

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-1587

In the Matter of

THOMAS R. DELANEY II and
CHARLES W. YANCEY

Respondents.

**RESPONDENT CHARLES W. YANCEY'S RESPONSE TO RESPONDENT
DELANEY'S POST HEARING PROPOSED FINDINGS OF FACT**

Respondent Charles W. Yancey (“Yancey”), by and through counsel, submits this Response to Respondent Delaney’s (“Delaney”) Post-hearing Proposed Findings of Fact. Pursuant to the Court’s post-hearing order (Thomas R. Delaney II, Admin. Proc. Rulings Release No. 2011, 2014 SEC LEXIS 4305 (Nov. 13, 2014)), this submission indicates which of Delaney’s Proposed Findings of Fact Yancey does not dispute. Where Yancey disputes one of Delaney’s Proposed Findings of Fact, this submission provides the reason for the dispute and a counterstatement accompanied by quotations of the key language from the evidentiary record that supports the objection. Also, for the Court’s convenience, the table below reflects the numbered Findings of Fact that Yancey disputes.

<i>No Dispute</i>	1-5, 7-8, 10-12, 15-19, 24-30, 32-36, 39-40, 43-47, 50-55, 57-58, 60-65, 67-73, 75-77, 79-90, 92-97, 100
<i>Dispute</i>	6, 9, 13-14, 20-23, 31, 37-38, 41-42, 48-49, 56, 59, 66, 74, 78, 91, 98-99

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.
 - a. Response: *No Dispute*.
2. Delaney's current bosses, who are aware of the Division's allegations against him but have continued to employ him in a compliance-related job, believe that he is honest.
 - a. Response: *No Dispute*.
3. Nothing about the Division's allegations, lawsuit, or the evidence in this case changed any witness's opinion of Delaney's character.
 - a. Response: *No Dispute*.
4. No witness who testified expressed a neutral or negative opinion of Delaney's character for honesty and integrity; all witnesses who were asked expressed only positive opinions of Delaney's Character.
 - a. Response: *No Dispute*.
5. Delaney's colleagues and subordinates enjoyed working for and with him because of his industry knowledge, honesty, and collaboration.
 - a. Response: *No Dispute*.
6. Delaney performed his job as CCO as well as he could based on the available resources he had.
 - a. Response: *Dispute* – accuracy of statement.
 - b. Counterstatement: Delaney performed his job as CCO as well as he could based on the available resources he had; **when requested, Yancey provided or approved additional resources to Delaney or Compliance without hesitation.**
 - c. Support:
 - d. **Tr. 725:8-14 [Alaniz]**
8 Q Okay. If you could, tell us what -- what you

9 know -- or your opinion of Mr. Delaney's performance in
10 his job as CCO.

11 A My opinion, I believe he did the best that he
12 could. We had a lot of fires to put out. We were always
13 behind the eight ball. I think with what resources we
14 had, I believe he did the best.

e. **Tr. 1340:2-24** [Delaney]

Q Was Mr. Yancey an accessible supervisor?

A He was.

Q Was he an engaged supervisor?

A He was.

Q Did he foster a culture of compliance at the
organization?

A He did.

Q **When you needed something in the Compliance
department, did Mr. Yancey generally provide it?**

A **He did.**

Q **Did you ask to expand the Compliance department
while you were the Chief Compliance Officer?**

A **I did.**

Q **Did that require Mr. Yancey's approval?**

A **It did.**

Q **Did he grant it?**

A **He did.**

Q How did you expand the Compliance department,
in what way?

A When I started with the Compliance department,
it was about a team of five or so, and at our high point
we had over 25 compliance associates that were in that
department. It was a meaningful -- it was a meaningful
addition to -- to staff. We had implemented a very, very
expensive compliance system called Actimize, the
implementation of which I recall was nearly \$500,000.
Bill Yancey approved that without blinking an eye.

f. **Ex. 525** (In response to Delaney's staffing memo, Yancey stated "[i]f we add
anywhere it will be in Compliance as nothing is more important.")

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.

a. Response: *No Dispute*.

8. Delaney is regarded by his managers and others to whom he reported as a compliance-minded individual and an effective CCO.

a. Response: *No Dispute*.

9. During his tenure at Penson, **Delaney** worked to improve compliance by doubling the number of compliance personnel.

a. Response: *Dispute* – incomplete as stated.

b. Counterstatement: During his tenure at Penson, Delaney **and Yancey** worked **together** to improve compliance by doubling the number of compliance personnel.

c. Support:

d. **Stip. FOF 72**. During the relevant time period 2008 to 2011 Penson's compliance department, **under the direction of Yancey and Delaney**, grew to over 23 employees. Tr. 2506:12-15, 2507:16-19.

e. **Tr. 1226:16-23** [Delaney]

16 Q What about the size? Did you feel like you had
17 enough people within Compliance to do everything that
18 needed to be done?

19 A Well, I think over time we ended up adding
20 significantly to that. **So certainly while I was there**
21 and partnering with the Chief Executive Officer, Bill
22 Yancey, really -- really focused on building a robust
23 compliance program.

f. **Tr. 727:4-16** [Alaniz]

4 Q Let me ask: At Penson when you started, how
5 many compliance -- how many people were there in the
6 Compliance department?

7 A I would say anywhere from 10 to 12 individuals.

8 Q Okay.

9 A Maybe -- no more than 15.

10 Q And when you left, do you recall how many there
11 were?

12 A Over 20. Maybe 20, 25.

13 Q Okay. So in that time that you were there that

14 Mr. Delaney was the CCO, the Compliance department
15 doubled?

16 A Yes.

10. During his tenure at Penson, Delaney worked to improve Compliance by reorganizing the Compliance personnel into three groups, or silos, to handle three significant compliance responsibilities: anti-money laundering; regulatory liaison; and operations.

a. Response: *No Dispute*.

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

a. Response: *No Dispute*.

12. No witness who testified indicated that Delaney's compensation, including salary and bonus, was in any way tied to the profits of Stock Loan or Penson.

a. Response: *No Dispute*.

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.

a. Response: *Dispute* – incomplete as stated.

b. Counterstatement: 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. **It is undisputed that Delaney never escalated any Stock Loan violations to Yancey.**

- c. Support:
- d. **Stip. FOF 43** (Yancey was not aware that Penson's Stock Loan Department was violating Rule 204).
- e. **Tr. 1757:8-16** [Hasty]
 - 8 Q All right. Let me ask just assuming
 - 9 hypothetically that there had been meeting with Mr.
 - 10 Gover and you and Mr. Delaney where it was discussed
 - 11 that Stock Loan was deliberately choosing not to comply
 - 12 with Rule 204. Based on who you know Tom Delaney to
 - 13 be, what would you expect his response would have been?
 - 14 A I would have expected him to immediately say,
 - 15 That's not an acceptable solution, and he would have
 - 16 escalated that further.

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

- a. Response: *Dispute* – accuracy of statement.
- b. Counterstatement: Brian Gover's memory is neither clear nor reliable **with regard to his alleged meetings with Delaney.**
- c. Support:
- d. **Tr. 140:15-22** [Gover]
 - 15 **It's been how long since -- since the date of the**
 - 16 **meetings that you described with Mr. Delaney?**
 - 17 **A In the range of five years.**
 - 18 Q Okay. And how clear would you say your memory
 - 19 is of the dates of those meetings?
 - 20 A You know, I think, you know, I can pretty
 - 21 accurately within nine months, but, you know, I would not
 - 22 be able to reliably say, yeah, at this point.

15. Gover entered into a cooperation agreement with the Division.

- a. Response: *No Dispute*.

16. Gover testified that he met with Johnson, Delaney and Hasty regarding Rule 204 sometime between November 2009 and July 2010.
- a. Response: *No Dispute*.
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.
- a. Response: *No Dispute*.
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.
- a. Response: *No Dispute*.
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.
- a. Response: *No Dispute*.
20. Alaniz described a meeting at which Gover was questioned **at length** by John Kenny about Rule 204 close-out failures.
- a. Response: *Dispute* – accuracy of statement.
- b. Counterstatement: Alaniz described a meeting at which Gover was questioned **for approximately 15-20 minutes** by John Kenny about Rule 204 close-out failures
- c. Support:
- d. **Tr. 790:1-20** [Alaniz]
1 going to be a peculiar question -- but during this
2 meeting, was there an interaction between Mr. Kenny and
3 Mr. Gover that you recall?
4 A Yes.
9 Q Okay. What was the interaction that you
10 recall?
11 A The interaction from John Kenny was the basic,
12 simple question of what happened, what were they doing to

13 remediate it, and Brian Gover replied how he was going to

14 remediate it.

15 Q Okay.

16 A What the issues were and what the remediation

17 process was.

18 Q Did that go on for a while, this back and

19 forth?

20 A It was probably about 15, 20 minutes.

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

a. Response: *Dispute* – accuracy of statement.

b. Counterstatement: Gover **could not recall the** meeting where Kenny asked Gover about the failures in Alaniz's 3012 testing ever happened.

c. Support:

d. **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.

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.

- a. Response: *Dispute* – unclear as stated.
- b. Counterstatement: 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, **John Kenny**.
- c. Support:
- d. **Tr. 155:3 –7** [Gover]
Q Do you -- so you don't recall a meeting where Mr. Yancey was there and Mr. Delaney was there. And who's John Kenny?
A **John Kenny is the COO. I reported to John Kenny.**
- e. **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.

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

- a. Response: *Dispute* – incomplete as stated.

a. Counterstatement: Gover never told Kenny or anyone else that failures to close out were attributable to Stock Loan. **Gover's knowledge of any Stock Loan failures was gained independently of the December 2009 Audit.**

b. Support:

c. **Tr. 153:25 – 154:21** [Gover]

24 Q Do you

25 attribute that to any particular part of Pension other
1 than buy-ins?

2 A Yeah. I mean, at the end of the day Pension is
3 responsible for the close-outs.

4 Q I get that. I'm just trying to figure out
5 if -- if wasn't buy-ins --

6 A What I think was happening was that Stock Loan
7 was recalling the shares. So they were coming back and
8 saying, hey, so let me take a back -- a step back. It
9 might be helpful to understand the process.

10 Q Well, let me -- instead, let me go here. So

11 you think this relates to that Stock Loan's -- whether
12 they were buying in for market open?

13 A I think it re- -- I think it relates to, when
14 Stock Loan was recalling the shares, as to whether those
15 shares were being recalled in time for the open or if
16 they were getting recalled and they were coming into the
17 close.

d. **Tr. 154:22-25** [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.

e. **Tr. 155:18 – 156:1** [Gover]

18 you don't remember it, as you're sitting here, if you
19 were asked about that back at the time the 3012 report
20 came out, I take it you would have mentioned the Stock
21 Loan issue if you knew about it, right?

22 A If I were aware of the Stock Loan issue, yeah.

23 Q You for certain would have brought that up?

24 A If I were aware and had a belief that Stock
25 Loan was not doing what they should have been doing, yes,
I would have brought it up.

f. **Tr. 173-17-21; 175:19-21 [Gover]**

A . . . **Just because there were issues in the buy-ins group of getting the
executions done on time does not mean that there were issues in Stock
Loan or were not issues in Stock Loan. They're separate.**

. . . .

A . . . If you're saying given the audit around the buy-in's piece, no, I don't
think that that would have given rise to a reasonable inquiry of the Stock Loan.

g. **Stip. FOF 78** (The December 2009 audit and June 2010 follow-up 204(a) audit
results related only to the Buy-Ins Department)

h. **Tr. 855:11 – 856:12 [Gover]** (agreeing that based on his test results, it was not
necessary to go to the Stock Loan Department)

i. **Tr. 168:13-22 [Gover]**

A: the December audit was focused only to . . . **It was focused on the
processes within my group and where we were failing.**

j. **Tr. 170:5-13 [Gover]**

Q: I guess the point I want to establish is that your group made an incredible
effort, incredible effort at all times to comply with Rule 204(a); do you agree?

A: We made -- we made an effort to comply with 204. **The results of the
audit showed we weren't making buy-ins, my group.** The efforts weren't
sufficient. But yes, the people in the group, they cared, they wanted to do the
right thing, they wanted to comply with the regulations.

24. DeLaSierra entered a cooperation agreement with the Division.

a. Response: *No Dispute.*

25. During his testimony DeLaSierra was afraid that the Division of enforcement might
charge him in the lawsuit as well.

a. Response: *No Dispute.*

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.

a. Response: *No Dispute*.

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

a. Response: *No Dispute* – but contains typographical error.

b. Counterstatement: DeLaSierra testified that he did not discuss the requirements for Rule 204 with Eric Alaniz.

c. Support:

d. **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.

28. Alaniz testified that DeLaSierra met with him and discussed Rule 204 and the closeout requirements.

a. Response: *No Dispute*.

29. DeLaSierra acknowledged the Alaniz's understanding of Rule 204, that close-outs must be completed by market open on T+4 or T+6, was correct.

a. Response: *No Dispute* – but contains typographical error.

b. Counterstatement: DeLaSierra **acknowledged Alaniz's** understanding of Rule 204, that close-outs must be completed by market open on T+4 or T+6, was correct.

c. Support:

d. **Tr. 751:13-25** [Alaniz]

13 A No, they did not. Brian Hall was silent. Rudy

14 De La Sierra indicated that that was not his

15 interpretation of the rule.

16 Q Okay. What did he tell you his interpretation

17 was?

18 A He did not. He just stated that my

19 interpretation was not the correct interpretation. So at

20 that point, so there wouldn't be any, I guess, head

21 butting or trying to, I guess, to avoid any type of

22 confusion, I let them take the rule with them. I told

23 them to read it, sleep on it, and the next day we would

24 reconvene and we would decided what -- what they thought

25 the understanding of the rule was.

e. **Tr. 752:3-10** [Alaniz]

3 Q That next day meeting, what happened?

4 A The next morning, I was called up. I can't

5 remember who called me up. I met with Brian Hall, Rudy

6 De La Sierra, and they brought in Matt Butane and I went

7 over with Doug Gorenflo. And as soon as we arrived, I

8 asked them if they had time to read the rule. And they

9 said yes, and they did confirm that my interpretation of

10 the rule was correct.

30. DeLaSierra understood the requirements of Rule 204 from the very beginning of 204T, that buying in had to occur at market open on T+6.

a. Response: *No Dispute*.

31. In DeLaSierra's first investigative testimony before the SEC, the only meeting that he mentioned that made Penson's Compliance department aware of Stock Loan's practice of not closing out Sales by market open was a meeting in early 2011.

a. Response: *Dispute* – unclear as stated.

b. Counterstatement: In DeLaSierra's first investigative testimony before the SEC, the only meeting that he mentioned that made Penson's Compliance department

aware of Stock Loan's practice of not closing out **Long Sales of Loaned Securities** by market open was a meeting in early 2011.

c. Support:

d. **Tr. 265:1 – 267:11** [DeLaSierra]

A On the loan sale piece, I never had a discussion with Eric Alaniz about it.

Q You never had a discussion about when close-out was required under Rule 204?

A On the long sale portion, no.

Q Okay. You – you testified – like I mentioned, you testified about this – this two times before; is that right?

A Correct.

Q And the first one was in 2012, the spring or fall. For some reason I'm remembering fall and probably wrong, but we can resolve that pretty quickly. I am, in fact, wrong. So in the spring of 2012, you testified. And do you recall if you were asked whether Compliance knew about this practice?

A Yes.

Q Okay. You recall that you were asked that?

A I recall that I was asked that, yes.

Q And the first thing that you were asked was: At the time that Rule 204T came out, did the Stock Loan department consult with anyone from Compliance?

And then I think the question – maybe the question was going to go on. I think Mr. Warner was the one asking it, and it got cut off. And what did you answer?

A I said we did not consult with them.

Q Okay. So that was back in 2012. And as we covered earlier, you remembered events a little bit more clearly then?

A Yes.

Q And you testified that when 204T came out, you didn't consult with anyone from Compliance?

A Consult, yes. We did not consult.

Q Now, you – you were also asked during that

testimony if – if anyone from Compliance was aware of this practice. Is that right?

A Yes.

Q All right. And when you were asked about that, you mentioned a meeting. Is that –

A Oh.

Q Is that accurate?

A Yeah.

Q And – and the meeting you mentioned, you said it was the beginning of last year, which again you were testifying in 2012. Right?

A Right.

Q So you mentioned a meeting in the beginning of 2011.

A Yes.

Q And – and that’s the meeting that you testified about when you were asked how it was that Compliance was aware, how you knew Compliance was aware of this practice?

A Oh, I’m sorry. Is that a question?

Q Yeah.

A Yes.

Q And you didn’t mention any other meetings with Compliance?

A Yes.

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

a. Response: *No Dispute*.

33. In DeLaSierra’s first testimony, he said he did not consult with Compliance about Rule 204T when the rule came out.

a. Response: *No Dispute*.

34. DeLaSierra’s misread his own prior testimony into the record.

a. Response: *No Dispute* – but contains typographical error.

b. Counterstatement: DeLaSierra misread his own prior testimony into the record.

c. Support:

d. **Tr. 269:23 – 270:7** [DeLaSierra]

23 Q Who did you say attended?

24 A Myself and Mike Johnson and Tom Delaney.

25 Q Myself and/or Mike Johnson?

1 A No, and Mike Johnson.

2 Q That's – that's what your transcript says?

3 A The – the transcript says "and/or."

4 Q Okay. Does and/or – are you saying the

5 transcript's wrong?

6 A I'm saying I could have – could have said

7 that, yes

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.

a. Response: *No Dispute*.

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

a. Response: *No Dispute*.

37. Stock Loan never put any Rule 204 policies or procedures for not closing out until the afternoon of T+6 in writing.

a. Response: *Dispute* – unclear as stated.

b. Counterstatement: Any policy of Stock Loan to close-out long sales of loaned securities in the afternoon of T+6 was not in writing, but an oral understanding solely among Stock Loan personnel.

c. Support:

d. **Tr. 389:21 – 390:4** [Wetzig]

21 Q So Mike Johnson developed the procedure by

22 which you would not close out until afternoon of T+6?

23 A Correct.

24 Q And did he communicate that to you in writing
25 ever?

1 A Not that I'm aware of.

2 Q **That was just an oral understanding among the
3 Stock Loan folks?**

4 A **That is correct.**

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

a. Response: *Dispute* – accuracy of statement.

b. Counterstatement: In preparation for testing in **2009**, Alaniz met with Stock Loan to learn about their Rule 204 process.

c. Support:

d. **Tr. 748:21-749:20** [Alaniz]

21 Q **Okay. You have today's date on there, November**

22 **13th, 2009. Best of your recollection, would that have**

23 **been near when you would have begun this testing process?**

24 A **Yes.**

25 Q All right. Now, I want to go back to this –

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.

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.

39. Although he explicitly told them he was testing Rule 204, no one in the Stock Loan department at Penson told Alaniz that their operations were inconsistent with the rule.

a. Response: *No Dispute*.

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

a. Response: *No Dispute*.

41. Both Stock Loan and Buy-Ins knew the Rule 204 close-out requirements.

a. Response: *Dispute* – unclear as stated.

b. Counterstatement: **Personnel from both Stock Loan and Buy-Ins departments** knew the Rule 204 close-out requirements.

c. Support:

d. **Tr. 101:17-23** [Gover]

17 Q Who at PFSI knew about Rule 204(a) and the
18 obligations to – to close out that we just discussed?
19 And I'll just throw it out. Did buy – did the buy-ins
20 department know that?

21 A Yes.

22 Q Did the Stock Loan department know that?

23 A Yes.

e. **Tr. 202:6-14** [DeLaSierra]

6 Q Mr. De La Sierra, were you aware of when the
7 rule required close-outs of long sales?

8 A When 204T went into place?

9 Q Yes, sir.

10 A Yes.

11 Q What time did the rule require close-outs?

12 A Market open of T6.
13 Q And that wasn't Stock Lending's practice?
14 A Correct.

f. **Tr. 536:3-6** [Johnson]

3 Q And – and your reading of the rule was that it
4 required close-out by market open on T+6?
5 A My reading of the rule as it pertained to long
6 sales and CNS, yes.

42. During the meeting with Stock Loan, which purportedly occurred after the initial meetings with Delaney related to difficulty of complying with Rule 204, no one indicated that Delaney told them they didn't need to comply with Alaniz's interpretation of Rule 204.

a. Response: *Dispute* – unclear as stated.

b. Counterstatement: During a meeting between Alaniz, Hall, and DeLaSierra, which purportedly occurred after the alleged meeting between Delaney and Stock Loan personnel related to difficulties complying with Rule 204, neither Hall nor De La Sierra told Alaniz that Delaney told them they didn't need to comply with Alaniz's interpretation of Rule 204.

c. Support:

d. **Tr. 752:24 – 753:5** [Alaniz]

24 Q Did – during this meeting, did either Rudy De
25 La Sierra or Brian Hall tell you, “Hey, we met with Tom
1 Delaney and he told us that we don't need to comply with
2 your interpretation of that rule”?
3 A No.
4 Q Did anyone ever tell you that from Stock Loan?
5 A No.

43. During Alaniz's meeting with Stock Loan, no one discussed contrary industry practice; for example, that in the industry, other firms weren't closing out by market open.

a. Response: *No Dispute*.

44. Following the meeting with Stock Loan, Alaniz had no reason to suspect that Stock Loan wasn't buying in at market open.

a. Response: *No Dispute*.

45. Alaniz prepared the initial draft of the 3012 summary report (Exhibit 135).

a. Response: *No Dispute*.

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

a. Response: *No Dispute*.

47. Alaniz kept testing results and documentation in folders and kept them at Penson. These documents were reviewed by regulators, including FINRA.

a. Response: *No Dispute*.

48. By the time of the March 2010 meeting, Alaniz believed the problem with the Buy Ins function was in the process of being remediated.

a. Response: *Dispute* – accuracy of statement.

b. Counterstatement: By the time of the **March 31, 2010 CEO certification meeting**, Alaniz believed the problem with the Buy Ins function was in the process of being remediated.

c. Support:

d. **Tr. 793:8 – 795:21** [Alaniz]

8 But as I recall, when you were being asked
9 about this meeting by Ms. Atkinson, there was – there
10 was a question about substantial compliance; do you
11 remember that?

12 A What was the question?

13 Q Maybe something to do with whether – whether
14 someone could believe – or something to do with whether
15 you were substantially in compliance with Rule 204; do
16 you remember that?

17 A Yes.

18 Q Now, just so we're clear here, your test didn't
19 test everything having to do with 204, did it?

20 A No.

21 Q It just – it didn't – as a matter of fact,
22 204 applies to every close-out of every security?

23 A Yes.

25 Q And so while you had a test that showed a
25 problem with that buy-ins function, I think we saw that
1 you had already been getting preliminary results back
2 from, say, Summer Poldrack saying that things were
3 getting better; is that about right?

4 A Yes.

5 Q And I take it during this meeting here you
6 would have communicated that to Mr. Delaney?

7 A I don't know if I communicated it to him in
8 this meeting. I always had access to his office. It was
9 possible I could have forwarded it to him, but I probably
10 would have communicated it to him, that's correct.

11 Q And the same thing with Mr. Yancey; you
12 probably during this meeting would have wanted to let him
13 know, "Hey, we've had issues, but here are the early
14 remediation results"?

15 A I did not.

16 Q You don't recall doing that?

17 A No, I don't believe I did say that. The
18 meeting was more structured to have the business
19 owners – well, let me step – let me step back.

20 **The reason we brought these business owners**
21 **into this meeting, which was not typical – normally we**
22 **would have had just our meetings with Bill Yancey – but**
23 **in the resulting – or after going through all the items,**
25 **he would have questions that only the business owners**
25 **could answer. So this year, we brought in individuals so**
1 **in the event that he had questions, any concerns, he**
2 **could address it to them directly.**

3 Q And I take it there were some concerns about
4 this 204 testing?

5 A Yes.

6 Q And did you feel like they were addressed?

7 **A** From the discussions that John Kenny had with
8 **Brian, they had – they had discussed remediation issues**
9 **or remediation communication items to conform with the**
10 **rule and I had no issue with that.**
11 **Q** You had no issue with the remediation they
12 **discussed?**
13 **A** No.
14 **Q** And I take it it was your opinion that if that
15 **remediation was done, that would resolve the problem?**
16 **A** Correct.
17 **Q** Okay. So whether they were – had been in
18 substantial compliance when you did your testing, you
19 understood they were on the road to substantial
20 compliance when you were in this meeting; is that right?
21 **A** Yes.

49. Stock loan was responsible for carrying out remediation.

- a. Response: *Dispute* – accuracy of statement.
- b. Counterstatement: **Stock Loan and the Buy Ins departments were responsible for carrying out remediation as provided by the Rule 204 audit.**
- c. Support:
- d. **Ex. 70 (December 2009 Audit report) at 3-4** (recommendations, measures, and responsibilities for Stock Loan); **Ex. 70 at 7-8** (recommendations, measures, and responsibilities for Buy Ins).
- e. **Tr. 784:25 – 785:4 [Alaniz]**
25 Was it typical of your experience in – as a
1 Compliance Officer that you would identify problems and
2 the business units would come up with the most efficient
3 solutions to – to solve those problems?
4 A It was typical, yes.

50. The April 2010 OCIE Response indicated that the buy-in issue had been rectified, including specific steps that were being taken to correct the problems.

- a. Response: *No Dispute*.

51. Remediation efforts following the December 2009 3012 testing were underway by the time the April 2010 OCIE response was drafted.
- a. Response: *No Dispute*.
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.
- a. Response: *No Dispute*.
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...”
- a. Response: *No Dispute*.
54. No one ever informed Alaniz of a policy or practice at Penson that Stock Loan wasn’t to be bought in.
- a. Response: *No Dispute*.
55. Alaniz did not escalate the issues arising out of the July 2010 emails to Delaney. Rather, he copied Delaney and others on the email simply to ensure he was giving correct advice.
- a. Response: *No Dispute*.
56. Alaniz, Poldrack and Hasty agreed that the penalty box is not an acceptable solution, but rather a violation in and of itself.
- a. Response: *Dispute* – unclear as stated.
- b. Counterstatement: Alaniz, Poldrack, and Hasty agreed that the penalty box is not an acceptable solution for violations of Rule 204, but rather a violation in and of itself.
- c. Support:
- d. **Tr. 819:24 – 820:13** [Alaniz]
24 A “She is of the opinion that the penalty box is
25 not an acceptable solution since there are other controls
820

1 on the back side that need to be in place to ensure that
2 we do not violate 204T.”
3 Q Okay. Do you think the T might be an error
4 given that 204 had been in place for about a year at this
5 point?
6 A Yes.
7 Q Okay. Do you agree – first of all, the “she”
8 in that sentence you just read, do you understand that to
9 refer to Holly?
10 A Yes.
11 Q All right. Do you agree with Holly’s response
12 there?
13 A Yes.

e. **Tr. 822:8-12** [Alaniz]

8 I
9 go, “In that case, I agree with you that what Holly had
10 stated is correct; **they should not be using the penalty**
11 **box as a remediation for fail violations of Reg SHO 204.**
12 **That is a violation in itself.”**

57. Alaniz understood that closing out by market open was not an option, but a requirement under Rule 204.

a. Response: *No Dispute*.

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.

a. Response: *No Dispute*.

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

a. Response: *Dispute* – unclear as stated.

b. Counterstatement: The November 2010 OCIE Response (Ex. 101) was **consistent with** Alaniz’s testing results; **Penson had performed a significant amount of remediation between Alaniz’s audit and the OCIE response.**

- c. Support:
- d. **Stip. FOF 61** (Gover believed that the OCIE response language was accurate both when drafted and as of the date he testified at trial).
- e. **Tr. 1792:1-12** [Hasty]
1 Q So when was this letter in relation – and,
2 again, to the best of your knowledge here today, in
3 time relation to when Mr. Alaniz got it?
4 A This was after.
5 Q How much after?
6 A It would have been nearly a year, 11 months.
7 Q And do you – what would be your expectation
8 as to whether there was any remediation done between
9 the time of testing and the time of this letter?
10 A I would have expected that there would have
11 been significant remediation done during that time
12 frame.
- f. **Tr. 1739:3-19** [Hasty]
3 Q Okay. And What about Rule 204T? When was
4 Rule 204T? When did it go out of – of effect?
5 A That, I'm not certain. July maybe 2010.
6 Q July 2010 or 2009?
7 A 2009. Sorry.
8 Q No problem.
9 So would Mr. Alaniz' testing in December of
10 2009 tell you anything about what the practices of
11 Person were related to 204T?
12 A Yes, I would assume they would.
13 I'm sorry. Rephrase your question.
14 Q Sure.
15 204T went out in July of 2009. Would testing
16 that took place six months later tell you anything
17 about what was going on with regard to 204T?
18 A Oh, likely not. Again, modifications were
19 likely to have been made.

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.

a. Response: *No Dispute*.

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

a. Response: *No Dispute*.

62. Delaney believed Johnson was adequately supervised.

a. Response: *No Dispute*.

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

a. Response: *No Dispute*.

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.

a. Response: *No Dispute*.

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.

a. Response: *No Dispute*.

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

a. Response: *Dispute* – accuracy of statement.

b. Counterstatement: **Alaniz believed that** the Stock Lending and Buy-Ins groups understood Rule 204 best.

c. Support:

d. Tr. 749:21 – 750:3 [Alaniz]

21 Q Okay. And who would you say at – in all of
22 Penson knew Rule 204 best, or who did you – who was
23 it – did you expect to know it best?
24 A I expected those business units to know it the
25 best.

1 Q And the business units were the
2 operations/buy-ins group –

3 A And the Securities Lending department.

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

a. Response: *No Dispute*.

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

a. Response: *No Dispute*.

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).

a. Response: *No Dispute*.

70. The memo Delaney Circulated Related to Rule 204 was copied almost word-for-word from a bulletin issued by Penson's counsel.

a. Response: *No Dispute*.

71. Following Delaney's call with outside counsel, Penson did not change its practices with respect to Rule 204. In fact, the violations continued after Delaney left Penson.

a. Response: *No Dispute*.

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

a. Response: *No Dispute*.

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

a. Response: *No Dispute*.

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).

a. Response: *Dispute* – unclear as stated.

b. Counterstatement: **In discussing footnote 55, an advisory note to Rule 204, the Division's expert, Professor Harris, testified that "the rule does not require that you recall on T+2. Accordingly, if you don't recall on T+2, you haven't violated any rule."**

c. Support:

d. **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.

e. **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.

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.

a. Response: *No Dispute*.

76. Sendero was built for Penson as a front-end software stock loan system, which would generate reports for failures to deliver.

a. Response: *No Dispute*.

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

a. Response: *No Dispute*.

78. Sendero was only 95 percent accurate.

a. Response: *Dispute* – accuracy of statement.

b. Counterstatement: **Wetzig believed that** Sendero was 95 percent accurate.

c. Support:

d. **Tr. 374:18-20** [Wetzig]

18 Q Do you have a sense of – can you put that in a

19 range of accuracy, how accurate it seemed to be?

20 A I would say **95 percent**.

79. Scott Fertig was co-CCO at Penson until December 2008.

a. Response: *No Dispute*.

80. Scott Fertig currently works for the Securities and Exchange Commission.

a. Response: *No Dispute*.

81. Prior to joining Penson, Gorenflo worked as an examiner at FINRA, and has a reputation as black-and-white, never crossing the foul line.

a. Response: *No Dispute*.

82. In its OIP, the Division alleged that Penson systematically violated Rule 204T(a)/204(a) from October 2008 until November 2011.

a. Response: *No Dispute*.

83. Wetzig did not have any discussions with Delaney pertaining to Rule 204 prior to the phone call with outside counsel.

a. Response: *No Dispute*.

84. Mike Johnson was the head of Stock Loan, and managed Stock Loan personnel, including DeLaSierra, Hall and Wetzig, among others.
- a. Response: *No Dispute*.
85. Wetzig testified that he knew a lot about the requirements of Rule 204 since the rule first came out.
- a. Response: *No Dispute*.
86. Wetzig then gave contradictory testimony that he didn't know how to comply with Rule 204.
- a. Response: *No Dispute*.
87. Even after the call with counsel in early 2011, Stock Loan did not change its practices and understood that they were violating Rule 204.
- a. Response: *No Dispute*.
88. Johnson settled with the Division, and was not required to pay disgorgement.
- a. Response: *No Dispute*.
89. Wetzig settled with the Division and agreed to cooperate.
- a. Response: *No Dispute*.
90. Wetzig was not ordered to pay any penalties or disgorgement, or to be barred from the industry as part of his settlement with the Division.
- a. Response: *No Dispute*.
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**.
- a. Response: *Dispute* – accuracy of statement.

b. Counterstatement: Poppalardo testified that compliance need not be perfect. In fact, there is an acceptable margin of error **in whether supervision of the underlying activity was reasonable.**

c. Support:

d. **Tr. 2001:19 – 2002:4** [Poppalardo]

19 You're not indicating there that compliance

20 needs to be perfect, are you?

21 **A Compliance doesn't need to be perfect, but**

22 **the systems and compliance with the rules, you are**

23 **expected to comply with the rules 100 percent. I think**

24 **the – the acceptable margin of error comes in whether,**

25 **you know, your supervision of the underlying activity**

1 was reasonable or not. You can't be expected to review

2 every transaction within a firm. And so it's not

3 unlikely that there would be a transaction or a few

4 transactions that might not comply.

92. The Rule 204 violations at issue equal approximately \$77.00 per day for the relevant time period (October 2008 – October 2011), based on a total of 252 trading days per year. Based on the date range stipulated for Delaney (see **Stipulated FOF 58**), this daily total is even less.

a. Response: *No Dispute.*

93. The Division entered into a contract with its expert, Professor Harris, for half a million dollars for work performed in this administrative proceeding.

a. Response: *No Dispute.*

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.

a. Response: *No Dispute.*

95. The Division did not introduce any emails or other documentary evidence suggesting a follow-up of any alleged meetings pertaining to Stock Loan's violative Rule 204 practices where Delaney was purportedly present, prior to February 2011.

a. Response: *No Dispute*.

96. The Division did not introduce any documentary evidence wherein Stock Loan personnel were seeking guidance or compliance advice from Delaney regarding Rule 204.

a. Response: *No Dispute*.

97. By January, 2010, Compliance personnel were overseeing remediation of known Rule 204 compliance issues uncovered during Rule 204 testing.

a. Response: *No Dispute*.

98. The Rule 3012 **Testing** Report presented to Yancey for his signature indicated that documentation of 3012 testing was available in the Compliance department at Penson.

a. Response: *Dispute* – accuracy of statement.

b. Counterstatement: The Rule 3012 **Summary** Report presented to Yancey for his signature indicated that documentation of 3012 testing was available in the Compliance department at Penson.

c. Support:

d. **Exhibit 135** – “2. Execution and documentation of testing (available in the Compliance dept.)”

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

a. Response: *Dispute* – accuracy of statement.

b. Counterstatement: The Rule 3012 **Summary** Report signed by Yancey **indicated that** exception and remediation reports were attached.

c. Support:

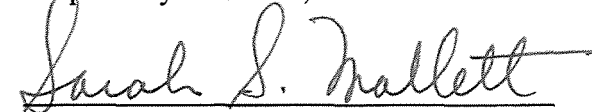
d. **Exhibit 135** – “3. Exception and remediation tracking (attached)”

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.

a. Response: *No Dispute*.

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Respectfully Submitted,



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