

**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 THOMAS R. DELANEY II'S COMBINED MOTION TO STRIKE
AND MOTION TO ENTER DELANEY'S UNOPPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW INTO THE RECORD**

Respondent Thomas R. Delaney II ("Delaney"), by and through counsel, hereby moves the Court to: (1) strike the Division's Supplemental Findings of Fact; and (2) enter Delaney's unopposed Proposed Findings of Fact and Conclusions of Law into the record as findings of fact and conclusions of law.

Respondent Charles W. Yancey has filed a similar motion with the Court. Delaney agrees with and incorporates herein, the authorities cited in Respondent Yancey's motion, which are relevant to both respondents in this administrative proceeding.

I. The Court Should Strike the Division's Supplemental Findings of Fact.

Respondent Delaney moves for an order striking the Division's Supplemental Findings of Fact because it violates the Post-Hearing Order ("Post-Hearing Order") entered on November 13, 2014, and the Commission's Rules of Practice.

The Post-Hearing Order (¶¶ 5 and 5(a)) provides that the parties were to file all proposed findings of fact and conclusions of law by December 19, 2014. The Division's Supplemental Findings of Fact were filed on January 20, 2015 -- over a month past the Court's deadline. Moreover, nothing in the Post-Hearing Order provides for *supplemental* findings of fact. The Division's Supplemental Findings of Fact do not conform with any of the requirements of the Post-Hearing Order. *See* Post-Hearing Order at ¶ 6.¹ Accordingly, the Division's Supplemental Findings of Fact violate the Court's Post-Hearing Order and should be stricken.²

In addition, 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.*³

In *OptionsXpress*, Judge Murray rejected precisely the same attempt by the Division to circumvent the Rules of Practice. 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'

¹ 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).

² 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).

³ *See also In the Matter of OptionsXpress, Inc.*, SEC Admin. Proc. File 3-14848, 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).

motions to strike, struck the Division's supplemental findings of fact, and excluded all references to it from the record. *Id.* Judge Murray 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 Delaney. Accordingly, the Court should grant Delaney's motion to strike and exclude the Division's Supplemental Findings of Fact and all references to it from the record.⁴

II. The Division Does Not Oppose Delaney's Proposed Findings of Fact and Conclusions of Law.

Delaney also moves for an order entering Delaney's unopposed Proposed Findings of Fact and Conclusions of Law into the record. In the Post-Hearing Order, the Court ordered the parties to submit responses to a party's proposed findings of fact and conclusions of law.

"... Any 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. 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 quotation(s)..."

See Post-Hearing Order at ¶ 6.

On January 20, 2015, the Division submitted its responsive Post-Hearing Briefs.⁵ The Division did not respond or object to Delaney's Proposed Findings of Fact and Conclusions of Law. The Division did not make any proposed counterstatements to Delaney's proposed factual

⁴ *See OptionsXpress*, 2013 WL 2471113, at *1; *see also* C.F.R. § 201.180(b).

⁵ Similar to Yancey, Delaney also notes that the Division also violated ¶ 6 of the Court's Post-Hearing Order by filing two separate responsive briefs, effectively allowing itself to exceed the page limit set by this Court by double.

findings or legal conclusions, nor did it identify any language that it disputed. The Division has thus waived any objections to Delaney's proposed finding of fact or conclusions of law.⁶ Accordingly, because the Division does not oppose Delaney's Proposed Findings of Fact and Conclusions of Law, and because each of Delaney's Proposed Findings of Fact are supported by a preponderance of the evidence, Delaney's Proposed Findings of Fact and Conclusions of Law should be entered into the record.⁷

III. Conclusion.

For the reasons stated, the Court should strike the Division's Supplemental Findings of Fact and all references to it, and enter into the record all of Delaney's Proposed Findings of Fact and Conclusions of Law.

DATED this 22nd day of January, 2015.

CLYDE SNOW & SESSIONS

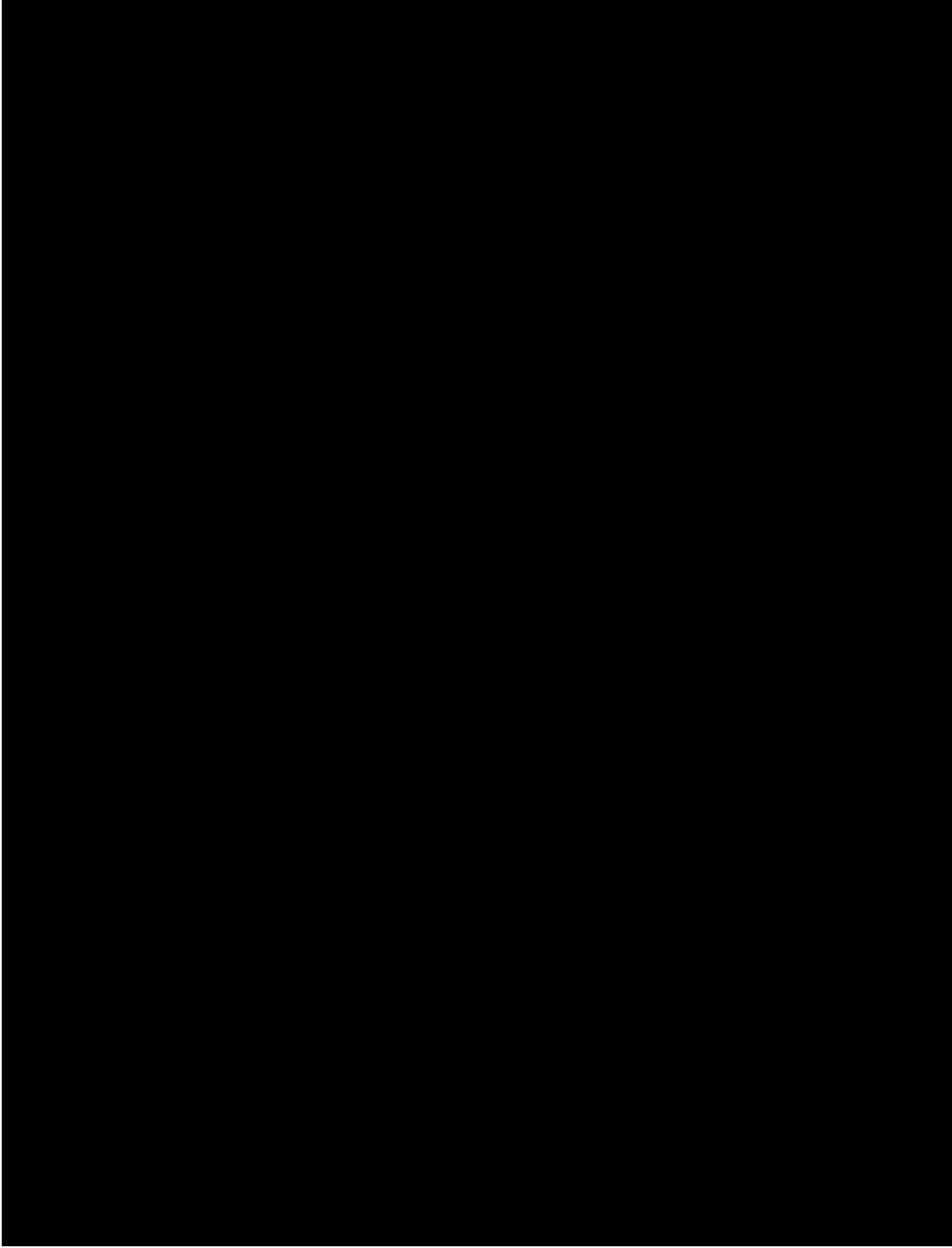


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ATTORNEYS FOR RESPONDENT THOMAS R. DELANEY II

⁶ 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).

⁷ See *id.*



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January 22, 2015

Via Federal Express

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 please find the original and three copies of Thomas R. Delaney II's Combined Motion to Strike and Motion to Enter Delaney's Unopposed Findings of Fact and Conclusions of Law Into the Record.

By copy of this letter, I have served all parties of record. If you have any questions or need additional information, please do not hesitate to contact our office.

Sincerely,

CLYDE SNOW & SESSIONS

A handwritten signature in blue ink, appearing to be "AL" with a stylized flourish.

Aaron D. Lebenta

Encls.

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