UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
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January 30, 2015

Via E-Mail and Overnight Mail

Honorable Jason S. Patil
Administrative Law Judge
100 F Street, N.E.
Mail Stop 2557
Washington, D.C. 20549

Re: *In the Matter of Delaney and Yancey*, Admin Proc. No. 3-15873

Dear Judge Patil:

The Division of Enforcement is filing this letter in compliance with your Order of January 27, 2015 and identifies the proposed findings of fact and conclusions of law of respondents that the Division disputes.[1] In doing so, the Division has kept in mind the Court's admonishment that the parties should not dispute facts on relevance grounds. In other words, some of the proposed facts or conclusions of law the Division does not dispute may not be accurate, but are unimportant and/or irrelevant.

I. DELANEY'S PROPOSED FINDINGS OF FACT

Many of Delaney's proposed findings of fact are wrong on their face – the evidence he cites in support does not support the finding at all. In other instances, Delaney's proposed findings address the ultimate issues in the case, issues the parties have spent their entire briefs discussing. The specific findings the Division disputes, and the reasons therefore, are as follows:

Prop. FOF 1. Respondent Tom Delaney is regarded as an honest man of exemplary character, and possessing high integrity by all Penson employees who testified and were asked to express an opinion about his character.

[1] The Division has cited to its Post-Hearing Brief ("Div. Post-Hearing Br.), Reply to Respondent Yancey's Post-Hearing Brief ("Div. Yancey Reply Br."), and Reply to Respondent Delaney's Post-Hearing Brief ("Div. Delaney Reply Br.") by page number, however it has cited to its Proposed Findings of Fact ("Div. Prop. FOF") and Proposed Conclusions of Law ("Div. Prop. COL") by the number of the finding or conclusion instead.

The Division disputes this proposed finding of fact. In fact Delaney is not an honest man of exemplary character and possessing high integrity. Delaney is neither honest nor credible and does what he believes to be expedient rather than what is right. *See* Div. Post-Hearing Br. at 7-9 ; Div. Prop. FOF at ¶¶ 62-65, 322; Div. Delaney Reply Br. at 1-4.

Prop. FOF 6. Delaney performed his job as CCO as well as he could based on the available resources he had.

The Division disputes this proposed finding of fact. Delaney did not perform his job as CCO as well as he could. Instead, Delaney aided and abetted violations of the federal securities laws, acted recklessly, and was negligent in his performance. *See* Div. Post-Hearing Br. at 11-27, 45-48; Stip. FOF ¶¶ 13, 21, 22, 28, 41, 49, 78; Div. Prop. FOF at ¶¶ 74-109, 111-163, 167, 170-176, 185, 307, 308, 325; Div. Delaney Reply Br. at 1, 4-7, 9, 14-20.

Prop. FOF 7. Based on Delaney's colleagues and supervisors' experience with him, Delaney never hid problems from management or regulators and routinely escalated issues up the chain of command or to regulators.

The Division disputes this proposed finding of fact. Delaney hid problems about Rule 204 from both Yancey and regulators. *See* Div. Post-Hearing Br. at 21-26, 43-48; Stip. FOF ¶¶ 13, 21, 22, 28, 78; Div. Prop. FOF at ¶¶ 105-106, 111 - 114, 117-121, 124, 126, 142-149, 151-176, 185, 307, 308, 325, 326; Div. Delaney Reply Br. at 17-20. He was also negligent in his performance. *See* Div. Post-Hearing Br. at 27.

Prop. FOF 11. When faced with the choice, Delaney did not compromise compliance in order to increase profits.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – the testimony does not indicate that he was ever "faced with the choice," but rather only indicates the witnesses' speculation. *See* Delaney proposed findings at ¶ 11:

a. **Tr. 1440:6-8** [Spiker]
6 Q Do you believe that he would choose
7 compliance over profits?
8 A Always.

b. **Tr. 1448:15-18** [Simpson]
15 Q Sure. As CCO, faced with a fact pattern,
16 would he choose to make money or would he choose to
17 comply with the law?
18 A Absolutely to comply with the law.

c. **Tr. 1766:1-5** [Hasty]
1 Q In your experience with Mr. Delaney and your
2 time together at Penson, did you see Mr. Delaney make

3 any -- take any actions motivated by financial
4 consideration?
5 A No.

In addition, whatever the motive, Delaney aided and abetted the federal securities laws. *See* Div. Delaney Reply Br. at 13-14.

Prop. FOF 13. Delaney has a reputation for escalating compliance issues. If he learned that Stock Loan was choosing to violate the rules, Delaney would not have accepted it and would have escalated the issue immediately.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – Hasty testifies only that if Delaney learned that Stock Loan was choosing to violated the rules she would *expect* that he would escalate it. *See* Delaney FOF ¶ 13. That is, in fact, not what happened. *See* Div. Post-Hearing Br. at 11-26, 43-48; Stip. FOF ¶¶ 13, 21, 22, 28, 41, 49, 78; Div. Prop. FOF at ¶¶ 74-109, 111-176, 185, 307, 308, 325, 326; Div. Delaney Reply Br. at 1, 4-7, 9, 14-20.

Prop. FOF 14. Brian Gover's memory is neither clear nor reliable.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – in fact the testimony indicates that Gover was able to "pretty accurately" date the meeting with Delaney. *See* Delaney proposed findings at ¶ 14.

Prop. FOF 16. Gover testified that he met with Johnson, Delaney and Hasty regarding Rule 204 sometime between November 2009 and July 2010.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – it does not include a date range. *See* Delaney proposed findings at ¶ 16. In fact, Gover testified that the meeting was between March 2010 and June 2010. Div. Prop. FOF at ¶ 116.

Prop. FOF 17. Hasty contradicted Gover's testimony: she did not attend a meeting with Gover at which it was discussed that Stock Loan was choosing not to comply with Rule 204's close out requirements.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding - Hasty did not deny the meeting occurred, she only testified that she did not recall it. *See* Delaney proposed findings at ¶ 17:

Tr. 1756:10-20 [Hasty]

10 Q Do you recall ever having a meeting with [Gover]
11 where it was discussed that Stock Loan was choosing not
12 to close out in accordance with Rule 204?
13 A No.
14 Q So you don't recall that meeting ever
15 happening?
16 A No.
17 Q Do you recall ever being in -- in a meeting
18 with him and Summer Poldrack related to Rule 204 at
19 all?
20 A No.

As discussed in the Division's Reply Brief, Hasty did not remember any meetings concerning Rule 204, even ones she admitted attending. Div. Delaney Reply Br. at 9. Div. Prop. FOF ¶ 327.

Prop. FOF 18. Johnson contradicted Gover's testimony: he did not attend a meeting with Gover to discuss the possibility of recalling loans on T+2 to close out 204 fails.

The Division disputes this proposed finding of fact. This proposed finding is incorrect because it mischaracterizes Gover's testimony. Gover did not testify that he had a meeting with Johnson to "discuss the possibility of recalling loans to T+2 to close out 204 fails." He testified that "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." Div. Delaney Reply Br. at 9.

Prop. FOF 19. Delaney contradicted Gover's testimony: he did not attend any meeting with Gover at which Stock Loan's intentional non-compliance with Rule 204 was discussed.

The Division disputes this proposed finding of fact. Delaney attended a meeting with Gover at which they discussed Stock Loan's compliance issues with Rule 204. *See* Div. Post-Hearing Br. at 16-17; Div. Prop. FOF ¶ 116; Div. Reply to Delaney Post-Hearing Br. at 9.

Prop. FOF 21. Gover denied that meeting where Kenny asked Gover about the failures in Alaniz's 3012 testing ever happened.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – Gover did not deny the meeting occurred, he only testified that he did not recall it, and specifically acknowledged that it could have occurred. *See* Delaney proposed findings at ¶ 21:

a. **Tr. 154:23 – 154:16** [Gover]
22 Q And so is that -- so if that's what you

23 thought, do you recall there being a meeting about this,
24 about this 3012 report?
25 A I don't recall a meeting of it. It's not to
1 say that there couldn't have been one. I don't recall a
2 meeting. I don't recall a meeting, though.
3 Q Do you -- so you don't recall a meeting where
4 Mr. Yancey was there and Mr. Delaney was there.
5 And who's John Kenny?
6 A John Kenny is the COO. I reported to John
7 Kenny.
8 Q So Mr. Kenny was there. You don't remember
9 talking about this 3012 report with -- with that cast of
10 characters? And more, but at least that?
11 A No, I don't.
12 Q And so you don't remember having an extensive
13 discussion with Mr. Kenny where he was asking you
14 about -- about these fails and what buy-ins was going to
15 do to correct the problems in this 3012 report?
16 A No, I don't.

Prop. FOF 22. Gover testified that if he had known close out failures were a Stock Loan problem he would have mentioned that in a meeting with his supervisor.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – in answer to that question, Gover answered, "I don't know. It's hard for me to speculate…". *See* Delaney proposed findings at ¶ 22:

a. **Tr. 156:13 – 157:1** [Gover]
12 Q But if someone was calling upon you to fix this
13 problem, you would have identified it as a Stock Loan
14 problem, right, assuming you knew about the Stock Loan
15 problem?
16 A Yeah, I don't -- I don't know. It's hard for
17 me to speculate what if on something that -- you know, a
18 conversation that may or may not have happened five years
19 ago.
20 Q Well, let's go here. You wouldn't sit back
21 while the person you reported to probed you at length
22 about this problem and not report that some of it was
23 Stock Loan if you knew some of it was Stock Loan?
24 A No.
25 Q Would you have just sat back silently?
1 A Of course not.

Prop. FOF 23. Gover never told Kenny or anyone else that failures to close out were attributable to Stock Loan.

The Division disputes this proposed finding of fact. Gover told Delaney. *See* Delaney Prop. FOF 16.

Prop. FOF 26. Although DeLaSierra believed Delaney knew about Stock Loan's practice, the only concrete information that he pointed to that would have made Delaney aware of the practice was that Penson's Stock Loan department still had counterparties.

The Division disputes this proposed finding of fact. DeLaSierra testified it was made clear to Delaney that there was a conflict between Rule 204 and Stock Loan's practices and that Stock Loan was unable to buy-in borrowing counterparties. *See* Div. Prop. FOF ¶ 84, 85, 91-93.

Prop. FOF 27. DeLaSierra's testified that he did not discuss the requirements for Rule 204 with Eric Alaniz.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – DeLaSierra testified only that he did not discuss the loan sale or long sale requirements of Rule 204. *See* Delaney proposed findings at ¶ 27:

a. **Tr. 264:21 – 265:7** [DeLaSierra]
20 Q So in 2009 during Mr. Alaniz's audit, you
21 didn't tell him no, our understanding is the rule allows
22 us to buy in at market close?
23 A I don't think that came up.
24 Q You don't think he had that conversation with
25 you about what was required of Rule 204?
1 A Correct.
2 Q Okay. Are you sure of that?
3 A On the loan sale piece, I never had a
4 discussion with Eric Alaniz about it.
5 Q You never had a discussion about when close-out
6 was required under Rule 204?
7 A On the long sale portion, no.

Prop. FOF 32. DeLaSierra's memory was better at the time of his first investigative testimony than it was during the final hearing.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – DeLaSierra only agreed with counsel who said, "the closer I am to an event, the better I remember it." He was not asked, nor did he say, that his memory was better at the time of his first investigative testimony than it was during the hearing. *See* Delaney proposed findings at ¶ 32:

a. **Tr. 250:11 – 251:5** [DeLaSierra]
10 Q Okay. Mr. De La Sierra, how many times have
11 you now testified about this topic?
12 A In court? I'm sorry. I don't understand.
13 Q In on-the-record testimony or investigative
14 testimony by --
15 A This is my third time.
16 Q Your third time. And the first time you
20
17 testified was fall of 2012?
18 A I don't believe so. I think it was in the
19 spring.
20 Q You think it was in the spring of what, 2012?
21 A I believe so, yes.
22 Q Okay. So at some point in 2012. And then you
23 testified again in 2013?
24 A Correct.
25 Q And -- and then you're testifying here today?
1 A Yes.
2 Q And tell me: Your memory, I assume, works sort
3 of like mine; that is, the closer I am to an event, the
4 better I remember it.
5 A Yes.

And in fact, Delaney claimed that his memory was faulty at his first testimony and that after review of documents his memory improved. Div. Delaney Reply Br. at 6, Div. Prop. FOF 323.

Prop. FOF 34. DeLaSierra's misread his own prior testimony into the record.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – DeLaSierra was clearly trying to answer Delaney's counsel's question about who attended a meeting. Any "misreading" was plainly inadvertent. *See* Delaney proposed findings at ¶ 34.

Prop. FOF 35. Johnson does not know whether Delaney was aware of Stock Loan's practice of not closing out long sales by market open for stocks out on loan as described in Exhibit 89.

The Division disputes this proposed finding of fact, which is taken from a snippet of Johnson's testimony. In fact, Johnson alerted Delaney to Stock Loan's wrongdoing. *See* Div. Delaney Reply Br. at 5-6; Div. Prop. FOF ¶¶ 84-85.

Prop. FOF 36. Delaney was not aware that Stock Loan had been deliberately violating Rule 204 prior to seeing the FINRA exam response in March, 2011.

The Division disputes this proposed finding of fact. Delaney was aware Stock Loan was not complying with Rule 204 sometime between October 2008 and March 2010. *See* Ex. 157, Div. Post-Hearing Br. at 11-26, 45-48; Stip. FOF 13, 21, 22, 28, 41, 49, 78; Div. Prop. FOF at ¶¶ 74-109, 111-163, 167, 170-176, 185, 307, 308, 325; Div. Delaney Reply Br. at 1, 4-7, 9, 14-20.

Prop. FOF 38. In preparation for testing in 2009 and 2010, Alaniz met with Stock Loan to learn about their Rule 204 process.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – Alaniz testified that he met with Stock Loan to make sure he understood the Rule. There is no evidence he asked Stock Loan about "their Rule 204 process." *See* Delaney proposed findings at ¶ 38:

a. **Tr. 749:1-20** [Alaniz]
1 to the meetings that you had. What was the purpose of
2 meeting with the Stock Loan department?
3 A The purpose of meeting with any department in
4 this search, under these circumstances with the Stock
5 Loan, was to ensure that I understood the rule
6 completely. Not completely as -- completely as to what I
7 was going to test.
8 Q All right. You've read the rule?
9 A I've read the rule.
10 Q So -- so you said that you met with him to make
11 sure you understood it. How did meeting with him help
12 you understand it?
13 A Well, Reg SHO -- Regulation SHO was new to me.
23
14 The rule was new at the time. So since they were the
15 business unit that dealt with this rule on a daily basis,
16 I wanted to make sure that I understood it as I read it.
17 As them being the individuals that would be applying this
18 rule, I wanted to make sure we were on the same page so
19 that I wasn't testing one thing when they thought I was
20 testing another.

Prop. FOF 40. Stock Loan misled Alaniz by not mentioning their non-compliant procedures with regard to Rule 204.

The Division disputes this proposed finding of fact. The proposed finding is an argumentative conclusion and Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – Alaniz did not testify that Stock Loan misled him. *See* Delaney proposed findings at ¶ 40.

a. **Tr. 745:15-23** [Alaniz]

15 Q What about, did your test focus primarily on
16 buy-ins -- on the buy-ins fu
17 A I didn't make -- yes, it dic
18 I didn't make any distinction between what I was going to
19 focus on. It was just buy-in. The focus was to ensure
20 that the rule was being adhered to.
21 Q Okay. And you constructed the test as best you
22 could to -- to attempt to test that, correct?
23 A Yes.

Prop. FOF 46. Alaniz included what he thought were key issues on the 3012 summary report. Delaney generally took Alaniz's suggestions on what to include.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – Alaniz testified only that he could make suggestions as to what to include. He did not testify that he "included what he thought were key issues" nor that "Delaney generally took Alaniz's suggestions on what to include." *See* Delaney proposed findings at ¶ 46.

a. **Tr. 858:20-25** [Alaniz]
20 Q So if you had thought it was an important issue
26
21 and should have been included, you had the ability to
22 tell him to include it?
23 A Yes.
24 Q Or suggest it anyway?
25 A Suggest it, yes.

In addition, Delaney determined what would be included as a significant compliance problem in the 3012 summary report. *See* Div. Delaney Reply Br. at 22; Div. Prop. FOF ¶¶159, 335.

Prop. FOF 52. At the time of the April 2010 OCIE response, Delaney was not aware of any practice by Stock Loan for not closing out long sales of loaned securities by market open on T+6.

The Division disputes this proposed finding of fact. Delaney was aware Stock Loan was not complying with Rule 204 by March 2010. *See* Ex. 157, Div. Post-Hearing Br. at 11-26, 45-48; Stip. FOF 13, 21, 22, 28, 41, 49, 78; Div. Prop. FOF at ¶¶ 74-109, 111-163, 167, 170-176, 185, 307, 308, 325; Div. Delaney Reply Br. at 1, 4-7, 9, 14-20.

Prop. FOF 53. In July 2010, Poldrack sent an email to Hasty, Reilly and Gover (Ex. 91) indicating that Stock Loan stated that "Stock Loan isn't to be bought in ..."

Prop. FOF 54. No one ever informed Alaniz of a policy or practice at Penson that Stock Loan wasn't to be bought in.

The Division disputes this proposed finding of fact. Exhibit 91, the exhibit referenced in Delaney's Proposed Finding of Fact 53 "indicating that ... Stock Loan isn't to be bought in," was an e-mail to and from Alaniz. *See* Ex. 91.

Prop. FOF 58. Every witness who testified on the topic (Gover, Alaniz, and Hasty) stood by the accuracy of the representations made in the OCIE response in November 2010.

The Division disputes this proposed finding of fact. Delaney admitted that the OCIE response was inaccurate. Div. Post-Hearing Br. at 26; Div. Prop. FOF ¶¶ 175-176; *see also* Div. Delaney Reply Br. at 20.

Prop. FOF 59. The November, 2010 OCIE Response (Exhibit 101) was not inconsistent with Alaniz's testing results.

The Division disputes this proposed finding of fact. Delaney admitted that the OCIE response was inconsistent with Alaniz' testing result. Div. Post-Hearing Br. at 26; Div. Prop. FOF ¶¶ 175-176; *see also* Div. Delaney Reply Br. at 20. Moreover, Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – Hasty testified only that some remediation had occurred. She was not asked whether, and did not testify that, the OCIE response was "not inconsistent with Alaniz' testing results." *See* Delaney proposed findings at ¶ 59.

Prop. FOF 60. Delaney relied on information from Penson personnel that remediation was underway and that reasonable processes were in place and, as a result, believed the OCIE response was accurate.

The Division disputes this proposed finding of fact. Delaney admitted that the OCIE response was inaccurate. Moreover, Delaney had received additional recent information indicating that Stock Loan was continuing to violate Rule 204. Div. Post-Hearing Br. at 25-26; Div. Prop. FOF ¶¶ 126, 169-176; *see also* Div. Delaney Reply Br. at 20.

Prop. FOF 61. Johnson had a supervisor, and Delaney was reasonable in believing Johnson was in compliance.

The Division disputes this proposed finding of fact to the extent Delaney intends it to prove that Johnson was in compliance with Rule 204. The cited testimony does not support such a finding – Pendergraft was asked, "Mr. Delaney wouldn't have had any reason to be concerned that Mike Johnson wasn't being supervised?" He was not asked, nor did he say, that Johnson was in compliance with Rule 204 or that Delaney was reasonable in believing him to be so. *See* Delaney proposed findings at ¶ 61. In addition, Delaney was not reasonable in believing that Johnson was in compliance with Rule 204. *See* Div. Post-Hearing Br. at 11-26, 45-48; Stip. FOF ¶¶ 13, 21, 22, 28, 41, 49, 78; Div. Prop. FOF at ¶¶ 74-109, 111-163, 167, 170-176, 185, 307, 308, 325; Div. Delaney Reply Br. at 1, 4-7, 9, 14-20, 27.

Prop. FOF 63. There was no ambiguity that Johnson was supervised by Pendergraft.

The Division disputes this proposed finding of fact. The evidence clearly demonstrates that Yancey was Johnson's supervisor, or, at least, that there was ambiguity about who supervised Johnson. Div. Post-Hearing Br. at 28-37; Stip FOF ¶¶ 2, 9, 37, 41, 56, 98, 111, 116-119; Div. Prop. FOF ¶¶ 23, 199, 205-214, 217-218, 221-235, 237-241, 247-269, 270-279, 282-286, 289, 293-303, 312, 329-332; *see also* Div. Yancy Reply Br. at 3-15.

Prop. FOF 64. The business units, such as Stock Loan, were considered subject matter experts, and compliance personnel relied on the expertise of the business units for an understanding of the compliance issues associated with each business unit.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – the cited testimony states only that business units were considered subject matter experts. It does not say that "compliance personnel relied on the expertise of the business units for an understanding of the compliance issues associated with each business unit." *See* Delaney proposed findings at ¶ 64.

Prop. FOF 65. At Penson, creating WSPs was the responsibility of the business units, as was reviewing those WSPs to be certain they accurately reflected the business practices of the business unit.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – the testimony makes clear that Compliance retained ultimate responsibility for the WSPs. Delaney proposed findings at ¶ 65. Moreover, Delaney was ultimately responsible for ensuring the accuracy of PFSI's WSPs. *See* Div. Prop. FOF ¶¶ 117, 142, 325; Div. Delaney Reply Br. at 19.

Prop. FOF 66. At Penson, the Stock Lending and Buy-Ins groups understood Rule 204 best.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – Alaniz testified only that *he would expect* Stock Loan and Buy-Ins to best understand Rule 204. Delaney proposed findings at ¶ 65. In fact, Holly Hasty testified that Delaney was the person responsible for implementation of Rule 204. *See* Div. Prop. FOF ¶ 27.

Prop. FOF 67. Penson's WSPs were adequate and typical of the industry.

The Division disputes this proposed finding of fact. 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. Delaney received notice from Alaniz of these deficiencies, but, nevertheless, approved the deficient WSPs. *See* Div. Prop. ¶¶ FOF 118-121, 326; Div. Delaney Reply Br. at 19.

Prop. FOF 68. Delaney never authorized any Penson employee not to comply with Rule 204 or 204T.

The Division disputes this proposed finding of fact. When informed by Stock Loan personnel that they could not and were not complying with the Rule, Delaney did not instruct them that they had to comply. *See* Div. Prop. FOF ¶ 93; *see also* Div. Post-Hearing Br. at 14.

Prop. FOF 69. Indeed, Delaney circulated an email regarding the adoption of Rule 204 to Penson personnel informing them of the requirements of the Rule (Exhibit 125).

The Division disputes this proposed finding of fact. The email (Exhibit 125) did not explain the requirements of the Rule or provide guidance on how Stock Loan should comply with the Rule. *See* Div. Post-Hearing Br. at 19Div. Prop. FOF ¶¶ 132-136.

Prop. FOF 72. Penson did not violate Rule 204 for a profit motive.

Prop. FOF 73. Compliance with Rule 204 is very complex and difficult and not many firms get it right.

The Division disputes this proposed finding of fact. Rule 204 clearly provides that clearing firms, such as PFSI, must close out CNS failures to deliver resulting from long sales no later than market open T+6. *See* Div. Post-Hearing Br. at 4; Div. Prop. Findings of Fact and Conclusions of Law ¶¶ 1. 33. Moreover, when PFSI determined, in order to comply with Rule 204, it should recall its loaned securities on T+2 rather than T+3, PFSI's system took only 1 week to program which resulted in complete compliance with Rule 204. *See* Div. Prop. ¶¶ FOF 60-61.

Prop. FOF 74. The Division's expert, Professor Harris, testified that footnote 55, an advisory note to Rule 204, is not at a part of Rule 204(a).

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding - Professor Harris did not testify that footnote 55 is not a "part of Rule 204." Professor Harris testified that participants are not required to recall loaned securities at T+2. *See* Delaney proposed findings at ¶ 74:

a. **Tr. 1114:19-24** [Harris]
19 Q Were you -- do you know Footnote 55?
20 A I've been exposed to it, yes.
21 Q True or false: It is a violation of Rule 204
22 if you do not recall a long sale loan security on T+2?
23 A The footnote does not require you -- the rule
24 does not require you to recall on T+2.
b. **Tr. 1115:9-11** [Harris]
9 A As I stated before, the rule does not require
10 that you recall on T+2. Accordingly, if you don't recall

11 on T+2, you haven't violated any rule.

Prop. FOF 75. If Penson had 99 percent compliance with the close-out requirements under Rule 204(a), it would be fair to assume that Penson had a reasonable system in place to ensure compliance.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – Ms. Poppalardo testified that "it's so dependent on the rule and what the rule is trying to accomplish." Moreover, In her testimony Ms. Poppalardo was asked only about a "supervisory system." The question did not address whether there was a system of procedures to ensure compliance. *See* Delaney proposed findings at ¶ 75. In addition, PFSI's Stock Loan department intentionally violated Rule 204 daily for three years, and Delaney knew or should have known about the non-compliance; such conduct does not reflect a reasonably compliant system. *See, e.g.*, Div. Post-Hearing Br. at 5-27.

Prop. FOF 77. Sendero was heavily relied upon by Stock Loan with regard to timing of recalls.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – No one testified that Sendero was "heavily relied upon" for any purpose. *See* Delaney proposed findings at ¶ 77.

a. **Tr. 234:23 – 235:4** [DeLaSierra]
23 What was your sense of
24 Sendero's accuracy, reliability?
25 A I felt it was very reliable.
1 Q So if Sendero was telling you there was a fail
2 due to an open Stock Loan, did you have confidence in
3 that?
4 A Yes, we did.

b. **Tr. 365:11-17** [Wetzig]
11 Q And in your experience, did you have experience
12 to work with Sendero?
13 A I did.
14 Q And in your experience, was it -- did it seem
15 to be an accurate system at telling you whose
16 responsibility, whether it was a short or a long?
17 A Yes. Sendero was a very accurate system.

c. **Tr. 372:21-24** [Wetzig]
21 When you talked about the recall on T+3, was that
22 something, again, that -- that Sendero did?
23 A Correct. On T+3, Sendero would tell us what we
24 needed to recall.

d. **Tr. 364:22 – 365:5** [Wetzig]
22 How would you know whether
23 an open obligation was due to a customer's short sale or
24 a -- a long sale, there -- that there was a stock loan
25 outstanding on?
1 A So our system would tell us what to recall and
2 look to see if there was a CNS obligation versus, say, a
3 loan.
4 Q And was there a name for that system?
5 A That system was called Sendero.

e. **Tr. 365:18-25** [Wetzig]
18 Q So on T+3, was there some process to look at
19 Sendero to figure out if there was obligations that Stock
20 Lending would have on an -- on an existing fail to
21 settle?
22 A Yes. So Sendero, we essentially had a recall
23 screen, and we -- it was, I guess, query-based, and it
24 would tell us what we need to recall versus our
25 obligations.

In addition, the Division disputes this proposed finding of fact to the extent it suggests Stock Loan personnel did not know that they were in violation of Rule 204 because they relied on the Sendero system. In fact, Stock Loan personnel knew they were in violation of Rule 204. *See, e.g.*, Div. Post-Hearing Br. at 5-6, 13-14; Div. Prop. FOF ¶¶ 33-58.

Prop. FOF 78. Sendero was only 95 percent accurate.

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – Mr. Wetzig did not testify that Sendero was "only 95 percent accurate." *See* Delaney proposed findings at ¶ 78. In fact, Mr. Wetzig was discussing the reprogramed Sendero which had been designed to rectify PFSI's Rule 204 issues, and which Mr. Wetzig testified did solve PFSI's Rule 204 issues. *See* Div. Prop. FOF ¶¶ 60-61.

Prop. FOF 86. Wetzig then gave contradictory testimony that he didn't know how to comply with Rule 204.

The Division disputes this proposed finding of fact. The proposed finding is an argumentative conclusion and Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – Wetzig did not testify that there was a contradiction. Wetzig's testimony was consistent. He testified that, although he knew the requirements of the Rule, he did not know how to meet those requirements or comply with the Rule. *See* Delaney proposed findings at ¶ 85-86 (Wetzig testimony). Stock Loan relied on the Compliance department to provide guidance on compliance with Rule 204. *See* Div. Prop. FOF ¶¶ 87-90.

Prop. FOF 91. **Poppalardo testified that compliance need not be perfect. In fact, there is an acceptable margin of error, based on supervision and whether the underlying activity was reasonable.**

The Division disputes this proposed finding of fact. Delaney misstates and mischaracterizes the cited testimony, which does not support the proposed finding – in fact, Popplardo testified that "you are expected to comply with the rules 100 percent." *See* Delaney proposed findings at ¶ 91.

Prop. FOF 94. **The Division did not introduce any documentary evidence indicating that Delaney knew prior to February 2011 that Stock Loan had a practice of violating Rule 204 by failing to close out long sales of loaned securities by T+6 at market open.**

The Division disputes this proposed finding of fact. The Division introduced Delaney's Wells submission, in which he admits knowing of the violations before February 2011. *See* Ex. 157; Div. Post-Hearing Br. at 7-9 ; Div. Prop. FOF at ¶¶ 62-65, 322; Div. Delaney Reply Br. at 1-4. The Division also introduced documentary evidence that confirmed conversations Delaney had with Stock Loan personnel and Gover and showed that there were significant Rule 204 compliance problems in the Stock Loan department. *See* Div. Post-Hearing Br. at 17-18; Div. Prop. FOF ¶¶ 117-126.

Prop. FOF 99. The Rule 3012 Testing report signed by Charles Yancey attached exception and Remediation Reports.

The Division disputes this proposed finding of fact. The cited exhibit, Exhibit 135, does not attach any such reports. Nor does, Exhibit 186, which contains the report transmitted to FINRA.

Prop. FOF 100. As part of the remediation efforts arising from Alaniz's 3012 testing of Rule 204, Stock Loan instituted a manual work-around process until the system limitations in Sendero could be updated.

The Division disputes this proposed finding of fact to the extent Delaney intends to imply that the "manual work-around process" was intended to, or did, result in compliance with Rule 204(a). The cited exhibit, Exhibit 345, makes clear that the manual process was aimed at Rule 204(b), the penalty box requirement. Exhibit 345 at p. 7.

We will put coding in place in Sendero (Stock Loan's Front-End Trading and Locate Application) so that "penalty box" securities can be uploaded daily as needed. Placing a security in the "penalty box" in Sendero will prohibit the lending of shares (whether to an introducing broker-dealer for short selling purposes or to a registered clearing firm) for three business days. The Buy-In Department will utilize this new functionality by assessing daily which 204 securities were not closed out by market open and uploading these securities into Sendero. The Stock Loan Department borrows for 204 securities daily prior to market open and will monitor those borrows to ensure proper settlement of CNS fails. If the arranged borrows do not make and, consequently, the CNS fail is not delivered, Stock Loan will upload those failed borrows into Sendero. Uploading a 204 security that is already in the "penalty box" from a previous failure to closeout or borrow will overwrite the previous time stamp, thereby extending the penalty-box period three day from the most recent upload.

While the development work is being completed, manual measures will be made to ensure Penson does not violate the "penalty box" restriction of 204. These measures will include the Buy-In Department notifying the Stock Loan Department daily of any required closeouts not executed by the market open on T+4, Stock Loan tracking failed borrows daily, and Stock Loan maintaining a daily list of all items in the penalty box. The items on this list will be manually identified in Sendero as non-lendable for three days from their most recent inclusion on the daily penalty box list.

II. DELANEY'S PROPOSED CONCLUSIONS OF LAW

As with his proposed conclusions of law, many of Delaney's proposed conclusions of law are facially wrong – he misstates or mischaracterizes the cited authority or the cited authority is inapplicable. The specific conclusions of law which the Division disputes, and the reasons therefore, are as follows:

Prop. COL 2. **The elements of aiding and abetting are: (1) a primary or independent securities law violation committed by another party; (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. a. *Graham v. SEC,* 222 F.3d 994, 1000 (D.C. Cir. 2000); *Woods v. Barnett Bank of Ft. Lauderdale,* 765 F.2d 1004, 1009 (11th Cir. 1985) ; *Investors Research Corp. v. SEC,* 628 F.2d 168, 178 (D.C. Cir. 1980); *Woodward v. Metro Bank of Dallas,* 522 F.2d 84, 94-97 (5th Cir. 1975); *Russo Sec. Inc.,* 53 S.E.C. 271, 278 & n.16 (1997).**

The Division disputes this proposed conclusion of law. In Commission cases the elements of 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) ("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."). Div. Post-Hearing Br. at 10; Div. Prop. COL ¶ 11; Div. Delaney Reply Br. at 12.

Prop. COL 5. **To establish the necessary mental state for aiding and abetting, the Division must show a personal incentive to the alleged aider and abettor. a. *Barker v. Henderson, Franklin Starnes and Holt,* 797 F.3d 490, 497 (7th Cir. 1986) (observing, in analyzing a claim for aiding and abetting, "the court should ask whether the fraud (or cover-up) was in the interest of the defendants. *Did they gain* by bilking the buyers of the securities?") *In re Axis Capital Holdings Ltd. Securities Litig.,* 456 F.Supp.2d 576, 594 (S.D.N.Y.2006) (generalized allegations that can be attributed to any business endeavor, such as the desire to make a profit and maintain business relationships, are insufficient to set forth a motive to aid and abet fraud); In re Bear Stearns Companies, Inc. Sec., Derivative, & ERISA Litig., 763 F. Supp. 2d 423, 499 (S.D.N.Y. 2011) (observing, "[m]otives that are generally possessed by most corporate directors and officers do not suffice; instead, plaintiffs must assert a concrete and personal benefit to the individual defendants resulting from the fraud." (quotation and citations omitted)); *In re PXRE Grp., Ltd., Sec. Litig.,* 600 F.Supp.2d 510, 530–33 (S.D.N.Y.2009) (indicating, that to be indicative of scienter, the allegations must move the desire to raise capital beyond the realm of the generic by illustrating some concrete and personal benefits defendants sought to attain [sic].**

The Division disputes this proposed conclusion of law. First, there is no *Barker v. Henderson, Franklin Starnes and Holt,* 797 F.3d 490, 497 (7th Cir. 1986). Second, Delaney's citations to cases interpreting the Private Securities Litigation Reform Act are not relevant to this Commission case. Finally, motive is not an element of an aiding and abetting claim. *See* Div. Delaney Reply Br. at 13-14.

Prop. COL 6. **"[A]wareness or knowledge by the aider and abettor that his or her role was part of any overall activity that was improper." a. *Graham v. SEC,* 222 F.3d 994, 1000 (D.C. Cir. 2000) [sic].**

The Division disputes this proposed conclusion of law as unintelligible.

Prop. COL 7. **For the purposes of aiding and abetting liability, "[a]wareness of wrongdoing means knowledge of wrongdoing." *Howard v. SEC,* 376 F.3d 1136, 1142 (D.C. Cir. 2004) (observing, "aiding and abetting liability cannot rest on the proposition that the person 'should have known' he was assisting violations of the securities laws.").**

The Division disputes this proposed conclusion of law to the extent is intended to mean that recklessness is insufficient to prove aiding and abetting liability. "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." *Eric J. Brown, et al.*, Rel. No. 34-66469, 2012 WL 625874 (Feb. 27, 2012) Div. Post-Hearing Br. at 10; Div. Prop. COL ¶ 11; Div. Delaney Reply Br. at 12, 14-15.

Prop. COL 8. Satisfaction of the knowledge requirement for aiding and abetting depends on the theory of primary liability. a. *SEC v. DiBella,* 587 F.3d 553, 566 (2d Cir. 2009) (observing, "[s]atisfaction of the [knowledge] requirement will ... depend on the theory of primary liability.").

The Division disputes this proposed conclusion of law to the extent is intended to mean that recklessness is insufficient to prove aiding and abetting liability. "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." *Eric J. Brown, et al.*, Rel. No. 34-66469, 2012 WL 625874 (Feb. 27, 2012) Div. Post-Hearing Br. at 10; Div. Prop. COL ¶ 11; Div. Delaney Reply Br. at 12, 14-15.

Prop. COL 10. The "awareness of wrong-doing requirement' in aiding and abetting disciplinary cases was designed to insure that innocent, incidental participants in transactions later found to be illegal are not subjected to harsh administrative penalties. a. *SEC v. DiBella,* 587 F.3d 553, 566 (2d Cir. 2009).

The Division disputes this proposed conclusion of law to the extent is intended to mean that recklessness is insufficient to prove aiding and abetting liability. "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." *Eric J. Brown, et al.*, Rel. No. 34-66469, 2012 WL 625874 (Feb. 27, 2012) Div. Post-Hearing Br. at 10; Div. Prop. COL ¶ 11; Div. Delaney Reply Br. at 12, 14-15.

Prop. COL 11. "Extreme recklessness" is neither ordinary negligence nor 'merely a heightened form of ordinary negligence,'" and cannot be "derived from inexcusable neglect." *Howard v. SEC*, 376 F.3d 1136, 1153 (D.C. Cir. 2004).

The Division disputes this proposed conclusion of law to the extent is intended to mean that recklessness is insufficient to prove aiding and abetting liability. "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." *Eric J. Brown, et al.*, Rel. No. 34-66469, 2012 WL 625874 (Feb. 27, 2012) Div. Post-Hearing Br. at 10; Div. Prop. COL ¶ 11; Div. Delaney Reply Br. at 12, 14-15.

Prop. COL 13. A finding of recklessness requires an abundance of red flags and suggestions of irregularities that demanded inquiry. a. *Howard v. SEC,* 376 F.3d 1136, 1149 (D.C. Cir. 2004) (refusing to find respondent liable for aiding and abetting and distinguishing other authority by observing that a finding of recklessness requires an "abundance of red flags and suggestions of irregularities that demanded inquiry.").

The Division disputes this proposed conclusion of law. Delaney misstates the cited authority. *Howard v. SEC*, 376 F.3d 1136, 1149 (D.C. Cir. 2004) says:

> In *Graham,* what made the defendant's actions reckless, and not merely negligent, was an "abundance" of "red flags and suggestions of irregularities [that] demand[ed] inquiry as well as adequate follow-up and review." 222 F.3d at 1006 (internal quotations and citation omitted); *see also Wonsover,* 205 F.3d at 411 (noting existence of "several 'red flags' "). On this record, the SEC is unable to identify any such unusual circumstances with regard to the non-bona fide purchases - the focus of the SEC's attention in this case. All the SEC can say is that Howard should have known what the legal requirements of Rule 10b-9 were and that he violated the disclosure laws by failing to reveal what he should have found out, but did not. At best this amounts to a finding of negligence; at worst it is liability without fault. Given the record in this case, there is no substantial evidence that Howard had the requisite scienter to aid and abet the violations, caused by JCI's counting of non-bona fide purchases towards the minimum of the part-or-none offering, of § 17(a) of the Securities Act, § 10(b) of the Exchange Act, and Rules 10b-5 and 10b-9 thereunder.

Howard does not make the finding claimed by Delaney.

III. YANCEY'S PROPOSED FINDINGS OF FACT

Like Delaney, many of Yancey's proposed findings of fact go to core issues in this case that the Division plainly disputes in its post-hearing pleadings. The specific findings of fact the Division disputes, and the reasons therefore, are as follows:

Prop. FOF 1. Reg SHO Rule 204 is a complex, technical, and operational rule.

The Division disputes this proposed finding of fact. Rule 204 clearly provides that clearing firms, such as PFSI, must close out CNS failures to deliver resulting from long sales no later than market open T+6. *See* Div. Post-Hearing Br. at 4; Div. Prop. COL ¶ 1; Div. Prop. FOF ¶ 33. Moreover, when PFSI determined, in order to comply with Rule 204, it should recall its loaned securities on T+2 rather than T+3, PFSI's system took only 1 week to program which resulted in complete compliance with Rule 204. *See* Div. Prop. ¶¶ FOF 60-61. Finally, the proposed finding of fact appears to suggest that Rule

204 is an unimportant rule, when compliance with all of the securities laws is extremely important. *See* Div. Prop. FOF ¶¶ 3-5, 79.

Prop. FOF 4. Sendero was updated around 2010.

The Division disputes this proposed finding of fact. Witness testimony from Rudy DeLaSierra indicated that Sendero was not reprogrammed to issue recalls on T+2 until the fall of 2011. *See* Div. Prop. FOF ¶¶ 59-61.

Prop. FOF 5. The June 2010 follow-up Rule 204 testing showed significant improvement. Alaniz also conducted a spot check with Summer Poldrack, and the results indicated 100% compliance.

The Division disputes this proposed finding of fact. While the June 2010 follow-up test did show improvement over the 99% failure rate revealed in the December 2009 audit, the test still showed significant failures. *See* Div. Post-Hearing Br. at 26; Div. Prop. FOF ¶¶ 174-176. Further, the June 2010 follow-up test tested a smaller sample than the original test, and only tested short sales rather than short and long sales, which is problematic. *See* Div. Prop. FOF ¶¶ 140-141. The Division does not dispute that Alaniz's later spot-check indicated full compliance.

Prop. FOF 6. Bill Yancey delegated supervision of Michael Johnson to Phil Pendergraft in approximately August 2008.

The Division disputes this proposed finding of fact. Yancey did not delegate supervision of Johnson to Pendergraft. Pendergraft disputed Yancey's account, and the supervisory matrix continued to designate Yancey as Johnson's supervisor throughout the relevant time period. *See, e.g.*, Div. Post-Hearing Br. at 29-37; Div. Prop. FOF ¶¶ 221-303; Div. Yancey Reply Br. at 3-15.

Prop. FOF 7. Employees at Penson relied on Penson's organizational charts, not the Registered Representative Supervisory Matrix, to determine supervisors and supervisory relationships.

The Division disputes this proposed finding of fact. PFSI's Written Supervisory Procedures ("WSPs") directed individuals to the supervisory matrix, rather than the organizational charts, for the designation of supervisors. *See* Div. Post-Hearing Br. at 29; Div. Prop. FOF ¶¶ 258-259. Further, the supervisory matrix, which was incorporated into PFSI's WSPs, was a significant, legally-relevant document. *See, e.g.*, Div. Post-Hearing Br. at 29-32; Div. Prop. FOF ¶¶ 256-303; Div. Yancey Reply Br. at 3-7.

Prop. FOF 8. After Tom Delaney became aware of the Rule 204 issues related to the Stock Loan Department in early 2011, he escalated the issues to outside counsel.

The Division disputes this proposed finding of fact. Delaney became aware of Rule 204 issues related to the Stock Loan department as early as October 2008, and no later than March 2010. *See, e.g.*, Div. Post-Hearing Br. at 11-21; Div. Prop. FOF ¶¶ 68-141;

Div. Delaney Reply Br. at 2-12. The Division does not dispute that Delaney escalated certain Rule 204 issues to outside counsel in early 2011.

Prop. FOF 9. During the period 2008-2011 and for the period that Mike Johnson reported to Phil Pendergraft, Phil Pendergraft supervised Mike Johnson with respect to the following activities:

The Division generally disputes the characterization that Pendergraft "supervised" Johnson with respect to the below enumerated activities. Pendergraft explained that, while he or another PWI executive "directed" Johnson with respect to his global responsibilities, Pendergraft did not "supervise" Johnson, which Pendergraft took to mean as having regulatory or compliance oversight. *See* Div. Post-Hearing Br. at 34; Div. Prop. FOF ¶ 226. In addition, Pendergraft was heavily involved in PFSI issues, including compensation and customer relationship issues, regardless of whether he formally supervised PFSI employees. *See* Div. Prop. FOF ¶ 242-245. And, Pendergraft's interaction with PFSI's Stock Loan department did not materially change after Johnson became a PWI employee. *See* Div. Prop. FOF ¶ 235.

Furthermore, Yancey misstates and mischaracterizes the cited testimony, which does not support his proposed finding - Pendergraft did not testify that he "supervised" Johnson with respect to the below enumerated activities. (*See, e.g.*, Tr. 1529:6-10 ("Did you, between 2008 and 2011, with respect to Mr. Johnson's PWI global responsibilities, including his PFSI responsibilities, evaluate and review his performance? A. Yes, sir.").

Finally, the Division disputes that the below enumerated activities prove that Yancey fully delegated supervision for Johnson to Pendergraft, or that Pendergraft was Johnson's exclusive supervisor. *See* Div. Post-Hearing Br. at 38-39; Div. Yancey Reply Br. at 7-10, 14-15.

A. Evaluated and review performance of Mike Johnson;

The Division does not dispute that, for the periods of time when Johnson reported to Pendergraft between 2008 and 2011, Pendergraft evaluated and reviewed his performance.

B. Disciplined Mike Johnson;

The Division disputes that Pendergraft in fact disciplined Johnson. *See* Tr. 1529:11-17 ("Did you, between '08 and '11, so it will be the same preface, with respect to his PWI global responsibilities, which includes his responsibility over the Stock Loan Department of PFSI, discipline Mr. Johnson where appropriate? A. I would have, and may have done so. I don't recall specifically doing so.").

C. Determined, with input from others, Mike Johnson's base compensation and bonus;

The Division does not dispute that, for the periods of time when Johnson reported to Pendergraft between 2008 and 2011, Pendergraft participated in determining, with input from others, Johnson's base compensation and bonus.

D. Approved, with input from others, Mike Johnson's budget for the compensation of all PWI subsidiary stock lending groups;

The Division does not dispute that, for the periods of time when Johnson reported to Pendergraft between 2008 and 2011, Pendergraft approved, with input from others, Mike Johnson's budget for the compensation of all PWI subsidiary stock lending groups.

E. Received input on issues with respect to staffing regarding Mr. Brian Hall and Mr. Rudy DeLaSierra;

The Division does not dispute that for the periods of time when Johnson reported to Pendergraft between 2008 and 2011, Pendergraft received input on issues with respect to staffing regarding Mr. Brian Hall and Mr. Rudy DeLaSierra.

F. Maintained authority to overrule or override any decisions of Mike Johnson;

The Division disputes this proposed finding. The cited exhibits demonstrate only that Pendergraft had the authority to overrule *certain* decisions of Johnson, not *any* decision.

G. Had authority to advise regarding customer relations issues;

The Division does not dispute that for the periods of time when Johnson reported to Pendergraft between 2008 and 2011, Pendergraft had authority to advise regarding customer relations issues,

H. Instructed Mike Johnson regarding PFSI firm financing and lending balances;

The Division does not dispute that for the periods of time when Johnson reported to Pendergraft between 2008 and 2011, Pendergraft instructed Mike Johnson regarding PFSI firm financing and lending balances.

I. Instructed Mike Johnson to report on revenue and expenses of PFSI stock loan;

The Division does not dispute that for the periods of time when Johnson reported to Pendergraft between 2008 and 2011, Pendergraft instructed Mike Johnson to report on revenue and expenses of *all of the PWI subsidiary stock loan groups, including* PFSI stock loan. (Tr. 1532:20-24 ("Again, with the same preface, would you have instructed Mr. Johnson to report to you on the revenue and expenses of all of the PWI subsidiary Stock Loan groups, including PFSI? A. Yes.").

J. Approved business development and client relation plans and budgets of Mike Johnson;

The Division does not dispute that for the periods of time when Johnson reported to Pendergraft between 2008 and 2011, Pendergraft approved business development and client relation plans and budgets of Mike Johnson. However, as Pendergraft made clear, others would have also provided input into these issues with respect to PFSI Stock Loan. (Tr. 1532:25-1533:7 ("Same preface, would you have approved -- been the person to approve Mr. Johnson's business development and client relations plans and budget? A. Yes. Q. And that would include with respect to his supervision of the PFSI Stock Loan? A. Yes, although I -- there certainly would have been other people providing input into those plans.").

K. Approved Mr. Johnson's travel budget and question his expenses;

The Division does not dispute that for the periods of time when Johnson reported to Pendergraft between 2008 and 2011, Pendergraft approved Mr. Johnson's travel budget and question his expenses.

L. Received information regarding Mike Johnson's need for time off and vacation schedule.

The Division does not dispute that for the periods of time when Johnson reported to Pendergraft between 2008 and 2011, Pendergraft received information regarding Mike Johnson's need for time off and vacation schedule.

Prop. FOF 10. Phil Pendergraft approved Mr. Johnson's activities related to regulatory and compliance issues, including Regulation SHO.

The Division disputes this proposed finding of fact. Pendergraft did not supervise Johnson with respect to regulatory and compliance issues. *See* Div. Post-Hearing Br. 34; Div. Prop. FOF ¶¶ 226-227. Further, Pendergraft interacted with Johnson with respect to Regulation SHO issues in 2005, which was during the time period that Johnson was Vice President for PFSI Stock Loan and did not report to Pendergraft. *See* Div. Yancey Reply Br. at 15-16; Div. Prop. FOF ¶ 236.

Prop. FOF 11. Bill Yancey routinely checked in with Phil Pendergraft regarding the issues described in items A-L in Proposed Finding of Fact #9 and acted reasonably in ensuring that the stock lending group and Mr. Johnson were properly conducting business in accordance with the securities laws.

The Division does not dispute that Yancey routinely checked in with Pendergraft regarding the issues described in items A-L in Proposed Finding of Fact #9.

The Division does dispute that Yancey acted reasonably in ensuring that the stock lending group and Mr. Johnson were properly conducting business in accordance with the securities laws. In fact, no one supervised Johnson or PFSI Stock Loan with respect to regulatory or compliance issues. *See* Div. Post-Hearing Br. 37-38; Div. Prop. FOF ¶¶ 304-315; Div. Yancey Reply Br. at 17-18.

Prop. FOF 12. Mr. Pendergraft had the authority to promote Mr. Johnson and other Stock Loan Personnel.

The Division disputes this proposed finding of fact to the extent that Yancey intends it to show that having the authority to promote proves that Yancey fully delegated supervision for Johnson to Pendergraft, or that Pendergraft was Johnson's exclusive supervisor. *See* Div. Post-Hearing Br. at 38-39; Div. Yancey Reply Br. at 7-10, 14-15.

The Division further disputes this proposed finding of fact to the extent it is supposed to mean that Pendergraft had the authority to promote Johnson and Stock Loan personnel in connection with their roles at PFSI. PFSI Stock Loan reported to Yancey, not Pendergraft. *See* Div. Post-Hearing Br. 35, 37; Div. Prop. FOF ¶¶ 199, ¶ 231c. All of the evidence cited in support of this proposed finding deal with promotion opportunities related to PWI global, rather than PFSI. *See* Ex. 526 (Johnson asking for opportunity with Penson London), 549 (Johnson asking for opportunity with international execution support), 664 (Johnson asking for compensation increase for Brian Hall, who was a PWI employee),[2] 678 (Johnson asking for title and compensation increase for Matt Battaini and Brian Hall, who are PWI employees),[3] 711 (Johnson asking for title change for Matt Battaini, who was PWI employee). Thus, at best the cited evidence shows that Pendergraft had authority to promote within the PWI structure.

Prop. FOF 13. Mr. Pendergraft had the authority to hire and fire stock loan personnel.

The Division disputes this proposed finding of fact to the extent that Yancey intends it to show that having the authority to hire or fire proves that Yancey fully delegated supervision for Johnson to Pendergraft, or that Pendergraft was Johnson's exclusive supervisor. *See* Div. Post-Hearing Br. at 38-39; Div. Yancey Reply Br. at 7-10, 14-15.

The Division further disputes this proposed finding of fact to the extent it is supposed to mean that Pendergraft had the authority to hire and fire PSFI Stock Loan personnel. PFSI Stock Loan reported to Yancey, not Pendergraft. *See* Div. Post-Hearing Br. 35, 37; Div. Prop. FOF ¶¶ 199, 231c. Indeed, all of the evidence cited in support of this proposed finding deal with hiring personnel within the PWI global Stock Lending structure. *See* Ex. 666 (discussing resumes for a hire in Canada), 824 (discussing "how the Global Team works and where I need help").

Prop. FOF 14. Phil Pendergraft supervised Mike Johnson.

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[2] *See, e.g.*, Ex. 310 (Hall was PWI employee).
[3] *See, e.g.*, Ex. 310 (Battaini was PWI employee).

The Division disputes this proposed finding of fact. Yancey was Johnson's designated supervisor. Moreover, Pendergraft did not supervise Johnson with respect to regulatory and compliance issues, which remained the responsibility of Yancey. *See, e.g.*, Div. Post-Hearing Br. at 29-37; Div. Prop. FOF ¶¶ 221-303; Div. Yancey Reply Br. at 3-15.

Prop. FOF 15. Penson's Stock Loan Department and the Buy-Ins Department were separate departments, and a problem in one department did not suggest that there was an issue in the other department.

The Division disputes this proposed finding of fact. Delaney's omission of the December 2009 Rule 204 audit from the March 2010 3012 Summary Report was a red flag that Delaney was not being forthcoming with regulators about PFSI's Rule 204 compliance problems generally. *See, e.g.*, Div. Post-Hearing Br. at 39-42.

Prop. FOF 16. The registered representative supervisory matrices that reflected Bill Yancey as Michael Johnson's supervisor were wrong.

The Division disputes this proposed finding of fact. The supervisory matrices were correct. Yancey was PFSI's CEO and did not delegate supervision over Johnson, and therefore remained Johnson's supervisor. *See, e.g.*, Div. Post-Hearing Br. at 32-37; Div. Prop. FOF ¶¶ 221-255; Div. Yancey Reply Br. at 7-15. Moreover, the supervisory matrices were reliable. They were incorporated into PFSI's WSPs, were regularly reviewed and updated, and repeatedly sent to Yancey to review. *See* Div. Post-Hearing Br. at 29-32; Div. Prop. FOF ¶¶ 256-303; Div. Yancey Reply Br. at 5-7. Finally, the supervisory matrices have independent legal significance: it was PFSI's NASD Rule 3010(a)(5) designation, which means it "assign[ed] ... each registered person to an appropriately registered representative(s) and/or principal(s) who *shall be responsible for supervising* that person's activities." *See* Div. Post-Hearing Br. at 29; Div. Yancey Reply Br. at 4-5.

Prop. FOF 18. Employees at Penson understood Michael Johnson reported to and was supervised by Phil Pendergraft.

The Division disputes this proposed finding of fact to the extent it is intended to demonstrate that Johnson was, in fact, supervised by Pendergraft. PFSI's WSPs directed individuals to the supervisory matrix, rather than the organizational charts, for the designation of supervisors. *See* Div. Post-Hearing Br. at 29; Div. Prop. FOF ¶¶ 258-259. Further, Pendergraft did not understand that he was responsible for supervising Johnson as to regulatory and compliance issues. *See* Div. Post-Hearing Br. 34-36; Div. Prop. FOF ¶¶ 226-227, 231-234; Div. Yancey Reply Br. at 10-11. Finally, the testimony by various PFSI employee was not as clear or as probative as Yancey claims. *See* Div. Yancey Reply Br. at 11-13.

Prop. FOF 19. Tom Delaney, Bill Yancey, and Holly Hasty believed the November 2010 OCIE response, which stated: "Penson believes that the reasonable processes employed to close out positions that were

allegedly in violation of rule 204T were effective and performed as designed" was accurate.

The Division disputes this proposed finding of fact. Delaney has admitted that the language in the OCIE letter was inconsistent with the Rule 204 testing Alaniz conducted in December 2009 and June 2010. Div. Prop. FOF ¶ 175. Hasty has also testified that it was not possible to reconcile the statement in the OCIE letter with Alaniz's Rule 204 testing. Div. Prop. FOF ¶ 176. And the statement was not accurate, as it concealed Stock Loan's Rule 204 violations. *See* Div. Post-Hearing Br. at 25-26; Div. Delaney Reply Br. at 20.

Prop. FOF 21. Phil Pendergraft accepted supervision of Michael Johnson unconditionally.

The Division disputes this proposed finding of fact. Pendergraft did not accept delegation of supervision over Johnson for purposes of regulatory and compliance issues. *See, e.g.*, Div. Post-Hearing Br. at 32-37; Div. Prop. FOF ¶¶ 226-234; Div. Yancey Reply Br. at 10-11.

Prop. FOF 22. Employees at Penson observed Phil Pendergraft supervising and giving direction to Michael Johnson, including on issues related to PFSI stock lending.

The Division disputes this proposed finding of fact. No one, including Pendergraft, supervised Johnson or PFSI Stock Loan with respect to regulatory of compliance issues. *See* Div. Post-Hearing Br. at 37-38; Div. Prop. FOF ¶¶ 309, 312-314. Rudy DeLaSierra, PFSI Stock Loan vice president, specifically confirmed he did not observe Pendergraft interact with Johnson on regulatory or compliance issues. *See* Div. Post-Hearing Br. at 35; Div. Prop. FOF ¶ 312; Div. Yancey Reply Br. at 18.

Prop. FOF 23. Bill Yancey conducted weekly group and one-on-one meetings with his direct reports.

The Division disputes this finding to the extent it is intended to demonstrate that because Yancey did not meet with Johnson, Yancey was not Johnson's supervisor. The Division does not dispute that Yancey conducted weekly group and one-on-one meetings with certain other of his direct reports, but disputes this proposed finding of fact because Yancey did not conduct such meetings with Johnson, who he was responsible for supervising. *See* Div. Post-Hearing Br. at 37-38; Div. Prop. FOF ¶¶ 310-314; *see also id.* ¶¶ 253-255 (Johnson listed as Yancey's direct report in 2011 CEO certification).

Prop. FOF 25. PFSI's Compliance department did not believe that the December 2009 Audit warranted explicit reference in the CEO Certification Summary Report.

The Division disputes this proposed finding of fact. Testimony from the compliance department, and specifically Delaney and Alaniz, underscores that the December 2009 audit results were a key compliance issue. *See* Div. Yancey Reply Br. at 22-23.

Prop. FOF 26. Files containing all 3012 testing results, including the December 2009 Audit results, were made available to regulators for their review.

The Division disputes this proposed finding of fact. The December 2009 audit results were omitted from the remediation tracking logs requested by and sent to FINRA. *See* Div. Yancey Reply Br. at 23; Div. Prop. FOF ¶ 166.

Prop. FOF 27. The information in the Registered Representative Supervisory Matrix did not reflect the actual or day-to-day supervisory responsibilities.

The Division disputes this proposed finding of fact. The supervisory matrix was PFSI's NASD Rule 3010(a)(5) designation, which means it "assign[ed] ... each registered person to an appropriately registered representative(s) and/or principal(s) who *shall be responsible for supervising* that person's activities." *See* Div. Post-Hearing Br. at 29; Div. Yancey Reply Br. at 4-5.

Prop FOF 28. Michael Johnson had one supervisor; he did not have a dual-reporting supervisory structure.

The Division disputes this proposed finding of fact. Pendergraft explained that, while he or another PWI executive "directed" Johnson with respect to his global responsibilities, Pendergraft did not "supervise" Johnson, which Pendergraft took to mean as having regulatory or compliance oversight – that supervisory responsibility remained with someone at PFSI. *See* Div. Post-Hearing Br. at 34; Div. Prop. FOF ¶ 226; Div. Yancey Reply Br. at 10-11.

Prop. FOF 29. Supervision must include regulatory compliance.

The Division disputes this proposed finding of fact. Firms have significant flexibility in how they choose to structure supervision, and at PFSI, operational and compliance supervision could be divided. *See* Div. Yancey Reply Br. at 16-17; Div. Prop. FOF ¶¶ 228-229.

Prop. FOF 30. Employees at Penson believed that Bill Yancey was an accessible and engaged supervisor.

The Division disputes this proposed finding of fact. Johnson did not believe Yancey was an accessible and engaged supervisor; to the contrary, Yancey left Johnson and Stock Loan unsupervised with respect to regulatory and compliance issues. *See* Div. Post-Hearing Br. at 37-38; Div. Prop. FOF ¶¶ 304-314; Div. Yancey Reply Br. at 17-18. The Division does not dispute that certain other employees at PFSI believed that Yancey was an accessible and engaged supervisor.

Prop. FOF 37. The November 24, 2010 OCIE response was drafted by Mr. Gover, and reviewed by Ms. Hasty and Mr. Delaney.

The Division disputes this proposed finding of fact. Delaney re-drafted and edited the November 2010 OCIE response; he did not just "review" it. *See* Div. Post-Hearing Br. at 25; Div. Prop. FOF ¶¶ 171-174; Div. Delaney Reply Br. at 20.

Prop. FOF 38. Delaney believed that there was no reason for Bill Yancey to question the truthfulness or accuracy of Penson's 2010 OCIE response.

The Division disputes this proposed finding of fact. Delaney himself admitted the language in the 2010 OCIE response was inconsistent with the results of PFSI's Rule 204 testing, which Yancey knew about. *See* Div. Post-Hearing Br. at 26; Div. Prop. FOF ¶¶ 175-176.

Prop. FOF 39. Bill Yancey had no reason to overrule the judgment of the compliance department regarding the contents of the 3012 Summary Report attached to the 3130 CEO Certification.

The Division disputes this proposed finding of fact. The omission of any mention of PFSI's Rule 204 issues should have been a red flag to Yancey that Delaney may have been concealing PFSI's Rule 204 compliance problems from regulators. *See* Div. Post-Hearing Br. at 39-42; Div. Prop. FOF ¶¶ 105-114, 181-196; Div. Yancey Reply Br. at 21-23.

Prop. FOF 40. Penson was not required to explicitly reference the December 2009 Rule 204 Audit in the 3012 Summary Report attached to the CEO certification.

The Division disputes this proposed finding of fact. The 3012 Summary Report was intended to discuss "key compliance problems" and summarize the "extensive testing" that had been conducted. *See* Div. Post-Hearing Br. at 41; Div. Prop. FOF ¶¶ 153-158.

Prop. FOF 41. Penson tracked and assigned to the appropriate business units remediation of all deficiencies from internal and external audits.

The Division disputes this proposed finding. PFSI's "remediation log" made no mention of the Rule 204 testing or remediation. *See* Div. Yancey Reply Br. at 23; Div. Prop. FOF ¶ 166.

Prop. FOF 42. Penson consistently closed out or cleared the overwhelming majority of its CNS fail positions.

The Division disputes this proposed finding of fact. While many trades naturally settled prior to market-open T+6, when a settlement failure reached market-open T+6, which is the point at which Rule 204 says PFSI must take action to close-out the fail, PFSI Stock Loan took no action to close-out the fail. Thus, 100% of the fails that reached the point

where Rule 204 required action were not closed out on time. *See* Div. Prop. FOF ¶¶ 41-42.

Prop. FOF 43. Mr. Paulukaitis's written expert report does not mention dual supervision.

The Division disputes this proposed finding of fact. The Court ruled that the dual supervision issue "is a reasonable inference or extrapolation from [Paulukaitis's] underlying report." Tr. 929:7-929:8.

Prop. FOF 46. In Penson's 3012 testing and 3130 certification meetings, Yancey was generally provided with a high-level summary.

The Division disputes this proposed finding of fact. Yancey had repeated, detailed discussions with compliance regarding the December 2009 Rule 204 test results. *See* Div. Post-Hearing Br. at 40-41; Div. Prop. FOF ¶¶ 182-186.

Prop. FOF 50. Penson's implementation process for new rules and regulations was as follows: In response to a new rule, the Compliance Department held initial meetings with the affected business units and management to determine what procedural changes, development efforts, technology resources, or training is required, as well as to create a roadmap for compliance deadlines and testing. Penson also distributed special compliance memorandums both internally and externally to keep employees and correspondents abreast of the recent regulations. A similar process was used with the implementation of Reg SHO and Rule 204T/Rule 204.

The Division disputes this proposed finding of fact. Yancey misstates and mischaracterizes the cited testimony to the extent he intends to imply that this process was applied to Rule 204 implementation for PFSI's Stock Loan department. There is no evidence that such a process occurred. Delaney testified to only one conversation with Stock Loan in which, rather than determining what procedural changes, development efforts, technology resources, or training was required he told Stock Loan to "write your congressman." Div. Prop. FOF ¶ 91. Similarly, the only technological modification to facilitate Stock Loan's compliance with Rule 204(a) occurred in November 2011. Div. Prop. FOF ¶¶ 59-61. Delaney did not provide appropriate guidance to Stock Loan on how it could comply with Rule 204. *See* Div. Post-Hearing Br. at 14, 18-19; Div. Prop. FOF ¶¶ 86-93; 129-136.

Prop. FOF 51. Brian Hall told the Division that Michael Johnson reported to Phil Pendergraft.

The Division disputes this proposed finding of fact. More specifically, the Division has objected to the admission of *Brady* letters, which is the source of this proposed finding of fact. *See, e.g.*, Div. Yancey Reply Br. at 13 n.6.

Prop. FOF 52. Penson provided compliance training to its employees, including training on Regulation SHO and Rule 204.

The Division disputes this proposed finding of fact. Delaney did not provide appropriate guidance or training to Stock Loan on how it could comply with Rule 204. *See* Div. Post-Hearing Br. at 14, 18-19; Div. Prop. FOF ¶¶ 86-93; 129-136.

Prop. FOF 53. Penson regularly updated its Written Supervisory Procedures (WSPs) through a collaborative process across the various departments, as well as maintained other localized checklists.

The Division disputes this proposed finding of fact. PFSI's WSPs were not updated to include procedures for closing out long sales in compliance with Rule 204. *See* Div. Post-Hearing Br. at 20-21; Div. Prop. FOF ¶¶ 118-121; Div. Delaney Reply Br. at 19.

Prop. FOF 54. Rule 204 contains a "safety valve" in the form of the penalty box because no system can guarantee perfect settlement. The penalty box allows the capital markets to continue operations related to short selling.

The Division disputes this proposed finding of fact to the extent it is intended to imply that compliance with Rule 204(a) is optional or that violation of Rule 204(a) can be "cured" by Rule 204(b). Compliance with Rule 204(a) is not optional. Violation of Rule 204(a)'s close-out requirement is an independent violation of the rule; complying with Rule 204(b)'s "penalty box" provision does not cure the violation. *See* Div. Post-Hearing Br. at 4; *see also* Tr. 2091:5-2091:16 (Paz) ("Q. We can agree that failure to comply with the close-out requirements is itself a violation of the rule; and in addition to that, there are penalty box requirements; is that right? A. The Commission has -- sorry, let me back up.... Certainly the staff has said as much, and I believe the Commission has also said as much, that a violation of 204(a) is itself a violation, and that the penalty box, which I described as a safety valve, is a subsequent step that would allow the operations of the broker-dealer.").

Prop. FOF 55. "Penson Financial," "Penson," or "PFSI" refers to the U.S. broker-dealer, a subsidiary of Penson Worldwide ("PWI").

The Division disputes this proposed finding of fact. The cited testimony in support of this proposed finding of fact does not establish a uniform definition of these terms, but only demonstrates that one witness used the terms in this matter. While the Division believes that, generally, "Penson Financial," "Penson," or PFSI" were used to refer to the U.S. broker-dealer, that may not be universally true. For example, certain witnesses used the term "Penson" to refer to Penson Worldwide. *See, e.g.*, Tr. 1479:14-21 (Pendergraft) ("Q. And I've heard from some witnesses that Mr. Son physically had a desk in your office or vice versa, and so you would come to work and both sit together in the same room; is that fair? A. I think that we would both have objection to having the office described as the other guy's office, but we shared an office for the entire time that we were at *Penson.*") (emphasis added).

Prop. FOF 57. "Stock Lending," "Stock Loan," or "Securities Lending" refers to Penson's Stock Loan Department.

The Division disputes this proposed finding of fact. The cited testimony in support of this proposed finding of fact does not establish a uniform definition of these terms, but only demonstrates that one witness used the terms in this matter. While the Division believes that, generally, "Stock Lending, "Stock Loan," or "Securities Lending" were used to refer to PFSI's Stock Loan department, that may not be universally true. For example, certain witnesses used the term "Stock Loan" to refer to Penson Worldwide's global stock lending function. *See, e.g.*, Tr. 1494:22-1495:8 ("Q. Was there -- with respect to the Stock Loan function, and again, I'm focusing on kind of the '08 through '11 time period, would *Stock Loan* as a unit do a presentation at MBR? A. Yes. Q. And who would give that presentation, Mr. Johnson? A. Typically, if he was in town. Q. And would he present both on what was going on in Canada and London as well as Dallas? Dallas would be a component of his presentation? A. Yes, sir.") (emphasis added).

Prop. FOF 60. Delaney was a conscientious, qualified, and engaged CCO.

The Division disputes this proposed finding of fact. While CCO of PFSI, Delaney aided and abetted violations of the federal securities laws. *See, e.g.* Div. Post-Hearing Br. at 6-27.

Prop. FOF 61. Delaney was unaware of Rule 204 issues related to the Stock Loan Department until early 2011.

The Division disputes this proposed finding of fact. Delaney became aware of Rule 204 issues related to the Stock Loan department as early as October 2008, and no later than March 2010. *See, e.g.*, Div. Post-Hearing Br. at 11-21; Div. Prop. FOF ¶¶ 68-141; Div. Delaney Reply Br. at 2-12.

Prop. FOF 63. Delaney was honest, transparent, and full of integrity.

The Division disputes this proposed finding of fact. Delaney is neither honest nor credible and does what he believes to be expedient rather than what is right. See Div. Post-Hearing Br. at 7-9; Div. Prop. FOF at ¶¶ 62-65, 322; Div. Delaney Reply Br. at 1-4.

Prop. FOF 65. Yancey had approximately eight (8) direct reports during the relevant time period, one of whom was Delaney.

The Division disputes this proposed finding of fact. Yancey also had supervisory responsibility for Johnson during the relevant time period, and Johnson is not included in the eight direct reports. *See, e.g.*, Div. Post-Hearing Br. at 28-37; *see also* Div. Prop. FOF ¶¶ 253-255 (Johnson listed as Yancey's direct report in 2011 CEO certification). The Division does not dispute that Delaney was one of Yancey's direct reports.

Prop. FOF 68. In his compliance role at Penson, Alaniz created and administered a comprehensive and robust 3012 testing program.

The Division disputes this proposed finding of fact. Alaniz's Rule 3012 testing did not test Stock Loan's compliance with Rule 204, nor did his follow-up testing test a larger sample or test close-outs of long sales. *See* Div. Post-Hearing Br. at 19-20; Div. Prop. FOF ¶¶ 105-109, 137-141.

Prop. FOF 69. In December 2009, Alaniz conducted an NASD Rule 3012 test ("the December 2009 Audit"), which tested Rule 204 close-out procedures.

The Division disputes this proposed finding of fact. Alaniz's Rule 3012 testing did not test Stock Loan's compliance with Rule 204. *See* Div. Post-Hearing Br. at 19; Div. Prop. FOF ¶¶ 105-109, 138.

Prop. FOF 71. Alaniz did not use the term "99% violation rate" in describing the December 2009 Audit results with Yancey in the January 28, 2010 quarterly 3012 meeting.

The Division disputes this proposed finding of fact. The compliance department specifically pointed out to Yancey that 112 of the 113 items tested failed to close out as required by Rule 204. *See* Div. Post-Hearing Br. at 40-41; Div. Prop. FOF ¶ 185.

Prop. FOF 75. The December 2009 Audit did not contain any language regarding a "99%" fail rate.

The Division disputes this proposed finding of fact. The audit report notes that 112 of 113 transactions tested failed to comply with Rule 204. *See* Div. Post-Hearing Br. at 22; Div. Prop. FOF ¶ 111.

Prop. FOF 82. Delaney did not intend to change the meaning of the language in Brian Gover's original draft of Penson's November OCIE response when he modified the statement to read: "Penson believes that the reasonable processes employed to close-out positions that were allegedly in violation of Rule 204T were effective and performed as designed."

The Division disputes this proposed finding of fact. While Gover drafted the response from a Buy-Ins perspective, Delaney was responsible to ensure the response reflected PFSI's policies as a whole. Delaney knew of Stock Loan's violations and did not disclose them. Accordingly Delaney's modification changed the response from a Buy-Ins response to a PFSI response. *See* Div. Delaney Reply Br. at 20 & n.13; Div. Prop. FOF ¶ 126.

Prop. FOF 83. When Penson prepared examination responses, the Compliance department relied on input from the business units and the "subject matter experts" in each department.

The Division disputes this finding to the extent it is intended to imply that Compliance had no responsibility for the responses. While business units could prepare responses

from their own perspective it was the responsibility of Compliance, and the CCO in particular to ensure that the responses were accurate from a global PFSI perspective. *See* Div. Post-Hearing Br. at 23-24, 25-26; Div. Prop. FOF ¶ 150.

Prop. FOF 85. Bill Yancey is honest, ethical, and full of integrity.

The Division disputes this proposed finding of fact. Yancey failed to supervise two senior executives, and continues to attempt to avoid responsibility for his actions. *See, e.g.*, Div. Post-Hearing Br. at 45-46, 48.

Prop. FOF 87. Alaniz and Delaney testified that none of the 3012 tests conducted for that year were explicitly included in the Summary Report attached to the March 31, 2010 CEO certification.

The Division disputes this finding of fact to the extent it is intended to imply that none of the 3012 tests conducted for that year were included in the Summary Report attached to the March 31, 2010 CEO certification at all. Delaney testified that topics that were the subject of compliance testing at PFSI were discussed in the Annual Report. *See* Div. Prop. FOF ¶ 164.

Prop. FOF 91. As a Series 27 license-holder, Phil Pendergraft was the best-qualified person to supervise Michael Johnson and Stock Lending activities.

The Division disputes this proposed finding of fact. Johnson's supervisor was assigned in PFSI's WSPs, and that supervisor was Yancey. Further, Yancey was responsible for supervising Johnson unless and until he clearly and without confusion delegated that responsibility. *See, e.g.*, Div. Post-Hearing Br. at 28-37.

Prop. FOF 92. Penson's Reg SHO and Rule 204 policies and procedures addressed (1) all elements of the rule, (2) set out specific procedures to follow, and (3) identified individuals and supervisors responsible for compliance.

The Division disputes this proposed finding of fact. PFSI's WSPs did not contain procedures for closing out long sales. *See* Div. Post-Hearing Br. at 20-21; Div. Prop. FOF ¶¶ 118-121; Div. Delaney Reply Br. at 19.

Prop. FOF 94. Penson distributed special compliance memorandums and alerts both internally to employees and externally to correspondents regarding Regulation SHO and Rule 204T/204(a).

The Division disputes this proposed finding of fact. Delaney did not provide appropriate guidance or training to Stock Loan on how it could comply with Rule 204. *See* Div. Post-Hearing Br. at 14, 18-19; Div. Prop. FOF ¶¶ 86-93; 129-136.

Prop. FOF 95. As part of its efforts to comply with new rules, including Rule 204, Penson updated and modified its procedures through technology

efforts and developments. The "IT steering committee," assisted with technology resources at Penson. Penson prioritized technology efforts and resources dedicated to regulatory compliance, such as Rule 204 compliance.

The Division disputes this proposed finding of fact. First, Yancey misstates and mischaracterizes the cited testimony. Hasty clearly testifies that she is discussing technological modifications to facilitate Buy-Ins short sale Rule 204 compliance, not Stock Loan's Rule 204(a) compliance. See Yancey Prop. FOF ¶ 95. Furthermore, PFSI's WSPs did not contain procedures for closing out long sales. *See* Div. Post-Hearing Br. at 20-21; Div. Prop. FOF ¶¶ 118-121; Div. Delaney Reply Br. at 19. PFSI's technology was not designed or modified to enable Stock Loan to comply with Rule 204. *See* Div. Prop. FOF ¶ 131. Sendero was not re-programmed to comply with Rule 204 by recalling on T+2 until fall 2011. *See* Div. Prop. FOF ¶¶ 59-61.

Prop. FOF 98. In 2008, Pendergraft directed the Vice President of Human Resources, Dawn Gardner, to move Johnson from PFSI to PWI.

The Division disputes this proposed finding of fact. In 2008 Pendergraft directed Gardner to move Johnson's payroll from PFSI to PWI, nothing more. *See* Div. Prop. FOF ¶ 238.

Prop. FOF 100. After August 2008, Penson's organization charts listed Johnson on the same level as Yancey, reporting to Pendergraft, Engemoen, and Son.

The Division disputes this proposed finding of fact. The organizational charts state that Johnson reported to Son. *See* Div. Post-Hearing Br. at 36; Div. Prop. FOF ¶¶ 240-241.

Prop. FOF 102. Penson employees were not confused about who Johnson reported to.

The Division disputes this proposed finding of fact. At best, the evidence shows confusion about Johnson's supervision. *See, e.g.*, Div. Post-Hearing Br. at 36-37; Div. Yancey Reply Br. at 10-15.

IV. YANCEY'S PROPOSED CONCLUSIONS OF LAW

Many of Yancey's proposed conclusions of law either misstate the relevant law for Commission cases, or claim propositions that are not supported by the cited cases. The specific conclusions of law the Division disputes, and the reasons therefore, are as follows:

Prop. COL 5. There are three essential elements to an aiding and abetting claim:
(1) the existence of a securities law violation by the primary party;
(2) awareness or knowledge by the aider and abettor that his role was part of an overall activity that was improper; and

(3) that the aider and abettor knowingly and substantially assisted in the conduct that constituted the primary violation.

The Division disputes this proposed conclusion of law. In Commission cases the elements of 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) ("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."). Div. Post-Hearing Br. at 10; Div. Prop. COL ¶ 11; Div. Delaney Reply Br. at 12.

Prop. COL 7. **For purposes of Section 15(b)(4)(E), a supervisor has been defined as:**
A person at the broker-dealer who has been given (and knows or reasonably should know he has been given) the authority and the responsibility for exercising such control over one or more specific activities of a supervised person . . . so that such person could take effective action to prevent a violation of the Commission's rules which involves such activity or activities by such supervised person.

The Division disputes this proposed conclusion of law. The authority upon which Yancey relies is based on an analysis of whether a compliance officer may be found liable for failure to supervise. *See Patricia Ann Bellows*, Rel. No. ID-128, 1998 WL 409445, at *8 (July 23, 1998); *Arthur Huff*, 1991 WL 296561, at *9 (March 28, 1991). In contrast, a president/CEO always has authority and responsibility for exercising control over his employees. As a result, a president/CEO of a broker-dealer has supervisory responsibility for all employees unless and until he clearly and without confusion delegates supervisory responsibility. Div. Post-Hearing Br. at 27-28, 32; Div. Prop. COL ¶¶ 24, 26-27, 29.

Prop. COL 8. **A supervisory relationship "can only be found in those circumstances when, among other things, it should have been clear to the individual in question that he was responsible for the actions of another and that he could take effective action to fulfill that responsibility."**

The Division disputes this proposed conclusion of law. Again, the authority upon which Yancey relies was a situation in which the respondent was a compliance officer, outside the normal change of command, to whom supervision had ostensibly been delegated. *Arthur Huff*, 1991 WL 296561, at *9 (March 28, 1991). It has no application to this proceeding in which the respondent is the head of the normal chain of command and is

purportedly the delegator. A president/CEO of a broker-dealer has supervisory responsibility for all employees unle[illegible] without confusion delegates supervisory responsibility[illegible]27-28, 32; Div. Prop. COL ¶¶ 24, 26-27, 29.

Prop. COL 13. Delegation can take place through the actions and words of the parties involved, which include the delegator, delegatee, and supervisee.

The Division disputes this proposed conclusion of law. Delegation cannot take place simply through the actions of the parties involved. Instead, delegation must by clear, reasonable, and effective. *See* Div. Post-Hearing Br. at 32. In each of the cases cited by Yancey the delegatee acknowledged that supervision had been delegated to him or her. *See Swarwood Hesse, Inc.*, Rel. No. 34-31212, 1992 WL 252184 (Sept. 22, 1992), *Thomas F. White*, Rel No. 34-3498, 1994 WL 389903 (July 19, 1994).

Prop. COL 14. A delegation occurs when, through the actions and words of the involved parties, the involved parties understand that supervision has been delegated.

The Division disputes this proposed conclusion of law. Delegation cannot take place simply through the actions of the parties involved. Instead, delegation must by clear, reasonable, and effective. *See* Div. Post-Hearing Br. at 32. In each of the cases cited by Yancey the delegatee acknowledged that supervision had been delegated to him or her. *See Swarwood Hesse, Inc.*, Rel. No. 34-31212, 1992 WL 252184 (Sept. 22, 1992), *Thomas F. White*, Rel No. 34-3498, 1994 WL 389903 (July 19, 1994); *Universal Heritage Investments Corp.*, Rel. No. 34-193081982 WL 525157 (Dec. 8, 1982).

Prop. COL 15. The testimony of those other than the delegator, delegatee, and supervisee may be relevant in deciding whether delegation has occurred.

The Division disputes this proposed conclusion of law. Yancey misstates the cited authority. In fact, in *Swarwood Hesse, Inc.*, Rel. No. 34-31212, 1992 WL 252184 (Sept. 22, 1992), the Commission found that a third person's opinion about delegation was irrelevant. *Swartwood*, 1992 WL 252184 at *6. Instead the Commission relied on the admission of the delegatee that delegation had occurred. *Id.*

Prop. COL 16. The Gutfreund facts and circumstances test is relevant in deciding whether delegation has occurred.

The Division disputes this proposed conclusion of law. The *Gutfreund* test is not relevant to determining whether a CEO of a broker-dealer has delegated supervisory responsibility such that he is relieved of his supervisory obligations. *See* Div. Post-Hearing Br. at 38-39; Div. Prop. COL at ¶¶ 25, 28; Div. Yancey Reply Br. at 7-10.

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."

The Division disputes this proposed conclusion of law. The *Gutfreund* test is not relevant to determining whether a CEO of a broker-dealer has delegated supervisory responsibility such that he is relieved of his supervisory obligations. *See* Div. Post-Hearing Br. at 38-39; Div. Prop. COL at ¶¶ 25, 28; Div. Yancey Reply Br. at 7-10.

Prop. COL 18. Under Gutfreund, non-exclusive indicia of supervisory authority include the ability to:

- **Discipline.**
- **Advise about the specific regulatory rule at issue.**
- **Authority to affect conduct at issue.**
- **Fire.**
- **Assess performance.**
- **Assign, direct, or approve activities.**
- **Promote.**
- **Approve leave.**

The Division disputes this proposed conclusion of law. The *Gutfreund* test is not relevant to determining whether a CEO of a broker-dealer has delegated supervisory responsibility such that he is relieved of his supervisory obligations. *See* Div. Post-Hearing Br. at 38-39; Div. Prop. COL at ¶¶ 25, 28; Div. Yancey Reply Br. at 7-10.

Prop. COL 19. Contradictory evidence as to delegation does not demonstrate that there was confusion in the supervisory structure.

The Division disputes this proposed conclusion of law. The case cited does not stand for the above proposition, but only for the proposition that the lack of written delegation "is not dispositive" of the issue. Further, if there is confusion concerning delegation, that delegation is by definition not clear, reasonable, or effective, and the CEO retains supervisory responsibility for the registered person. *See* Div. Post-Hearing Br. at 32.

Prop. COL 20. No one piece of evidence, including a specific document or specific witness testimony, is dispositive of delegation.

The Division disputes this proposed conclusion of law. The supervisory matrix has independent legal significance: it was PFSI's NASD Rule 3010(a)(5) designation, which means it "assign[ed] ... each registered person to an appropriately registered representative(s) and/or principal(s) who *shall be responsible for supervising* that person's activities." *See* Div. Post-Hearing Br. at 29; Div. Yancey Reply Br. at 4-5.

Prop. COL 23. A delegator's follow-up need not be so robust that it would fall into the category of actual supervision.

The Division disputes this proposed conclusion of law. All of the issues on which Yancey purportedly followed up with Pendergraft are business/operational issues, not regulatory/compliance issues. *See* Div. Yancey Reply Br. at 15 n.7.

Prop. COL 25. Negligence is the applicable standard in assessing whether supervision was reasonable under the prevailing circumstances.

The Division disputes this proposed conclusion of law to the extent Yancey intends it to mean that he did not have the duty to vigorously follow up on red flags and suggestions of irregularity. *See* Div. Post-Hearing Br. at 39-40. Further, the only case Yancey cites in support, the initial decision in *In the Matter of Urban*, was later dismissed by an evenly divided Commission and thus is "of no effect." Commission Rule of Prac. 411(f).

Prop. COL 27. "The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions."

The Division disputes this proposed conclusion of law to the extent Yancey intends it to mean that he did not have the duty to vigorously follow up on red flags and suggestions of irregularity. *See* Div. Post-Hearing Br. at 39-40. Further, the only case Yancey cites in support, the initial decision in *In the Matter of Urban*, was later dismissed by an evenly divided Commission and thus is "of no effect." Commission Rule of Prac. 411(f).

Prop. COL 41. Supervision must include regulatory compliance.

The Division disputes this proposed conclusion of law. Firms have significant flexibility in how they choose to structure supervision, and at PFSI, operational and compliance supervision could be divided. *See* Div. Yancey Reply Br. at 16-17; Div. Prop. FOF 152 ¶¶ 228-229.

In conclusion, the Division disputes many of Respondents' proposed findings of fact and conclusions of law. Those disputes, set forth briefly above, are more fully detailed in the Division's post-hearing pleadings.

Sincerely,

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