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.

RESPONDENT CHARLES W. YANCEY'S RESPONSE TO DIVISION OF ENFORCEMENT'S POST HEARING PROPOSED CONCLUSIONS OF LAW

Respondent Charles W. Yancey ("Yancey"), by and through counsel, submits this Response to Division of Enforcement's Post Hearing Proposed Conclusions of Law. Pursuant to the Court's post-hearing order (*Thomas R. Delaney II*, Admin. Proc. Rulings Release No. 2011, 2014 SEC LEXIS 4305 (Nov. 13, 2014)), this submission indicates which of the Division's Proposed Conclusions of Law Yancey does not dispute. Where Yancey disputes one of the Division's Proposed Conclusions of Law, this submission provides the reason for the dispute and a counterstatement accompanied by quotations of the key language of the legal authority that supports the objection. Also, for the Court's convenience, the table below reflects the numbered Conclusions of Law that Yancey disputes.

No Dispute	2-5, 7, 13-17, 19, 32-35, 37-45
Dispute	1, 6, 8-12, 18, 20-31, 36

GLOBAL OBJECTION

Pursuant to Section 5(c) of the Court's November 13, 2014 Order, "the purpose of the parties' proposed findings of fact and conclusions of law is to adduce, but not argue, the facts and law that the undersigned should rely on to decide this proceeding. Any proposed findings of fact or conclusions of law that contain such argument will be stricken." Yancey globally objects to the inclusion of any argument in the Division of Enforcement's Proposed Conclusions of Law. Yancey, further requests that this Court strike any Proposed Conclusion of Law that contains impermissible argument.

CONCLUSIONS OF LAW

I. BACKGROUND

A. Rule 204T/204

1. Rule 204T/204 require participants of a registered clearing agency to deliver equity securities to a registered clearing agency when delivery is due; that is, by settlement date. As relevant here, settlement date is generally three days after the trade date ("T+3"). For short sales, if the participant does not deliver securities by T+3 and has a failure-to-deliver position at the clearing agency (also referred to as CNS fails/failures to deliver), at market open on the morning of the settlement day following the settlement date ("T+4"), it must take affirmative action to close-out the failure-to-deliver position by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours on T +4. For long sales, if the participant has a failure-to-deliver position at the clearing agency (also referred to as CNS fails/failures to deliver) at market open on the morning of the third day following the settlement date ("T+6"), it must take affirmative action to close-out the failure-to-deliver position by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours on T+6.

- Response: **Dispute** – redundant of Stipulated Conclusion of Law 1, which was previously stipulated to by all parties. A separate or additional conclusion of law is unnecessary. The Division has also changed the language with which the parties previously agreed.

- Counterstatement: Respondent Yancey refers the Court to Stipulated Conclusion of Law 1, which reads:

> Rule 204T/204 requires participants of a registered clearing agency to deliver equity securities to a registered clearing agency when delivery is due; that is, by settlement date. As relevant here, settlement date is generally three days after the trade date ("T+3"). For short sales, if the participant does not deliver securities by T+3 and has a failure-to-deliver position at the clearing agency (also referred to as CNS fails/failures to deliver), at market open on the morning of T+4 it must take affirmative action to close out the failure-to-deliver position by purchasing or borrowing the securities of like kind and quantity by no later than the beginning of regular trading hours on the settlement day following the settlement date ("T+4"). For long sales, if the participant has a failure-to-deliver position at the clearing agency (also referred to as CNS fails/failures to deliver), **at market open on the morning of T+6 it must take affirmative action to close out the failure-to-deliver position by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours on the third day following the settlement date ("T+6").** Tr. pp. 2292:7 – 2293:15.

II. THE DIVISION'S CLAIMS AGAINST RESPONDENT DELANEY

A. The Division brings its claims against Respondent Delaney under Sections 15(b) and 21C of the Exchange Act of 1934

2. Section 15(b)(6) of the Exchange Act provides that, with respect to any person who is associated with a broker or dealer, the Commission shall sanction such person, if the Commission finds that such sanction is in the public interest and that such person has committed any act enumerated in subparagraph (E) of paragraph (4) of subsection 15(b). *See* 15 U.S.C. §78o(b)(6)(A)(i).

- Response: **No Dispute.**

3. Section 15(b)(4)(E) provides for sanctions against one who has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any rules or regulations under the Exchange Act. *See* 15 U.S.C. §78o(b)(4)(E).

- Response: **No Dispute.**

4. Section 21C of the Exchange Act provides that, if the Commission finds that any person has violated any rule or regulation under the Exchange Act, the Commission may publish its findings and enter an order requiring any person that was a cause of the violation to cease and desist from causing any future violation of the same provision, rule, or regulation. *See* 15 U.S.C. §78u-3(a).

- Response: **No Dispute.**

5. Rule 204T/204 is a rule under the Exchange Act. 17 C.F.R. §242.204.

- Response: **No Dispute.**

6. With respect to PFSI's violation of Rule 204 and Rule 204T, the Division is not required to show either materiality or scienter. *In the Matter of OptionsXpress, Inc.*, Rel. No. 490, 2013 WL 2471113 at *62 (June 7, 2013) ("Rule 204 and Rule 204T are strict liability provisions and scienter is not required for a violation.").

- Response: **Dispute** – inconsistent with the cited authority and the Division's pleadings.

- Counterstatement: Where the Division has pled that the underlying Rule 204 and Rule 204T violations were a systematic policy and practice by Penson's Stock Loan department "of *intentionally* and consistently violating Rule 204(a) with respect to . . . long sales of loaned securities" then the Division has necessarily pled scienter and must prove scienter as an element of the underlying primary violation.

- Support:

  - *See* Division's Order Instituting Proceedings ("OIP") at ¶ 5 ("As a result, they caused Penson to violate the rule *thousands* of times from October 2008 until November 2011") (emphasis added); OIP at ¶ 47 ("for long sales of loaned securities, the reason for 'not buying-in at the open' was *a conscious decision to systematically* violate Rule 204T/204) (emphasis added); OIP at ¶ 69 ("From October 2008 through November 2011, the Senior Vice President of Stock Loan *willfully implemented* and enforced procedures that he knew were *systematically* causing Penson to violate Rule 204T(a)/204(a) in connection with long sales of loaned securities"); *see also* Division's Opposition to Respondent Yancey's Motion to Identify Rule 204(a) Violations, at 2, September 17, 2014; *see also id.* at 5 (". . . this case focuses on a *systematic, intentional* practice of violating Rule 204(a)" (emphasis added); *id.* at 4 (" . . . the more important, overarching violation was the *intentional practice* of consistently violating Rule 204(a)"); Division's Opposition to Motion for More Definite Statement at 3 ("[T]he Division has alleged that Stock Loan instituted a policy and practice of *intentionally and consistently violating* Rule 204(a) with respect to a particular type of transaction—long sales of loaned securities.") (emphasis added).

  - *See U.S. v. Agnew,* 931 F.2d 1397, 1408 (10th Cir. 1991) ("Scienter its broad sense means knowledge, but has sometimes been used as a word of art connoting willfulness or specific intent to violate a known law."); *cf. SEC v. St. Anselm Exploration Co.,* 936 F.Supp.2d 1281, 1298 (D.Colo.2013) (observing that "scheme liability" requires proof of scienter).

  - The Division is limited to the facts and legal theories alleged within its Order Instituting Proceeding, and un-pled theories or factual circumstances cannot serve as a predicate for finding liability. *See In the Matter of Gregory M. Dearlove, CPA*, Admin. Proc. File No. 3-12064, Initial Decision Release. No. 315 at 4546 n. 40, 4951, 2006 SEC LEXIS 1684, *118-119 (July 27, 2006) (where Division sought to impose new standard of liability twelve days before hearing, ALJ declines consideration of that standard); *In the Matter of Robert Bruce Lohmann*, Admin. Proc. File No. 3-10611, Initial Decision Release No. 214 at 13, 17 n.5, 2002 SEC LEXIS 2380 at *33, 46 n.5 (Sept. 19, 2002), *aff'd*, Exchange Act Release. No. 48092, 2003 SEC LEXIS 1521 (June 26, 2003) (where Division seeks to rely on evidence that was not put forth in its OIP, ALJ declines consideration of that evidence, and states "the Commission has made clear that uncharged misconduct provides no basis for enhanced sanctions"); *In the Matter of Richmark Capital Corp.*, Admin. Proc. File No. 3-9954. Initial Decision Release No. 201 at 25, 2002 SEC LEXIS 601 at *6769 (March 18, 2002), *aff'd*, Exchange Act Release No. 48758, 2003 SEC LEXIS 2680 (Nov. 7, 2003) ("the

Division's case must fairly be limited to the time frame set out originally in the OIP").

- *OptionsXpress* does not stand for the proposition that Rule 204 and Rule 204T do not require a showing of *materiality*. *See In the Matter of OptionsXpress, Inc.*, Rel. No. 490, 2013 WL 2471113 at *62 (June 7, 2013) ("Rule 204 and Rule 204T are strict liability provisions and *scienter* is not required for a violation.") (emphasis added).

B. The Division has charged Respondent Delaney with causing PFSI's violations of Rule 204/204T.

7. To prove that Delaney caused PFSI's violations, the Division must 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. *In the Matter of Robert M. Fuller*, Rel. No. 34-48406, 2003 WL 22016309 at *4 (Aug. 25, 2003) ("Section 21C of the Exchange Act authorizes the Commission to order a person who was a cause of a violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation. To issue such an order, we must find that: (1) a primary violation occurred, (2) there was an act or omission by the respondent that was a cause of the violation, and (3) the respondent knew, or should have known, that his conduct would contribute to the violation."); *see also* 15 U.S.C. §78u-3(a) ("If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this chapter, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation.").

- Response: **No Dispute**.

8. The Division need only show that Delaney was negligent to prove that he caused PFSI's violation. *See KPMG Peat Marwick LLP*, Rel. No. 34-43862, 2001 WL 47245, at *19 (Jan. 19, 2001) ("We hold today that negligence is sufficient to establish "causing" liability under Exchange Act Section 21C(a), at least in cases in which a person is alleged to "cause" a primary violation that does not require scienter.").

- Response: **Dispute** – cited legal principle is not applicable in this case given the Division's allegations. *See* Response to Division's Proposed COL 6.

- Counterstatement: Where the primary violation upon which the Division bases its charge requires a showing of scienter, the Division must likewise prove scienter in "causing" the primary violation.

- Support:

  - *KPMG Peat Marwick LLP*, Rel. No. 34-43862, 2001 WL 47245, at *19 (Jan. 19, 2001) ("We hold today that negligence is sufficient to establish "causing" liability under Exchange Act Section 21C(a), *at least in cases in which a person is alleged to "cause" a primary violation that does* ***not*** *require scienter*.") (emphasis added).

  - *In the Matter of Robert W. Armstrong, III*, 2004 WL 737067 *12, Release No. 248 (April 6, 2004) ("It is assumed that scienter is required to establish secondary liability for causing a primary violation that requires scienter.").

  - *See also* Response to Division's Proposed COL 6.

C. The Division has charged Respondent Delaney with willfully aiding and abetting PFSI's violations of Rule 204/204T.

9. A finding of willfulness does not require an intent to violate the law, but merely an intent to do the act which constitutes a violation. *See, e.g., Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.C. Cir. 2000) ("*In Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798 (D.C.Cir.1965), we rejected the argument 'that specific intent to violate the law is an essential element of the willfulness required to violate Section 15(b)' and noted that the argument 'ha[d] been rejected by this court, by the Second Circuit, and by the Commission.' 348 F.2d at 802-03. We further stated that '[i]t has been uniformly held that "willfully" in this context means intentionally committing the act which constitutes the violation' and rejected the contention that 'the actor [must] also be aware that he is violating one of the Rules or Acts.'" *Id*. at 803.").

- Response: **Dispute** – redundant of Stipulated Conclusion of Law 6, which was previously stipulated to by all parties. A separate or additional conclusion of law is unnecessary. The Division has also attempted to change the language with which the parties previously agreed.

- Counterstatement: Respondent Yancey refers the Court to Stipulated Conclusion of Law 6, which reads: "Willfulness is shown where a person intends to commit an act that constitutes a violation." Tr. p. 2537:14-19.

10. Negligent conduct meets the requirement of willfulness. *See Matter of C. James Padgett*, Rel. No. 34-38423, 1997 WL 126716 at *7 & n. 34 (March 20, 1997) ("Padgett and Graff argue that negligent conduct cannot support a finding of 'willful' conduct. Section 15(b) of the Exchange Act, under which this proceeding was brought, requires a finding of a violation of the securities laws to be 'willful.' The courts have long held that willfulness here means no more than intentionally committing the act that constitutes the violation. *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965); *Arthur Lipper Corp. v. SEC*, 547 F.2d at 180.")

- Response: **Dispute** – contrary to Stipulated Conclusion of Law 6, which was previously stipulated to by all parties; contrary authority exists; cited sources do not support the Division's statement.

- Counterstatement: **Merely** negligent conduct **does not** meet the requirement of willfulness.

- Support:

  - Stipulated Conclusion of Law 6 ("Willfulness is shown where a person *intends* to commit an act that constitutes a violation.") (emphasis added).

  - *In the Matter of C. James Padgett*, does not stand for the proposition that "negligent conduct meets the requirements of willfulness." *See* Rel. No. 34-38423, 1997 WL 126716 at *7 & n. 34 (March 20, 1997). Rather, the footnote in *Padgett* upon which the Division relies reiterates that some intentional act is required before conduct can be considered willful: "[t]he courts have long held that willfulness here means no more than *intentionally committing* the act that constitutes the violation." *Id.* (emphasis added).

  - *Allison v. Bank-One Denver*, 1994 WL 637403 *10 (D. Colo., Jan. 7, 1994) ("An act in violation of securities laws is done willfully 'if done intentionally and deliberately and if it is not the result of innocent mistake, negligence or inadvertence.'" (quoting *United States v. Dixon*, 536 F.2d 1388, 1397 (2d Cir.1976)); *Feist .v U.S.*, 607 F.2d 954, 961 (Ct. Cl. 1979) (observing, "'Willfulness' has been almost universally defined as an intentional, voluntary, conscious act or omission," and that "[m]ere negligence is not sufficient proof of willfulness.").

11. To prove that Delaney aided and abetted PFSI's violations, the Division must show that: 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. *In the Matter of Eric J. Brown, et al.*, Rel. No. 34-66469, 2012 WL 625874 (February 27, 2012) ("To establish that a respondent aided and abetted a books and records violation, we must find that (1) a violation of the books and records provisions occurred; (2) the respondent substantially assisted the violation; and (3) the respondent provided that assistance with the requisite scienter. The scienter requirement for aiding-and-abetting liability in administrative proceedings may be satisfied by evidence that the respondent knew of, or recklessly disregarded, the wrongdoing and his or her role in furthering it.").

- Response: **Dispute** – contrary authority exists; the Division has not pled or otherwise proceeded on a recklessness theory prior to trial.

- Proposed Counterstatement: To prove Delaney aided and abetted PFSI to violate Rule 204T(a)(1)/204(a)(1) of Regulation SHO, the Division must prove each of

the following three elements: (1) a primary or independent securities law violation; (2) **awareness or knowledge by the aider and abettor that his or her role was part of any overall activity that was improper** and (3) that the aider and abettor **knowingly and substantially** assisted the conduct that constitutes the violation.

- Support:

  - *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1009 (11th Cir. 1985 ("'[A] person may be held as an aider and abettor only if some other party has committed a securities law violation, if the accused party has general awareness that his role was part of an overall activity that is improper, and if the accused aider-abettor *knowingly and substantially assisted the violation.*'" (quoting *Woodward v. Metro Bank of Dallas,* 522 F.2d 84, 94-97 (5th Cir. 1975)) (emphasis added); *accord Investors Research Corp. v. SEC,* 628 F.2d 168, 178 (D.C.Cir.1980) (identifying the elements of aiding and abetting as "1) another party has committed a securities law violation; 2) the accused aider and abetter had a general awareness that his role was part of an overall activity that was improper; and 3) the accused *aider and abetter knowingly and substantially assisted the principal violation.*") (emphasis added).

  - *See also* Response to Division's Proposed COL 6 (and cases cited therein).

12. The Division may show that Delaney substantially assisted PFSI's violations by demonstrating that he repeatedly disregarded red flags of suspicious activity and did not report that activity to Yancey. *See In The Matter Of Ronald S. Bloomfield, et al.*, Rel. No. 34-71632, 2014 WL 768828 at *17 (Feb. 27, 2014) ("Bloomfield and Martin substantially assisted Leeb's violations by repeatedly disregarding red flags of suspicious activity in the Uselton and Thimble accounts and not reporting that activity to Leeb.").

- Response: **Dispute** – Contrary to Stipulated Conclusion of Law 7, which was previously stipulated to by all parties, and which addresses the substantial assistance element. A separate or additional conclusion of law is unnecessary.

- Counterstatement: Respondent Yancey refers the Court to Stipulated Conclusion of Law 7, which reads: "To satisfy the substantial assistance element of aiding and abetting, the SEC must show that the defendant in some sort associated himself with the venture, that he participated in it as something that he wished to bring about, and that he sought by his action to make it succeed." Tr. p. 2539:8-18.

13. Recklessness may be found if Delaney encountered red flags or suspicious events creating reasons for doubt that should have alerted him to the improper conduct of the primary violator. *Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004) ("'Extreme recklessness' - or as many courts of appeals put it, 'severe 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, *Graham*, 222 F.3d at 1006; *see also Wonsover v. SEC*, 205 F.3d 408, 411 (D.C.Cir.2000), or if there was 'a danger ... so obvious that the actor must have been aware of' the danger. *Steadman*, 967 F.2d at 641-42, *quoting Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir.), *cert. denied*, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1977); *see also Wonsover*, 205 F.3d at 414.").

- Response: **No Dispute.**

14. A finding that one willfully aids and abets a violation necessarily makes that person a "cause" of those violations. *Matter of Sharon M. Graham*, Rel. No. 34-40727, 1998 WL 823072 at n. 35 (Nov. 30, 1998). ("Our finding that Graham willfully aided and abetted Broumas' violations necessarily makes her a "cause" of those violations. *See Dominick & Dominick, Incorporated*, 50 S.E.C. 571, 578 n.11 (1991). As noted above, to conclude that a respondent aided and abetted another's violation, it must be found that the respondent acted with scienter. A respondent is a "cause" of another's violation if the respondent "knew or should have known" that his or her act or omission would contribute to such violation. Exchange Act Section 21C(a).").

- Response: **No Dispute**.

III. THE DIVISION'S FAILURE TO SUPERVISE CLAIMS AGAINST YANCEY

A. The Division brings its claims against Respondent Yancey under Section 15(b) of the Exchange Act

15. Section 15(b)(4)(E) provides for sanctions against one who has failed reasonably to supervise, with a view to preventing violations of the rules and regulations under the Exchange Act, another person who commits such a violation, if such other person is subject to his supervision. *See* 15 U.S.C. §78o(b)(4)(E).

- Response: **No Dispute.**

16. Section 15(b)(4)(E) provides an affirmative defense to a failure to supervise charge: That section provides that no person shall be deemed to have failed reasonably to supervise any other person, if (i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and (ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with. *See Matter of Michael Bresner,* Rel. No. 517, 2013 WL 5960690 at * 117 (Nov. 8, 2013) ("Section 15(b)(4)(E) of the Exchange Act and Section 203(e)(6) of the Advisers Act provide an affirmative defense: no person may be deemed to have failed to reasonably supervise if (1) there have been established procedures, and a system for applying such procedures, to prevent and detect any violation; and (2) the person has reasonably satisfied his duties and obligations without reasonable cause to believe that the procedures and system were not being followed."); 15 U.S.C. §78o(b)(4)(E).

- Response: **No Dispute.**

17. The affirmative defense provided by Section 15(b)(4)(E) does not apply where there are no "established procedures, or a system for applying those procedures, which together reasonably could have been expected to detect and prevent the violations." *Michael Bresner,* 2013 WL 5960690 at * 116 ("This affirmative defense does not apply where there are no 'established procedures, or a system for applying those procedures, which together reasonably could have been expected to detect and prevent the violations.'") (*citing John H. Gutfreund*, Rel. No. 34-31554, 1992 WL 362753 at n. 20 (Dec. 3, 1992)).

- Response: **No Dispute.**

18. NASD Rule 3010 provides that a broker-dealer's supervisory system shall provide for the assignment of each registered person to an appropriately registered representative(s) and/or principal(s) who shall be responsible for supervising that person's activities. NASD Rule 3010(a)(5) ("Each member shall establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules. Final responsibility for proper supervision shall rest with the member. A member's supervisory system shall provide, at a minimum, for the following: ... (5) The assignment of each registered person to an appropriately registered representative(s) and/or principal(s) who shall be responsible for supervising that person's activities.").

- Response: **Dispute.** Yancey does not dispute NASD Rule 3010's requirements but disputes the accuracy of the Registered Representative Supervisory Matrix; disagrees that a firm's NASD Rule 3010(a)(5) designation of supervisors is dispositive authority of supervisory jurisdiction with respect to a failure to supervise claim; and disputes that the Registered Representative Supervisory Matrix was Penson's designation of supervisors for the purposes of NASD Rule 3010(a)(5).

- Counterstatement: A firm's 3010(a)(5) designation is one fact and circumstance, among many, to be evaluated in determining who supervises a particular person.

- Support:

  - Under *Gutfreund* and its progeny and the testimony of the Division's own expert, a firm's 3010(a)(5) designation is ***one*** fact and circumstance, among many, to be evaluated in in determining who supervises a particular person. *In the Matter of John H. Gutfreund*, 51 S.E.C. 93, 113 (Dec. 3, 1992) ("determining if a particular person is a supervisor depends on whether, under the facts and circumstances of a particular case, that person has a requisite degree of responsibility, ability, or authority to affect the conduct of the employee whose behavior is at issue").

  - Paulukaitis Test. at 487:22-25 (in discussing various factors and circumstances that determine whether a particular person is a supervisor:

"Q: And the WSPs -- and I think you mentioned that earlier. The WSPs are *one fact and circumstance* that *may* evidence supervisory authority; is that fair? A: Yes.") (emphasis added).

- *See also* Yancey Prop. COL 16 ("The *Gutfreund* facts and circumstances test is relevant in deciding whether delegation has occurred") (and cases cited); Yancey Prop. COL 17 ("Under *Gutfreund*, 'determining if a particular person is a supervisor depends on whether, under the facts and circumstances of a particular case, that person has a requisite degree of responsibility, ability, or authority to affect the conduct of the employee whose behavior is at issue.'") (and cases cited); Yancey Prop. COL 18 (providing the non-exclusive *Gutfreund* indicia of supervisory authority) (and cases cited); Yancey Prop. COL 20 ("No one piece of evidence, including a specific document or specific witness testimony is dispositive of delegation.") (and cases cited).

- *See also* Yancey Response to Division's Prop. FOF 265.

B. The Division has charged Respondent Yancey with failing to supervise Delaney and Michael Johnson.

19. Proper supervision is the touchstone to ensuring that broker-dealer operations comply with the securities laws and NASD rules. It is also a critical component to ensuring investor protection. *Matter of Dennis S. Kaminski*, Rel. No. 34-65347, 2011 WL 4336702 (September 16, 2011) ("Proper supervision is the touchstone to ensuring that broker-dealer operations comply with the securities laws and NASD rules. It is also a critical component to ensuring investor protection.").

- Response: **No Dispute**.

20. To prove that Yancey failed to supervise Delaney, the Division must show that: 1) Yancey was a registered person; 2) Yancey failed to reasonably supervise Delaney with a view to preventing violations of the securities laws; 3) Delaney was a registered person; 4) Delaney was subject to Yancey's supervision; and 5) Delaney committed such violation. *See* 15 U.S.C. §78o(b)(4)(E) ("The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated-- ... has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision.").

- Response: **Dispute** – recitation of the elements is confusing and ambiguous. Moreover, the Division omits that, with respect to the first element listed below—

"an underlying securities law violation by another person,"—the underlying securities violation by another person must be "willful."

- Counterstatement: In satisfying its burden on a failure to supervise claim, the Division must prove each of the following elements:

  (1) a willful underlying securities law violation by another person;

  (2) association of the registered representative or person who committed the violation;

  (3) supervisory jurisdiction over that person; and

  (4) failure to reasonably supervise the person committing the violation.

- Support:

  - Yancey Prop. COL 2 (citing *In the Matter of Dean Witter Reynolds, Inc.*, SEC Administrative Proceeding File 3-9686, Initial Decision Release No. 179, 2001 WL 47244 at *38 (Jan. 22, 2001); *In the Matter of Michael Bresner*, SEC Administrative Proceeding File 3-315015, Initial Decision Release No. 517 at 115 (Nov. 18, 2013)).

  - Section 15(b)(4)(E) requires the subordinate to have "***willfully*** aided, abetted, counseled, commanded, induced, or procured" the underlying violation. Securities Exchange Act of 1934, 15 U.S.C. § 78o(b)(4)(E) (2012).

  - To establish a "willful" violation, the subordinate must have acted with willfulness or scienter, which "is shown where a person intends to commit an act that constitutes a violation." *H.J. Meyers*, Initial Decision Release No. 211 (Aug. 9, 2002); *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) ("[A] finding of willfulness [requires] . . . intent to commit the act which constitutes the violation."); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976) (defining scienter as a "mental state embracing the intent to deceive, manipulate, or defraud"); *Donald L. Koch*, Advisers Act Release No. 3836, 2014 WL 1998524, at *13 n.139 ("Our finding of scienter . . . demonstrates that Respondents'' violations were willful."). *See also Sharon M. Graham*, 53 S.E.C. 1072, 1080-81 (1998), *aff'd*, 222 F.3d 994, 1000 (D.C. Cir. 2000) ("The three elements necessary to find willful aiding and abetting are: (1) securities law violations by [a primary wrongdoer]; (2) general awareness or knowledge that the actions of the accused were part of an overall course of conduct that was illegal or improper; and (3) knowing or reckless substantial assistance by the accused in the conduct constituting the primary violations."). But where the subordinate is alleged to have "caused" a violation that does not require scienter and mere negligence is sufficient. For "causing" liability, three elements must be established: "(1) a primary violation; (2) an act or omission by the respondent that was a cause of the

violation; and (3) the respondent *knew, or should have known*, that his conduct would contribute to the violation." *Robert M. Fuller*, 80 SEC Docket 3539, 3545 (Aug. 25, 2003); *see also KPMG Peat Marwick LLP*, 74 SEC Docket 384, 421 (Jan. 19, 2001) (holding that negligence is sufficient to establish liability for causing a primary violation that does not require scienter); *Albert Glenn Yesner, CPA*, 75 SEC Docket 220, 255 (Initial Decision) (May 22, 2001) ("With respect to the non-scienter primary violations Yesner is alleged to have caused, a negligence standard will be applied.").

21. To prove that Yancey failed to supervise Johnson, the Division must show that: 1) Yancey was a registered person; 2) Yancey failed to reasonably supervise Johnson with a view to preventing violations of the securities laws; 3) Johnson was a registered person; 4) Johnson was subject to Yancey's supervision; and 5) Johnson committed such violation. *See* 15 U.S.C. §78o(b)(4)(E) ("The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated-- ... has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision.")

- Response: **Dispute** – recitation of the elements is confusing and ambiguous. Moreover, the Division omits that, with respect to the first element—"an underlying securities law violation by another person,"—the underlying securities violation by another person must be "willful." *See* Yancey's response to Division's Proposed Conclusion of Law 20, above.

22. Neither scienter nor willfulness is an element of a failure to supervise charge. *Matter of Michael Bresner*, Rel. No. 517, 2013 WL 5960690 at * 117 (Nov. 8, 2013) ("Neither scienter nor willfulness is an element of a failure-to-supervise charge, although scienter may be considered in evaluating the reasonableness of supervision.") (*citing Clarence Z. Wurts*, Rel. No. 34-43842, 2001 WL 32844 at * 8 (2001)).

- Response: **Dispute** – incomplete statement. Division's Proposed Conclusion of Law 22 should include the full recitation of the quoted language.

- Counterstatement & Support: Neither scienter nor willfulness is an element of a failure to supervise charge, **although scienter may be considered in evaluating the reasonableness of supervision**. *Matter of Michael Bresner*, Rel. No. 517, 2013 WL 5960690 at * 117 (Nov. 8, 2013) ("Neither scienter nor willfulness is an element of a failure-to-supervise charge, although scienter may be considered in evaluating the reasonableness of supervision.") (*citing Clarence Z. Wurts*, Rel. No. 34-43842, 2001 WL 32844 at * 8 (2001)).

23. To prove that Yancey failed to reasonably supervise Delaney, the Division may show that Yancey ignored red flags. *Matter of Banc of America Investment Services, Inc. and Virginia Holliday*, Release No. 34-60870, 2009 WL 3413048 *6 (October 22, 2009) ("Red flags and suggestions of irregularities demand inquiry as well as adequate follow up and review. When indications of impropriety reach the attention of those in authority, they must act decisively to detect and prevent violations of federal securities laws."). Particular vigilance in response to red flags is especially important in large firms such as PFSI. *See Wedbush Securities, Inc.*, Exch. Act Rel. No. 25504, 48 SEC 963, 967 (Mar. 24, 1988) (Commission opinion reviewing NASD disciplinary action) ("In large organizations it is especially imperative that those in authority exercise particular vigilance when indications of irregularity reach their attention").

- Response: **Dispute** – ambiguous statement. Yancey disagrees that the Division may satisfy its burden on its failure to supervise claim by proving *solely* that Yancey ignored "red flags."

- Counterstatement: The existence or nonexistence of "red flags" is a factor to be considered in deciding whether a supervisor reasonably supervised his subordinate.

- Support:

  - *In the Matter of Michael Bresner*, SEC Admin. Proc. File 3-315015, Initial Decision Release No. 517, 2013 WL 5960690 at *116-117 (Nov. 8, 2013) (Considering multiple "red flags" as one factor among many that collectively contributed to a finding of supervisory liability).

  - Reasonable supervision is only one element of a failure to supervise claim. Before the Division can prevail in satisfying its burden that Yancey did not reasonably supervise Delaney, it must first satisfy all predicate elements of its claim. Additionally even if the Division prevails in satisfying its burden that Yancey did not reasonably supervise Delaney, Yancey must fail in proving his affirmative defenses. *See In the Matter of Dean Witter Reynolds, Inc.*, SEC Administrative Proceeding File 3-9686, Initial Decision Release No. 179, 2001 WL 47244 at *38 (Jan. 22, 2001) (providing elements of a failure to supervise claim); *In the Matter of Michael Bresner*, SEC Administrative Proceeding File 3-315015, Initial Decision Release No. 517 at 115 (Nov. 18, 2013).

24. The Division may prove that Johnson was subject to Yancey's supervision by showing that Yancey was the CEO, who is ultimately responsible for supervision of all registered employees. *Matter of Johnny Clifton*, Rel. No. 34-69982, 2013 WL 3487076 at *12 & n.81 (July 12, 2013) ("As the president of MPG Financial, and under the firm's WSPs, Clifton was responsible for supervising Registered Representative No. 1.").

- Response: **Dispute** – incomplete statement of the law. The Division takes this statement out of context and ignores well-established legal standards.

- Counterstatement & Support: Yancey refers the Court to his Proposed Conclusion of Law Nos. 9, 10, and 11, which read:

    - 9: A president and CEO of a firm "is responsible for the firm's compliance with all applicable requirements *unless and until he reasonably delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his or her duties*." *John B. Busacca III*, Exchange Act Release No. 63312, 99 SEC Docket 34481, 34496 (Nov. 12, 2010) (emphasis added);

    - 10: "A firm's president is not automatically at fault when other individuals in the firm engage in misconduct of which he has no reason to be aware." *In the Matter of Swartwood Hesse, Inc.*, Exchange Act Release No. 34-31212, 1992 WL 252184 at *6 (Sept. 22, 1992) (quoting *In the Matter of Juan Carlos Schidlowski*, 48 S.E.C. 507, 509 (1986));

    - 11: "The Commission "has long recognized that individuals . . . who may have overarching supervisory responsibilities for thousands of employees must be able to delegate supervisory responsibility . . . ." *In the Matter of Patricia Ann Bellows*, SEC Administrative Proceeding File 3-8951, Initial Decision Release No. 128, 1998 WL 409445, at *8 (July 23, 1998).

25. The "facts and circumstances" or "*Gutfruend*" test has never been applied to relieve a CEO of supervisory responsibility. *See John H. Gutfreund*, 1992 WL 362753; *Matter Of James J. Pasztor*, Rel. No. 34-42008, 1999 WL 820621 at n. 27 (October 14, 1999) ("The Commission did not suggest in *Gutfreund* that there are circumstances under which [line supervisors] might be relieved of their responsibility for associated persons subject to their supervision."); *Matter of Angelica Aguilera*, 2013 WL 3936214, *23 (July 31, 2013) (The "facts and circumstances" test ("*Gutfruend*") "related to the Commission's discussion of liability regarding the chief legal counsel of the firm who the Commission stated did not become a supervisor ""solely" because of his position, as opposed to the president of the firm, who the Commission stated "was responsible for compliance with all of the requirements imposed on his firm ...").

- Response: **Dispute** – misleading statement. The statement is also inconsistent with other authority.

- Counterstatement: Courts apply the Gutfreund facts and circumstances test when analyzing whether supervisory authority has been reasonably delegated.

- Support:

    - Yancey Prop COL 16 (and cases cited therein).

- *See also in the Matter of Newbridge Securities*, Exchange Act Release No. 380, 96 S.E.C. Docket 241, 2009 WL 1684744, at *19 n. 32 (June 9, 2009) (citing to *Gutfreund* facts and circumstances test in determining whether president and CEO delegated supervisory authority).

- The Division's reliance on *Pasztor* and *Aguilera* is misplaced. In both cases, respondents had supervisory responsibility by virtue of their positions (branch manager and president respectively). Both respondents argued that *Gutfreund* had done away with presumptive supervisory responsibility and that the court should look to the facts and circumstances to determine supervisory responsibility. Both courts held that Gutfreund did not relieve a presumptive supervisor (such as a president or branch manager) of their responsibility to supervise those below them unless and until they reasonably delegated supervisory responsibility to another. Neither case discussed *Gutfreund* in the context of delegation, which is the issue present in this case.

26. The CEO may delegate supervision of registered persons, but such delegation must be clear, reasonable, and effective. *See Application of Midas Securities, LLC*, Rel. No. 34-66200, 2012 WL 169138 at * 13 (Jan. 20, 2012) (effective delegation of supervision requires clear vesting of supervisory responsibility; "Lee's cited evidence does not refute his failure to effectively delegate supervision by clearly vesting supervisory responsibility in Cantrell for Centeno's and Santohigashi's sales."); *Application of Kirk A. Knapp*, Rel. No. 34-30391, 1992 WL 40436 at * 4 Feb. 21, 1992) (President who failed to make an effective delegation of authority retained his responsibility for supervision; "The president of a brokerage firm is responsible for the firm's compliance with all applicable requirements unless and until he reasonably delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his duties. We think it clear that Seshadri never made a reasonable or effective delegation of authority to Skalski. Seshadri therefore retained his responsibility for supervising sales, a responsibility he failed to shoulder.").

- Response: **Dispute** – accuracy of statement. The standard for delegation is "reasonableness." To the extent that the Division seeks to impose a higher standard, Yancey objects.

- Counterstatement: The CEO may delegate supervision of registered persons, **if such delegation is reasonable.**

- Support: Yancey refers the Court to the following Stipulated and Proposed Conclusions of Law, which read:

  - Stip. COL 9 ("**Generally, the delegation of supervisory responsibility is reasonable when** (1) the person to whom the responsibilities are delegated possesses sufficient knowledge and experience to perform those functions in a satisfactory manner and (2) the person who has delegated

supervisory responsibilities to another takes reasonable steps to ensure that the functions delegated are being performed in reasonable manner.");

- Yancey Prop. COL 9 ("A president and CEO of a firm is responsible for the firm's compliance with all applicable requirements unless and **until he reasonably delegates** a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his or her duties.'") (citing *John B. Busacca III,* Exchange Act Release No. 63312, 99 SEC Docket 34481, 34496 (Nov. 12, 2010)).

- Yancey Prop. COL 12 ("The act of delegation need not be formal or written") (and cases cited);

- Yancey Prop. COL 13 ("Delegation can take place through the actions and words of the parties involved, which include the delegator, delegatee, and supervisee.") (and cases cited);

- Yancey Prop. COL 10 ("A firm's president is not automatically at fault when other individuals in the firm engage in misconduct of which he has no reason to be aware.") (and cases cited).

27. It is the burden of the CEO to prove that there has been clear, reasonable, and effective delegation. *SEC v. Yu*, 231 F. Supp. 2d 16, 21 (D. D.C. 2002) (Defendant must submit "reliable evidence" of delegation to another individual).

- Response: **Dispute** – accuracy of statement. The standard for delegation is "reasonableness." To the extent that the Division seeks to impose a higher standard, Yancey objects. *See* Yancey's Response to Division's Prop. COL. 26.

- Counterstatement:

  - Yancey Prop. COL 9: "A president and CEO of a firm is responsible for the firm's compliance with all applicable requirements unless and until he reasonably delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his or her duties.'" (citing *John B. Busacca III,* Exchange Act Release No. 63312, 99 SEC Docket 34481, 34496 (Nov. 12, 2010)).

- Support:

  - The Division's reliance on *Yu* is misplaced. In *Yu*, the court held that a defendant did not delegate supervisory authority where he "submitted [no] reliable evidence of supervisory control by another," and the Division submitted a multitude of evidence showing continued supervision by the defendant. *SEC v. Yu*, 231 F. Supp. 2d 16, 21 (D. D.C. 2002). *Yu* never expressly decided or even discussed the party that has the burden to prove delegation in an administrative proceeding. *Id.*

- Further, it is undisputed that the Division bears the burden to satisfy each and every element of its claims against Mr. Yancey, including that Yancey had supervisory jurisdiction over Johnson. Stip. COL 2 ("The Division bears the burden of proof on all of the Division's claims against Delaney and Yancey"); Yancey Prop. COL 2 (laying out elements of failure to supervise claim).

28. The "facts and circumstances" or "*Gutfruend*" test has never been applied to prove a delegation.

- Response: **Dispute** – accuracy of statement and inconsistent with other authorities.

- Counterstatement: Courts use the *Gutfreund* facts and circumstances test to analyze whether a delegation has occurred.

- Support:

  - Yancey Prop COL 16 (and cases cited therein – *Bellows, Yu, Midas, and Raymond James*)

  - Yancey's Response to Division's Proposed Conclusion of Law 25 (and authorities cited therein).

29. If there is confusion concerning delegation, the delegation is not clear, reasonable, and effective, and the CEO of the broker dealer retains responsibility. *See Matter Of Koch Capital, Inc.*, Rel. No. 34-31652, 1992 WL 394580 at *5 (December 23, 1992) ("Applicants contend that Wolford was responsible for Koch capital's compliance with Rule 15c2–6. However, as President, Koch had the ultimate individual responsibility for assuring that the firm's compliance procedures were adequate. *Far from discharging this obligation, the record shows that Koch took no responsibility for compliance with Rule 15c2–6, but rather created confusion as to who was responsible.* Koch testified that he was not responsible for compliance, and he was not sure whether Wolford or Jones was responsible for compliance during the relevant period of time. While Koch assertedly delegated to Wolford the duty to write the compliance procedures, he knew that Wolford was inexperienced, and that the transition of day-to-day compliance responsibilities from Wolford to Jones resulted in a state of confusion in which no one assumed responsibility for compliance. In any event, Koch did nothing to ensure that Wolford wrote the procedures, that the procedures that she wrote were adequate, or that the firm implemented the procedures. To the contrary, as developed in the hearing before the Board of Governors, Koch ignored Wolford's insistence that Koch capital adopt more extensive procedures to secure compliance, and refused even to review her written drafts of such procedures.") (emphasis added).

- Response: **Dispute** – accuracy of statement and inconsistent with other authorities, including cited *Koch* case.

- Counterstatement: Contradictory evidence of delegation does not create confusion in the supervisory structure negating delegation. Moreover, the standard for delegation is "reasonableness." To the extent that the Division seeks to impose a higher standard, Yancey objects.

- Support:

  - Yancey Prop. COL 19 & 20 (*In the Matter of Swartwood Hesse, Inc.*, Exchange Act Release No. 34-31212, SEC Docket 1557, 1992 WL 252184 at *5 (Sept. 22, 1992) ("the fact that there was no written documentation to support this division of authority is not dispositive of the issue" and finding delegation even where broker-dealer's trader testified that he had "no idea" whether president delegated his "compliance responsibility").

  - *Koch* does not stand for the proposition that any contradictory evidence of delegation creates confusion in the supervisory structure negating delegation. Rather, *Koch* stands for the unremarkable and well-settled proposition that a president of a firm will continue to be responsible for compliance with all regulations unless and until he properly delegates supervisory authority. *Koch Capital*, 1992 WL 394580 at *5.

    - In *Koch*, the Commission concluded that the president had not properly delegated supervisory authority because:

      - The President made no effort to discharge his supervisory authority;

      - The President himself could not testify to whom he had delegated supervisory authority;

      - The President knew that one of the people he attempted to delegate supervisory authority to was inexperienced;

      - The President knew that the firm did not have written supervisory procedures governing the conduct at issue, and the President ignored the pleas of an employee to adopt more extensive procedures and review written drafts of new procedures. *Id.*

    - In contrast, here the evidence demonstrates that:

      - Yancey effectively and unambiguously delegated his supervisory authority over Johnson to Pendergraft;

      - Yancey, along with every other person who was asked (including Pendergraft), testified that Pendergraft supervised Johnson;

- During the relevant time period, Pendergraft was active and engaged with Penson and as Johnson's supervisor: there was no gap in supervisory authority;

- Pendergraft was qualified to supervise Johnson;

- Penson had adequate procedures governing the conduct at issue, and Yancey had no reason to believe Penson's procedures were inaccurate.

30. The Division may prove that Yancey failed to reasonably supervise Johnson by showing that there was a supervisory vacuum resulting in violations of Rule 204T/204. *See Matter Of The Application Of Bradford John Titus*, Rel. No. 34-38029, 1996 WL 705335 (December 9, 1996) ("Titus contends that he should not be held responsible for Dickinson's failure to fill the supervisory vacuum created by the departure of Broker/Dealer Services. As discussed above, however, Titus failed to fulfill his responsibilities as SROP and compliance director. We have previously rejected the assertion that a firm's change in corporate structure or supervisory systems provides a defense for abdicating obligations. As compliance officer, Titus was responsible for enforcing adequate supervisory procedures. Yet, after Viggers left the Firm and Broker/Dealer Services was disbanded, Titus did not approach senior management to provide replacement supervision.").

- Response: **Dispute** – accuracy of statement and unsupported by cited *Titus* case.

- Counterstatement: On unique facts, *In the Matter of Application of Bradford Titus* held that a delegator failed to reasonably supervise where there was a gap in supervision created by a change in corporate structure because the delegatee left the firm and no new supervisory delegation followed. 1996 WL 705335 (December 9, 1996).

- Support:

  - In *Titus*, a delegatee had been responsible for supervising the particular function at issue. *Titus*, 1996 WL 705335 at 4. After the delegatee left the firm, the delegatee's department was disbanded, and the respondent failed to delegate a new supervisor, leaving a "supervisory vacuum." *Id.*

  - In this case, on the other hand, Yancey delegated supervisory authority to Pendergraft. Pendergraft was an Executive Vice President at PFSI during the relevant time period, and Pendergraft provided Johnson with consistent and effective supervision. *See* Stip. FOF 75 and Yancey Prop. FOFs 9, 10, 12-14.

IV. THE REMEDIES SOUGHT BY THE DIVISION AGAINST RESPONDENTS

A. A cease-and-desist order against Delaney pursuant to Section 21C of the Exchange Act.

31. Section 21C of the Exchange Act provides that, if the Commission finds that any person has violated any rule or regulation under the Exchange Act, the Commission may publish its findings and enter an order requiring any person that was a cause of the violation to cease and desist from causing any future violation of the same provision, rule, or regulation. *See* 15 U.S.C. §78u-3(a).

- Response: **Dispute**. The Division's statement omits material language from the cited source.

- Counterstatement: Section 21C of the Exchange Act provides, **in pertinent part**, that if the Commission finds, **after notice and opportunity for hearing**, that any person has violated any rule or regulation under the Exchange Act, the Commission may publish its findings and enter an order requiring any person that was a cause of the violation **due to an act or omission the person knew or should have known would contribute to such violation**, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation.

- Support:

  - 15 U.S.C. § 78u-3(a) (stating, in pertinent part: "If the Commission finds, *after notice and opportunity for hearing*, that any person is violating, has violated, or is about to violate any provision of this chapter, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, *due to an act or omission the person knew or should have known would contribute to such violation*, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation." (emphasis added)).

32. In deciding whether to issue a cease-and-desist order, the court must consider whether there is a reasonable likelihood of future securities violations. *KPMG Peat Marwick LLP*, Rel. No. 34-43862, 2001 WL 47245 at *26 (Jan. 19, 2001). In the ordinary course, 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." *Id.*

- Response: **No Dispute**.

33. In deciding whether to issue a cease-and-desist order, the court may consider several factors including the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, the respondent's opportunity to commit future violations, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings. *KPMG Peat Marwick LLP*, Rel. No. 34-43862, 2001 WL 47245 at *26 (Jan.

19, 2001). This inquiry is a flexible one and no one factor is dispositive. *Id.* It is undertaken not to determine whether there is a "reasonable likelihood" of future violations but to guide the court's discretion. *Id.*

- Response: **No Dispute.**

B. Bars from association against Delaney and Yancey pursuant to 15(b)(6) of the Exchange Act.

34. Section 15(b)(6) of the Exchange Act provides that the Commission shall censure, limit, suspend, or bar any associated person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock, if the Commission finds that such censure, limitation, suspension, or bar is in the public interest. *See* 15 U.S.C. §78o(b)(6)(A)(i).

- Response: **No Dispute**

35. The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010, provided additional collateral bar sanctions to Exchange Act Section 15(b). Pub. L. No. 111-203, 124 Stat. 1376 (2010). In addition, the collateral bars added by the Dodd-Frank Act may be imposed even if some of the violative conduct pre-dated the Dodd-Frank Act because the bars are prospective remedies "whose purpose is to protect the investing public from future harm." *Matter of John W Lawton,* Rel. No. 3513, 2012 WL 6208750 at *7 - 10 (Dec. 13, 2012).

- Response: **No Dispute.**

36. In determining the public interest the Commission has considered the following factors: the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, the likelihood that the respondent's occupation will present opportunities for future violations, the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and, in conjunction with other factors, the extent to which the sanction will have a deterrent effect. *See Matter of Gary M. Kornman*, Rel. No. 34-59403, 2009 WL 367635 at * 6 (Feb. 13, 2009) (*citing Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)); *Matter of Ralph W. LeBlanc*, Rel. No. 34-48254, 2003 WL 21755845 at * 6 (July 30, 2003); *Matter of Peter Siris*, Rel. No. 34-71068, 2013 WL 6528874 at n.72 (Dec. 12, 2013).

- Response: **Dispute** – accuracy of statement. Deterrence is not one of the *Steadman* factors, but rather a consideration weighed against punishment when determining the severity of sanctions.

- Counterstatement: In determining the public interest the Commission has considered the following factors: the egregiousness of the respondent's actions,

the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, the likelihood that the respondent's occupation will present opportunities for future violations, the age of the violation, the degree of harm to investors and the marketplace resulting from the violation ~~and, in conjunction with other factors, the extent to which the sanction will have a deterrent effect~~. **The purpose of imposing sanctions is deterrence, *not* to punish the Respondent.** *In the Matter of Stephen J. Horning*, Exchange Act Release No. 56886, 2007 SEC LEXIS 2796, at *24 (Dec. 3, 2007).

37. The "'inquiry into the appropriate sanction to protect the public interest is a flexible one and no one factor is dispositive."' *See Kornman*, 2009 WL 367635 at * 6 (quoting *Matter of David Henry Disraeli*, Rel. No. 34-57027, 2007 WL 4481515 at * 15 (Dec. 21, 2007)).

- Response: **No Dispute.**

38. The determination of what is in the public interest "extends ... to the public-at-large," "the welfare of investors as a class," and "standards of conduct in the securities business generally." *See Matter of Christopher A. Lowry*, Rel. No. IA-2052, 2002 WL 1997959 at * 6 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003); *Matter of Arthur Lipper Corp.*, Rel. No. 34-11773, 1975 WL 163472 at * 15 (Oct. 24, 1975).

- Response: **No Dispute.**

C. Civil penalties against each Respondent pursuant to 21B of the Exchange Act.

39. Section 21B(a)(2) of the Exchange Act provides that, in any proceeding instituted under Section 21C, the Commission may impose a civil penalty if the Commission finds that person is or was a cause of the violation of any rule or regulation issued under the Exchange Act. 15 U.S.C. §78u-2(a)(2)(B).

- Response: **No Dispute.**

40. Section 21B(a)(1) of the Exchange Act further provides that, in any proceeding instituted under Section 15(b), the Commission may impose a civil penalty if it finds that such penalty is in the public interest and that such person has willfully aided and abetted a violation of the securities laws. 15 U.S.C. §78u-2(a)(1)(B).

- Response: **No Dispute.**

41. Section 21B(a)(1) of the Exchange Act also provides that the Commission may impose a civil penalty if it finds that such penalty is in the public interest and that such person has failed reasonably to supervise, within the meaning of section 15(b)(4)(E), with a view to preventing violations of rules and regulations, another person who commits such a violation, if such other person is subject to his supervision. 15 U.S.C. §78u-2(a)(1)(D).

- Response: **No Dispute.**

42. In making the public interest determination required by Section 21B(a)(1) of the Exchange Act, the Commission may consider (1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the harm to other persons resulting either directly or indirectly from such act or omission; (3) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior; (4) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in section 15(b)(4)(B) of this title; (5) the need to deter such person and other persons from committing such acts or omissions; and (6) such other matters as justice may require. 15 U.S.C. §78u-2(c).

- Response: **No Dispute.**

43. Section 21B(b) establishes a three-tier penalty structure and provides that a third-tier penalty is appropriate where (A) the act or omission involved a deliberate or reckless disregard of a regulatory requirement; and (B) such act or omission directly or indirectly created a significant risk of substantial losses to other persons. 15 U.S.C. §78u-2(b)(3).

- Response: **No Dispute.**

D. Disgorgement against each defendant pursuant to Exchange Act Section 21B.

44. Section 21B(e) of the Exchange Act provides that, in any proceeding in which the a penalty may be imposed, disgorgement may also be ordered. 15 U.S.C. §78u-2(e).

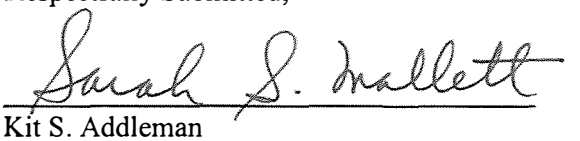
- Response: **No Dispute.**

45. Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. *See SEC v. First City Fin. Corp.,* 890 F.2d 1215, 1230-32 (D.C. Cir. 1989).

- Response: **No Dispute.**

January 20, 2015

Respectfully Submitted,



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