnify Terex against any such loss. When Apuzzo signed the remarketing agreement, he understood that, although it would likely result in millions of dollars in losses to Terex for which Terex expected to be indemnified by URI, URI's commitment to indemnify Terex for such losses was set forth in a separate document that failed to make any explicit reference to the remarketing agreement, the residual value guarantee, or even the transaction to which it related.

Apuzzo was later asked to provide a valuation letter to URI's auditor representing that URI had assigned fair market valuations to the equipment sold to GECC. The SEC alleges that "[i]nstead, Apuzzo *offered* to provide an appraisal letter that not only failed to disclose the appraisal values that Terex had determined, but affirmatively and misleadingly asserted that 'nothing has come to [his] attention' to cause Apuzzo to believe that the overall equipment valuations regarding the equipment 'could not be achieved in a transaction between a willing buyer and willing seller.'" Compl. ¶ 26 (emphasis added) .

URI agreed to purchase $20 million of new equipment from Terex and to pay Terex before year-end 2000 if the equipment could be delivered in 2001 rather than immediately. Apuzzo agreed to this and, in addition, provided assurances to Nolan and others that URI could substitute different equipment if necessary, or otherwise return equipment for full credit if URI subsequently determined that it did not need the equipment. Under

GAAP, because Terex was unable to deliver the new equipment to URI before December 31, 2000, Terex could immediately recognize the revenue from the sale to URI if the transaction complied with "bill and hold" accounting guidance. Among other things, Apuzzo's agreement to allow URI to substitute or return equipment did not comply with "bill and hold" requirements.

Apuzzo was able to avoid fully disclosing the terms of his agreement with Nolan and others. No purchase agreement was prepared between Terex and URI, and URI did not issue any purchase orders. In addition, while Nolan and others reduced to writing URI's "right of return" on the new equipment it was purchasing and sent it to Apuzzo along with the backup remarketing agreement, the document was described as a "Separate Agreement" and was not part of the backup remarketing agreement, which was signed by Apuzzo on behalf of Terex.

URI made two lump-sum indemnification payments to Terex in connection with Terex I. An initial payment of $5 million was made simultaneously with the execution of the documents for the transaction. The second payment was made on January 2, 2003, after a final reconciliation of the numbers had been performed by GECC, Terex and URI. Apuzzo and Nolan agreed that URI's indemnification payments to Terex would be made as undisclosed "premiums" paid in connection with URI's purchase of new equipment from Terex.

In accordance with the agreement between Apuzzo, Nolan and others, the initial $5 million indemnification payment was made in connection with URI's agreement to purchase approximately $20 million of new equipment from Terex before the end of the 2000 calendar year. On December 29, 2000, with Apuzzo's knowledge and approval, Terex issued two invoices that reflected an ag-

gregate price of $25 million for new equipment that Terex internally valued at $20 million. Notwithstanding the prices shown on the invoices, with Apuzzo's knowledge and approval, Terex recorded only $20 million of the $25 million as revenue for 2000 and recorded the $5 million overpayment as a reserve to be used to cover Terex's anticipated losses under its residual value guarantee. Contemporaneously, Nolan forwarded the inflated invoices to URI's accounting department, knowing that the accounting department would enter the incorrect prices in URI's books and records.

Following URI's payment of $25 million to Terex on December 29, 2000, Apuzzo improperly recorded the $20 million portion of the payment as revenue for the fiscal year-ending December 31, 2000. Apuzzo was able to do so by not fully revealing the terms of the agreement with URI, which did not comply with "bill and hold" requirements.

During 2001 and 2002, as an industry recession continued, URI and Terex were unable to resell the equipment at or near the residual value that had been guaranteed to GECC. In fact, losses exceeded the initial estimated $5 million shortfall. Towards the end of 2002, following extensions of the remarketing period provided for in the remarketing agreement, GECC prepared a final reconciliation with respect to Terex's obligations under the residual value guarantee. Simultaneously, Terex and URI prepared a final reconciliation with respect to URI's obligations under the backup remarketing agreement.

On December 31, 2002, Apuzzo signed a "Contract" between URI and Terex which purported to extend the remarketing and purchase agreements between the two companies that would otherwise expire. The Contract provided that URI would make an $8 million "prepay-

ment," to be applied as a "surcharge" on the additional purchase of equipment from Terex during the following six months. The Contract provided that Terex could keep the prepayment even if URI failed to make the additional purchase.

On January 2, 2003, GECC sent an email to both Apuzzo and URI notifying them that a reimbursement for approximately $8.3 million was to be paid that day to GECC. Terex paid that amount to GECC, and the next day URI made a final indemnification payment to Terex of approximately $8.7 million. URI improperly recorded the $8.7 million as expenses unrelated to the sale-leaseback transaction.

Terex II

In December 2001, as the fiscal year for both URI and Terex was coming to an end, Apuzzo participated in a second fraudulent three-party sale-leaseback transaction, which was engineered to enable URI to meet its fourth quarter and year-end earnings guidance and to permit Terex to make a large year-end sale of new equipment to URI. Terex II was structured similarly to the Terex I transaction: (1) URI sold used equipment to GECC and leased it back for a short period; (2) Terex agreed to remarket the equipment and provide GECC with the same residual value guarantee it had previously made; and (3) URI agreed to purchase new equipment from Terex and to indemnify Terex for the losses it was expected to incur under the residual value guarantee.

As before, the agreements were structured to conceal the interlocking nature of the three-party transactions. In particular, the documents failed to disclose the effective *quid pro quo* between Terex's agreement with GECC to remarket the equipment and provide a residual value guarantee, and URI's agreement to both purchase

new equipment from Terex and indemnify Terex for its losses under the residual value guarantee.

Just as with Terex I, in which the transaction documents were edited to remove references to the interlocking nature of the agreements, Apuzzo signed the Terex II remarketing agreement knowing that it made no reference to URI's commitment to indemnify Terex. Moreover, Apuzzo understood that URI continued to want the agreements to be kept separate. On December 19, 2001, Apuzzo received an email from the Terex sales manager who was engaged in the negotiations with URI, which specifically noted that the URI sales manager wanted the transactions "on two separate documents." Compl. ¶ 42. Consistent with this goal, URI's commitment to indemnify Terex was not disclosed in the "bill and hold" letter, dated December 21, 2001, URI sent in connection with its agreement to purchase new equipment from Terex.

Prior to entering into the agreements in connection with Terex II, Terex had determined that the valuation of the used equipment being sold to GECC by URI was above the fair market value and would likely cause Terex losses in excess of $4 million as a result of Terex's promise that GECC would receive pursuant to the remarketing agreement at least 96% of the purchase price GECC was paying to URI. Before agreeing to provide GECC with the residual value guarantee, Terex insisted that URI agree to indemnify Terex for this anticipated loss. Apuzzo received internal email communications disclosing the materially lower appraisals of the used equipment being sold to GECC and the imposition of a $4 million "premium" on the sale of $24 million of new equipment being sold by Terex to URI covering the corresponding shortfall Terex expected as a result of the residual value guarantee.

On December 27, 2001, the day before the sale-leaseback and remarketing agreements were executed, Apuzzo received an email from a Terex employee notifying GECC and others that the equipment list submitted by URI to GECC, which listed the equipment for which Terex was providing the residual value guarantee, contained "correct values." Compl. ¶ 44. Notwithstanding this communication to GECC, Apuzzo signed the remarketing agreement between Terex and GECC knowing that it did not disclose the materially lower appraisals that Terex had obtained, the likelihood of substantial losses to Terex pursuant to the residual value guarantee, and URI's commitment to indemnify Terex for those losses.

Apuzzo received internal Terex communications discussing the payment of a $4 million "premium" on the purchase of $24 million of new equipment. As in the Terex I transaction, Terex issued inflated invoices showing the aggregate purchase price of the new equipment to be $28 million, without disclosure of the purported $4 million "premium." As before, the disguising of the indemnification payment was done with Apuzzo's knowledge.

While Terex sales managers negotiated directly with their URI counterparts concerning many of the details of the transaction, Apuzzo was involved throughout the process, in discussions with Nolan, monitoring email communications, and maintaining control over the final terms of the agreements. On December 29, 2001, the day after the agreements were executed, in an email to one of Terex's senior officers, Apuzzo reported on the successful conclusion of the negotiations, noting in particular that Terex had generated cash from the sale to URI that would be credited to cash at year end. As with the Terex

I transaction, Apuzzo improperly recorded revenue from the sale of the new equipment to URI to improve Terex's reported year-end financial results.

$3.5 Million Advance Payment

During the same period in which the Terex I transaction was negotiated, URI was simultaneously negotiating with GECC the purchase of an unrelated equipment rental company in which GECC had an ownership interest. In connection with that negotiation, URI made an advance payment to GECC of a $3.5 million fee, which was contingent upon URI's successful completion of the acquisition. Nolan and others and GECC agreed that if URI did not successfully complete the acquisition, GECC would pay the $3.5 million to Terex instead of returning it to URI. Although Terex had no involvement with the proposed acquisition being negotiated between URI and GECC, Apuzzo agreed to include in the Terex I remarketing agreement a provision requiring that the contingent fee URI was paying to GECC be forwarded to Terex if the URI acquisition was not completed.

Having signed the Terex I remarketing agreement in December 2000 requiring the $3.5 million to be forwarded to Terex, in June 2001 Apuzzo agreed to amend the agreement to reduce the amount that GECC was to forward to Terex by approximately $1.25 million. The amendment served no purpose other than to allow URI and GECC to conceal the $1.25 million in fees URI was being charged by GECC in connection with new sale-leaseback transactions in which Terex had no financial or other involvement. In December 2001, Apuzzo agreed to again amend the Terex I remarketing agreement, lowering the amount that GECC was to forward to Terex by an additional $277,000. This amendment served no purpose other than to allow URI and GECC to use the

$277,000 to cover fees URI was being charged in connection with the Terex II transaction.

II. LEGAL STANDARD

When deciding a motion to dismiss under Rule 12(b)(6), the court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Although a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful in fact)." *Id.* (citations omitted). The plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974. "The function of a motion to dismiss is 'merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" *Mytych v. May Dept. Store Co.*, 34 F. Supp. 2d 130, 131 (D. Conn. 1999), quoting *Ryder Energy Distribution v. Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 779 (2d Cir. 1984). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims." *United States v. Yale New Haven Hosp.*, 727 F. Supp. 784, 786 (D. Conn. 1990) (citing *Scheuer*, 416 U.S. at 232).

While Rule 8(a) sets forth minimum pleading requirements, securities fraud claims, including claims for aiding and abetting fraud, are subject to Rule 9(b)'s heightened pleading requirement that the circumstances constituting

the fraud be stated with particularity. *See Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). But Rule 9(b)'s particularity requirement does not apply to allegations of mental condition such as intent or knowledge, which only need to be pled generally. To satisfy this requirement, the complaint must allege an adequate factual foundation that create a strong inference of scienter. *Stern v. Leucadia Nat. Corp.*, 844 F.2d 997, 1004 (2d Cir. 1980); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320-22 (2007) (noting that the court must take all of the alleged facts collectively, and not scrutinize individual allegations in isolation, to determine whether they give rise to a strong inference of scienter).

III. DISCUSSION

The SEC may bring a civil action against "any person that knowingly provides substantial assistance to another person in violation of a provision of [the securities laws], or of any rule or regulation issued" thereunder. 15 U.S.C. § 78t(e). Thus, "[t]o state a claim that defendants aided and abetted violations of the Exchange Act, the SEC must allege (1) a primary violation of the Exchange Act, (2) actual knowledge of the violation by the aider and abettor, and (3) that the aider and abettor substantially assisted the primary violation. *See SEC v. Cedric Kushner Promotions*, 417 F. Supp. 2d at 334." *SEC v. Espuelas*, 579 F. Supp. 2d 461, 483-84 (S.D.N.Y. 2008).

Apuzzo maintains that the complaint should be dismissed because it fails to adequately allege the second and third elements, i.e., actual knowledge of the violation and substantial assistance. In addition, Apuzzo contends that the majority of the SEC's claims are time-barred by the five-year statute of limitations and that the complaint fails to satisfy the requirement of Fed. R. Civ. P. 9(b)

that fraud be pled with particularity. Because the court concludes that while the SEC has adequately alleged actual knowledge of the violation it has not adequately alleged substantial assistance, the court does not reach Apuzzo's arguments with respect to the statute of limitations and pleading fraud with particularity.

A. Actual Knowledge of the Violation

The SEC contends that recklessness or extreme recklessness is sufficient for aiding and abetting liability, and in support of that contention the SEC relies on cases such as *Howard v. SEC*, 376 F.3d 1136, 1142-43 (D.C. Cir. 2004), and *Geman v. SEC*, 334 F.3d 1183, 1195 (10th Cir. 2003). However, the court finds persuasive the analysis in *SEC v. KPMG, LLP*, 412 F. Supp. 2d 349 (S.D.N.Y. 2006):

> Exchange Act Section 20(e) imposes liability in an SEC enforcement action on "any person that knowingly provides substantial assistance to another person in violation of a provision of this title, or of any rule or regulation issued under this title." 15 U.S.C. § 78t(e). The SEC argues that Section 20(e) encompasses recklessness in addition to actual knowledge. This contention must be rejected.
>
> Elsewhere in the Exchange Act, in a provision also passed as part of the PSLRA, "knowingly" is explicitly defined as actual knowledge, but that definition is limited to its subsection. *See* 15 U.S.C. § 78u-4(f)(1)(A). Nevertheless, the fact that the "knowingly" was defined as actual knowledge in the very same bill that contained Section 20(e) weighs in favor of the defendants' contention that the provision does not encompass recklessness. "[I]dentical words used in different parts of the

> same act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995) (citation omitted). In addition, the Senate considered and rejected an amendment to the proposed Section 20(e) that would have added recklessness to the standard. . . .
>
> . . .
>
> In support of its contention that Section 20(e) encompasses recklessness, the SEC notes that courts reference pre-*Central Bank* case law on aiding and abetting to flesh out the requirements of the provision, citing *SEC v. Lybrand*, 200 F. Supp. 2d. 384, 399 (S.D.N.Y. 2002). The contention that Section 20(e) was intended to codify existing law is a tenuous one, however. The law prior to *Central Bank*, and thus prior to the PSLRA, was not uniform on the issue of what constituted the requisite scienter for aiding and abetting liability, and the Supreme Court had in fact granted certiorari on the issue in *Central Bank*, although it never reached it because of its outright rejection of private aiding and abetting claims under Section 10(b) in that case. *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 844 (2d Cir. 1998) (citing 61 U.S.L.W. 3813-14, 508 U.S. 959, 113 S.Ct. 2927, 124 L. Ed. 2d 678 (U.S. June 8, 1993)). Congress was aware of this lack of uniformity when it passed Section 20(e).

Id. at 382-83. *See also SEC v. Stanard*, No. 06 Civ. 7736 (GEL), 2009 WL 196023, *31 (S.D.N.Y. Jan. 27, 2009) ("Courts have been clear in requiring a showing of 'actual knowledge of the violation by the aider and abettor.'");

SEC v. Espuelas, 579 F. Supp. 2d 461, 484 (S.D.N.Y. 2008) ("[A]ctual knowledge is the standard for aiding and abetting . . ."); *SEC v. Cedric Kushner Promotions, Inc.*, 417 F. Supp. 2d 326, 335 (S.D.N.Y. 2006) ("This court agrees that knowing misconduct must now be shown."). *But see SEC v. PIMCO Advisors Fund Management LLC*, 341 F. Supp. 2d 454, 468 (S.D.N.Y. 2004) ("Recklessness is sufficient scienter to satisfy the knowledge element of aider and abettor liability in this case, where Corba, as an executive of the entity that managed investors' funds, owed a fiduciary duty to those who were defrauded by the misleading disclosures. *Armstrong*, 699 F.2d at 91.").

Apuzzo argues that the SEC has failed to adequately allege facts that could show he had actual knowledge of the primary violation of the securities laws by URI. "[A] defendant's general awareness of its overall role in the primary violator's illegal scheme is sufficient knowledge for aiding and abetting liability." *K & S Partnership v. Continental Bank, N.A.*, 952 F.2d 971, 977 (8th Cir. 1991) (citing *FDIC v. First Interstate Bank*, 885 F.2d 423, 429-31 (8th Cir. 1989)). "Such knowledge may be proved by and inferred from circumstantial evidence, including facts available to the defendant's employees. . . . *Woods v. Barnett Bank of Fort Lauderdale*, 765 F.2d 1004, 1009 (11th Cir. 1985). Knowledge may be shown by circumstantial evidence . . ." *Id.* (internal quotation marks omitted). However, "[a] plaintiff's case against an aider, abetter, or conspirator may not rest on a bare inference that the defendant must have had knowledge of the facts." *Id.* (quoting *Schlifke v. SeaFirst Corp.*, 866 F.2d 935, 948 (7th Cir. 1989)) (internal quotation marks omitted).

The complaint alleges that URI and Nolan committed the primary violation by improving URI's 2000 and 2001

financial results by inflating the profits generated from the sales of the used equipment to GECC and recognizing prematurely revenue from those sales of equipment to GECC, and that concealing the true structure of Terex I and Terex II from URI's auditor was part of the fraudulent scheme. URI was able to inflate profits from the sales of the used equipment by selling it to GECC at prices in excess of its fair market value. URI was able to recognize revenue prematurely by concealing from its auditor the fact that URI continued to possess the risks and rewards of ownership and the fact that the sales price was not fixed and determinable because of outstanding commitments under the three-party interlocking agreements. The interlocking nature of the agreements between URI and GECC, GECC and Terex, and Terex and URI was disguised through the use of separate agreements that concealed the connection between the transactions, and the indemnification payments by URI to Terex were concealed through the use of inflated invoices that disguised the indemnification payments as undisclosed premiums on URI's purchase of new equipment from Terex.

The complaint contains factual allegations which, taken as true, support a conclusion that Apuzzo knew URI was inflating the profits generated by URI's sales of the used equipment to GECC and also knew the material details as to the true structure of each of Terex I and Terex II; Apuzzo knew that the transactions were being documented in a manner that concealed the interlocking nature of the three-party agreements and thus failed to disclose the true structure of the transactions; Apuzzo knew that the results from the transactions would be inaccurately reflected in URI's financial statements if the true structure of the transactions was not known to

URI's auditor; and Apuzzo knew that URI's auditor was being misled.

The factual allegations in the complaint support a conclusion that Apuzzo knew URI was inflating the profits generated by URI's sales of the used equipment to GECC and also knew the material details as to the true structure of each transaction. In connection with Terex I, Apuzzo obtained an internal Terex appraisal of the used equipment URI was selling to GECC and knew that URI had assigned a valuation to the used equipment sold to GECC in excess of its fair market value. On behalf of Terex, Apuzzo signed both the remarketing agreement and the backup remarketing agreement, the combined effect of which was to make URI ultimately financially responsible for the residual value guarantee to GECC, so he knew that URI continued to possess the risks and rewards of ownership and that the sales price was not fixed and determinable. In connection with Terex II, Apuzzo had comparable knowledge that the valuation of the used equipment being sold to GECC by URI was in excess of $4 million above the fair market value. Apuzzo signed the remarketing agreement between Terex and GECC in connection with Terex II, and before doing so he insisted that URI agree to indemnify Terex for its anticipated loss pursuant to the remarketing agreement. Apuzzo was involved throughout the process in Terex II and maintained control over the final terms of the agreements.

Apuzzo knew that the transactions were being documented in a manner that concealed the interlocking nature of the three-party agreements and thus failed to disclose the true structure of transactions. In connection with Terex I, Apuzzo sent Nolan an initial draft of the proposed backup remarketing agreement that explicitly

described Terex's residual value guarantee to GECC and recited URI's agreement, pursuant to the backup remarketing agreement, to remarket equipment as well as indemnify Terex for any losses it incurred as a result of the residual value guarantee. Apuzzo signed the backup remarketing agreement, knowing that URI's revised draft deleted all explicit references that would reflect the connection between the backup remarketing agreement, the sale-leaseback agreement and the remarketing agreement, even though it was in Terex's interest to make it clear that URI was responsible for indemnifying Terex for losses it incurred as a result of the residual value guarantee given pursuant to the remarketing agreement. With respect to the indemnification payments, Apuzzo agreed with Nolan that the payments would be made as undisclosed "premiums" paid in connection with URI's purchase of new equipment from Terex. Apuzzo approved the issuance by Terex of invoices that reflected an aggregate purchase price of $25 million for new equipment that Terex valued at $20 million.

In connection with Terex II, the transaction documents were also edited to remove references to the interlocking nature of the three-party agreements, and Apuzzo received an email from a Terex sales manager that specifically noted URI's desire for separate documents. As in Terex I, the indemnification payment was disguised as a premium on the purchase of new equipment, and Terex issued inflated invoices that did not disclose that premium; the disguising of the indemnification payment was done with Apuzzo's knowledge.

The complaint contains factual allegations that support a conclusion that Apuzzo knew that the results of the transactions would be inaccurately reflected in URI's financial statements if the true structure of the transac-

tions was not known to URI's auditor. Apuzzo was a licensed CPA with an MBA in public accounting, had previously worked in a public accounting firm, and was the chief financial officer of Terex during the relevant time period. His accounting knowledge is relevant. *See Espuelas*, 579 F. Supp. 2d at 483-84 ("The Complaint contains no allegations that someone with accounting knowledge communicated to her that the transactions were being accounted for incorrectly, and like Scolnik, the Complaint lacks any allegations that Kampfner possessed any accounting expertise herself."); *SEC v. Sandifur*, No. C05-1631C, 2006 WL 538210, *7 (W.D. Wash. March 2, 2006)("[T]here are no allegations that Defendant Ness had been told that the transaction would violate GAAP. Instead, the complaint relies on allegations regarding Defendant Ness's training and position in the company . . . to support its allegation that he 'knew or was reckless in not knowing' that it was improper for Metropolitan to recognize revenue on the Neighborhood I transaction . . . and that it was improper to recognize the gain in Metropolitan's 10-Q for that quarter . . ."). Apuzzo was aware of facts about how the transactions were actually structured sufficient to inform a person knowledgeable about accounting that the transactions did not qualify as minor sale-leasebacks.

The SEC alleges that Apuzzo's motivation for entering into the transactions was to boost Terex's year-end financial results, and Apuzzo's knowing conduct with respect to how the results of the transactions were reflected in Terex's financial statements also supports such a conclusion with respect to his knowledge concerning URI's financial statements. In connection with Terex I, although the invoices issued to URI reflect an aggregate purchase price of $25 million for new equipment that

Terex internally valued at $20 million, with Apuzzo's knowledge and approval, the $5 million overpayment was recorded as a reserve to be used to cover Terex's anticipated losses under its residual value guarantee. URI's purchase of the $20 million of new equipment did not comply with "bill and hold" accounting guidance. However, in a pattern similar to the steps taken by URI to disguise the interlocking nature of the sale-leaseback agreement, the remarketing agreement and the backup remarketing agreement, no purchase agreement between Terex and URI was prepared, URI did not issue any purchase orders, and URI's right of return of the new equipment it was purchasing was memorialized in the Separate Agreement, which was signed by Apuzzo on behalf of Terex. Apuzzo improperly recorded the $20 million portion of the payment as revenue for the fiscal year ending December 31, 2000. Similarly, in the Terex II transaction, Apuzzo improperly recorded revenue from the sale of new equipment to URI to improve Terex's recorded year-end results.

Finally, the factual allegations in the complaint support a conclusion that Apuzzo knew that URI's auditor was being misled. In connection with Terex I, Apuzzo obtained an internal appraisal of the used equipment URI was selling to GECC and thus knew that URI was selling the equipment to GECC at a price in excess of its fair market value. Apuzzo was asked to provide a valuation letter to URI's auditor representing that URI had assigned fair market valuations to the used equipment sold to GECC, but instead, he offered to provide a different letter.

B. Substantial Assistance

As discussed above, in addition to alleging a primary violation of the Exchange Act and actual knowledge by

the aider and abettor of the violation, the SEC must allege that the aider and abettor substantially assisted the primary violation. "In alleging the requisite 'substantial assistance' by the aider and abettor, the complaint must allege that the acts of the aider and abettor proximately caused the harm to the corporation on which the primary liability is predicated." *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 62 (2d Cir. 1985). "Allegations of a 'but for' causal relationship are insufficient. *Edwards & Hanly*, 602 F.2d at 484." *Id.* at 63. "[M]ere awareness and approval of the primary violation is insufficient to make out a claim for substantial assistance." *SEC v. Power*, 525 F. Supp. 2d 415, 422 (S.D.N.Y. 2007) (quoting *SEC v. Treadway*, 430 F. Supp. 2d 293, 339 (S.D.N.Y. 2006)). "A defendant provides substantial assistance only if [he] affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed." *SEC v. Espuelas*, 698 F. Supp. 2d 415, 433 (S.D.N.Y. 2010) (internal quotation marks omitted).

SEC v. Patel, Civil No. 07-cv-39-SM, 2008 WL 782483 (D.N.H. March 24, 2008), contains a helpful discussion of examples of allegations that adequately allege substantial assistance contrasted to ones that fail to do so. There, in concluding that the SEC had failed to adequately allege conduct linking defendant Collins to the primary violation, the court compared the allegations with respect to Collins to the allegations against the alleged aiders and abettors in *SEC v. Druffner*, 353 F. Supp. 2d 141 (D. Mass. 2005)[2] and *SEC v. Power*, 525 F. Supp. 2d 415 (S.D.N.Y. 2007) :

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[2] In *Druffner*, defendant Shannon was the manager of the branch at which the fraudulent scheme was carried

In *Druffner*, the substantial assistance alleged in the complaint consisted of the defendant's "1) *approving* additional account numbers and FA numbers, 2) *authorizing* the processing of unfinished transactions at the New York office and 3) *failing to stop* the brokers' fraudulent activity after he received numerous block letters complaining of such activity when he had a duty as Branch Manager to do so." 353 F. Supp. 2d at 151 (emphasis added). According to the court, "[s]uch allegations involve[d] specific instances of *affirmative conduct* that support[ed] the charge that [the defendant] aided and abetted the brokers' securities law violations." *Id.* (emphasis added). And in *Power*, an enforcement action against a former Vice President of Tyco International Ltd. ("Tyco"), the court denied the defendant's motion to dismiss based upon the SEC's factual allegations that the defendant: (1) *created* a form of transaction that was "designed . . . to have a specific and false accounting effect," 525 F. Supp. 2d at 418; (2) *was responsible* for fraudulent acquisition accounting that reduced Tyco's assets and increased its liabilities . . . ; (3) *proposed* an asset write-off that was implemented with the effect of inflating "Tyco's reported income improperly by reducing its depreciation expenses," *id.*; (4) *oversaw* various fraudulent accounting decisions in a 1999 acquisi-

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out. "The defendant brokers allegedly used numerous broker identification numbers (called 'FA numbers,' shorthand for 'financial advisor numbers') and opened nearly 200 customer accounts under fictitious names." *SEC v. Druffner*, 353 F. Supp. 2d 141, 146 (D. Mass. 2005).

tion . . . ; and (5) "*directed* the entry of multiple improper pre-merger adjustments," *id.* (emphasis added).

Here, by contrast, the complaint alleges that: (1) the Ariel letter agreement *was circulated* to Collins and others . . . ; (2) Collins and others *received* e-mails from Kay and others about the Ariel agreement . . .; (3) Collins and others *decided* not to provide the Ariel letter agreement to Enterasys's outside auditor . . . ; (4) Collins *was advised* by Hurley of Hurley's intent to submit a falsified version of the Ariel agreement to Enterasys's outside auditor . . . ; (5) Collins and others *agreed to a plan*, never executed, to conceal SG Cowen's return of products it had purchased from Aprisma . . . ; (6) Collins *knew* that it was improper to recognize revenue from the Accton transaction . . . ; (7) Collins *knew*, and *failed to disclose*—to whom, the complaint does not say—that Enterasys was responsible for reselling the products it sold to JBS, making it improper to recognize revenue from that transaction . . . ; and (8) Collins *knew* of the falsity of the summary of investment-related revenue that Hurley prepared at Gagalis' direction and submitted to the outside auditor . . . . Those are the only factual allegations in the complaint that refer to Collins. Few, if any, rise to the level of "affirmative conduct," and none of those that arguably do rise to that level specifically link Collins to the primary violation, which is the false reporting of revenue in Enterasys's SEC filings.

The closest the SEC comes to alleging affirmative conduct is its claim that Collins, together with Kay

> and Gagalis, "decided" not to provide the original Ariel letter agreement to the outside auditor. But, even assuming that participating in a group decision to withhold the Ariel agreement is the equivalent of actually withholding it, the SEC's allegation falls short of what is needed to support a claim that Collins substantially assisted in the preparation of a fraudulent SEC filing, given the complaint's failure to specify either the Enterasys official(s) who were responsible for providing documentation to the auditor or the reporting relationships among Collins, Kay, and Gagalis, or what role Collins played in (or what influence, authority, or responsibility he had with regard to) "deciding" as part of the group.

Patel, 2008 WL 782483 *11-12.

Also, in *SEC v. Pimco Advisors Fund Management LLC*, 341 F. Supp. 2d 454 (S.D.N.Y. 2004), the court concluded that "Corba's alleged facilitation of the undisclosed Canary arrangement and the market timing activities conducted thereunder, in combination with his failure to correct his own funds' market timing-related disclosures when they were rendered materially misleading, indicate that Corba provided substantial assistance in the primary violation . . ." *Id.* at 468. The conduct that constituted "facilitation" by Corba of the undisclosed arrangement was Corba and a co-defendant entering into an arrangement with Canary Capital Partners LLC on behalf of several PIMCO entities; Corba was at the time the manager of two of the PIMCO mutual funds and the chief executive officer of a corporate entity within the PIMCO family of mutual funds, and thus he owed a fiduciary duty to those who were defrauded by misleading disclosures with respect to the funds.

Here, the complaint contains factual allegations which taken as true support a conclusion that there was a "but for" causal relationship between Apuzzo's conduct and the primary violation, but do not support a conclusion that Apuzzo's conduct proximately caused the primary violation. The complaint alleges that URI and Nolan committed the primary violation by improving URI's 2000 and 2001 financial results by inflating the profits generated by sales of used equipment to GECC and recognizing prematurely revenue from those sales of equipment to GECC, and as part of the fraudulent scheme concealed the true structure of Terex I and Terex II from URI's auditor. Absent from the complaint here are allegations tending to support a conclusion that Apuzzo caused the primary violation by creating the structure for Terex I and Terex II, like the defendant in *Power*. Rather the complaint alleges that Nolan and others purported to structure the transactions as minor sale-leasebacks. Also absent from the complaint are allegations tending to support a conclusion that Apuzzo was the person responsible for bringing the respective parties to the three-party agreements to the transactions. Rather, the complaint alleges that Nolan contacted GECC and then Nolan and others initiated discussions with Terex. Nor does the complaint contain allegations tending to support a conclusion that Apuzzo was the person who caused the modifications to the transaction documents so as to conceal the interlocking nature of the three-party agreements. Rather, the complaint alleges, with respect to Terex I, that when Apuzzo sent Nolan an initial draft of the backup remarketing agreement Apuzzo's draft explicitly described Terex's residual value guarantee to GECC and recited URI's agreement to indemnify Terex for losses that Terex incurred as a result of the residual value guarantee, but Nolan and others sent Apuzzo a re-

vised draft that concealed the true nature of Terex I. Terex II was then structured similarly to Terex I.

Unlike the defendant in *Power*, Apuzzo was not responsible for the accounting decisions at URI, the entity whose materially misleading financial statements were the vehicle for the primary violation. Nolan, not Apuzzo, was URI's chief financial officer; the accounting decisions for which Apuzzo was responsible were those affecting the financial statements of Terex. Also, the complaint alleges that Nolan, not Apuzzo, forwarded the inflated invoices for the new equipment purchased in connection with Terex I to URI's accounting department so the incorrect prices could be entered in URI's book and records.

Nor does the complaint contain factual allegations tending to support a conclusion that Apuzzo concealed information from URI's auditor. While the complaint alleges that Apuzzo was asked to provide a valuation letter to URI's auditor, it alleges that instead he offered to provide an appraisal letter that would have been misleading. However, the complaint does not allege that Apuzzo actually provided an appraisal letter to anyone. Nor does the complaint allege who asked Apuzzo to provide the valuation letter to URI's auditor or to whom Apuzzo offered to provide an appraisal letter.

Unlike the defendant in *PIMCO*, Apuzzo did not enter into an arrangement on behalf of the entity whose financial statements the SEC alleges were rendered materially misleading as a result of the fraudulent scheme. Also, unlike the defendant in *Druffner*, Apuzzo did not give Nolan or others within URI authorization that was necessary in order for them to engage in conduct that carried forward the fraudulent scheme. Rather the factual allegations in the complaint support only the conclusion

that Apuzzo participated in Terex I and Terex II, the transactions about which URI's auditor was misled, knowing of the primary violation. As the chief financial officer of Terex, not URI, Apuzzo had no duty to disclose the true structure of the transactions to URI's auditor, and the complaint does not contain factual allegations as to circumstances that gave rise to such a duty on his part. Apuzzo's "mere awareness and approval of the primary violation" does not establish that he proximately caused the harm to URI and thus substantially assisted the primary violation. *Power*, 525 F. Supp. 3d at 422.

Accordingly, the SEC has failed to allege that Apuzzo aided and abetted the primary violation of the securities laws by Nolan and others.

IV. CONCLUSION

For the reason's set forth above, the defendant's Motion to Dismiss (Doc. No. 40) is hereby GRANTED.

It is so ordered.

Dated this 20th day of December, 2010 at Hartford, Connecticut.

/s/ AWT

Alvin W. Thompson

United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Case No. 3:07CV1910 (AWT)

SECURITIES AND EXCHANGE COMMISSION

v.

JOSEPH F. APUZZO

(December 22, 2010)

JUDGMENT

This action having come on for consideration of the defendant's motion to dismiss, before the Honorable Alvin W. Thompson, United States District Judge, and

The court, having considered the full record of the case including applicable principles of law, and having filed a ruling granting, it is therefore,

ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendant Joseph F. Appuzo, and this case is dismissed.

Dated at Hartford, Connecticut, this 22nd day of December, 2010.

ROBIN D. TABORA, Clerk

United States District Court

By /s/ SLS
Sandra Smith
Deputy Clerk