

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 1784/September 9, 2014

ADMINISTRATIVE PROCEEDING

File No. 3-15873

In the Matter of

THOMAS R. DELANEY II and
CHARLES W. YANCEY

ORDER ON *IN CAMERA*
MATERIALS AND JOINT MOTION
AND NOTICE OF HEARING
LOCATION

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on May 19, 2014, pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company Act of 1940. The OIP alleges that Penson Financial Services, Inc. (Penson), violated Rule 204T(a)/204(a) of Regulation SHO, pertaining to the regulation of short sales, and that Thomas R. Delaney II (Delaney) and Penson's Senior Vice President of Securities Lending (Vice President)¹ willfully aided and abetted and caused Penson's violations, and that Charles W. Yancey (Yancey) failed reasonably to supervise Delaney and the Vice President with a view to preventing and detecting their violations.

I held a prehearing conference on June 23, 2014, and have issued two orders on motions and a clarifying order. *Thomas R. Delaney*, Admin. Proc. Rulings Release No. 1557, 2014 SEC LEXIS 2223 (June 25, 2014); *Thomas R. Delaney*, Admin. Proc. Rulings Release No. 1652, 2014 SEC LEXIS 2679 (July 25, 2014); *Thomas R. Delaney*, Admin. Proc. Rulings Release No. 1671, 2014 SEC LEXIS 2837 (Aug. 6, 2014). The hearing will begin on October 27, 2014, at 9:30 a.m. CDT in the United States District Court for the Northern District of Texas, Courtroom 1351, 1100 Commerce Street, Dallas, Texas 75242.

¹ Michael H. Johnson (Johnson) was Senior Vice President of Penson Worldwide, Inc.'s Securities Lending Department. *Michael H. Johnson*, Exchange Act Release No. 72186, 2014 SEC LEXIS 1711 (May 19, 2014). The Commission accepted Johnson's Offer of Settlement and on May 19, 2014, he was (1) ordered to cease and desist from committing or causing any violations or any future violations of Rule 204 of Regulation SHO, (2) subjected to an industry-wide bar pursuant to Section 15(b)(6) of the Exchange Act and Section 9(b) of the Investment Company Act, with the right to apply for reentry after five years, and (3) ordered to pay a civil money penalty of \$125,000, which may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended (Fair Fund distribution).

On July 25, 2014, in response to Delaney's requests, I ordered the Division to provide my Office by August 29, 2014, for *in camera* review:

all interview notes in the investigative file for any individual to be called as a witness that the Division has withheld from Delaney as non-Jencks Act material; and

a privilege log that includes for each withheld document the date of the document, the author and recipient, the type of document, and the privileged claimed.

Thomas R. Delaney, 2014 SEC LEXIS 2679, at *7, *9 (citations omitted).

In addition, I ordered:

the Division to file for the record by August 29, 2014, a statement summarizing the measures the Division has taken to comply with [*Brady v. Maryland*, 373 U.S. 83, 87 (1963),] and an affirmation by Division counsel that to the best of her knowledge and belief those measures are sufficient to uncover any *Brady* materials in the investigative file.

Id. at *11-12 (italics added).

Pending Issues

On August 29, 2014, in response to my July 25, 2014, Order, as clarified on August 6, 2014, the Division provided me for *in camera* review the following materials:

1. Correspondence to Judge Murray from Nicholas Heinke (Heinke) dated August 29, 2014 (Heinke Letter);
2. Declaration of Heinke Regarding the Division of Enforcement's Search for Material Exculpatory Evidence (Heinke Declaration); and
3. Interview notes from the Division's investigative file (documents bates stamped SEC-Jencks 000001-000154).

The Heinke Letter states that the Division has included notes of all interviews it conducted in this investigation and it summarizes the nature of each of the seventeen sets of notes, emails, and memoranda provided.

In addition, on September 4, 2014, the Division submitted to me for *in camera* review a Privilege Log and an explanatory letter from Division counsel Polly Atkinson (Atkinson), dated September 4, 2014. A printout of the Privilege Log is 425 pages, and almost every page has thirty or so entries. Each page has five columns headed "From," "CC," "Subject," the date "Received," and "To." Atkinson's letter identifies the following categories of withheld documents listed on the Privilege Log, and the reasons for withholding the materials:

- A. Internal emails between Commission employees with a list of employees sending and receiving;
- B. Emails between Division staff and FINRA employees;
- C. External emails concerning settlement negotiations; and
- D. Investigative and trial preparation materials prepared by the Division staff.

Finally, the Division filed letters on August 29, 2014, and September 4, 2014, stating that it has complied with my orders dated July 25, 2014, and August 6, 2014.

Ruling

My review of the voluminous material produced by the Division reveals no indication that the Division has failed to produce to Delaney any Jencks Act material contained in the interview notes that are part of the investigative file. The Privilege Log and accompanying letter, covering communications between September 1, 2010, and May 19, 2014, describe with particularity the withheld materials and the details support the Division's position that these materials were properly withheld. *See Dole v. Milonas*, 889 F.2d 885, 890 (9th Cir. 1989); *see also Michael Sassano*, Securities Act Release No. 8865, 2007 WL 4699012, at *3 (Nov. 30, 2007). Finally, the Heinke Declaration outlining the steps Heinke, a Division attorney, has taken and his knowledge of what others have done, with his representation that to the best of his knowledge and belief the Division has taken sufficient steps to uncover any *Brady* materials in the investigative file, provides sufficient assurance that the Division has fulfilled its *Brady* obligations. I therefore accept the Division's representation that it has fully complied with my order issued on July 25, 2014, as clarified on August 6, 2014.

The hearing will begin at 9:00 a.m. on October 27, 2014, and at 9:30 a.m. every following day, and will conclude at 5:30 p.m. or 6:00 p.m., with an hour for lunch. The parties should have witnesses ready so that we can proceed at a good pace. When the Division concludes its direct case, Respondents are expected to present their opposition, and when they conclude, the Division is expected to be ready with its rebuttal case, if it has one. The hearing will continue every day the court house is open.

The procedural schedule provides for the pre-hearing circulation of expert testimony. Experts will adopt their written testimony and be ready for cross-examination. There will be no additional direct testimony from the experts. There will be no opening or closing statements by counsel. The Commission's Rules of Practice require exhibits in hard form. The parties shall submit hard copies of all exhibits allowed in evidence or identified but not allowed in evidence, to the Office of the Commission's Secretary at the conclusion of the hearing. If the parties have copies of the exhibits in electronic format I would appreciate receiving a copy. I am committed to ruling on the many affirmative defenses at the start of the hearing and I will take care of any other pending matters at that time. Since I am unaware of any other matters that need to be discussed, the Joint Motion for Prehearing Conference filed on September 4, 2014, is DENIED.

Brenda P. Murray
Chief Administrative Law Judge