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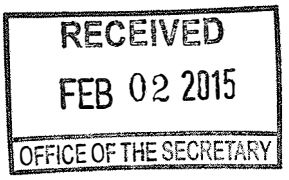
ONE UTAH CENTER • THIRTEENTH FLOOR
201 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84111-2216
TEL 801.322.2516 • FAX 801.521.6280
www.clydesnow.com

January 30, 2015

Via Email and FedEx

Honorable Jason S. Patil, Administrative Law Judge
Darien S. Capron, Attorney-Advisor
Office of Administrative Law Judges
U.S. Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 2557
Washington, D.C. 20549



RE: *In the Matter of Thomas R. Delaney II and Charles W. Yancey,*
Administrative Proceeding File No.: 3-15873

Dear Judge Patil:

This letter is in response to the Court's email correspondence dated January 28, 2015. Respondent Thomas R. Delaney II, by and through counsel, hereby states his position with respect to the readmission of the previously-withdrawn expert report of Greg Florio.

As a preliminary matter, Delaney respectfully objects to this post hoc process in which he is being asked to present a hypothetical defense to a theory that was never advanced prior to post-hearing briefing. The fact that no one – not the Division of Enforcement, not either Respondent, and not the Judge – ever said the word "negligent" or any permutation of it during the Final Hearing demonstrates that the Division did not bring this case on a pure causing theory premised on negligence. Being asked now to articulate what evidence would have been introduced or what strategic decisions would have been made differently falls short of the due process standards that are required in administrative proceedings. Delaney is entitled to notice and an opportunity for a hearing on a charge before liability or remedies may be imposed, including the right to "be timely informed of . . . the matters of fact and law asserted" in the proceeding against him, in order to allow him to prepare a defense. Imposing liability based on

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RODNEY G. SNOW
STEVEN E. CLYDE
EDWIN C. BARNES
NEIL A. KAPLAN*
D. BRENT ROSE
CHARLES R. BROWN§
J. SCOTT HUNTER
PERRIN R. LOVE*
DEAN C. ANDREASEN
ANNELI R. SMITH
WALTER A. ROMNEY, JR.
MATTHEW A. STEWARD
T. MICKELL JIMENEZ
JENNIFER A. JAMES†
CHRISTOPHER B. SNOW*
BRENT R. BAKER◇
D. LOREN WASHBURN*¤
AARON D. LEBENTA
MARK L. SMITH¤
WAYNE Z. BENNETT
BRIAN C. WEBBER
BRIAN A. LEBRECHT¤

ROBERT D. ANDREASEN
KATHERINE E. JUDD
DIANA L. TELFER
JONATHAN S. CLYDE
SHANNON K. ZOLLINGER
TIMOTHY R. PACK
JACOB L. FONNESBECK*
NICOLE SALAZAR-HALL
LAUREN A. MCGEE

OF COUNSEL:
NATHAN B. WILCOX
REAGAN L.B. DESMOND ¤ △
JAMES W. ANDERSON
EDWARD W. CLYDE (1917-1991)

‡ SENIOR COUNSEL
* ALSO ADMITTED IN WASHINGTON, D.C.
§ ALSO ADMITTED IN IDAHO
† ALSO ADMITTED IN COLORADO
◇ ALSO ADMITTED IN NEW YORK
¥ ALSO ADMITTED IN MASSACHUSETTS
¤ ALSO ADMITTED IN CALIFORNIA
△ ALSO ADMITTED IN OREGON
◊ ALSO ADMITTED IN NEVADA

evidence not introduced at the hearing, or upon theories of liability neither pled nor pursued until post-hearing briefing, is inimical to these rights.[1]

In its OIP, the Division alleged that Delaney willfully aided and abetted and caused PFSI to violate Rule 204T(a)/204(a). Nowhere in its OIP did the Division advance a theory of negligence against Delaney. The same is true for the pre-hearing briefing and evidence presented at the Final Hearing. In fact, even in its post-hearing briefing, it is unclear which of the remedies the Division seeks against Delaney are available if liability were solely based on a causing/negligence theory. Yet, the Court is now considering providing the Division with an opportunity to pursue additional unpled theories, well after the conclusion of the Final Hearing and post-hearing briefing, and requiring Delaney to develop a new defense using hypotheticals and evidence outside the record. Delaney respectfully reiterates his objection to this process.

As stated in Delaney's Response to the Court's January 23, 2015 Order, Delaney is still uncertain as to what negligence theory the Division is now pursuing, i.e., *how* the Division contends Delaney acted negligently. This makes identification of hypothetical evidence he would have submitted to combat the unpled theory an unavoidably speculative exercise. Furthermore, while Delaney indicated in his Response to the Court's January 23, 2015 Order that if the Division had provided notice that it intended to advance a theory of negligence, Delaney would not have withdrawn Florio's testimony and would have sought a more comprehensive opinion from Florio regarding Delaney's conduct as CCO, this is just one piece of the puzzle that would have been different. Delaney would also have asked different questions of other witnesses, including some of the questions identified in his Response to the January 23, 2015

[1] To satisfy the requirements of due process under the Administrative Procedures Act, 5 U.S.C. § 554(b), an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992); s*ee also Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir.1971). Additionally, "an agency may not change theories in midstream without giving respondents reasonable notice of the change." *Id.* (quoting *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256 (D.C.Cir.1968)). The Sixth Circuit has held that "**[t]**he fundamental fairness inherent in administrative due process cannot permit the [government] to plead a certain charge, insist at hearing that only that charge is being litigated, and then raise a related, but more onerous charge only after the hearing record is closed." *See N.L.R.B. v. Homemaker Shops, Inc.*, 724 F.2d 535, 537-538 (6th Cir. 1984). The Eleventh Circuit has held that "evidence introduced at a hearing that is relevant to a pleaded issue as well as an unpleaded issue cannot serve to give the opposing party fair notice that the new, unpleaded issue is entering the case." *Wesco Mfg., Inc. v. Tropical Attractions,* 833 F.2d 1484, 1487 (11th Cir.1987). "The applicable law is clearcut. Both the Administrative Procedure Act and the Board's own rules require that the complaint inform the Company of the violations asserted. *N.L.R.B. v. Blake Const. Co., Inc.*, 663 F.2d 272, 279 (D.C. Cir. 1981). The Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing." *Id.*

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Order, and potentially retained other experts. Essentially, adding back in Florio's testimony is not enough; the entire hearing would need to be redone.

As a result, admitting and considering Florio's report or testimony would not cure, even partially, the notice deficiency at issue. For example, had Delaney been provided notice that the Division would be proceeding on a negligence basis and its theory of negligence, he would have had his compliance expert(s) present throughout the hearing so they could base or adjust their opinions to reflect the testimony and evidence actually elicited at the hearing, including any additional questions that may have been asked of fact witnesses had Delaney been given notice of the Division's negligence theory. Admitting Florio's report would not correct for this possibility, which is now not subject to being fully corrected.

Furthermore, the Florio Report does not even address the unpled negligence theory. As he stated in his report, Florio analyzed the issues raised in the OIP, in which the Division alleged willful, affirmative and intentional conduct by Delaney.

> "I have been retained by counsel for Thomas R. Delaney, II ("Delaney") to assist it in analyzing a number of issues raised in the [Division's] [OIP], against Respondent[s] Delaney ... From my review of the OIP in this matter, I understand that the Division claims that Delaney willfully aided and abetted and caused [Penson] to violate temporary Rule 204T(a) and permanent Rule 204(a) of Regulation SHO ... Specifically, the Division alleges that Delaney affirmatively assisted senior members of Penson's Stock Loan department to intentionally violate the close out obligations of Rule 204(a) with respect to a certain type of transaction, which the Division calls "long sales of loaned securities."

Florio Report, at p. 2 (emphasis added).

In sum, Delaney does not object to the readmission of the Florio Report. However, Delaney does object to reliance on the admission of Florio's Report alone, as it pertains to the Division's unpled negligence claim against Delaney, and to the exclusion of all other evidence that could have and would have been adduced at the hearing had such a theory been advanced. Such reliance is misplaced because it will not correct for the deficiency of notice; does not cure the Division's own evidentiary shortcomings where, for example, they failed to ever establish a

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standard of care for a chief compliance officer, much less that Delaney's conduct fell short of one; and, would be highly prejudicial to Delaney.

Sincerely,

CLYDE SNOW & SESSIONS

Aaron D. Lebenta

cc: Polly Atkinson, Division of Enforcement, U.S. Securities and Exchange Commission (via email)
Sarah S. Mallett, Haynes and Boone, Counsel to Yancey (via email)