

UNITED STATES OF AMERICA  
BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING  
File No. 3-15873

In the Matter of

Thomas R. Delaney II and  
Charles W. Yancey

Respondents

**RESPONDENT CHARLES W. YANCEY'S MOTION TO ENTER  
YANCEY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS  
OF LAW INTO THE RECORD AND MOTION TO STRIKE**

Respondent Charles W. Yancey ("Yancey"), by and through counsel, hereby moves the Court to: (1) enter Yancey's unopposed Proposed Findings of Fact and Conclusions of Law, filed December 19, 2014, into the record as findings of fact and conclusions of law and (2) strike the Division's Supplemental Findings of Fact, filed January 20, 2015.

**I. The Division does not oppose Yancey's Proposed Findings of Fact and Conclusions of Law.**

On November 13, 2014, the Court ordered the parties to submit any responses to a party's proposed findings of fact and conclusions of law by January 16, 2015 ("Post-hearing Order"). See Post-Hearing Order at ¶ 6. The Court later extended this deadline to January 20, 2015. The

Court ordered that “[a]ny response to a party’s proposed findings of fact and conclusions of law shall be numbered, and must reflect those paragraphs as to which there is no dispute.” *Id.* The Court further ordered that “a party’s response to findings of fact and conclusions of law . . . shall be limited to a counterstatement of the factual finding or legal conclusion, specifically identifying the language that is disputed, and then supporting that counterstatement by citations and quotations(s) . . . .” *Id.*

On January 20, 2015, the Division submitted its responsive post-hearing brief. The Division did not respond or object to Yancey’s proposed findings of fact and conclusions of law.<sup>1</sup> The Division did not make any proposed counterstatements to Yancey’s proposed factual findings or legal conclusions, nor did it identify any language that it disputed. Accordingly, because the Division does not oppose Yancey’s proposed findings of fact and conclusions of law, and because each of Yancey’s proposed findings of fact are supported by a preponderance of the evidence, as demonstrated in Yancey’s Proposed Findings of Fact and Conclusions of law, Yancey’s proposed findings of fact and conclusions of law should be entered into the record as findings of fact and conclusions of law. *See Sandkuhl & Co.*, 42 S.E.C. 761 (Sept. 10, 1965) (exceptions to recommended findings of fact and law “may be deemed waived” where a party does not specify the findings in which it takes exception, nor submit any supporting reasons for those exceptions, despite being explicitly provided an opportunity to do so); *Cf. Johnson v. Tuckwell*, 2014 WL 1683290, at \*2 (W.D. Wis. Apr. 29, 2014) (finding, in the context of a summary judgment, that “because defendants did not object to any of plaintiff’s proposed

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<sup>1</sup> In accordance with the Post-hearing Order, Respondent Delaney did respond to Yancey’s Proposed Findings of Fact and Conclusions of Law. Respondent Delaney disputes two of Respondent Yancey’s proposed findings of fact. *See* Delaney’s Reply to Yancey’s Proposed Findings of Fact and Conclusions of Law, filed Jan. 20, 2015, at pp. 7, 9. Delaney does not dispute any of Yancey’s Proposed Conclusions of Law. *Id.* at pp. 12-18. Thus, there are no objections to Yancey’s Proposed Conclusions of Law, and the Court should find all of Yancey’s Proposed Findings of Fact, except Proposed Findings of Fact 61 and 79, as stipulated, supported by a preponderance of the evidence, and binding on the parties pursuant to 17 C.F.R. § 201.324.

findings of fact or otherwise respond to them, [the Court] must treat” plaintiff’s allegations as true).

**II. The Court should strike the Division’s Supplemental Findings of Fact because it violates the Court’s Post-hearing Order.**

Respondent Yancey also moves for an order striking the Division’s Supplemental Findings of Fact because it violates the Post-hearing Order and the Commission’s Rules of Practice.

First, the Division’s Supplemental Findings of Fact violate the Post-hearing Order. Pursuant to the Post-hearing Order, “a party’s response to findings of fact. . . shall be limited to a counterstatement of the factual finding . . . specifically identifying the language that is disputed, and then supporting that counterstatement by citations and quotation(s).” *See* Post-hearing Order at ¶ 6. Nothing in the Post-Hearing Order provides for *supplemental* findings of fact. Nor does the Division’s Supplemental Findings of Fact conform with any of the requirements of the Post-hearing Order. *See id.*<sup>2</sup> Accordingly, the Division’s Supplemental Findings of Fact violate the Court’s Post-hearing Order and should be struck in its entirety.<sup>3</sup>

Second, the Division’s Supplemental Findings of Fact violate established law. Rule 340(a) of the Commission’s Rules of Practice provides that before “an initial decision is issued, each party shall have an opportunity, reasonable in light of all the circumstances, to file in writing proposed findings and conclusions together with, or as a part of, its brief.” *See* 17 C.F.R. § 201.340. The Commission’s Rules of Practice do not allow a party to file consecutive versions of the facts. *Id.*; *see also In the Matter of OptionsXpress, Inc.*, SEC Admin. Proc. File 3-14848,

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<sup>2</sup> Rule 340(b) of the Commission’s Rules of Practice provides similar requirements under which a proper response may be filed and also states that “[n]o further briefs may be filed except with leave of the hearing officer.” C.F.R. § 201.340(b).

<sup>3</sup> Pursuant to Rule 180(b), a hearing officer “may reject, in whole or in part, any filing that fails to comply with any requirements of these Rules of Practice or of any order issued in the proceeding . . . [and] such filings shall not be part of the record.” C.F.R. § 201.180(b).

Initial Decision Release No. 490, 2013 WL 2471113, at \*1 (June 7, 2013) (granting Respondents' motion to strike the Division's additional findings of fact and any references to it).

In *OptionsXpress*, Judge Murray rejected *precisely the same* attempt by the Division to circumvent the Rules of Practice. In *OptionsXpress*, the Division filed its proposed findings of fact on December 7, 2012.<sup>4</sup> On February 1, 2013, the Division filed its post-hearing reply brief but also filed additional, supplemental findings of fact.<sup>5</sup> All respondents moved to strike the Division's supplemental findings of fact.<sup>6</sup> Recognizing that "the Commission's Rules of Practice do not allow a party to file consecutive versions of the facts," Judge Murray granted the respondents' motions to strike, struck the Division's supplemental findings of fact, and excluded all references to it from the record.<sup>7</sup> Judge Murray further held that "to accept the Division's [Supplemental Findings of Fact] would be unfair as it would deprive Respondents of their ability to contest in writing the Division's new factual assertions." *Id.*

The circumstances here are no different. Just as it did in *OptionsXpress*, the Division is attempting to file consecutive versions of the facts. And just as in *OptionsXpress*, allowing the Division to submit consecutive versions of the facts here would unfairly prejudice Respondent Yancey. Accordingly, the Court should grant Yancey's motion to strike and exclude the Division's Supplemental Findings of Fact and all references to it from the record. *See OptionsXpress*, 2013 WL 2471113, at \*1; *see also* C.F.R. § 201.180(b).

### **III. The Division violated the Court's Post-hearing Order by filing two responsive briefs.**

Yancey also objects to the Division's attempt to circumvent the Post-hearing Order's

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<sup>4</sup> *See OptionsXpress, Inc.*, 2013 WL 2471113, at \*1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

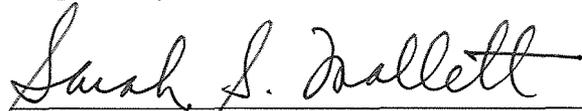
twenty-five page limit by filing *two* twenty-five page reply briefs. *See* Post-Hearing Order at ¶ 6. In doing so, the Division essentially filed a fifty page responsive post-hearing brief, in violation of the Court's Post-hearing Order. *Id.* The Division chose to bring its case against two respondents. It did not file two separate OIPs. Nor did it file two separate pre-hearing briefs. And it did not file two separate post-hearing briefs. That it now chooses to file two separate reply briefs is nothing more than a transparent attempt to circumvent the Court's Post-hearing Order.

#### **IV. Conclusion and relief sought.**

Because they are unopposed and supported by a preponderance of the evidence, all of Respondent Yancey's proposed findings of fact, other than Proposed Findings of Fact 61 and 79, should be entered into the record as findings of fact. Similarly, because they are unopposed, all of Respondent Yancey's conclusions of law should be entered into the record as conclusions of law. Lastly, because it violates the Post-hearing Order and settled law, the Court should strike the Division's Supplemental Findings of Fact and all references to it.

January 22, 2015

Respectfully Submitted,



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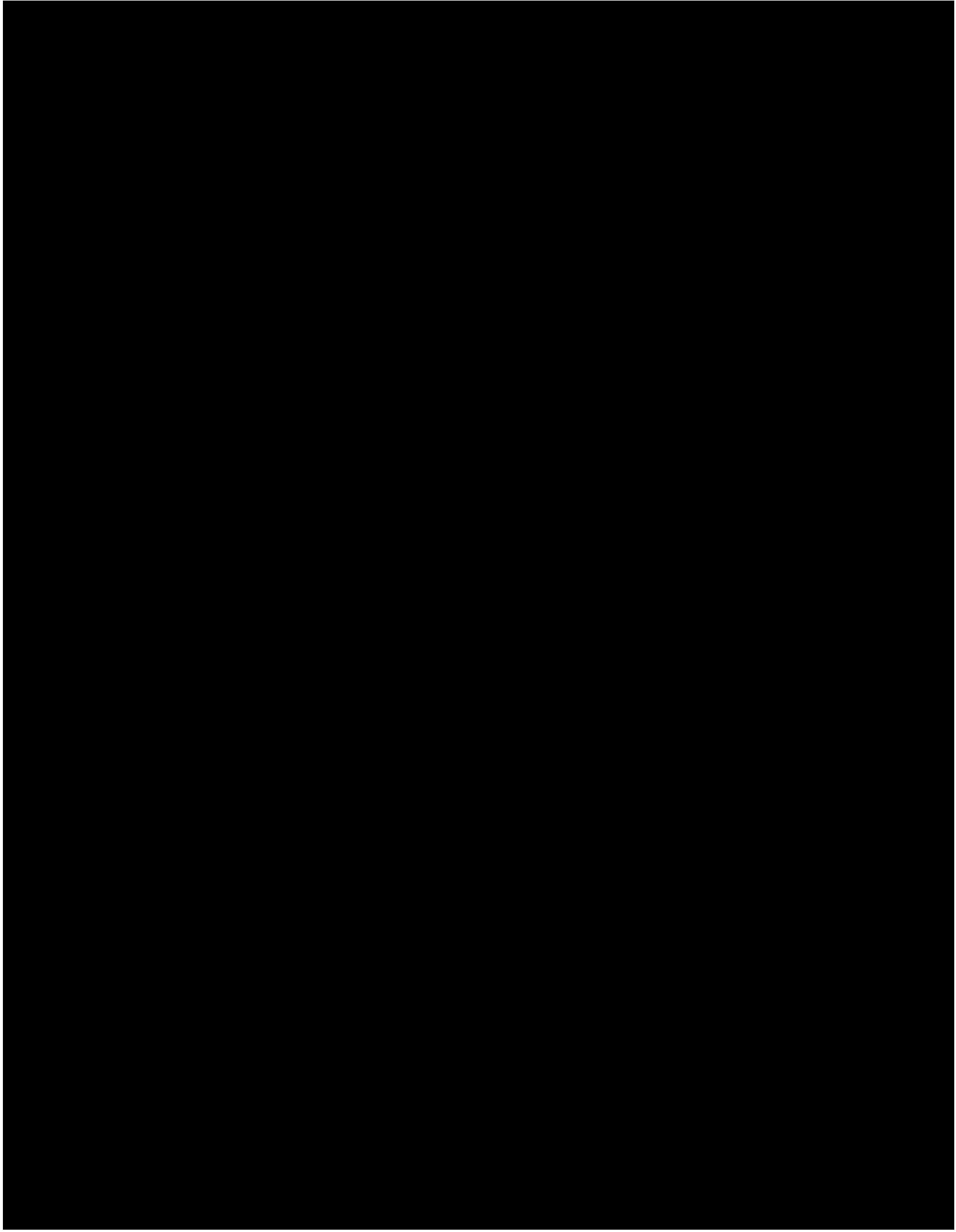
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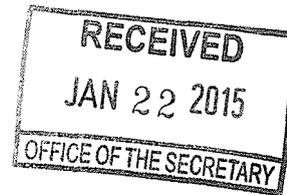
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**ATTORNEYS FOR RESPONDENT  
CHARLES W. YANCEY**





January 22, 2015

**Via Hand Delivery**

Lynn M. Powalski, Deputy Secretary  
Office of the Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Mail Stop 1090  
Washington, D.C. 20549

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

Dear Ms. Powalski:

Enclosed for filing is an original and three copies of Respondent Charles W. Yancey's Motion to Enter Yancey's Proposed Findings of Fact and Conclusions of Law Into the Record and Motion to Strike.

By copy of this letter, I have served all parties of record. If you have any questions, do not hesitate to contact me at the number below. Thank you.

Sincerely yours,

A handwritten signature in cursive script that reads "Sarah S. Mallett".

Sarah S. Mallett  
Haynes and Boone, LLP  
Direct Phone Number: (214) 651-5797  
sarah.mallett@haynesboone.com

Encls.

cc: (w/enclosures)  
Honorable Jason S. Patil, Administrative Law Judge (courtesy copy via email)  
Polly Atkinson, Division of Enforcement, U.S. Securities and Exchange Commission (via email)  
Brent Baker, Clyde Snow, Counsel to Delaney (via email)