ORIGINAL

ADMINISTRATIVE PROCEEDING
FILE NO. 3-16195

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **JUDY K. WOLF,** **Respondent.**	**Judge Cameron Elliot**

DIVISION OF ENFORCEMENT'S REPLY TO RESPONDENT JUDY K. WOLF'S POST-HEARING BRIEF

April 3, 2015

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I. INTRODUCTION

In her post-hearing brief, Respondent concedes that her employer, Wells Fargo, committed a primary violation of both Section 17(a) of Exchange Act and Rule 17a-4(j) thereunder, and Section 204(a) of the Advisers Act by producing an altered document to the Commission staff without disclosing the alteration. She also concedes that she had a direct role in that violation, as she was the person who created and then altered the document, and did not disclose her alteration. She also concedes that she knew, prior to her alteration of her insider trading review log, the Commission staff was conducting an investigation and that Wells Fargo was cooperating in that investigation, and that she knew it was wrong to produce altered documents to the Commission without disclosing the alteration. Nonetheless, she contends that she did not aid and abet, or cause Wells Fargo's primary violation because she did not have actual notice that her Burger King insider trading review file was the subject of a document request by the Commission staff at the time she altered her log and created a new cover sheet for her file. Respondent's argument both misstates the law and ignores the facts.

To establish willful aiding and abetting liability in an action that does not require a showing of scienter, such as this one, the Division must show: (1) a primary violation of the securities laws; (2) Respondent's general awareness that her role was part of an overall activity that was improper; and (3) Respondent substantially assisted in the primary violation. The first element is conceded, and the third element is readily established, as Respondent was solely responsible for the alteration of her log and Wells Fargo's primary violation was a direct result of her conduct. Nor is there any question that Respondent, an experienced compliance professional, working in a highly regulated industry, and who was well versed in Commission enforcement actions brought under both Section 17(a) of the Exchange Act and Section 204(a) of the Advisers Act, knew that it was improper to alter documents years after the fact, without disclosing those alterations. That alone is sufficient to establish liability.

In addition, Respondent was surrounded by red flags at the time she altered her log. Prior to her alteration, she knew that the Commission had charged two individuals with insider trading in

Burger King securities, she knew the Commission staff's investigation was continuing, and she knew Wells Fargo was cooperating with the staff's investigation. She also admitted that she altered her log for the purpose of giving her supervisor additional information to enable her supervisor to answer questions about her review. While Respondent contends that she did so solely to allow her supervisor to answer "internal" questions, the evidence shows that Respondent had answered all of those "internal" questions months earlier. There was thus no legitimate reason for her to have altered her log to back fill information about her purported reasons for closing her Burger King review two years earlier with no findings. In short, her admissions, as well as the circumstantial evidence that surrounded her at the time she altered her log, establish that she knew, or was at least reckless in not knowing, that her conduct was wrong, and hence, aided and abetted Wells Fargo's primary violation. At a minimum, she should have known that that her conduct would contribute to Wells Fargo's primary violation, and hence, was a cause of that violation.

Significant sanctions are appropriate. Respondent's insider trading review log was a key compliance document, and its alteration undermined the Commission's ability to conduct an examination of Wells Fargo's compliance with its duties under both Section 15(g) of the Exchange Act and Section 204A of the Advisers Act. Not only did Respondent alter her log and fail to disclose her alteration, she lied to the Commission staff about what she had done, and continues to defend and justify her conduct without ever acknowledging that it was wrong or improper. Respondent's failure to appreciate the significance of her misconduct, and her inability to admit that her conduct was wrongful, provides no assurance she will not commit future violations, thus warranting both a cease-and-desist order and an associational bar. Finally, Respondent has not demonstrated an inability to pay significant second-tier penalties.

II. ARGUMENT

A. Respondent Willfully Aided and Abetted, And Caused Wells Fargo's Primary Violation

The parties are in general agreement on the elements of willful aiding and abetting liability. As formulated by Respondent, those elements are: (1) a primary violation occurred; (2) Respondent possessed a general awareness that her role was part of an overall activity that was improper; and (3) Respondent knowingly and substantially assisted the primary violation. Resp. Post-Hearing Brief, p.19 (citing *In the Matter of Centreinvest, Inc.*, Exchange Act Release No. 60413, 2009 SEC LEXIS 2611 (July 31, 2009)); *see also SEC v. Grendys*, 840 F. Supp. 2d 36, 45 (D.D.C. 2012).

Respondent concedes the first element, that is, Wells Fargo's primary violation of Section 17(a) of the Exchange Act and Rule 17a-4(j) thereunder, and Section 204(a) of the Advisers Act. However, as to the second element, Respondent contends that the Division must show that she had "actual knowledge" of the primary violation, rather than a "general awareness" that her conduct was improper. Put simply, that is not the law. *See SEC v. Grendys*, 840 F. Supp. 2d at 45 (and cases cited at pp. 25-26 of the Division's opening brief). As to the third element, Respondent contends that the Division must show that she in some way associated herself with Wells Fargo's deficient production, and that she participated in it as something she wished to bring about. Resp. Post-Hearing Brief, p. 20 (citing *In the Matter of Thomas R. Delaney II and Charles W. Yancy*, Initial Decision Release No. 755, 2015 SEC LEXIS 1014 (Mar. 18, 2015)). But this third element only requires the Division to show that Wells Fargo's primary violation was a "direct or reasonably foreseeable result" of Respondent's conduct. *SEC v. Grendys*, 840 F. Supp. 2d at 45; *SEC v. Johnson*, 530 F. Supp. 2d 325 (D.D.C. 2008). Under that test, there can be no question that this element is also satisfied.

1. Wells Fargo's primary violation is undisputed

Respondent's counsel stipulated to the existence of Wells Fargo's primary violation of Section 17(a) of the Exchange Act and Rule 17a-4(j) thereunder and Section 204(a) of the Advisers

Act in paragraphs 63 and 66-67 of the Stipulated Facts. Respondent's counsel also confirmed that stipulation to the Court at the start of the hearing. RT (02/23/15) 35:1-26; 36:1-10.[1] Based on Respondent's counsel's representation, the Court admitted the Order Instituting Proceedings against Wells Fargo (Exhibit 533) into evidence and acknowledged that the Stipulated Facts covered this issue. RT (02/23/15) 36:11-25.[2]

Although Respondent concedes the existence of a primary violation, at the same time, she attempts to trivialize it, by suggesting that she was a "low-level" employee, that her insider trading review log was not a required document, and that she did nothing to impede the Commission's examination authority. Resp. Post-Hearing Brief, at pp. 2-3. Nothing could be further from the truth.

a. Respondent performed a critical role in Wells Fargo's compliance department

Although Respondent may not have been paid a six-figure salary, she was hardly a "low-level" employee. Respondent was a compliance professional with a dually-registered broker-dealer and investment adviser who was responsible for conducting trade surveillance to detect possible insider trading and for properly documenting those efforts. She held the title of "compliance consultant," had worked in the securities industry since 1979, and held four securities licenses. SF ¶ 3. Respondent drafted Wells Fargo's written policies and procedures for conducting reviews of suspected insider trading with input from her supervisors, and she admitted that those policies and procedures required retention of review documentation for a seven-year period. SF ¶ 12. Such a lengthy retention period was consistent with Respondent's understanding of the importance of the review records she created and maintained because, "so in the future if someone comes back and

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[1] Respondent's counsel: "And as, Your Honor, will notice from -- even from our stipulated facts, there are primary violations and facts alleged in that Order of Instituting Proceedings which are not at all in issue in this case, but to avoid this issue we even stipulated to those primary violations." RT (02/23/15) 35:17-25, 36:1-10.

[2] Moreover, the Division's counsel made clear that although Wells Fargo was accused of violating both the recordkeeping provision and the record production provision for its late production of documents, the Division did not allege in this action that Respondent willfully aided and abetted or caused Wells Fargo's late production of documents. RT (02/23/15) 100:7-101:4.

looks at a review or the procedures, they will know what we did and how we did it." Ex. 521, 42:4:10. Respondent also "conducted hundreds" of insider trading reviews, and conceded that other than herself "no one else at Wells Fargo conducted the initial review." Resp. Post-Hearing Brief, p. 3. She also conceded that she "conducted the reviews on her own, and made a decision to escalate a review . . . in situations that she determined suggested possible insider trading." *Id.* In short, because of her duties and responsibilities in Wells Fargo's compliance department, she sat at the very crossroads of Wells Fargo's compliance program to prevent the misuse of material nonpublic information as required under Section 15(g) of the Exchange Act and Section 204A of the Advisers Act, and the Commission's authority to examine books and records of that compliance effort pursuant to Sections 17(a) and 17(b) of the Exchange Act and Rule 17a-4(j) thereunder and Section 204(a) of the Advisers Act. She also knew that the "purpose of the statutes and regulations at issue here is to allow the Staff to obtain accurate records." Resp. Post-Hearing Brief, p. 32; SF ¶ 49.

b. Respondent's insider trading review log was an important compliance document

Respondent's insider trading review log was an important compliance document. Respondent and others within Wells Fargo's compliance department relied on her log "so in the future if someone comes back and looks at a review or the procedures, they will know what we did and how we did it." Ex. 521, RT (02/23/15) 42:4-10. Between 2009 and 2013, Respondent listed on the log every insider trading review she conducted and she often noted substantive information on the log such as disposition of the reviews and whether they were escalated for further action. Ex. 343. She admitted that the purpose of the log was to support the documentation of her reviews because it noted what she had done, what companies she had looked at, what findings she may have had made, and the basis for her findings. RT (02/23/15) 158:17-159:1-22, 381:1-3. Respondent admitted that she sometimes included information about the reasons for closing an insider trading review (SF ¶ 19) and she shared excerpts of the log concerning a particular insider trading review

with her supervisor (*id.*, ¶ 20). Respondent and others in her department relied upon the log when there were questions about a particular insider trading review. Ex. 399. The log was also used to create coversheets of insider trading review files other than Burger King. Ex. 401.[3]

c. Respondent's conduct directly undermined the Commission's examination authority

Finally, the Commission's examination authority is not some academic exercise. Pursuant to its authority under Section 17(a)(1), the Commission promulgated Rule 17a-4 to address broker-dealers' obligations to preserve records. That rule requires broker-dealers to "furnish promptly to a representative of the Commission legible, true, complete and current copies of [records required by Rule 17a-3] or . . . any other [*i.e.*, non-required] records of the member, broker, or dealer . . . that are requested by the representative of the Commission." The Commission has emphasized that the record–keeping rules, such as Rule 17a-4, "are a keystone of the surveillance of brokers and dealers by our staff and the securities industry's self-regulatory bodies." *In the Matter of David R. Williams*, Exchange Act Release No. 21788, 1985 SEC LEXIS 2093, at *7 (Feb. 26, 1985); *see also In the Matter of Edward J. Mawod & Co.*, 46 SEC 865, 873 n.39 (May 6, 1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979); *SEC v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. 587, 610 (S.D.N.Y. 1993). In *SEC v. J.W. Korth & Co.*, 991 F. Supp. 1468 (S.D. Fla. 1998), the Court found that Section 17(a) of the Exchange Act and the rules promulgated thereunder "are central to the SEC's execution of its congressionally-mandated regulatory duties. *See*, e.g., H.R. Rep. No. 229, 9th Cong., 1st Sess. 119-120 (1975) (Commission's "examination authority . . . is, of course, essential to any effort by the Commission to discharge its responsibilities under the Act")." 991 F. Supp. at 1472, n.5.

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[3] In her April 2014 testimony, Respondent testified that every month she provided an employee in the Retail Control Group, Greg Otto, with data about how many insider trading reviews she completed or were pending, which he included in monthly reports he provided their supervisor. Ex. 532 (RT (04/14/14) 319:24-320:14. Respondent testified that the log was one of the places she looked in order to compile that information. *Id.*, 320:15-22. Respondent testified that in Mr. Otto's monthly reports he attached copies of the log to show what insider trading reviews Respondent performed in a given month. *Id.*, 406:9-407:2.

Similarly, the books and records of an investment adviser are critical to the Commission's examination authority of registered investment advisers. Section 204(a) of the Advisers Act was expressly amended in 1960 to allow the Commission staff the authority to examine an investment adviser's books and records.[4] That authority would be directly undermined if employees of investment advisers, such as Respondent, were allowed to intentionally alter, without noting the alteration, compliance-related documents relating to an investment adviser's implementation of its policies and procedures designed to prevent the misuse of nonpublic information, years after the fact, and at a time when they knew, or should have known, those documents would be subject to examination by the Commission staff.[5]

2. Respondent knew and was aware of her wrongdoing

With respect to the second element, the Division must establish that Respondent had a "general awareness" that her role was part of an overall activity that was improper. *See In the Matter of Peak Wealth Management Opportunities, LLC*, Exchange Act Release No. 69036, 2013 SEC LEXIS 664, at *16 (Mar. 5, 2013). This knowledge or awareness element can be satisfied by a showing of recklessness where the alleged aider and abettor is a fiduciary or a direct participant. *Id.*; *In the Matter of Harding Advisory, LLC*, Initial Decision Release No. 734, 2015 SEC LEXIS 118, at

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[4] Act of Sept. 13, 1960, Pub. L. No. 86-750, § 6, 74 Stat. 886 (1960).

[5] Respondent's misconduct also prolonged the Commission staff's investigation. The staff sought Wells Fargo's books and records about its surveillance of suspected insider trading in Burger King three times in 2012 including as late as December 21, 2012. SF, ¶ 36. On January 11, 2013, Wells Fargo produced Respondent's Burger King review file. *Id.*, ¶ 37. On March 11, 2013, Respondent claimed she told her counsel that there were additional filed materials to be produced (Resp. Post Hearing Brief, pp. 12-13), which were then produced to the Staff (Ex. 606). On March 13, 2013, the staff took Respondent's investigative testimony and she admitted she was the first person to testify regarding the Burger King insider trading review conducted in September 2010, at which time she lied about altering the log. SF ¶¶ 49-52. On March 14, 2013, the staff requested the metadata associated with the altering of the log and all prior and subsequent versions of the log. *Id.*, ¶ 53. On March 27, 2013, the staff subpoenaed Respondent for documents and to appear for testimony a second time. *Id.*, ¶ 55. On January 14, 2014, the staff issued a Wells Notice to Respondent's counsel. Ex. 531. On April 10, 2014, the staff took Respondent's testimony again, at which time she recanted much of her initial testimony about the alteration of the log and creation of the coversheet. SF, ¶¶ 58-59.

*250 (Jan. 2. 2015); *In the Matter of Timbervest, LLC*, Initial Decisions Release No. 658, 2014 SEC LEXIS 2990, at *170 (Aug. 20, 2014) (*citing Ross v. Bolton,* 904 F.2d 819, 824 (2d Cir. 1990)).

a. Respondent's was generally aware that her insider trading review records could be subject to examination by the Commission staff

Respondent was directly responsible for the primary violation, as she was the person her altered her log and failed to disclose what she had done. Thus, to establish liability, the Division does not need to show that Respondent had actual knowledge of the staff's request for her Burger King file; all that the Division must establish is her general awareness that it was improper to alter compliance-related documents well after the fact, and not disclose the alteration. *In the Matter of Peak Wealth Management Opportunities, LLC*, 2013 SEC LEXIS 664, at *16; *In the Matter of Harding Advisory, LLC*, 2015 SEC LEXIS 118, at *250); *In the Matter of Timbervest, LLC*, 2014 SEC LEXIS 2990, at *170.

As a compliance professional, in a highly regulated industry, there can be no question that she knew altering documents was improper. In fact, it was forbidden by Wells Fargo's Code of Ethics and Business Conduct. Respondent also knew, from her familiarity with the Commission's enforcement actions in *Buckingham Research* and *Janney Montgomery Scott*, that the alteration of documents without disclosing those alterations was a violation of the securities laws. The Division submits that on the evidence alone, the second element of aiding and abetting liability has been established.[6] *See, e.g., Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000); *In the Matter of Peak Wealth Opportunities, LLC*, 2013 SEC LEXIS 664, at *16; *In the Matter of Harding Advisory LLC*, 2015 SEC LEXIS 118, at *250.

[6] Tellingly, Respondent's Post-Hearing Brief wholly ignores any discussion of Wells Fargo's Code of Ethics and Business Conduct, or the fact that Respondent reviewed the Orders against *Buckingham Research Group, Inc.* and *Janney Montgomery Scott LLC* relating to the adequacy of controls at broker-dealers and investment advisers, and to the illegality of altering compliance documents prior to production to the staff.

b. At the time she altered her insider trading review log, Respondent was specifically aware of the staff's investigation

Respondent admits that on September 14, 2012 she learned about the Commission staff's investigation and "that Wells Fargo was cooperating in that investigation." Resp. Post-Hearing Brief, p. 22; Ex. 380 at PRADO-SEC-025241. In an attempt to excuse her conduct, however, Respondent contends that she was only aware of the Commission staff's investigation of insider trading in Burger King securities, but that she had no knowledge that the staff's investigation included scrutiny of Well Fargo's compliance department's review of the trading in Burger King securities. As Respondent argues, during her testimony at the hearing, she "*correctly* emphasized that she only knew about the investigation into *Prado* and did not leap to the conclusion that her prior Burger King insider trading review was either under investigation or that her file was being requested for production. Her failure to make such a connection was completely reasonable. The SEC is charged with pursing persons who engage in insider trading, but not usually investigating compliance department failures to have reported the trading." Resp. Post-Hearing Brief, p. 23 (emphasis in original). But given her knowledge of the Commission's action in *Buckingham*, as well as her knowledge that Wells Fargo's policies and procedures for conducting insider trading reviews were legally mandated, there is no logical basis for Respondent to have made such a fine distinction in her mind concerning the potential scope of the staff's investigation.

Moreover, she concedes that "the charging of Prado would have ended the only investigation about which [she] had any knowledge." Resp. Post-Hearing Brief, p. 23. But if that were the case, there would have been no reason for Respondent – *after Prado was charged* – to have recalled her Burger King file from long term storage, conduct additional investigation regarding the circumstances surrounding Prado's trading or her reasons for closing her review two years earlier with no findings, or create a second file for the additional work she performed in connection with the Burger King matter in the fall of 2012. Indeed, her creation of that second file,

ostensibly for the purpose of avoiding any appearance of backfilling her original review file, evidences her knowledge that *both* files would likely be subject to examination by the Commission staff. There is simply no other reason for her to have created that second file.

Furthermore, she knew that after Prado had been charged by the Commission, the Burger King matter did not go away. In late November 2012, the Commission charged Igor Cornelson with trading in Burger King securities and, in its press release, which Respondent had read, the Commission announced that its investigation was continuing. Ex. 376 (PRADO-SEC-025468-70). But presumably, with the charging of Cornelson, Respondent understood that investigation was also complete, and yet questions about – and requests for – her Burger King review file persisted. Thus, Respondent's argument that she was completely oblivious to the potential scope of the staff's investigation when she altered her log and created a new cover sheet for her Burger King file strains credulity.

Respondent's subsequent conduct in failing to disclose the alteration of her review log and creation of a new cover page to her Burger King file, either to her supervisors or to Commission staff, at a time when she knew that the Commission staff intended to, and did in fact, question her about her review, is also reflective of her state of mind at the time she altered her log. Had Respondent truly believed that she had done nothing wrong in creating a new cover page to her file, she presumably would have disclosed that fact to her supervisors in January 2013, when she was advised of the staff's intention to interview her; or at least during her initial investigative testimony before the staff, when she was asked pointed questions about the obvious date discrepancy in the "Comments and Notes" field of her cover sheet.[7]

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[7] With respect to her initial investigative testimony before the Commission staff, where she falsely testified that she had not recently altered her log, Respondent claims that when she realized Wells Fargo had not corrected her testimony, she authorized her new counsel at Zuckerman Spaeder LLP to do so. Resp. Post-Hearing Brief, p. 16. Respondent ignores, however, that Wells Fargo had advised the Commission staff, weeks before Zuckerman's mid-April 2013 proffer, that the metadata associated with her review log showed that her initial testimony was false. Thus, Zuckerman's after-the-fact efforts to correct the record reflect nothing as to Respondent's mental state at the time she

c. Respondent's did not have some innocent "purpose" for backfilling her log

Respondent contends that she had a wholly innocent purpose in altering her insider trading review log on December 28, 2012 – that she was just trying to assist her supervisor in answering "internal" questions about her review and why she had closed it with no findings. Resp. Post-Hearing Brief, p. 9. But the evidence establishes that Respondent had answered those questions long ago.

On September 27, 2012, Respondent emailed her supervisor to offer "a little more info" on Prado's Burger King trading: "According to news articles (The Street, Market Watch, Wall Street Journal), rumors of a sell of BKC to a private equity group had been circulating for several weeks prior to the announcement. The stock price was up 15% on 9/1/12, the day prior to the announcement." Resp. Post-hearing Brief, p. 7; Ex. 380, SEC-PRADO-025251. She printed some of those articles for the first time on September 14, 2012, the same day that she first learned of the staff's investigation. Ex. 380A, SEC-PRADO-025277-86.

On December 28, 2012, after Respondent's supervisor asked for only for the original frontrunning report, Respondent "attached a coversheet to the original frontrunning report before she gave it to Ms. St John. . . Ms. Wolf, before printing the coversheet, added two new sentences of information about her initial review. . . She added those sentences by putting them on her spreadsheet, and then printing the coversheet from the spreadsheet entry regarding her Burger King review." Resp. Post-Hearing Brief, pp. 9-10.[8] Rather than directing her supervisor to her September 27th email, Respondent chose to add information to the log about rumors of the acquisition that was

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testified. Similarly, Respondent's citations to Wells Fargo's outside counsel's Wells letters as evidence she did not intentionally testify falsely are similarly inconsequential. Wells Fargo's outside counsel readily conceded that they had no idea why Respondent testified in the manner she did. *See* Ex. 611 at p. 5 ("[w]e do not know if Ms. Wolf's testimony about when she added the two sentences to the spreadsheet was the result of faulty recollection or was instead a deliberate misrepresentation."

[8] There is no evidence in the record that Respondent was asked by her supervisor on December 28, 2012 to create or give her a coversheet to accompany the original frontrunning report.

virtually identical to, and in all likelihood copied from, her September 27th email. SF ¶¶ 37, 40, 61-62; Ex. 380, SEC-PRADO-025251; Ex. 255, p. 1.

Respondent's purpose in altering her log in December 2012 is clear. It was not for the purpose of giving additional information to her supervisor that might be "useful" in answering "internal" questions; rather it was for the purpose of creating what would appear to be a contemporaneous record that provided an explanation for her having closed her Burger King review with no findings. It is apparent that she wanted to make it appear that she had considered, back in 2010, pre-existing rumors of Burger King's acquisition in deciding to close her review. Her altered log benefitted both herself, by making her appear more competent than she was, and it also served to benefit Wells Fargo, by making it appear that its compliance department had closed its Burger King review for justifiable reasons. But, notably, there is no evidence in the original file that she had considered such information at the time, and significantly, in her post-hearing brief, she never actually claims that she had.

Regardless of her purpose, Respondent was clearly on notice that her Burger King file could be the subject of examination by the staff. At a minimum, she was reckless in not appreciating that fact. By her own admission and the evidence adduced at the hearing, Respondent knew that the Commission staff was investigating the trading in Burger King securities and that Wells Fargo was cooperating with the investigation. Resp. Post- Hearing Brief, p. 22. The evidence further shows she was the *sole participant* in altering the log on December 28, 2012 to add the two sentences that did not exist before. SF ¶¶ 37, 40, 60-62. She *alone* created the coversheet to include the information added to the log by the alteration. *Id.*, ¶¶ 38, 39. She gave the coversheet with the alteration along with the original frontrunning report from the 2010 review file to her supervisor. Resp. Post-Hearing Brief, pp. 9, 10. She elected not to tell anyone within Wells Fargo that she altered the log, nor did she disclose she created the coversheet with the altered information, prior to

the production of the coversheet to the staff. SF ¶¶ 41-4260-62. Respondent admitted that she did this in order to enable her supervisor to answer questions about Respondent's Burger King review. Resp. Post-Hearing Brief, p. 9.

Her admissions, together with the Division's other evidence that places her conduct in its appropriate context, establish, at a minimum, that Respondent, while employed as a compliance consultant by a dually-registered broker dealer and investment adviser, recklessly engaged in "highly unreasonable conduct" which represents "an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known" to Respondent or was "so obvious" that Respondent "must have been aware of it." *In the Matter of Peak Wealth Opportunities, LLC,* 2013 SEC LEXIS 664, at *16 (*quoting Rolf v. Blyth, Eastman, Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978) (*quoting Sanders v. John Nuveen & Co.*, 554 F.2d 790, 793 (7th Cir. 1977)); *see also, Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004) ("[a secondary violator may act recklessly, and thus aid and abet an offense, even if he is unaware he is assisting illegal conduct."). As such, the second element of aiding and abetting liability has been established.

3. Respondent's substantially assisted with the wrongdoing

Wells Fargo produced to the Commission staff an excerpt of Respondent's insider trading review log for the Burger King review that had been altered prior to its production to the staff (Ex. 533, ¶¶ 30-31) and it admitted that doing so was a violation of the firm's recordkeeping obligations (*Id.*, ¶¶ 34-35). Respondent conceded her substantial assistance with Wells Fargo's violation when she admitted she was the only person who altered the log on December 28, 2012, she created the coversheet from the altered log that was produced to the staff, and that she did not tell anyone within Wells Fargo that she altered the log or created the coversheet prior to its production to the staff. SF ¶¶ 37-42, 60-62.

In the face of that evidence, Respondent's asserts that she did not "substantially assist" in Wells Fargo's recordkeeping violation because she did not "in some way associate[] herself" with

the violation and she did not "she participate[] in it as something that she wished to bring about." Resp. Post-Hearing Brief, pp. 20, 26. But that is a misstatement of the controlling case law. The "substantial assistance" element only requires the Division to show that Wells Fargo's primary violation was a "direct or reasonably foreseeable result" of Respondent's conduct. *SEC v. Grendys*, 840 F. Supp. 2d at 45; *SEC v. Johnson,* 530 F. Supp. 2d 325 (D.D.C. 2008).[9] Under that test, there is can be no question that this third element is also satisfied.

4. At a minimum, Respondent caused Wells Fargo's primary violation

Not only does the evidence establish that Respondent aided and abetted Wells Fargo's primary violation, it also establishes that she caused it. Causing liability requires that: (1) a primary violation occurred; (2) an act or omission by the respondent contributed to the violation; and (3) the respondent knew or should have known that his or her conduct would contribute to the violation. *See In the Matter of Gateway Int'l Holdings, Inc.*, Exchange Act Release No. 53907, 2006 SEC LEXIS 1288, at *35 (May 31, 2006); *In the Matter of Robert M. Fuller,* 56 S.E.C. 976, 984 (2003), *pet. denied*, 95 Fed. Appx. 361 (D.C. Cir. Apr. 23, 2004; *In the Matter of Erik W. Chan*, 55 S.E.C. 715, 724-26 (2002).

As noted above, a primary violation of Wells Fargo's books and records obligation exists, and

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[9] In its opening brief the Division cited to the Commission' opinion in *In the Matter of Gregory O. Trautman*, Securities Act Release No. 9088, 2009 SEC LEXIS 4173 (Dec. 15, 2009), for the proposition that the "substantial assistance" element for aiding and abetting liability can be satisfied by a showing that Respondent's conduct was a "proximate cause" of the primary violation. *Trautman*, in turn, relied on *SEC v. Pentagon Capital Management*, 612 F. Supp. 241, 266 (S.D.N.Y. 2009) and *SEC v. Treadway*, 430 F. Supp. 2d 292, 339 (S.D.N.Y. 2006). In *Trautman*, the Commission further noted that the D.C. Circuit had not adopted a proximate cause requirement, citing to *SEC v. Johnson*, 530 F. Supp. 2d at 303 n. 7. In *SEC v. Apuzzo*, 689 F.3d 204 (2d Cir. 2012), the Second Circuit held that its proximate cause test for substantial assistance only applies in private securities actions, where reliance is an element. In contrast, in a SEC enforcement action, the Second Circuit now holds the SEC to what appears to be a lower standard, namely, that the defendant must consciously assist the commission of the specific violation in some active way. *Id.* 689 F.3d at 212 n.8; *see also SEC v. Syron*, 934 F. Supp. 2d 609, 634 (S.D.N.Y. 2013). The Division respectfully submits that under any of these tests, the element of substantial assistance is satisfied, as Respondent's knowing and intentional alteration of her log without disclosing what she had done was a direct cause of Wells Fargo's primary violation.

is it undisputed that Respondent's alteration of the log directly led to that violation. The only disputed issue is whether Respondent knew or should have known her conduct would contribute to the violation. But in her post-hearing brief, Respondent all but ignores the fact that a showing of negligence is sufficient to hold her liable for causing Wells Fargo's primary violation. Indeed, it is well established that negligence is sufficient to establish liability for causing a primary violation that does not require scienter. *See Howard*, 376 F.3d at 1141; *In the Matter of KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1175 (2001), *recon. denied*, 55 S.E.C. 1, 4 & n.8 (2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002), *reh'g en banc denied*, 2002 U.S. App. LEXIS 14543 (Jul. 16, 2002). Neither Section 17(a) of the Exchange Act nor Section 204(a) of the Advisors Act requires that Respondent (or Wells Fargo) to have acted with scienter. *See. e.g., In the Matter of BKD, LLP*, Exchange Act Release No. 73768, 2014 SEC LEXIS 4704, at *10 (Dec. 8, 2014) (Exchange Act Section 17(a); *In the Matter of Aetna Capital Management, Inc.*, Investment Advisors Act Release No. 1379, 51 S.E.C. 631, 1993 SEC LEXIS 2090, at *18, n. 19 (Aug. 19, 1993) (Advisors Act Section 204)).

Respondent knew or should have known that her conduct would contribute to the violation because she was a compliance consultant responsible for ensuring that Wells Fargo maintained the insider trading review log, she created the log entry, and she ultimately admitted to altering the log. These facts show that at a minimum Respondent acted negligently when she altered the log and thereby contributed to Wells Fargo's inability to produce a true, complete and current copy of that record.

In an attempt to avoid a finding of negligence, however, Respondent asserts that she did not ask her supervisor why she wanted the original Burger King frontrunning report on December 28, 2012 because it was not her "practice to question Ms. St John, her supervisor, about why Ms. St John needed material that she requested." Resp. Post-Hearing Brief, p. 10. But her purported lack of curiosity does not excuse her conduct. Respondent was a compliance professional, familiar with the Commission's action in *Buckingham*, and readily conceded at the hearing, as she had to, that had she

known that someone other than her supervisor would get a copy of the coversheet, "she would not have attached the coversheet to the frontrunning report before providing the material to Ms. St John . . ." *Id.*, p. 10. Her testimony is significant, as it demonstrates that she knew it would have been wrong, indeed, a violation of the securities laws, to have altered her log had she known it would be examined by the Commission staff. But by that late date, months after Prado had been charged, and a month after Cornelson had been charged, and knowing that the Commission staff's investigation was continuing and that Wells Fargo was cooperating in the investigation, and in the face of continuing questions about and requests for her Burger King file, it would have been wholly unreasonable for Respondent to expect that the staff's investigation had come to a close. Thus, at a minimum, it was negligent of Respondent to alter her log, create the coversheet with the altered information, and to give the coversheet to her supervisor along with the original frontrunning report without disclosing the alteration to anyone. By engaging in those acts and omissions, Respondent contributed to Wells Fargo's primary violation, and thus, at a minimum, caused Wells Fargo's primary violation.

B. Under The *Steadman* Factors, Respondent Should Be Sanctioned For Her Misconduct

The public interest demands significant sanctions on Respondent including a cease-and-desist order, a permanent bar, and second-tier civil penalties.

1. Respondent's conduct was egregious

Respondent was a compliance professional with a dually-registered broker-dealer and investment adviser who was responsible for conducting trade surveillance to detect possible insider trading and for properly documenting those efforts. Respondent contends, however, that for her to have connected the dots between the records she created contemporaneously during her 2010 review of Burger King trading and the Commission staff's subsequent investigation into Burger King trading would have been an "illogical leap." Resp. Post-Hearing Brief, pp. 21-22. But the evidence demonstrates otherwise. Indeed, Respondent's failure to appreciate the wrongfulness of

any part of her conduct, whether it be: (1) altering her log after she learned of the staff's investigation and that Wells Fargo was cooperating with that investigation; (2) creating the coversheet with the altered information in order to coach her supervisor on how to answer future questions why Respondent closed her review in 2010 with no findings, i.e., there were rumors in the marketplace before the acquisition announcement; or (3) lying to the staff in her initial investigative testimony on March 13, 2013 about the alteration of the log and creation of the coversheet, demonstrates that need for significant sanctions. The effect of her conduct was to prolong and needlessly complicate the staff's investigation, further contributing to its egregiousness.

2. Respondent's conduct was not an isolated event

Respondent contends that since she has not admitted to altering other records, the circumstances surrounding the Burger King alteration was isolated in nature. This argument ignores that Respondent has admitted that she altered the log after she learned of the staff's investigation in mid-September 2012 and of Wells Fargo's cooperation with that investigation, she then created a coversheet (which she was not asked by her supervisor to do) with backfilled information about rumors, gave the coversheet to her supervisor along with the original frontrunning report without disclosing the alteration, and that she then lied to the staff about her alteration in her initial testimony in March 2013. These facts demonstrate that Respondent's conduct was not an isolated event.

3. Respondent acted with the highest degree of scienter

Respondent contends this case "is all about scienter," but "she possessed none." Resp. Post-Hearing Brief, p. 33. Respondent was 34-year veteran of the securities industry. She was responsible for detecting possible insider trading at her firm and for documenting those efforts pursuant to written policies and procedures as required under the federal securities laws. She knew the importance of creating and maintaining accurate and complete records under both the securities laws and Wells Fargo's Code of Ethics and Business Conduct. She understood the implications of the Commission

actions in *Buckingham* and *Janney* with respect to firms' internal controls governing insider trade surveillance efforts and, specifically in the *Buckingham* case, that alteration of records arising from those compliance efforts was a violation of the law. She kept the log as a summary of her trading reviews, which was treated by herself and others in the compliance department as a reliable source of information about her reviews. She learned of the staff's investigation in mid-September 2012 and she knew that Wells Fargo was cooperating with that investigation. Despite all of that, Respondent altered the log to cover up her substandard review of Burger King trading, and created the coversheet with the backfilled information. Moreover, she did not disclose the alteration to either her supervisors or the Commission staff when she had an opportunity to do, and she lied in her initial testimony before the staff only to recant large portions of her testimony over a year later. Respondent clearly was an active participant in Wells Fargo's primary recordkeeping violation and she knew or was reckless in not knowing what she was doing was wrong.

4. **Respondent's has offered no assurances against future violations**

Respondent argues that the Division failed to prove that her "conduct was improper, let alone egregious" (*id.*, p. 32) and that "she did not commit the alleged violations" (*id.*, p. 33). These statements demonstrate Respondent's defiance. In keeping with her defiant attitude, she contends that in order for her to have considered the connection between the records she created during her 2010 review of Burger King trading and the Commission's staff's investigation into Burger King trading would have been an "illogical leap" for her. *Id.*, pp. 21-22. These statements are far from expressing any remorse and do not provide any assurances against future violations of the federal securities laws.[10]

5. **There is a likelihood of future violations**

The Division accepts at face value Respondent's statements that she is presently "out of the

[10] At best, Respondent acknowledged that her conduct "*could have been* wrong," that altering a document "*would have been* improper," and that "the alleged conduct *would, if true,* be improper" (Resp. Post-Hearing Brief, p. 33-34, emphasis added), but they likewise do not provide assurances against future violations.

securities industry" and "has no desire to rejoin the industry, particularly in a compliance job." Resp. Post-Hearing Brief, p. 34. The Division does not, however, accept the blanket unsubstantiated statement: "No possibility of her committing a future violation exists." *Id.* Respondent has the physical and mental ability to work in some capacity in the securities industry, and given her misconduct, lack of remorse, and lack of assurances against future violations, the opportunity for future violations is apparent.

6. Second-tier civil penalties against Respondent are appropriate given the absence of evidence of an inability to pay

Reckless disregard of regulatory requirements and deterring future violations by others of the securities laws are worthy of imposition of second-tier civil penalties under Section 21B of the Exchange Act and Section 203(i) of the Advisers Act. Respondent does not dispute that. Rather, Respondent asks for leniency in the dollar amount of any penalties that may be imposed on her.

At the hearing, the issue of Respondent's decision to not provide the Division with a sworn financial disclosure statement demonstrating her claimed current inability to pay civil penalties was addressed. RT (02/23/15) 98:1-99:9, 286:13-297:1. Large portions of the hearing transcript on February 24, 2015 were ordered sealed in order for the Court to receive Respondent's testimony on her current financial condition. Despite this, Respondent's counsel offered no documents into evidence that in any way substantiated her claimed inability to pay. *See, e.g.,* Section 21B (Evidence Concerning Ability to Pay); Rule 630(b) of the Commission's Rules of Practice. Even after receiving Respondent's testimony about her current financial condition, it was evident that she failed to demonstrate an inability to pay civil penalties. Her post-hearing brief sheds no further light on the subject, other than to acknowledge she can pay a "nominal" amount in penalties. Resp. Post-Hearing Brief, p. 38. This Court may, in its discretion, consider evidence concerning Respondent's claimed inability to pay in determining whether penalties are in the public interest. *See* Rule 630(a) of the Commission's Rules of Practice.

Respondent is neither impoverished, nor insolvent. She has not applied for and is not collecting any public assistance to relieve impoverishment, nor has she filed for bankruptcy

protection. Respondent has a positive net worth. She owns or co-owns real estate and personal property, and she has significant funds in her own retirement accounts, any of which can be used, partially or in full, to satisfy civil penalties without destroying her financially. In fact, she has enough assets that she provides financial support for others in her life. She is essentially leading the life of a retired person, collecting Social Security and living rent-free in a relative's apartment. She spends her days visiting friends and relatives, and doing nothing to support herself. Although not currently employed, Respondent has the skills and abilities to work and earn a living if she so choses. The evidence demonstrates that Respondent is not unable to pay civil penalties, but only that she just doesn't think she should have to, given her position that she did nothing wrong.

Therefore, an appropriate second-tier civil penalty should be imposed by Respondent under Section 21B of the Exchange Act and Section 203(i) of the Advisers Act.

III. CONCLUSION

For all the reasons stated, the Division requests that the Court find that Respondent has violated the specified provisions of the Exchange Act and the Advisers Act and impose the requested sanctions.

Dated: April 3, 2015

Respectfully submitted,

DIVISION OF ENFORCEMENT

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