

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

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 1828/September 22, 2014

ADMINISTRATIVE PROCEEDING  
File No. 3-15873

In the Matter of

THOMAS R. DELANEY II and  
CHARLES W. YANCEY

ORDER FOLLOWING SECOND  
PREHEARING CONFERENCE

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 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.<sup>1</sup>

This order recaps what transpired at a second prehearing conference held on September 18, 2014. *See* 17 C.F.R. § 201.221(e).

I denied the affirmative defenses that Thomas R. Delaney II (Delaney) and Charles W. Yancey (Yancey) set out in their Answers.<sup>2</sup> Almost every claimed affirmative defense was a blanket statement without any reference to the facts in this proceeding. I considered many of the claimed affirmative defenses invalid, and most were arguments that needed to be supported by facts and were not true affirmative defenses.<sup>3</sup> Respondents are free to raise these matters during the hearing and in their pre- and post-hearing briefs.

I denied Delaney's Motion for Postponement of Hearing and Supporting Memorandum of Law (Postponement Motion) filed on September 15, 2014. The Division of Enforcement

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<sup>1</sup> We will begin at 9:30 a.m. on the first day, and at 9:00 a.m. every subsequent day. I misstated the time in my prior order.

<sup>2</sup> Delaney Answer at 14-17; Yancey Answer at 20-22.

<sup>3</sup> An affirmative defense is "[a] defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." *Black's Law Dictionary* 430 (7th ed. 1999).

(Division) filed its Opposition to the Postponement Motion on September 17, 2014. My reasons for denying the Postponement Motion include the fact that the Commission has directed that the Initial Decision in this administrative proceeding be issued within 300 days of service of the OIP. OIP at 18; 17 C.F.R. § 201.360(a)(2). According to the Commission's Rules of Practice (Rules), a 300-day case should go to hearing approximately four months from the service date of the OIP. 17 C.F.R. § 201.360(a)(2). According to USPS tracking information and the green card receipt for certified mail, the OIP was served on May 22 and 23, 2014, so an Initial Decision must be issued by March 19, 2015, and the present date for the start of the hearing provides Respondents a month to prepare for the hearing beyond what the Commission's Rules suggest. *See id.* Delaney's Postponement Motion was filed only six weeks before the scheduled start of the hearing on a date that was agreed upon and ordered on June 27, 2014, nearly three months ago. *Thomas R. Delaney II*, Admin. Proc. Rulings Release No. 1563, 2014 SEC LEXIS 2298.

The Commission's Rules require my adherence to a strong policy of disfavoring postponement requests, and Delaney has not made a "strong showing" that the denial of the Postponement Motion would substantially prejudice his case. 17 C.F.R. § 201.161(b)(1). Finally, as the Division notes in its Opposition, many of Delaney's arguments in support of a postponement are the same claims that Respondents advanced in their Motions for a More Definite Statement, which were denied on June 25, 2014. *Thomas R. Delaney II*, Admin. Proc. Rulings Release No. 1557, 2014 SEC LEXIS 2223; Div. Opp. at 6.

I granted Yancey's Request for Issuance of Subpoena Duces Tecum to the Commission's Office of Compliance, Inspections and Examinations.

I denied Delaney's Requests for Issuance of Subpoenas Duces Tecum to: (1) Sungard Financial Systems; (2) the Financial Industry Regulatory Authority; and (3) the Securities Industry and Financial Markets Association, as unreasonable, oppressive, excessive in scope, and unduly burdensome. 17 C.F.R. § 201.232(b). I advised Delaney to narrow the subpoenas in order to remedy these problems. I signed revised subpoenas to these three entities today.

I denied Yancey's Motion to Identify Rule 204(a) Violations and Brief in Support, with the Affidavit of Sarah S. Mallett and Exhibits A-C (Yancey 204(a) Motion). The Division filed its Opposition to the Yancey 204(a) Motion on September 17, 2014. In this latest motion, Yancey repeats the arguments advanced in his Motion for a More Definite Statement, claiming that the Division should be required to identify the trades that it will use to show a primary violation by Penson Financial Services, Inc. Yancey would have me order the Division to:

- (1) confirm that, at the hearing, it will rely solely on the 222 previously-identified alleged violations;
- (2) confirm that, at the hearing, it will rely on other trades, in addition to the previously-identified 222 alleged violations, and immediately identify those additional trades by CUSIP number, security name, and date; or
- (3) confirm that it intends to rely solely on testimony from witnesses and does not intend to rely on any individual trade.

Yancey 204(a) Motion at 6.

As I noted when ruling on Respondents' Motions for a More Definite Statement, it is well established that Yancey has no right to know, in advance of the hearing, which evidence the Division intends to use in an attempt to carry its burden of showing the allegations in the OIP to be true by a preponderance of the evidence. *Thomas E. Delaney II*, Admin. Proc. Rulings Release No. 1557, 2014 SEC LEXIS 2223 (June 25, 2014) (citing cases). In addition, in accordance with the procedural schedule, Yancey will receive from the Division today, more than a month before the hearing, the names of the Division's witnesses and copies of its exhibits. See *Thomas R. Delaney II*, Admin. Proc. Rulings Release No. 1563, 2014 SEC LEXIS 2298 (June 27, 2014).

In response to Delaney's suspicions, as set out in Delaney's Motions to Compel Production of: (1) Statements by Division Witnesses Under Rule 231(a) and Supporting Brief; (2) Withheld Document List Under Rule 230(c) and Supporting Brief; and (3) Material Exculpatory and Impeachment Evidence Under Rule 230(b)(2) and Supporting Brief, filed July 9, 2014, I required the Division to (a) provide me with all interview notes in the investigative file for any person to be called as a witness that the Division withheld from Delaney as non-Jencks material; (b) prepare a privilege log for *in camera* inspection; and (c) supply a declaration that it had conducted a meaningful review to assure that all *Brady* material had been identified and provided to Respondents. *Thomas E. Delaney II*, Admin. Proc. Rulings Release No. 1652, 2014 SEC LEXIS 2679 (July 25, 2014). On September 9, 2014, after reviewing the materials *in camera*, I found nothing that indicated the Division had failed in its obligations under the Commission's Rules to make documents available to Respondents for inspection and copying. *Thomas R. Delaney II*, Admin. Proc. Rulings Release No. 1784, 2014 SEC LEXIS 3268.

At the September 18, 2014, prehearing conference, Respondents questioned whether all of the documents identified on the Division's privilege log were properly withheld. Respondents dispute that any privilege should attach to certain of these materials, and they suggested briefing to address the issue.

The Division responded that it has fully complied with its obligations under Rule 230(a), 17 C.F.R. § 201.230(a), and repeated its contention that all withheld documents are either beyond the scope of the documents required to be produced under the Commission's Rules, privileged, or both. The Division also stated that briefing this issue at this late stage would interfere with its ability to comply with the upcoming prehearing deadlines for the exchange of witness lists, copies of exhibits, and expert witness testimony. I saw no benefit in briefing, and my September 9, 2014, ruling stands.

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Brenda P. Murray  
Chief Administrative Law Judge