

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1557/June 25, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15873

In the Matter of

THOMAS R. DELANEY II and
CHARLES W. YANCEY

ORDER ON MOTIONS

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 either directly or indirectly that (1) Penson Financial Services, Inc. (Penson) violated Rules 204T and 204(a) of Regulation of Short Sales (Regulation SHO), 17 C.F.R. § 242.204 (Rule 204T/204(a)); (2) Penson's chief compliance officer Thomas R. Delaney II (Delaney) and Penson's Senior Vice President of Securities Lending (Vice President) willfully aided and abetted and caused Penson's violations; and (3) Penson's President/Chief Executive Officer Charles W. Yancey (Yancey) failed reasonably to supervise Delaney and the Vice President with a view toward preventing and detecting their violations.

On June 12, 2014, Yancey filed an Answer and Affirmative Defenses and a Motion for More Definite Statement and Brief in Support (Yancey Motion). On June 13, 2014, Delaney filed an Answer and Motion for More Definite Statement and Supporting Memorandum of Law (Delaney Motion). I will consider the thirteen affirmative defenses Yancey raised in his Answer and the nineteen affirmative defenses that Delaney raised in his Answer at the start of the hearing.

On June 18 and 19, 2014, the Division of Enforcement (Division) filed Oppositions to both Motions (Opposition).

On June 23 and 25, 2014, Yancey and Delaney, respectively, filed Reply Briefs in support of their motions in which they reiterate that they need specifics about the Penson trades that allegedly violated Rule 204(a) of Regulation SHO and that the information the Division has provided to them is insufficient.

A telephonic prehearing conference was held on June 23, 2014, at 11:00 a.m. EDT.

Delaney's Motion

Delaney's Motion points to at least twenty-two instances where it claims the OIP is deficient. The first claimed deficiency in Section II.A.3 of the OIP, which states that "[i]n thousands of occasions, however, Penson was not able to pass along the cost of compliance," and later that "[a]s a result of its stock lending activities, Penson frequently failed to deliver to CNS on long sales of loaned securities." Delaney Motion at 4. Delaney would require the Division to provide the dates, actual trades, or other identifying information for each specific "failure to deliver." Delaney Motion at 5-6. The second claimed deficiency relates to Section II.A.5, which says:

Senior officers in Stock Loan knew Rule 204T(a)/204(a) required Penson to close out those CNS failures to deliver resulting from long sales no later than market-open on T+6 . . . [and] willfully ignored the rule's requirements. They did so because they did not want the costs of compliance with Rule 204T/204(a) to negatively affect Stock Loan's net revenues. As a result, they caused Penson to violate the rule thousands of times from October 2008 until November 2011.

OIP at 2; Delaney Motion at 6-7. Delaney would require the Division to identify the "Senior officers in Stock Loan," provide the factual basis for the assertion that the costs of compliance with Rule 204T/204(a) would negatively affect Stock Loan's net revenues, and identify each violation of Rule 204T/204(a) on which the Division intends to rely to establish the primary violations alleged. Delaney Motion at 7. Delaney's Motion has twenty more alleged deficiencies and requests a great deal of information to remedy each.

Yancey's Motion

Yancey's Motion alleges that statements in the Summary section of the OIP do not provide enough specificity for Yancey to prepare a defense. Yancey Motion at 4. Specifically, Yancey objects to the following statements in the OIP that: (1) there were **thousands of occasions** when Penson allegedly was not allowed to pass along the cost of compliance with Rule 204T/204(a); (2) Penson **frequently** failed to deliver to CNS on long sales of loaned securities; (3) Penson violated Rule 204T/204(a) **thousands of times**; and (4) Penson **systematically** violated Rule 204T/204(a)'s market-open CNS close-out for long sales of loaned securities from October 2008 until November 2011. Yancey Motion at 4 (emphasis in motion); see OIP at 2-3.

Yancey insists that it must know which trades the Division alleges violated the rules at issue. It would require the Division to identify the actual trades, dates, and alleged violations of Rule 204(a) that Yancey should have discovered. Yancey Motion at 7.

Division's Opposition to Delaney's Motion

The Division opposes each of Delaney's specific requests on the following grounds: (1) Delaney does not need specific information about trades because the OIP alleges that he aided and abetted Penson's systematic, overarching practice of violating Rule 204(a); (2) the

information sought is not necessary to mount a defense and Delaney is attempting to conduct discovery of the evidence on which the Division intends to rely; and (3) the Division has provided Delaney investigative testimony and documents that discloses some of the information Delaney seeks. Opposition at 3-13.

Division's Opposition to Yancey's Motion

The Division contends that it has clearly identified a category of transactions that resulted in a systematic practice of Rule 204(a) violations and, because of the nature of the allegations, it need not identify specific trades. Opposition at 4. The Division also notes that Yancey is charged with failing to detect or prevent the violations of others, not his own failure to identify specific trades that allegedly violated Rule 204(a). Id. The Division represents that it has provided Yancey with evidence supporting the systematic practice alleged, which includes a sample showing as many as 222 Rule 204(a) violations in one month. Id. at 6-7. Finally, the Division argues that the case law cited is either inapplicable or unresponsive of Yancey's Motion. Id. 7-9.

Ruling

Rule 200(b) of the Commission's Rules of Practice specifies that the OIP shall state the nature of any hearing, the legal authority and jurisdiction under which it is to be held, and a short and plain statement of the matters of fact and law to be considered. 17 C.F.R. § 201.200(b).

It has long been established that "when dealing with challenges to the adequacy of allegations in an [OIP], a respondent is entitled to be sufficiently informed of the charges against him so that he may adequately prepare his defense, but he is not entitled in advance of the hearing to a disclosure of the evidence on which the Division intends to rely." The Stuart-James Co., Inc., 52 SEC Docket 679, 681 (May 8, 1989) (citing Charles M. Weber, 35 S.E.C. 79 (1953); J. Logan & Co., 38 S.E.C. 827 (1959); M.J. Reiter Co., 39 S.E.C. 484 (1959)).

The rulings cited by Delaney and Yancey are exceptions to established precedent, they are distinguishable, and they do not support the conclusion that the OIP is deficient. For example, Next Financial Group, Admin. Proc. No. 3-12738 (Sept. 17, 2007) (unpublished), available at <http://www.sec.gov/alj/aljorders/2007/3-12738-1.pdf> (last visited June 23, 2014), involved allegations that a broker-dealer violated certain regulations governing the disclosure of nonpublic personal information in its customer accounts, which is quite different than this situation. Similarly inapplicable is Hagen & Co., Inc., 1967 WL 88948, at *2 (July 18, 1967), which involved a judge's attempt to expedite the proceeding after acknowledging that the OIP provided sufficient notice. Western Pacific Capital Management, LLC, Admin. Proc. Rulings Release No. 691, 102 SEC Docket 51083 (Feb. 7, 2012), was a partial grant of a motion for a more definite statement where the judge found the OIP ambiguous regarding whether all or only a portion of the respondent's customers were at issue.

The parties engaged in the Wells Notice process by which they would have gained knowledge of the allegations, although at the prehearing conference Respondents' counsel stated

they did not obtain the specifics they seek through their Motions.¹ Consistent with the Commission's Rules of Practice, the Division notified Respondents of the availability of materials. See 17 C.F.R. § 201.230(a). Delaney and Yancey have received portions of the investigative record and are in the process of receiving more. The OIP complies with Commission Rule of Practice 200(b), and, in my judgment, Delaney and Yancey have sufficient information to defend the proceeding. At the prehearing stage of this proceeding, the Motions seek an unreasonable amount of specificity from the Division as to facts the Division might introduce to prove the allegations in the OIP.

For these reasons I DENY the Delaney Motion and the Yancey Motion.

Brenda P. Murray
Chief Administrative Law Judge

¹ A Wells Notice is a Division communication to a person that it has made a preliminary determination to recommend that the Commission initiate an action against the person. The person has the right to respond to the Wells Notice. Division of Enforcement Manual, October 9, 2013, available at www.sec.gov/divisions/enforce/enforcementmanual.pdf (last visited June 23, 2014).