INITIAL DECISION RELEASE NO. 976
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15873

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

In the Matter of THOMAS R. DELANEY II and CHARLES W. YANCEY	INITIAL DECISION ON EAJA APPLICATION March 7, 2016

APPEARANCES: Polly Atkinson, Nicholas Heinke, and Jonathan M. Warner for the Division of Enforcement, Securities and Exchange Commission

Brent R. Baker, D. Loren Washburn, and Aaron D. Lebenta of Clyde Snow & Sessions, P.C. for Respondent Thomas R. Delaney II

BEFORE: Jason S. Patil, Administrative Law Judge

I issued an initial decision in this matter on March 18, 2015, and after no petition for review was filed by any party, the Securities and Exchange Commission ordered that the decision become final on April 29, 2015. *Thomas R. Delaney II*, Securities Exchange Act of 1934 Release No. 74843, 2015 SEC LEXIS 1636; Initial Decision Release No. 755, 2015 SEC LEXIS 1014. My decision dismissed the charges against Respondent Charles W. Yancey, and it found Respondent Thomas R. Delaney II liable for causing, but not aiding and abetting, violations of Rules 204T(a) and 204(a) of Regulation SHO by Penson Financial Services, Inc., a clearing firm.[1] On May 29, 2015, Delaney filed a motion for attorney's fees and costs under the Equal Access to Justice Act (EAJA), which he supplemented at my direction on June 23, 2015. The

[1] Rule 204(a) requires participants of a registered clearing agency to deliver equity securities to the agency when delivery is due; that is, by settlement date, generally three days after the trade day (T+3). 17 C.F.R. § 242.204(a). If the participant fails to do so for long sales, the rule requires it to close out the failure-to-deliver position by purchasing or borrowing the required securities by no later than market open on T+6. *Id.* Rule 204(a), which became effective on July 31, 2009, made permanent the close-out requirements of temporary Rule 204T(a). In this decision, references to Rule 204 include both the permanent and temporary rule.

Division of Enforcement filed a response on July 6, 2015, and Delaney replied on July 21. Oral argument was held on July 22, 2015.

EAJA applies to this administrative proceeding. *See* 5 U.S.C. § 504(b)(1)(C); 17 C.F.R. § 201.33. The statute provides:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1). "The governing principle of the Act is that the 'United States should pay those expenses which are incurred when the government presses unreasonable positions during litigation.'" *Matthews v. United States*, 713 F.2d 677, 683–84 (11th Cir. 1983) (quoting *Goldhaber v. Foley*, 698 F.2d 193, 197 (3d Cir. 1983)).

An EAJA application must be filed no later than thirty days after the Commission's final disposition of a proceeding. 5 U.S.C. § 504(a)(2); 17 C.F.R. § 201.44(a). Delaney's application was filed within thirty days of the Commission's finality order, but the application cited the wrong statutory provision – 28 U.S.C. § 2412, which is limited to civil actions, rather than 5 U.S.C. § 504, its analogue in the administrative forum. Delaney also failed to provide with his original application "a detailed exhibit showing [his] net worth" and a "separate itemized statement . . . for each professional firm or individual" whose services were covered by the application, as required by the Commission's EAJA rules. 17 C.F.R. §§ 201.42(a), .43; *see Thomas R. Delaney*, Admin. Proc. Rulings Release No. 2772, 2015 SEC LEXIS 2245 (ALJ June 4, 2015). I nonetheless find his application timely, as it was submitted within the required time period. That the content of the application was imprecise does not warrant dismissal. *Cf. Scarborough v. Principi*, 541 U.S. 401, 420 (2004) (recognizing that – under civil analogue 28 U.S.C. § 2412 – a fee application may be amended, out of time, to show that the applicant "is eligible to receive an award" (citing *Bazalo v. West*, 150 F.3d 1380, 1383-84 (Fed. Cir. 1998)). It would be draconian and against the interests of justice to dismiss the application as untimely due to an erroneous statutory citation, and the Division does not identify any harm caused by Delaney's delay in submitting the net worth exhibit and itemized expense statement.[2] *See* Div. Resp. at 36-37. Indeed, the Division does not dispute, and I conclude, that Delaney is a financially eligible applicant, meaning that at all relevant times he has had a net worth of $2

[2] The Division was granted an extension of time to file its opposition to Delaney's application in light of the delayed financial information. *See Thomas R. Delaney II*, Admin. Proc. Rulings Release No. 2855, 2015 SEC LEXIS 2584 (ALJ June 24, 2015).

million or less. *See* 5 U.S.C. § 504(b)(1)(B); 17 C.F.R. § 201.34(b)(1); Delaney Supp. Resp., Ex. A.

EAJA limits recovery to a "prevailing party," and the Commission's EAJA rules provide that a "prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding." 5 U.S.C. § 504(a)(1); 17 C.F.R. § 201.35(a). Unlike Yancey, Delaney did not prevail on all of the Division's claims against him. But though EAJA does not define the term "prevailing party," it is clear that the statute is not confined to complete victories: "A private citizen need not prevail on every issue . . . to be entitled to a fee award; rather, a party may recover fees for those significant issues on which it succeeds." *United States v. 640.00 Acres of Land*, 756 F.2d 842, 846 (11th Cir. 1985) (interpreting the substantially similar language of 28 U.S.C. § 2412); *see also* 17 C.F.R. § 201.35(a) (permitting recovery of fees related to "a . . . portion" of the proceeding).

The Division acknowledges that its "position encompassed two charges – aiding and abetting, on the one hand, and causing, on the other." Div. Resp. at 8. But it argues that Delaney's victory on the aiding and abetting charge is meaningless for EAJA purposes because it was not a "discrete" portion of the proceeding. *Id.* at 8-10. I reject the Division's assertion, for which it cites no legal precedent, that claims cannot be discrete if they involve the same underlying facts. Although I found, and the parties agree, that similar evidence was relevant to both the aiding and abetting claim and the causing claim (*see* Initial Decision at 49; Delaney Supp. Resp. at 4; Div. Resp. at 9-10), this does not displace Congress's creation of different substantive law standards and remedies for the two distinct theories of secondary liability.

I also reject the Division's suggestion that because it obtained some sanctions against Delaney – a cease-and-desist order and first-tier civil penalties – the Division was the prevailing party and no EAJA award is appropriate. Div. Resp. at 3, 9. The Division cites *SEC v. Litler*, 874 F. Supp. 345, 347 (D. Utah 1994), in which the district court found that a defendant was not a prevailing party, even though he succeeded on the issues of scienter and injunctive relief, because the sanction imposed (mandatory future disclosure of his negligence-based violation) still "materially alter[ed] the relationship between defendant and the SEC." In support of this conclusion, the court cited to a Supreme Court case which held, in the context of the attorney's fee provision of the Civil Rights Act, that a civil rights plaintiff prevails against the government "when actual relief on the merits of his claim materially alters the legal relationship between the parties." *See Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992); *Litler*, 874 F. Supp. at 347. The *Litler* court seemingly reversed this rule when the EAJA applicant is a defendant rather than a plaintiff, concluding that a defendant cannot be a prevailing party if the government wins on any aspect of the case that impacts the parties' relationship. *Litler*, 874 F. Supp. at 347. Such an interpretation finds no support in the text or intent of EAJA, and it flies in the face of EAJA precedent and the Commission's own EAJA rules. I therefore decline to adopt the *Litler* court's reasoning here.

Delaney prevailed on the aiding and abetting claim, and consequently also succeeded in defeating the Division's request for remedies predicated on the alleged misconduct underlying that claim, including substantial third-tier penalties and an associational bar. *See* Initial Decision at 43, 60-62. I therefore conclude that he is a prevailing party under EAJA.[3]

At this point, the burden shifts to the Division to establish that its position was "justified to a degree that could satisfy a reasonable person" and had a "reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565-66 & n.2 (1988); *see* 5 U.S.C. § 504(a)(1); 17 C.F.R. § 201.35(a). "If the Division's case is justified to a degree that could satisfy a reasonable person, then no fees are to be awarded under the EAJA." *Michael Flanagan*, Exchange Act Release No. 49979, 2004 WL 1538526, at *4 (July 7, 2004) (internal quotation omitted). The outcome of the underlying case is not dispositive; instead, an "independent evaluation [must be conducted] through an EAJA perspective." *Richard J. Adams*, Exchange Act Release No. 48146, 2003 SEC LEXIS 1600, at *15 & n.14 (July 9, 2003) (quoting *FEC v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986)) (alterations in original).

The parties disagree on what evidence the Division is permitted to present in order to justify its position. The statute provides the following guidance:

> Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1); *see* 17 C.F.R. § 201.55. While "administrative record" is undefined, the "position of the agency" means, "in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based." 5 U.S.C. § 504(b)(1)(E); *see* 17 C.F.R. § 201.35.

I concur with the Division that the administrative record is not limited to the contents of the record index issued by the Commission's Office of the Secretary on February 24, 2015. First, the statute contemplates that the position subject to challenge by an EAJA applicant includes the agency's decision to bring a proceeding against a respondent. The "administrative record, as a whole" thus cannot plausibly be limited to just the record developed at the administrative hearing. Indeed, the House Report cited by Delaney states that the record "includ[es] the record with respect to the action or failure to act by the agency upon which the adversary adjudication or civil action is based." H.R. Rep. 99-120, at 7 (1985). In Commission administrative

[3] Accordingly, Delaney's alternate contention made under 5 U.S.C. § 504(a)(4) – that he would be entitled to fees for the Division's excessive demands for relief even if the Division was the prevailing party on its allegations that Delaney knowingly participated in an intentional scheme to violate Rule 204 – is moot. *See* Delaney Reply at 8-9; *Turner v. Nat'l Transp. Safety Bd.*, 608 F.3d 12, 17 (D.C. Cir. 2010) (Section "504(a)(4) applies only when the Government has prevailed").

proceedings, the record of this action or inaction includes the Division's investigative file, which contains the investigative transcripts and declaration that the Division contends contributed to the reasonableness of its position.

In addition, the statute refers to the record that "is made," not "was made," indicating that the development of the whole administrative record does not cease on the day the Secretary's record index issues. And the Commission's EAJA rules specifically provide that the Division's answer to an EAJA application may include "facts not already in the record of the proceeding," further supporting the notion that the "administrative record, as a whole" includes both materials admitted during the underlying hearing and the record developed during the EAJA portion of the proceeding.[4] *See* 17 C.F.R. § 201.52(c); *cf. Kuhns v. Bd. Of Governors of Fed. Reserve Sys.*, 930 F.2d 39, 42-43 (D.C. Cir. 1991) (holding that, in a settled administrative proceeding, the Federal Reserve Board "properly allowed the record to be supplemented to determine whether the Division had substantial justification"). I also note that the relevant record is that "which is made in the adversary adjudication for which fees and other expenses are sought." 5 U.S.C. § 504(a)(1). Given that Delaney seeks fees and expenses for the EAJA portion of the proceeding, it is difficult to see how the record developed in this phase of the proceeding can be excluded from my consideration of substantial justification. *See* Delaney Supp. Resp. at 5 & Ex. B; Delaney Supp. Submission of Fees and Costs. For these reasons, the exhibits submitted with the Division's answer are now part of the record. *See* 17 C.F.R. § 201.350(a)(2).

Delaney's principal contention is that the Division's position was not substantially justified because my initial decision found that Delaney lacked a motive to aid and abet the violations at issue, and did not credit the Division's other evidence that he was aware of and intended to assist in the violations.[5] *See* Delaney App. at 6-8; Delaney Supp. Resp. at 9-10. While it is true that I found that the Division failed to carry its burden of proof with respect to the scienter required for aiding and abetting, that is not dispositive for EAJA purposes:

> Because "substantial justification" is a different and less stringent standard than the "preponderance of the evidence" standard used to determine liability for a

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[4] The EAJA rules state that such new facts may be supported by affidavits, oral argument, or additional written submissions. *See* 17 C.F.R. §§ 201.52(c), .55(a).

[5] Delaney spends a significant portion of his EAJA application and reply brief repeating his post-hearing argument that the Division's case was focused only on Delaney's alleged motive and intentional misconduct, not on his negligence or recklessness. Delaney App. at 3-9; Delaney Reply at 2-7. As my initial decision made clear, Delaney had ample opportunity to defend himself against the charge that he was negligent or reckless. Initial Decision at 49-50. In any event, I need not decide whether the issues of intent and motive constitute their own significant and discrete substantive portions of the proceeding because even when considered separately, I find that the Division's position on those allegations was substantially justified.

> substantive securities violation, the conclusions . . . in the proceeding on the merits are not dispositive of the outcome of the matter before us now. An agency position can be substantially justified even if the trier of fact finds the evidence insufficient to prove the violations alleged.

Clarke T. Blizzard, Investment Advisers Act of 1940 Release No. 2409, 2005 SEC LEXIS 1940, at *11 (July 29, 2005).

There is no dispute that intentional misconduct would have supported an aiding and abetting claim; accordingly, the Division's position had a reasonable basis in law. Delaney Supp. Resp. at 9. Instead, the parties disagree over whether the Division had a reasonable basis in fact for believing the evidence adduced in the proceeding would and did support a claim for aiding and abetting – specifically, whether the evidence supported the claim that Delaney knew about the violations, or had a motive to aid and abet them.[6]

The Division points to multiple pieces of evidence justifying its assertion that Delaney knew about the violations of Rule 204. First, Delaney admitted in a Wells submission provided to the Division that: "Mr. Delaney escalated issues related to Regulation SHO frequently, sometimes daily, for the entire period from 2008 to 2011." Hearing Ex. 157 at 21. The submission further explained that:

> All of these issues[7] were raised many times - both routinely and extraordinarily - with Mr. Yancey, who was responsible at PFSI to deal with the issues and concerns Compliance escalated. Even though Mr. Yancey was well aware of all the challenges of complying with Rules 204T, 203, and 204 at PFSI, he did not take steps to encourage, much less require, changes to PFSI's, and particularly Stock Lending's, practices.

Id. at 32.

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[6] The Division argues that I should not consider the motive allegation separately from the overall aiding and abetting claim. Div. Resp. at 26-27. While I am mindful of the Commission's instruction to consider the case as a whole, I agree with the Third Circuit's position that the best way to do so is to "evaluate every significant argument made by an agency as part of [the court's] EAJA fee evaluation" in order to "determine whether, *as a whole*, the Government's position was substantially justified." *Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 131 (3d Cir. 1993) (emphasis in original); *see Flanagan*, 2004 WL 1538526, at *4, *8 n.42.

[7] "These issues" appears to refer, among other things, to Delaney's inability to control Stock Loan or Rule 204 buy-ins, the "huge financial incentives" for Stock Loan to violate Rule 204, and the Buy-Ins department's failure to buy-in by market open. Hearing Ex. 157 at 31-32.

The investigative and hearing testimony of Rudy De La Sierra also supported the Division's position that Delaney was aware of the violations. In investigative testimony, De La Sierra told the Division that he explained to Delaney in October 2008 that Stock Loan "was not closing out failure[s] to deliver[ ] by open market T+6," and he stated that Delaney "was aware" of the issue. Div. Resp. Ex. 2 at 168. He repeated these claims at the hearing, agreeing that there was not "any ambiguity that Mr. Delaney knew that Stock Loan was not closing out at market open T+6," in part because he "ma[d]e it clear to Mr. Delaney that Stock Loan was not closing out at market open."[8] Hearing Tr. 337-39.

Third, Michael Johnson testified during the Division's investigation that Delaney "knew stock loan wasn't closing out fails to deliver on margin long sales by open market T+6," in part because Johnson had told Delaney that Stock Loan was not complying with Rule 204T. Div. Resp. Ex. 3 at 74-80. He also testified that Delaney subsequently told him to follow industry practice instead of SEC rules. *Id.* at 216-17; *see id.* at 211. The Division acknowledges that Johnson's hearing testimony was "less direct on the issue of Delaney's knowledge," but correctly notes that Johnson did testify at the hearing that he "ma[d]e it clear to Mr. Delaney what the problem Stock Loan was having was." Div. Resp. at 19; Hearing Tr. 525.

Fourth, Brian Gover also provided evidence that Delaney knew about the violations. In investigative testimony, Gover explained that he discussed Stock Loan's policy of not closing out by market open T+6 with Delaney in 2009. Div. Resp. Ex. 4 at 132-33. Gover subsequently elaborated on that testimony in a declaration, as follows:

> Shortly [after the third quarter of 2009], Johnson, Delaney and I met face-to-face in Penson's offices in Dallas, Texas. In that meeting, Johnson confirmed that the Stock Loan Department did not consistently close out CNS failures to deliver relating to sales of loaned securities by market open T+6. He claimed that it was not industry practice to do so. He further claimed that nobody on the street bought in lending counterparties at market open T+6, and that the stock loan agreements did not allow for such buy ins.
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> In that meeting, Johnson and Delaney discussed whether Penson should purchase securities on Penson's own account by market open T+6 in order to comply with my understanding of Rule 204's obligation that long sales of loaned securities be closed out by market open T+6. Johnson and Delaney rejected this option for complying with Rule 204.

[8] I disagree with Delaney's assertion that because there were certain inconsistencies in De La Sierra's testimony, the Division was unjustified in relying on him as a witness. Delaney Reply at 15-16.

Div. Resp. App. 1 ¶¶ 6-7 (formatting altered). At the hearing, Gover testified that this conversation actually occurred in 2010, and I ultimately concluded that a preponderance of the evidence indicated that it did not occur until early 2011. *See* Initial Decision at 39-40.

At my request, the parties also focused on indirect evidence of Delaney's knowledge – the Division's allegation that there was a financial motive to violate Rule 204. In the initial decision, I found that the Division failed to prove that Delaney was motivated to aid and abet the violations in order to increase Penson's profits, and I dismissed as "general and speculative" the Division's evidence that the violations prevented the firm from incurring substantial costs and losses. Initial Decision at 34-35. But while the Division did not show by a preponderance of the hearing evidence that Penson had a financial motive to violate Rule 204, I find here that its position was justified to a degree that could satisfy a reasonable person.[9]

First, Delaney's Wells submission clearly indicated that people in the Stock Loan group had "enormous financial incentives" to violate Rule 204. Hearing Ex. 157 at 30. The submission justified this contention with the following explanation:

> The people in Stock Lending had huge financial incentives to delay close-outs, which would allow their business unit to retain and even increase customers and compete aggressively in the marketplace. Delaying, and even outright preventing buy-ins, allowed Stock Lending to profit by pleasing customers, reducing the fees associated with borrowing, and profiting from the arbitrage in share prices that continued to fall. Stock Lending personnel's income, particularly Michael Johnson's income, was tied directly to the performance of the department. Indeed, Michael Johnson frequently bragged about how he made more money than anyone else at PFSI.
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> It was no secret that any efforts to comply with Rules 204T, 203, and 204 were not well received by PFSI's customers. There are multiple email references that are part of the record from Stock Lending stating that their customers would be unhappy with a strictly enforced buy-in policy. As a result, Stock Lending had by far the most to lose by complying in terms of eroding profitability and customer base and, consequently, diminished income for Michael Johnson and those working beneath him.

[9] As evidenced by my discussion of financial motive in the initial decision, I disagree with Delaney's contention that the only financial motive alleged by the Division was increased profits, not cost avoidance. *See* Initial Decision at 34-35; Delaney Supp. Resp. at 12-13; OIP ¶¶ 7, 31, 37.

Id. at 31.[10] In addition, while not explained as thoroughly as in his Wells submission, in investigative testimony Delaney expressed his belief that "obviously the financial incentives for the Reg SHO group not to" comply with Rule 204 were "self-evident." Hearing Ex. 224 at 435. Delaney also acknowledged that he told the Division "that Stock Loan has financial incentives to violate Reg SHO" and that during his tenure as Penson's CCO, he "[c]ertainly . . . understood" that Stock Loan "had these financial incentives related to closeouts." *Id.* at 446, 459; *see id.* at 443-44, 458-59.

Second, according to Gover's declaration, "Delaney rejected" the option Gover proposed "for complying with Rule 204 . . . because of the associated costs to Penson." Div. Resp. App. 1 ¶ 7.

Third, in Johnson's investigative testimony, on the subject of Rule 204 compliance, he remarked that Stock Loan "could not get a morning buy-in off to save our soul without ruining our reputation with the street." Div. Resp. Ex. 3 at 72. And, according to Johnson, Stock Loan's relationship with other Wall Street firms was vital to keeping Penson afloat financially. *See id*. at 40-44, 177.

Fourth, in line with Johnson, Brian Hall's investigative testimony was that Wall Street counterparties "would threaten to discontinue doing business" if Penson complied with Rule 204 by closing out at market open. Div. Resp. Ex. 5 at 20. Hall did not testify at the hearing.

Finally, Lindsey Wetzig gave investigative testimony that there was "no question" that Penson would "be out of business" if it complied with Rule 204 by buying in its counterparties at T+6 market open. Div. Resp. Ex. 6 at 118-19. At the hearing, Wetzig also echoed the importance of the relationships with counterparties to Stock Loan's ability to function by borrowing and lending securities. Hearing Tr. 357-60.

I gave "sparing weight" in my initial decision to Delaney's Wells submission due to concerns about its reliability and my belief that other evidence was more probative on the issue of scienter. *See* Initial Decision at 35-37. And I ultimately did not credit the hearing testimony described above suggesting that Delaney knew about the violations or had a motive to aid and abet them. Seizing on these decisions, Delaney argues that "[a]part from the testimony of these witnesses which this [c]ourt has already determined to be less than credible, the Division has put forth no evidence that Delaney acted with the requisite scienter to support an aiding and abetting claim." Delaney Supp. Resp. at 9-10. But I cannot rely solely on my ultimate credibility

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[10] *See* Hearing Ex. 157 at 2 ("People within PFSI were resistant to change and, in many cases had strong financial incentives not to comply with Regulation SHO and its Rules."), 22 ("The fact is that the financial incentives of departments like Stock Lending, the financial incentives of which ran contrary to compliance's goals, made it impossible to change PFSI's practices overnight – or even over the course of two years – because doing so would have caused PFSI to lose customers in an environment where PFSI's competitors were also not complying."); *see also id.* at 4 n.7.

determinations when deciding whether the Division's position on scienter was substantially justified. As the Commission has explained, "[a] determination of substantial justification may be premised on evidence, including testimony, that was rejected by the initial trier of fact." *Kirk Montgomery*, Exchange Act Release No. 45161, 2001 SEC LEXIS 2775, at *13 (Dec. 18, 2001). The Seventh Circuit has similarly reasoned that:

> we cannot find the [government]'s decision to litigate an issue that turned on a credibility assessment was itself unreasonable; the fact that an ALJ might make an adverse finding on a credibility issue does not, in and of itself, deprive the [government]'s position of a basis in fact.

Temp Tech Indus., Inc. v. NLRB, 756 F.2d 586, 590 (7th Cir. 1985).

Neither can I penalize the Division for the fact that some of the testimony adduced at the hearing was not as direct or helpful to its position as that provided during its investigation. In *Flanagan*, 2004 WL 1538526, the Commission encountered a similar situation when determining whether the Division was substantially justified in asserting that a respondent exercised the requisite control over certain accounts. Despite the fact that the respondent testified at the hearing that his wife controlled the accounts, and the charges related to them were dismissed, the Commission observed that:

> Division counsel stated during the hearing that, on the basis of statements made to the Division by Holloway prior to the hearing, the Division believed Holloway would testify that he did control those accounts. Thus, although the Division was ultimately unable to adduce evidence as to Holloway's control at the hearing, it had substantial justification for believing it could establish a factual basis for this allegation when it brought the case.

Flanagan, 2004 WL 1538526, at *7. I also reject Delaney's claim that the Division's position became unjustified, and its failure to settle unreasonable, either when the profit miscalculation by Dr. Harris was revealed or when certain hearing witnesses testified less favorably than expected. Delaney Reply at 5, 11-12; *see* Initial Decision at 34. As detailed above, the Division still had evidence which, though insufficient to meet its burden of proof, is enough to satisfy a reasonable person that its allegations regarding scienter were justified and that it could therefore succeed on the full range of requested remedies.[11] These allegations were justified when the Division initiated the proceeding, and they remained so throughout the litigation.

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[11] Delaney appears to concede that his EAJA claim rests entirely on scienter. *See* Delaney Supp. Resp. at 9-10. In any event, I agree with the Division that the other element of aiding and abetting liability at issue in the underlying proceeding – substantial assistance – is sufficiently intertwined with scienter that the Division's justification for the latter also supports the former. *See* Div. Resp. at 21.

Based on my independent evaluation of the administrative record as a whole, including the nine pieces of evidence identified above, I find that the Division's position on the aiding and abetting claim (and associated remedies) was substantially justified. Accordingly, Delaney is not entitled to recover fees and costs under EAJA, and his application is DENIED.

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Jason S. Patil
Administrative Law Judge