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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15873

In the Matter of Thomas R. Delaney II and Charles W. Yancey Respondents.	DIVISION OF ENFORCEMENT'S REPLY TO RESPONDENT DELANEY'S POST-HEARING BRIEF

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I. INTRODUCTION

For nearly three years, the Stock Loan department at Penson Financial Services, Inc. ("PFSI") violated Rule 204 every single day. Respondent Tom Delaney, PFSI's Chief Compliance Officer ("CCO"), concedes conversations in which Stock Loan explained their problems with Rule 204 and the receipt of other information which, at the very least, demonstrate that he recklessly disregarded the violations. Despite this, Delaney did not disclose the red flags or suspicious events to his superiors or PFSI's regulators, and indeed made misrepresentations to regulators, even though they were asking specific questions about the Rule.

Delaney would have it that the Division must prove his affirmative knowledge to demonstrate his liability for aiding and abetting and causing PFSI's flagrant violations.[1] There is no basis for this contention under the law or under the facts of this case. As discussed below, long standing Commission precedent establishes that Delaney's reckless disregard of numerous red flags and suspicious events establishes the requisite scienter. Further, Delaney's failure to disclose those red flags and suspicious events establishes his substantial assistance. And, as discussed in the Division's post-hearing brief, misconduct of this kind is egregious and justifies the severest of sanctions. *See Gary M. Kornman,* Rel. No. 34-59403, 2009 WL 367635 (Feb. 13, 2009).

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[1] In his Wells submission, Delaney admitted being aware of the violations. He has recanted those admissions, and the Court has decided not to rely upon them. The Division disagrees with the Court's finding that admissions of a respondent's own knowledge and actions in a Wells submission can be unreliable, and preserves this issue for appeal, if necessary. The Wells statements at issue are statements of Delaney's own knowledge and actions. They are not "arguments of counsel" nor are they statements about which Delaney needed "an opportunity to fully investigate the facts." In fact, the notion that statements of Delaney's knowledge or actions might change after "an opportunity to fully investigate the facts" is, itself, troubling. In addition, Delaney knew these statements about his knowledge were being made to the Commission. Delaney testified that he read the Wells submission before it was submitted and approved it. Div. FoF 64b. In light of the Court's ruling, however, the Division has focused its reply brief on the significant evidence of Delaney's reckless disregard beyond his admissions.

II. BACKGROUND

As a clearing firm, PFSI had obligations under Rule 204(a) to close out CNS failures to deliver resulting from long sales no later than market open T+6. Stip. FoF 6. Two departments had responsibility for PFSI's Rule 204 close-outs. PFSI's Buy-ins department closed-out CNS fails caused by customers. Div. FoF 38. PFSI's Stock Loan department was responsible for closing out CNS fails arising from long sales of loaned securities.[2] Div. FoF 37. Nevertheless, From October 2008 until November 2011, two to ten times every day, PFSI failed to close out CNS fails resulting from long sales of loaned securities by market open T+6. Stip. FoF 7; Div. FoF 40.

III. WHAT DELANEY KNEW AND WHEN HE KNEW IT.

As is clear from both the Division's and Delaney's briefs, what Delaney knew and when he knew it is a key element at issue in the case against Delaney.

A. Delaney's Actual Knowledge of the Wrongdoing.

While Delaney works very hard to argue that he never knew of Rule 204T/204 violations at PFSI, he cannot escape the fact that significant evidence showed that he knew or must have known that Stock Loan was not complying with Rule 204T/204. As the Division showed in its post-hearing brief, there was a huge amount of information that alerted Delaney that violations could occur and, in fact, were occurring. Any attempt by Delaney to disclaim this knowledge should be rejected in the face of his severe lack of credibility.

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[2] Long sales of loaned securities originated with securities held in customer margin accounts. *See* Stip. FoF 7. When a margin customer sold the securities that were out on loan, PFSI issued account-level recalls to the borrowers on T+3, *i.e.*, three business days after execution of the margin customer's sale order. Stip. FoF 8. When the borrowers did not return the shares by the close of business T+3, and PFSI did not otherwise have enough shares of the relevant security to meet its CNS delivery obligations, PFSI incurred a CNS failure to deliver. Stip. FoF 8.

B. Delaney's is not Credible.

The vast majority of Delaney's substantive evidence contesting his knowledge relies on one witness – Delaney. Because of that, Delaney's credibility is a critical issue. And Delaney is simply, demonstrably, not credible.

1. Delaney repudiates his admissions.

While Court has ruled that Delaney's admissions of his own knowledge in his Wells submission are insufficiently reliable, the fact that Delaney repudiates his Wells submission and changes his story as needed is evidence of his lack of credibility. Delaney testified that he read and approved his Wells submission before it was submitted to the Commission. Div. FoF 64b. As a result, there are only three possibilities:

- Delaney was not truthful with his counsel. If Delaney was untruthful with his counsel about his knowledge, they included false statements in the Wells submission, and Delaney approved the submission of those false statements to the Commission.

- Delaney was not truthful with the Commission. If Delaney's counsel crafted the statements admitting Delaney's knowledge, Delaney read those misstatements and, knowing they were false, approved their submission.

- Delaney was not truthful with the Court. If Delaney was truthful with his counsel and truthful in approving his submission to the Commission, then he was not truthful at the hearing in this matter.

Whichever of the three possibilities is correct, Delaney was untruthful with someone. That fact shows that Delaney will say whatever he believes is expedient at the moment to avoid difficulty, whether it is right or not. That, by itself, demonstrates that, even if he was truthful at the hearing, he is unfit to be a participant in the securities

industry. Moreover, even if he was untruthful in his admissions, he is still liable for aiding and abetting, because the red flags and suspicious events he ignored demonstrate his recklessness.

2. Delaney was untruthful at the hearing.

As discussed at length in the post-hearing brief, however, Delaney was also evasive and untruthful at the hearing. A prime example of this is the conflict between his testimony and that of his current employer about his current job. Under questioning by his counsel, Delaney testified, "I had a conversation with the management and leadership team at First Command. And we ... decided that it was best that I step down as the Chief Compliance Officer." *See* Div. FoF 322. Under questioning by Delaney's counsel, however, Delaney's supervisor revealed that Delaney was, in fact, still the CCO: "And how do you know Tom? A Tom serves as the chief compliance officer of our holding company." *Id.* Again, Delaney says whatever he thinks will be most expedient and helpful to him at the moment, regardless of the truthfulness. The Division also offered several other examples of Delaney's lack of candor at the hearing. Div. FoF 65.

Delaney has proven that he is not candid, not truthful, and not credible. His denials should be given no weight.

C. Delaney Recklessly Disregarded the Wrongdoing.

Delaney encountered numerous red flags and suspicious events that should have alerted him to the wrongdoing. That reckless disregard is sufficient to prove aiding and abetting. *Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004).

In its post-hearing brief, the Division identified over a dozen red flags and suspicious events that should have alerted Delaney to the wrongdoing at issue here. In his post-hearing brief, Delaney discusses two of them: his conversations with Stock

Loan's Michael Johnson and Rudy DeLaSierra and his conversation with Brian Gover. However, before considering Delaney's arguments, it is important to remember two things: first, Delaney denials are not credible; and second, Delaney does not deny that he had conversations with Johnson in 2008 about Stock Loan's difficulty complying with Rule 204T/204, but only whether those conversations, together with other information he admits receiving, alerted him to the wrongdoing.

1. Delaney admits conversations in 2008 about Stock Loan's problems with Rule 204T/204.

As a predicate matter, it is important to remember that Delaney, himself, admits that he had at least one conversation in 2008 with Johnson about Stock Loan's problems complying with Rule 204T/204. Div. FoF 91.

2. Johnson alerted Delaney to the wrongdoing.

While Delaney makes much of the fact that Johnson testified – in response to one specific question – that he did not know what Delaney knew,[3] this is merely Johnson's commonsense statement that he did not know what was in Delaney's mind.[4] Any other testimony would be speculative. Johnson went on to testify, however, that in his conversations with Delaney when Rule 204T came out he "was looking for help on interpreting it, on what to do with Rule 204," and that, given the conflict between Rule 204 and industry practice, he "was searching for interpretation and guidance on how to

[3] It is not surprising that Johnson made it difficult for the Division to elicit evidence from him. He was a hostile witness toward the Division, believes he was mistreated during the charging and settlement process, and continues to believe this matter is nothing but a "witch hunt." (Div. FoF 13). Even so, Johnson was forced to admit that he did have conversations that Delaney, and that in those conversations he made the problem Stock Loan was having clear. Despite his hostility, his testimony is strong evidence that Delaney was on notice of Stock Loan's violations.

[4] The Court, however, has been presented with a plethora of evidence from which the Court can conclude that Delaney must have known, or been reckless in not knowing, that Stock Loan was not complying with Rule 204T/204. As detailed below, this evidence includes *Johnson's* own testimony.

comply." Div. FoF 85. Johnson testified that "we would always buy-in when … it was at the end of market" and that he communicated with Mr. Delaney that "we had a conflict between" the rule and the industry practice. *Id.* Johnson testified that he made the problem Stock Loan was having clear to Delaney. Div. FoF 84. Particularly given the other information being provided to Delaney, this conversation with Johnson should have alerted Delaney to the Stock Loan's failure to comply with Rule 204T/204.

3. DeLaSierra credibly confirmed Johnson's notice to Delaney.

Delaney argues that DeLaSierra does not confirm Johnson's notice of Stock Loan's failure to comply with Rule 204T/204 because he is not credible and his testimony is inconsistent with others. Neither argument has merit.

a. Delaney's arguments about credibility fail.

Delaney's arguments that DeLaSierra is not credible show how desperate he is to grasp at any argument.

Delaney's first argument is that DeLaSierra did not testify about the 2008 conversation in his first investigative testimony. This argument must be considered in light of the fact that Delaney argued that Delaney, himself, should not be held to his first testimony. Hearing Transcript ("Tr.") at pp. 1200:21-1202:1; Div. FoF 323. Delaney should not be permitted to argue out of both sides of his mouth; his attack on DeLaSierra's credibility on this basis should be discounted.

Second, Delaney argues that DeLaSierra is not credible because he had a cooperation agreement with the Division. But the fact of a cooperation agreement does not make testimony unreliable, especially where, as here, DeLaSierra's testimony is consistent with other facts. *See Thomas C. Gonnella*, Rel. No. ID-706, 2014 WL 5866859 at * 26 (November 13, 2014). DeLaSierra's hearing testimony about

conversations between Johnson and Delaney is consistent with Johnson's testimony, Delaney's testimony, and DeLaSierra's second investigative testimony, taken *before* he entered into a cooperation agreement.

Delaney's third argument is the most desperate. Delaney argues that, when DeLaSierra first testified in his investigative testimony about conversations in 2008 between Johnson, DeLaSierra, and Delaney, DeLaSierra testified that he "and/or" Johnson met with Delaney. Delaney claims DeLaSierra changed his story by testifying at the hearing that he *and* Johnson met with Delaney. As Delaney concedes, however, DeLaSierra's investigative testimony contemplates conversations between Delaney and *both* DeLaSierra and Johnson, as well as possible conversations between Delaney and *either* Johnson or DeLaSierra without the other – that is the commonsense meaning of "and/or." Delaney Brief at p. 21. In any event, hinging his defense on the use of a conjunction underscores the weakness in Delaney's argument. DeLaSierra's investigative testimony about conversations between DeLaSierra, Johnson, and Delaney is not inconsistent with his hearing testimony in any way.

b. DeLaSierra's testimony is not inconsistent with other testimony.

DeLaSierra's testimony is either consistent or not inconsistent with the other witnesses testifying at the hearing.

i. Delaney

Delaney admits to the same conversation in 2008 with Johnson that DeLaSierra testified about. *See* Div. FoF 91. The fact that Delaney now denies that it alerted him to Stock Loan's non-compliance with Rule 204T, despite his previous admissions to the contrary, demonstrates that Delaney, rather than DeLaSierra, is not credible.

ii. Johnson

Again, Johnson and DeLaSierra testified about the same conversation with Delaney in 2008. Div. FoF 80 – 87. Johnson did not contradict DeLaSierra's testimony about that conversation, Johnson merely said that he (Johnson) did not know what Delaney knew. *Id.* Johnson and DeLaSierra both testified that they made clear to Delaney that they were seeking guidance about how to comply with Rule 204, that they made clear to Delaney the problems they were having complying with the Rule, and that the Rule was in conflict with Stock Loan's procedures. *Id.*

iii. Alaniz

Both Alaniz and DeLaSierra testified about a conversation preceding the late 2009 testing of Rule 204. Alaniz and DeLaSierra had different recollections of the conversation. Given that the results of the 2009 testing related only to the Buy-ins department, it is unsurprising that DeLaSierra testified that his recollection was that the conversation preceding the testing did not relate to long sales. *See* Div. FoF 37, 105. Moreover, it makes sense that DeLaSierra did not engage in discussions with Alaniz about Stock Loan's problems closing out long sales of loaned securities in compliance with Rule 204. Stock loan had *already* had a conversation with Delaney about their problems complying with Rule 204 and had what they understood to be his tacit approval to continue their historic procedures. Given that conversation with Alaniz' boss, there was no reason to rehash the subject with Alaniz. In addition, given Stock Loan's conversation with Delaney about their problems complying with Rule 204, it would have been reasonable for them to assume that Delaney had provided whatever information he felt Alaniz needed to know about the issue. Moreover, Delaney's argument that Stock Loan concealed their violations of Rule 204 from the Compliance department

cannot be reconciled with Delaney's own testimony that he and Johnson discussed the problems Stock Loan was having complying with Rule 204T/204. Div. FoF 91.

4. Gover credibly testified about alerting Delaney.

Brian Gover testified that between March 2010 and June 2010, he had a meeting with Delaney and Johnson about Rule 204 issues. (Div. FoF 116). In that meeting, they discussed the conflict between the buy-ins at the end of the lending cycle contemplated by the MSLA and the earlier close-out required by Rule 204. *Id.*

There is no credible testimony denying that the meeting between Gover and Delaney occurred. While Holly Hasty did not recall the particular meeting Gover described, she also did not recall any other specific meetings about Rule 204, even those she attended. Tr. 1771:5-1772:17; Div. FoF 327. And Johnson was only asked about a meeting that was different in character than the one Gover described.[5]

The cross-examination of Mr. Gover on this point was rigorous. Nonetheless, at the end of his testimony he reaffirmed the conversation with Delaney and the timing of that conversation. Div. FoF 116.

5. Delaney's "other evidence."

Delaney argues that "other evidence" contradicts the Division's claim that red flags and suspicious events should have alerted Delaney to the wrongdoing at issue. This is a misstatement; Delaney does not identify any such "other evidence."

[5] Johnson was only asked "did you ever have a meeting with Brian Gover where you discussed the possibility of recalling loans on T+2 to close out to 204 fails?" Tr. at 568:14-568:17. In contrast, Gover testified, "the point of discussion was, the Stock Loan compliance and buy-ins was -- I think Stock Loan maintained that that wasn't industry practice and that the Stock Loan agreements, the MSLAs, weren't -- didn't support that. And so that's where we had a conflict." Tr. at 105:21-106:1.

a. Delaney's admissions.

Each of Delaney's arguments must be read keeping in mind that Delaney actually admits that he had at least one conversation in 2008 with Johnson about Stock Loan's problems complying with Rule 204T/204. Div. FoF 91.

b. No corroborative documentary evidence.

This is not evidence, it is argument. And Delaney's argument that there is no corroborative document stating that Stock Loan told Delaney Stock Loan was violating Rule 204 is flawed. No witness testified that they would expect to see the kind of document Delaney's argument describes. Moreover, the Division did offer multiple examples of documents which provided further alerts to Delaney about Stock Loan's non-compliance with Rule 204T/204. *See* Division Post-Hearing Brief at pp. 17 – 21.

c. Other witnesses.

No credible witness exonerates Delaney.

i. Stock Loan

Delaney's argument that other Stock Loan employees did not discuss Stock Loan's violations of Rule 204 is irrelevant. The fact that only DeLaSierra and Johnson testified about conversations they had with Delaney about Stock Loan's failure to comply with Rule 204T/204 does not contradict the fact that they had those conversations or the information communicated to Delaney in those conversations. The fact that other Stock Loan personnel did not also have those conversations is irrelevant.[6]

[6] In support of his argument, Delaney cites to statements from one of the Division's *Brady* letters. For the reasons outlined in the Division's response to Respondent Yancey's brief, those letters should be given no weight. *See* Yancey Reply Br. at 13 n.6.

ii. Delaney

The fact that Delaney now repudiates his admissions and denies knowing or understanding anything is unsurprising given his general lack of candor, truthfulness, or credibility.[7] His testimony on that point should be disregarded.

iii. Alaniz

Assuming Alaniz testified as Delaney represents, that testimony does not exonerate Delaney.[8] In fact, given the information Delaney had about the difficulty stock loan departments in general, and PFSI's Stock Loan department in particular, were having complying with Rule 204T/204, it is unconscionable that Delaney did not suggest that Alaniz focus his testing on Stock Loan's compliance with the Rule. Div. FoF 77 – 87, 91 – 101. Moreover, when Delaney received the results of Alaniz' testing, which related only to the Buy-ins department, it is, again, inconceivable that he did not direct Alaniz to conduct follow-up testing on the Stock Loan department. Div. FoF 107. But not only did the follow-up testing not test Stock Loan, it was restricted to testing short sale compliance with Rule 204. Div. FoF 138. Moreover, when Yancey suggested discussing Rule 204 compliance with Stock Loan, Delaney told him it was not necessary. Div. FoF 147 – 148. In short, this is yet another example of Delaney's recklessness on this issue. Indeed, that Alaniz did not independently discover Stock Loan's violations strongly suggests that Delaney's failure to disclose the red flags and suspicious events he had encountered to Alaniz furthered PFSI's violations.

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[7] While Delaney is correct that the Division did not call any additional witnesses "impugning Delaney's character or honesty" it did not need to. Delaney did that himself. *See* Div. FoF 62-65, 322.

[8] Delaney claims that "Alaniz testified that Delaney asked him to conduct the 3012 audit of Penson's Rule 204 compliance, but did not tell Alaniz which departments or reports to test or provide the methodology for the test." Delaney Br. at p.31. Delaney provided no citation for that testimony and the Division could not find it.

d. Delaney's candor

Delaney appears to want to take credit for not lying to FINRA about an $89 million dollar write-down in March, 2011.[9] Delaney Brief at 32. Again, this is argument, not evidence. There is no evidence in the record that Delaney had anything to do with that issue. In addition, whether or not PFSI or Delaney lied to regulators when caught red-handed is irrelevant to whether Delaney told, or misled, regulators and Yancey about red flags about Stock Loan's non-compliance with Rule 204 he had encountered.

IV. DELANEY AIDED AND ABETTED VIOLATIONS OF THE SECURITIES LAW.

A. Delaney Misstates the Legal Standards for Aiding and Abetting.

In his brief Delaney makes several misstatements concerning the legal standards for aiding and abetting liability.

1. The elements of Aiding and Abetting.

In Commission cases, the elements the Division must show to prove aiding and abetting are: 1) PFSI violated Rule 204/204T; 2) Delaney substantially assisted PFSI's violation; and 3) Delaney knew of, or recklessly disregarded, the wrongdoing and his role in furthering it. *Eric J. Brown, et al.*, Rel. No. 34-66469, 2012 WL 625874 (Feb. 27, 2012).

2. Delaney's substantial assistance need not be the "proximate cause" of PFSI's violations.[10]

The only circuit court to have considered the issue has held that "the SEC is not required to plead or prove that an aider and abettor proximately caused the primary securities law violation." *SEC v. Apuzzo*, 689 F.3d 204, 212 (2nd Cir. 2012); *see also*

[9] This letter deals with the same examination in which FINRA caught PFSI Stock Loan violating Rule 204. *See* Div. FoF 126. Tellingly, Delaney referred to PFSI's response to getting caught as "self-reporting." Tr. 1374:5-1374:8; Div. FoF. 328.

[10] Delaney makes this argument at both p. 34 and p. 35. The Division responds to both arguments here.

SEC v. Johnson, 530 F. Supp. 2d 296, 303, n.7 (D.D.C. 2008) ("The parties both state that "substantial assistance" requires a showing that the aider and abettor was a proximate cause of the statutory violation, citing case law from the Southern District of New York. … Our Court of Appeals has not expressly adopted this formulation of the "substantial assistance" requirement."). Accordingly, *SEC v. Pentagon Capital*, the 2009 Southern District of New York case cited by Delaney is no longer good law. Similarly, *SEC v. Grendys*, 840 F. Supp 2d 36, 46 (D. D.C. 2012), which rests only on Southern District of New York case law is no longer good law. *See id.* (*citing SEC v. Johnson,* 530 F. Supp. 2d 325, 337 (D.D.C.2008), *which cites Fraternity Fund Ltd. v. Beacon Hill Asset Mgt., LLC,* 479 F. Supp. 2d 349, 371 (S.D.N.Y.2007)).

In fact, the Division need only show that Delaney disregarded red flags of suspicious activity and did not disclose that activity to Yancey or regulators. *See Ronald S. Bloomfield, et al.*, Rel. No. 34-71632, 2014 WL 768828 at *17 (Feb. 27, 2014)

3. The Division need not establish Delaney's motive.[11]

Delaney argues that the Division must prove Delaney's motive. Delaney cites no authority supporting that proposition and, in fact, the law is to the contrary. Motive is not an element of an aiding and abetting claim. *In re Time Warner Inc. Secs. Litig.,* 9 F.3d 259, 268–69 (2d Cir.1993); *see also In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1422 (3d Cir.1997) (in private securities litigation, a plaintiff "must ***either*** (1) identify circumstances indicating conscious or reckless behavior by defendants ***or*** (2) allege facts showing both a motive and a clear opportunity for committing the fraud."). Thus, the Division is not compelled to establish what motivated Delaney. What is at issue is the fraudulent conduct itself, not its motivation. *See, e.g., SEC v. U.S.*

[11] Delaney makes this argument at pp. 7 – 13 and 35.

Environmental, Inc., 155 F.3d 107, 111-12 (2d Cir. 1998), *cert. denied sub nom. Romano v. SEC,* 526 U.S. 1111 (1999). "The federal securities laws do not shield parties simply because a fraudulent statement did not pad their personal pocketbook: The federal securities laws protect 'investors from fraudulent practices.'" *SEC v. Int'l Chem. Dev. Corp.,* 469 F.2d at 20, 26 (10th Cir. 1972).

4. Recklessness is sufficient to prove scienter.

Citing *Howard v. SEC*, 376 F.3d 1136 (D.C. Cir. 2004) Delaney argues that "the Division cannot rely on recklessness." *Howard* does not support Delaney's position. *Howard* specifically holds that "recklessness is sufficient to satisfy the scienter requirement for aiding and abetting liability" in Commission disciplinary proceedings; "[a] secondary violator may act recklessly, and thus aid and abet an offense, *even if he is unaware* that he is assisting illegal conduct"; and recklessness "may be found if the alleged aider and abettor encountered 'red flags,' or 'suspicious events creating reasons for doubt' that should have alerted him to the improper conduct of the primary violator, or if there was 'a danger ... so obvious that the actor must have been aware of' the danger." *Howard*, 376 F. 3d at 1143.[12] Clearly under both *Howard* and the Commission cases cited in the Division's post-hearing brief, recklessness is sufficient to prove aiding and abetting.

Delaney's argument that the OIP fails to sufficiently allege recklessness also fails. The Commission's Rules of Practice require only that the OIP state the nature of the hearing, the legal authority, "a short and plain statement of the matters of fact and law to be considered and determined," and the nature of any relief sought. 17 C.F.R.

[12] *Howard* found that while evidence that one "must have been aware" is sufficient to prove recklessness, evidence that one "should have been aware" is not. *Howard*, 376 F. 3d at 1143. The evidence here meets the *Howard* standard: the Division here showed information that put Delaney on notice of violations.

§201.200(b). It has long been established that a respondent is not entitled to disclosure of the evidence upon which the Division intends to rely, or to disclosure of the Division's theory of the case. *M. J. Reiter Co.*, 39 S.E.C. 484, 486 (1959); *J. Logan & Co.*, 38 S.E.C. 827, 829-30 (1959); *Charles M. Weber*, 35 S.E.C. 79, 80-81 (1953). There is no authority, and Delaney cites none, which requires the Division to detail the legal elements of its claims beyond charging Delaney with "aiding and abetting" and "causing," which the OIP clearly does. Similarly, there is no authority, and Delaney cites none, which would require the Division to detail in its OIP each "red flag" or "suspicious event" concerning which the Division will present evidence. The Division is only required to give notice to Delaney of the charges against him, and it has done so in this case. *See* Release No. 1557, Order denying Motion for More Definite Statement. *Robert Bruce Lohmann,* Rel. No. ID-214, 2002 WL 31086307 (Sept. 19, 2002), *Richmark Capital Corp.*, Rel. No. ID-201, 2002 WL 412145 (March 18, 2002), and *Rodale Press, Inc. v. F.T.C.*, 407 F.2d 1252 (D.C. Cir. 1968) do not suggest a different result. In *Lohman*, the Division offered a novel legal theory, not the long-established elements of aiding and abetting at issue here. In *Richmark Capital*, the Division sought to extend the relevant time period beyond that identified in the OIP. Again, that is not the case here. And *Rodale Press* stands for the unremarkable proposition that an appellate court cannot uphold a case on claims that were neither proven nor argued below.

In this case the Division brought a claim for aiding and abetting against Delaney. Under long established legal precedent, recklessness is sufficient for the Division to prove scienter against Delaney for aiding and abetting. Any argument by Delaney that he did not know that is disingenuous.

B. PFSI Violated Rule 204T/204.

Delaney does not dispute that PFSI violated Rule 204T/204. Instead Delaney argues that the violations were "only 0.68% of the total number of Penson's CNS net selling positions potentially associated with loaned shares" and, therefore, PFSI's violations were "both tiny and inconsequential." Delaney argument ignores two important things. First, Chief Administrative Law Judge Murray, noting that "Rule 204 and Rule 204T are strict liability provisions," rejected this exact argument. *In the Matter of Optionsxpress, Inc.*, Rel. No. 490, 2013 WL 2471113 at *62 (June 7, 2013) (the assertion that the "data show that 99.3 percent of trades occurred before the end of T+3 is an acknowledgement that there were many fails to deliver because seven-tenths of an enormous number of trades is a very large number."). Second, PFSI's violations were systematic and intentional. There were as many as ten intentional violations every single trading day. Div. FoF 40, 50,52. Moreover, Delaney uses the wrong denominator; while only 0.68% of all *trades* resulted in violations, 100% of *fails that reached the point where Rule 204 required action, at market open on T+6*, resulted in violations. Div. FoF 41.

C. Delaney Substantially Assisted PFSI's Violation.

To prove that Delaney substantially assisted PFSI's violation, the Division is not required to show that Delaney concealed Stock Loan's violations of Rule 204T/204 from Yancey and regulators. Rather, the Division need only show that Delaney disregarded red flags of suspicious activity and did not disclose that *suspicious activity* to Yancey or regulators. *See Ronald S. Bloomfield*, 2014 WL 768828 at *17. In other words, even if Delaney only encountered red flags and suspicious events, his failure to disclose those red flags substantially assisted PFSI's violations.

1. Delaney's argument concerning his actual knowledge fails.

Delaney argues that he did not know that Stock Loan was causing violations of Rule 204T/204, and that, since he did not know, he could not have concealed the "non-compliant procedures." Delaney's premise is flawed: Delaney's acts of substantial assistance are not necessarily "predicated on Delaney having actual knowledge of Stock Loan's non-compliant practices." Delaney's acts of substantial assistance can also be predicated on Delaney encountering red flags and suspicious events (over a dozen of them as set forth in the Division's post-hearing brief) and not disclosing the red flags and suspicious events to Yancey, when he had a duty to do so, and to regulators, when the failure to do so rendered other statements misleading.

2. Delaney substantially assisted the violations by not disclosing red flags and suspicious events to Yancey.

Delaney's brief does not discuss his failure to disclose red flags and suspicious events to Yancey. Delaney admits that if he learned that Stock Loan was not following Rule 204, he had a duty to investigate and report his findings to members of senior management. *See* Stip. FoF 13. Despite this duty, Delaney's knowledge that Stock Loan was not complying with Rule 204T/204, and his repeated encounters with red flags of suspicious activity, Delaney never informed Yancey 204 of those red flags or suspicious events. (Div. FoF 146). He never raised the issue with Yancey in the ordinary course of business, but more importantly Delaney did not disclose the red flags or suspicious events in direct conversations with Yancey about Rule 204 compliance. Div. FoF 144 – 148, 167. In fact, when Yancey suggested discussing Rule 204 compliance with Stock Loan, Delaney told him it was not necessary. Div. FoF 147 –

148. Standing alone, Delaney's failure to disclose the red flags, and especially his conversations with Stock Loan, to Yancey substantially assisted PFSI's violations.

3. Delaney substantially assisted the violations by not disclosing red flags and suspicious events to regulators.

Delaney's most surprising argument is that his lack of candor with regulators doesn't matter because the violations continued after disclosure of the violations was made. Delaney brief at pp. 35-36. This argument demonstrates a complete lack of understanding as to the need for honesty in the securities profession. The Commission has no such lack of understanding – they have held that "[T]he importance of honesty for a securities professional is so paramount... Providing information to investigators is important to the effectiveness of the regulatory system, and the information provided must be truthful. We have consistently held that deliberate deception of regulatory authorities justifies the severest of sanctions." *Gary M. Kornman,* Rel. No. 34-59403, 2009 WL 367635, *7 (Feb. 13, 2009). This lack of understanding shows that Delaney is unfit to be a securities professional.

Delaney also argues that he cannot be found responsible because he did not "make" any statements as required by *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S.Ct. 2296 (2011). However, *Janus*, by its own terms, does not apply to aiding and abetting liability. *Janus*, 131 S. Ct. at 2302 ("Such suits—against entities that contribute "substantial assistance" to the making of a statement but do not actually make it—may be brought by the SEC"). Moreover, *Janus* notes that "maker" is the one with authority to make the statement. *Id.* As the Chief Compliance Officer, Delaney was the person authorizing these statements on behalf of PFSI.

a. Delaney authorized misleading WSPs which were sent to regulators.

As with other arguments, Delaney attempts to attack this claim by setting up a straw man. The Division alleged that Delaney "authorized" and was responsible for PFSI's WSPs, not that he "drafted" them. *Compare* OIP ¶ 8 *with* Delaney brief at p. 37. Because Delaney authorized those WSPs, despite the significant red flags that alerted him to Stock Loan's violations of Rule 204, he substantially assisted those violations.

Delaney was ultimately responsible to ensure that PFSI's WSPs accurately reflected Stock Loan's Rule 204 procedures and for ensuring that there were procedures for discovering violations of securities laws. Div. FoF 117, 142, 325; Ex. 200 at p. PFSI2163747.

PFSI's WSPs did not describe Stock Loan's deficient Rule 204 close-out procedures or the procedures Stock Loan should have followed to comply with Rule 204. *See* Div. FoF 118 – 121. Delaney received notice from Alaniz of these deficiencies, but, nevertheless, approved the deficient WSPs. *Id.* Delaney's argument that the WSPs provided the requisite Rule 204 procedures is wrong. First of all, Delaney, himself, who had ultimate responsibility for the WSPs, did not identify any portion of the WSPs which set forth Stock Loan Rule 204 close-out procedures. Div. FoF 119. Moreover, Stock Loan's Lindsey Wetzig explained that the procedures which Delaney now identifies did not pertain to long sales of loaned securities. Tr. 398:9-401:1; Div. FoF 326.

The WSPs were transmitted to regulators. *See*, *e.g.*, Ex. 200. Despite over a dozen red flags, including Alaniz' e-mail alerting Delaney that Stock Loan Rule 204 procedures were missing from the WSPs, Delaney allowed the misleading WSPs, which he authorized, to be sent to regulators. Div. FoF 117 – 121.

b. Delaney concealed red flags in the CEO Certification report.

Delaney was responsible for the report attached to the CEO Certification. Div. FoF 155. The report was required to include "key compliance issues. Div. FoF 153. Nonetheless, Delaney did not disclose any of the red flags or suspicious events concerning PFSI's compliance with Rule 204, including the fact that PFSI's testing revealed catastrophic failures in Rule 204 compliance. Div. FoF 160 – 162. Despite his current argument to the contrary, Delaney, himself, testified that the failure to include Rule 204 was inexplicable. Div. FoF 163.

c. Delaney made misstatements in a letter to OCIE.

A November, 2010 letter to OCIE represented that "the processes employed to close-out positions that were allegedly in violation of rule 204T were effective and performed as designed." Div. FoF 174. The letter did not disclose that PFSI's Stock Loan was not able to comply with Rule 204, nor did it acknowledge the disastrous Rule 204 test results from December 2009 and June 2010. *Id.*

Delaney knew that language was included in the letter - he specifically edited the language. Div. FoF 173. Despite the fact that Delaney actually edited the misleading language, he did not disclose any of the red flags or suspicious events concerning PFSI's violations of Rule 204, including the letter Delaney had received from FINRA a few weeks earlier telling him that PFSI "failed to recall securities from stock loan" which resulted in Rule 204 violations. [13] Div. FoF 126. His failure to disclose the red flags and suspicious events rendered statement in the letter to OCIE misleading.

[13] As CCO of PFSI, Delaney was responsible to ensure that the response reflected PFSI's policies as a whole. In contrast, Gover, the head of the Buy-ins department, who originally wrote the response, did so from the Buy-ins perspective. While Buy-in's processes may have been reasonable at the time of the letter, Delaney was on notice of Stock Loan's violations.

V. DELANEY CAUSED PFSI'S VIOLATIONS OF RULE 204.

To prove that Delaney caused PFSI's violations, the Division need only show that: 1) PFSI violated Rule 204/204T; 2) an act or omission by Delaney contributed to PFSI's violation; and 3) Delaney knew, or should have known, that his conduct would contribute to PFSI's violation. *Robert M. Fuller*, Rel. No. 34-48406, 2003 WL 22016309 at *3 (Aug. 25, 2003); *see also* 15 U.S.C. §78u-3(a). Proof of negligence is sufficient to prove that Delaney caused PFSI's violation. *See KPMG Peat Marwick LLP*, Rel. No. 34-43862, 2001 WL 47245, at *19 (Jan. 19, 2001).

Delaney's argument that the Division has abandoned its causing claim has no merit. As Delaney acknowledges, the OIP in this matter put Delaney on notice that the Division was charging him with causing PFSI's violations. There was extensive evidence about Delaney's duties and his failure to meet those duties. *See*, *e.g.*, Div. FoF 117 – 122. As explained in the Division's post-hearing brief, these failures demonstrate both Delaney's negligence and his contribution to PFSI's violations.

VI. DELANEY SHOULD BE SANCTIONED.

Delaney argues that sanctions against him are unwarranted, but Delaney is wrong. The single, most important factor this court should consider is Delaney's penchant for saying and doing what is easy, instead of what is right.

Delaney did the easy thing in ignoring red flags and suspicious events alerting him to Stock Loan's violations of Rule 204T/204. When an avalanche of information alerted Delaney that stock loan departments in general, and PFSI Stock Loan in particular, were having difficulty complying with Rule 204T/204, Delaney ignored the problem. When Michael Johnson told Delaney that there was a conflict between Stock Loan's practices and the requirements of the Rule, Delaney said "write your

congressman." Div. FoF 91. Why did Delaney allow the violations? Because he didn't want to make waves? Because he dropped the ball and didn't want to admit it? Regardless of the reason, Delaney's conduct merits serious sanctions.

Delaney continued this pattern of saying the expedient thing in his Wells submission. Delaney apparently believed that admitting his knowledge of PFSI's Rule 204 violations would convince the Commission not to charge him for his conduct and so, Delaney did the expedient thing in telling the Commission in his Wells submission that he knew of the violations of Rule 204 all along. When that strategy backfired, he tried the next most expedient tactic – recanting his admissions and blaming his counsel, even though he approved the statements.

Clearly, Delaney is cavalier about honesty and truthfulness. And, because of the importance of protecting investors, it is critical that registered persons be held to the highest standards of honesty and truthfulness. *See Kornman,* 2009 WL 367635 at *7 ("the importance of honesty for a securities professional is so paramount that we have barred individuals even when the conviction was based on dishonest conduct unrelated to securities transactions or securities business."). Delaney's lack of honesty and truthfulness warrant strong sanctions.

A. A cease-and-desist order against Delaney is appropriate.

As to a cease-and-desist order, Delaney argues only that there is no risk of future violations. In the ordinary course, however, a past violation suffices to establish a risk of future violations. *Id.* The showing necessary to demonstrate the likelihood of future violations is "significantly less than that required for an injunction." *KPMG Peat Marwick LLP*, 2001 WL 47245 at *26.

As discussed in the Division's post-hearing brief, consideration of additional factors also demonstrates that there is a likelihood of future violations, including the fact that because Delaney is currently a chief compliance officer, he has the opportunity to commit future violations.

B. A Bar from association is appropriate.

As to a bar, Delaney does not address the relevant factors in his brief. Instead he argues that the Division did not prove its case against Delaney and that others got "light sanctions." As discussed above, the Division has proven its case against Delaney. And Delaney's argument that "primary violators" got "moderate sanctions" is simply irrelevant.[14] Each respondent's conduct must be evaluated independently. *See Kornman*, 2009 WL 367635 at * 6 (sanctions against others is not an enumerated factor).

As discussed in the Division's post-hearing brief, it is in the public interest to bar Delaney from association in the securities industry. Most importantly, while Delaney claimed he was no longer acting as a Chief Compliance Officer, his current employer testified that he is currently serving in that position. (Div. FoF 322). His untruthful testimony demonstrates both an opportunity to commit future violations and that he is unfit to be in such a position.

C. Civil penalties against Delaney are appropriate.

1. Civil penalty pursuant to Section 21B(a)(2).

Delaney does not discuss the appropriateness of a penalty under Section 21B(a)(2) of the Exchange Act. Under that provision, the Division need only prove that

[14] Nor is Delaney's argument accurate. Johnson *settled* to a collateral bar with a right to reapply after 5 years and a civil penalty of $125,000. Ex. 245. Sanctions against others remain to be determined.

Delaney was a cause of the Rule 204T/204 violations, that is that he contributed to them. *See* 15 U.S.C. §78u-2(a)(2)(B).

2. Civil penalty pursuant to Section 21B(a)(1).

Consideration of the relevant factors also indicate that a penalty pursuant to Section 21B(a)(1) of the Exchange Act is appropriate. Delaney's violations involved the deliberate or reckless disregard of a regulatory requirement. Moreover, Delaney's actions as a Chief Compliance Officer who was not truthful with regulators during examinations, not truthful with Commission staff during the investigation in this matter, not truthful with the Commission in his Wells submission, and not truthful with the Court in this proceeding, are egregious. Justice and the need to deter Delaney and others who would behave in such a manner demonstrate that a substantial penalty is in the public interest.

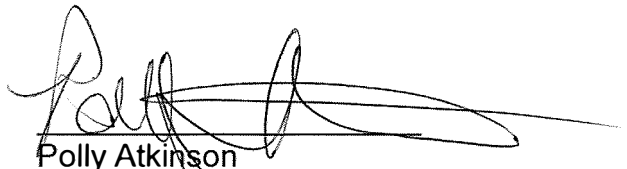
D. Disgorgement is appropriate.

As set forth in the Division's post-hearing brief, disgorgement against Delaney is also appropriate.

VII. CONCLUSION

Tom Delaney has clearly demonstrated that he is not qualified to be a participant in the securities industry. The Commission demands absolute truthfulness from those who would be entrusted with the hard-earned money of America's citizens. Delaney's continued, consistent lack of truthfulness and candor, and his cavalier attitude towards compliance prove that he is not worthy of that trust. Delaney should be held liable for aiding and abetting and causing PFSI's daily, intentional violations of Rule 204 and sanctioned accordingly.

DATED: January 20, 2015.



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