INITIAL DECISION RELEASE NO. 255
ADMINISTRATIVE PROCEEDING
FILE NO. 3-11086

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

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| In the Matter of | : | |
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| DOUGLAS W. POWELL, | : | INITIAL DECISION |
| CHARLES D. ELLIOTT, III, | : | August 17, 2004 |
| and RUSSELL S. TARBETT | : | |
| | : | |

APPEARANCES: Leslie Hendrickson Hughes and Thomas D. Carter for the Division of Enforcement, United States Securities and Exchange Commission

Douglas W. Powell, pro se;
Ivan B. Knauer and Michael J. Quinn for Charles D. Elliott, III;
Robert P. Oliver for Russell S. Tarbett

BEFORE: Robert G. Mahony, Administrative Law Judge

## INTRODUCTION

The Securities and Exchange Commission (Commission or SEC) initiated this proceeding with an Order Instituting Proceedings (OIP) on April 11, 2003, pursuant to: (1) Sections 15(b)(6) and 21C of the Securities Exchange Act of 1934 (Exchange Act), Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act), and Section 9(b) of the Investment Company Act of 1940 (Investment Company Act), against Respondents Douglas W. Powell (Powell) and Charles D. Elliott, III (Elliott); and (2) Sections 15(b)(6) and 21C of the Exchange Act, against Respondent Russell S. Tarbett (Tarbett).

Elliott and Tarbett filed Answers to the OIP on May 20, 2003. Powell filed his Answer on May 21, 2003. An eight-day hearing was held October 20-24 and 27-29, 2003, in Dallas, Texas. The Division of Enforcement (Division) called eleven witnesses, including the three Respondents. Elliott testified on his own behalf and called five additional witnesses. Powell testified on his own behalf and called no witnesses. Tarbett also testified on his own behalf and

called no witnesses. After the hearing, the Division, Elliott, and Tarbett filed proposed findings of fact, conclusions of law, and supporting briefs. Powell filed a posthearing brief.[1]

## ALLEGATIONS OF THE OIP

The OIP alleges that on May 13, 1999, the Commission entered its Order Making Findings and Imposing Remedial Sanctions, and Order to Cease and Desist (Suspension Order) against Powell and Elliott. Dominion Capital Corp., 69 SEC Docket 225. The Suspension Order suspended Powell and Elliott from association with any broker or dealer, in any capacity for the period May 13, 1999, to August 13, 1999, and thereafter in any supervisory or proprietary capacity until February 13, 2000 (Suspension Period). The OIP charges Powell and Elliott with willfully associating with Northstar Securities, Inc. (Northstar), a registered broker-dealer, while the Suspension Order was in effect. The OIP alleges that this association violated Exchange Act Section 15(b)(6)(B)(i), which proscribes anyone subject to a suspension order from associating with a broker-dealer without consent of the Commission.

The OIP further alleges that:

(1) Powell and Elliott willfully aided and abetted and caused Northstar's violation of Exchange Act Section 15(b)(6)(B)(ii). Additionally, Tarbett is charged with willfully aiding and abetting and causing Powell's and Elliott's violations of Exchange Act Section 15(b)(6)(B)(i), and Northstar's violation of Exchange Act Section 15(b)(6)(B)(ii);

(2) Powell, Elliott, and Tarbett willfully aided and abetted and caused Northstar's violation of Exchange Act Section 15(b)(1) and Rule l5b3-1 for filing nineteen inaccurate amendments to its Form BD from April 23, 1998, to March 16, 2001, which failed to disclose Powell's and Elliott's direct or indirect control of Northstar's management and the financing of its business;

(3) Powell, Elliott, and Tarbett willfully aided and abetted and caused Northstar's violation of Exchange Act Section l5(b)(1) and Rule l5b7-1 by failing to register Powell and Elliott as principals, who managed the securities business of Northstar and effected transactions on its behalf, during the periods April 1998 through May 12, 1999, and from February 14, 2000, through January 2001 (the periods before and after the effective dates of the Suspension Order);

(4) Powell, Elliott, and Tarbett willfully aided and abetted and caused recordkeeping violations by Northstar in violation of Exchange Act Section l7(a)(1) and Rules l7a-3(a)(12) and 17a-3(a)(12)(i)(d) because Northstar failed to keep on file Powell's and Elliott's employment applications or questionnaires or a copy of the Suspension Order, during the period April 1998 to November 2000; and

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[1] References to the OIP are cited herein as (OIP at___.). The parties' exhibits admitted into evidence are referred to as (DX. ___.) for the Division, (PX. ___.) for Powell, (EX. ___.) for Elliott, and (TX. ___.) for Tarbett. The hearing transcript is cited as (Tr. ___.). The Division's, Elliott's, Powell's and Tarbett's posthearing briefs are referred to as (Div. PHB at ___.), (Elliott PHB at ___.), (Powell PHB at___.), and (Tarbett PHB at ___.), respectively.

(5) Powell, Elliott, and Tarbett willfully aided and abetted and caused Northstar's violation of Exchange Act Section 17(a)(1) and Rule 17a-5 by failing to prepare and file the annual report for its fiscal year ending December 31, 2000.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

My findings and conclusions herein are based on the entire record and my observation of the witnesses who testified at the hearing. I have applied preponderance of the evidence as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981). All arguments, proposed findings and conclusions proffered by the parties were considered and only those consistent with this decision were accepted.

### A. Background[2]

#### 1. *Institution of Original Administrative Proceeding*

On August 19, 1997, the Commission instituted an administrative proceeding against, inter alia, Powell and Elliott. It was alleged that they failed to reasonably supervise certain registered representatives who engaged in illegal conduct while associated with Dominion Capital Corporation (Dominion Capital), a broker-dealer owned by Powell and Elliott since 1986.[3] (OIP at 2; DX. 1.) By 1998, Dominion Capital had between 200 and 250 brokers and 12 to 14 branch offices. (Tr. 247.)

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[2] Powell, age 64, is a graduate of the United States Naval Academy. He became a registered representative in 1982. Powell is currently registered with and chief executive officer (CEO) of New Investor World, Inc., which sells mutual funds and variable insurance products wholesale to insurance agents. (Tr. 48, 55-57.)

Elliott, age 57, is also a graduate of the Naval Academy and has a master's degree in business administration from Northern Colorado University. He is currently a registered representative with Calloway Financial Services. (Tr. 228-30.)

Tarbett, age 37, has a bachelor's degree in business administration and marketing from Texas Tech University. He is currently employed with a broker-dealer that sells interests in oil and gas properties. (Tr. 380-81.)

[3] From 1986 to November 1998, Powell and Elliott owned and were registered with Dominion Capital, a Texas broker-dealer that ceased business operations in 1998. (Tr. 55-56, 106, 230; DX. 3.) Powell was president of Dominion Capital until 1988 when Elliott succeeded him. (Tr. 230-23l.) In addition to Dominion Capital, Powell and Elliott owned a registered investment adviser, Dominion Financial Services; a mutual fund, Dominion Funds, Inc.; a mortgage brokerage, Dominion Mortgage Corporation; an insurance company, Dominion Agency, Inc.; and an administrative services company, Dominion Institutional Services Corp. (DIS). These entities are collectively referred to herein as the Dominion Companies, which is a d/b/a for Dominion Asset Management Company. (Tr. 57, 207-08; DX. 31 at 1.)

On February 16, 1998, because he expected Dominion Capital's registration to be revoked, Powell signed an option to have Dominion Institutional Services Corp. (DIS), its nominee or assignee, purchase Northstar and transfer Northstar's back-office administrative services to DIS. At the time, Northstar was a small broker-dealer registered with the Commission since 1976. The consideration on the option was $20,000, but payment of an additional $20,000 was required to finalize the purchase. Due to its importance, the option was discussed with Elliott prior to its execution. (Tr. 73-77, 99, 208-09, 611, 1538; DX. 4, 5.) At or about this time, Kelley B. Hill (Hill), the attorney for Powell and Elliott, informed them that the Commission would also impose sanctions on them personally rather than just on Dominion Capital.[4] (Tr. 1532-34, 1551.)

In April 1998, Powell and Elliott arranged for the compliance officer of Dominion Capital, Anita Mills-Barry (Mills-Barry), to purchase Northstar rather than DIS because they controlled DIS and could not associate with a broker-dealer if the Commission suspended them from associating with a broker-dealer.[5] At the time, Mills-Barry was a staff person provided to Dominion Capital by DIS and her salary was paid by DIS. (Tr. 78-79, 1536-38.) Prior to the purchase of Northstar, Mills-Barry insisted that she own and control the firm to ensure that Northstar was insulated from any impending Suspension Order. (Tr. 617-18, 678; DX. 16.) Powell and Elliott believed that if Mills-Barry completed the purchase, the transaction would enable them to rejoin Northstar after the Suspension Period. (Tr. 593-96; DX. 20, 22; EX. 201.)

Mills-Barry was unable to obtain financing to complete the purchase of Northstar. In April 1998, Powell and Elliott had DIS make a $20,000 personal loan to her. (Tr. 51, 87-88, 616-18; DX. 11.) In July 1998, DIS made her an additional $50,000 personal loan to increase Northstar's net capital. (Tr. 594; DX. 28.) Both loans were secured by non-interest bearing demand notes that Mills-Barry prepared and signed. (DX. 20, 21, 26.) Because the loans were issued to her personally, she did not list DIS as a direct or indirect owner of Northstar on the Form BD dated April 23, 1998, the date of the purchase. Mills-Barry became the sole director of Northstar on that date. (Tr. 611-16, 674-76; DX. 12, 24.) Northstar and the Dominion Companies shared office space at 5000 Quorum Drive in Dallas, Texas. (Tr. 80, 496-98; DX. 148, 149.)

At the time of the purchase, Mills-Barry executed an Agreement of Right of First Refusal (Right of First Refusal) with DIS, dated April 23, 1998, which entitled DIS to purchase Northstar

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[4] Hill, at the time, was an attorney with the law firm of Law, Snakard, & Gambill of Fort Worth, Texas. The firm began representing Dominion Capital, Powell, and Elliott in September 1997. (Tr. 1250-51.)

[5] Anita Mills-Barry, age 55, has a bachelor's degree in criminal justice research and statistics from the University of California–Davis. She began her career in the securities industry in 1980 and was an employee of DIS from 1996 to 1999. In 1996, DIS paid her a salary of more than $40,000 while she worked for Dominion Capital as the compliance officer. (Tr. 606-07.) In 1998, after she bought Northstar, she continued as an employee of DIS at an increased salary of $60,000. The salary increase was to compensate her for lost income because she could no longer perform due diligence activities after purchasing Northstar. She did not expect to receive a salary from Northstar. (Tr. 609-11, 618-19.) At the time of the purchase, Northstar had assets of about $25,000. (Tr. 615; DX. 25.)

stock if she resigned or was terminated by DIS, or was unable to perform her duties due to death, disability, or upon demand for payment of the notes. (DX. 22.) In addition, Mills-Barry executed a Services Agreement, also dated April 23, 1998, for DIS to perform the same services for Northstar that it performed for Dominion Capital and the other Dominion Companies. She believed that the Services Agreement was appropriate under the circumstances. (Tr. 89-90, 695-96; DX. 23.) The Services Agreement's compensation clause entitled DIS, from time to time, to request fees for the management and consulting services "in such amount as DIS shall request; provided however, that Northstar shall be entitled to reduce the amounts requested and to pay only such amounts as shall assure, in its sole discretion, that Northstar shall have sufficient cash to provide for its working capital and reserves needs and sufficient net capital to comply with SEC Rules . . . and all applicable NASD rules and regulations."[6] (DX. 23 at 2.)

Mills-Barry denies that she agreed to purchase Northstar as part of a plan to circumvent the Suspension Order, issued more than one year after she completed the purchase. (Tr. 665-68.) Also, she does not recall any instance when Elliott or Powell interfered with the management or made any decisions for Northstar. Mills-Barry represented to her counsel, who was dealing with the NASD, that she may have solicited advice from Powell and Elliott from time to time in areas in which they had more experience, but she made the final decisions as she and Tarbett ran Northstar. (Tr. 683, 691, 746-47; TX. 320.)

**2. *Transitioning to Northstar***

Powell, Elliott, and Mills-Barry sent information to brokers about the planned transition from Dominion Capital to Northstar.[7] (Tr. 625-27; DX. 32, 33, 38.) Powell identified an unsigned draft of a letter dated April 14, 1998, with Elliott's signature block. This letter, or something similar, was sent to Dominion Capital's brokers. (Tr. 114-15; DX. 32.) The letter concerned the "Reorganization of Dominion Capital Corporation." An attachment to the letter, titled "Summary of Plan for Reorganization" (Summary), discussed the reorganization and the

[6] In 1998, DIS received $2,023,254.16 in income from the services agreements with Northstar and the Dominion Companies. (Tr. 65; DX. 168.) The compensation arrangement between DIS and Northstar, which described DIS as a "related party," was disclosed in Northstar's 1998 annual report filed with the Commission on March 4, 1999. In 1998, Northstar paid DIS $503,500 pursuant to the Services Agreement. (DX. 57 at 8.)

[7] Amy Drissel (Drissel) was employed by the Dominion Companies from early 1998 until 2001 as the executive assistant to Elliott and Tarbett. (Tr. 1359-60.) She spent seventy-five to eighty percent of her time assisting Elliott with the mutual fund, the Dominion Insight Growth Fund (Fund). She also did some work for the insurance agency, the Dominion Agency. (Tr. 1363-64.) Shortly after she started, Elliott advised her of the SEC investigation. Early in 1998, he told her that a suspension would be imposed and he, along with Powell, would have nothing to do with the broker-dealer. (Tr. 1365.) Prior to the imposition of the suspension, phone calls were placed and letters sent to inform everyone about what would occur regarding the suspension. (Tr. 1367, 1373; DX. 32.) During the Suspension Period, if a Northstar broker attempted to speak with Elliott about securities-related business, he would refer them to Mills-Barry or Tarbett. Drissel states that Elliott "took the suspension very seriously." According to her, at no time did he act in a management role or as an officer or director of Northstar or otherwise attempt to interfere with its business. (Tr. 1369-70.)

transfer of brokers and their business to Northstar. The draft letter stated that the reorganization was necessary to settle "outstanding issues with regulators" and Northstar would be an affiliated broker-dealer with the Dominion Companies. The Summary stated, inter alia, that Mills-Barry would be president of the firm as well as chief compliance officer. However, under the terms of the settlement with the SEC, "Doug [Powell] and Dee [Elliott] [would] not transfer their licenses to Northstar in the near term."[8]

A letter signed by Powell was sent to the brokers informing them that, among other things, they would be dually registered with Dominion Capital and Northstar until the transfer to Northstar was completed, which occurred in or about September 1998.[9] (Tr. 117, 698; DX. 33.) A letter dated July 27, 1998, and signed by Mills-Barry advised Dominion Capital customers that the registered representatives were transferring to Northstar as well as any of their customer accounts. The letter stated, "If we do not hear from you, we will assume this transition is acceptable and will transfer your account." (DX. 38.)

On August 24, 1998, Powell, on behalf of Dominion Capital, and Mills-Barry, on behalf of Northstar, sent a memorandum to Dominion Capital registered representatives advising that, effective August 27 and August 31, 1998, depending on the clearing firm, all new business would be conducted through Northstar. (Tr. 287; DX. 39.)

**3.** ***Negotiations Prior to Suspension Order***

In January 1998, Hill entered into settlement negotiations with the Division that concluded in the imposition of the Suspension Order in May 1999. Most of his discussions were with Philip Offill (Offill), a Division attorney in Fort Worth, Texas. One matter discussed during the negotiations was whether a collateral bar would be imposed on both Powell and Elliott, which would prevent their association with the Dominion Investment Company, the Investment Adviser, and the Dominion Funds, Inc. ('40 Act registered entities). Another matter involved the relocation of the registered representatives in the event that Dominion Capital's registration was, in fact, revoked. Hill testified that both sides worked to avoid or minimize any adverse effect on the registered representatives or on Powell and Elliott if a collateral bar were imposed. (Tr. 1254-59.)

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[8] Powell's and Elliott's registration with Dominion Capital terminated in approximately November 1998. In November 2000, Powell and Elliott became registered representatives with Northstar. (Tr. 183; DX. 85.)

[9] By letters dated March 10 and March 20, 1998, Thomas Herbelin, Northstar's owner, advised NASD Regulation of his intent to sell Northstar to Mills-Barry. (DX. 7, 8.) In a continuing membership interview with the NASD on July 15, 1998, Northstar represented it would be a continuation of Dominion Capital, but neither Powell nor Elliott would be involved with the business of Northstar. However, Northstar did represent that Powell and Elliott would be possible sources of personal loans to Mills-Barry for Northstar "should the situation arise." The Services Agreement and other documents, including the promissory notes and checks, were submitted to the NASD as part of the continuing membership review, and no objection was made. (Tr. 697, 722-25, 728, 730; DX. 36.)

Hill worked closely with the Division to resolve any outstanding issues. (EX. 227-230.) As an example of their close cooperation, Offill provided Hill in February 1998 with a copy of a voting trust agreement that had been used in another administrative proceeding. If the Commission imposed a collateral bar, Powell and Elliott could assign their mutual fund ownership interests, pursuant to such an agreement, to a trustee to hold for the duration of Suspension Period. According to Hill, Offill was "very gracious and cooperative in trying to work through some of these difficult issues." Hill considered the sample voting trust agreement to be guidance provided by Offill. (Tr. 1256-62; EX. 228.)

Offill wrote to Hill on March 3, 1998, and confirmed that the Commission Staff (Staff) would recommend to the Commission that the proposed Offer of Settlement from Dominion Capital, Powell, and Elliott be accepted. Offill also stated that it would be acceptable to the Staff if Powell's and Elliott's interests in the '40 Act registered entities were placed in the voting trust agreement. (Tr. 1261-63; EX. 229.) Hill believed that this was another example of cooperation between the parties to ensure that Powell and Elliott complied with an impending Suspension Order.

Offill advised Hill in a letter dated May 14, 1998, that, although it could not bind the Commission, the Staff would recommend that the settlement offers be accepted. Offill stated, inter alia, that when evaluating Powell's and Elliott's eligibility to be reappointed or reelected to Dominion Financial's board, the suspension proposal in the settlement offers meant that they "cannot 'manage,' i.e., serve as officers or directors during the entire Suspension Period although they could become associated in a non-managerial capacity after the first portion of the Suspension Period is completed." (Tr. 1264-66; EX. 227). Ultimately, any consideration of imposing a collateral bar was dropped and the Suspension Period related only to the broker-dealer.[10] Accordingly, a voting trust agreement temporarily assigning Powell's and Elliott's interests in the '40 Act registered entities was no longer necessary.

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[10] Frederick C. Summers (Summers) was the attorney for the Fund. He began representing the Fund at the time of formation in 1992. DIS was the administrator of the Fund. (Tr. 1329-30.) Powell and Elliott were directors and executive officers of the Fund at its inception. Due to the impending suspension, Powell and Elliott resigned from the Fund in July 1998 to avoid associating with an investment adviser. However, after it was learned that the settlement would not include a collateral bar, they were reelected in February 1999. Summers testified that, during the Suspension Period, Elliott assisted in marketing the Fund and compiling documentation in connection with the Fund's annual board meeting in August 1999.

The Fund disclosed the issuance of the Suspension Order in a Statement of Additional Information (Statement), filed with the Commission on November 1, 1999. (Tr. 1331-33; EX. 226 at 7.) The Statement also disclosed that Northstar replaced Dominion Capital as the Fund's distributor on July 10, 1998, and the Fund paid Northstar $115,595 in brokerage commissions during the fiscal year ending June 30, 1999. The Statement further disclosed that the Fund shared offices, personnel, and expenses with DIS and that Powell and Elliott, through family partnerships, owned fifty percent of DIS's outstanding stock. (DX. 226 at 4.) Summers had discussions with the Staff, who were very helpful in formulating these disclosures. (Tr. 1338-39.) Summers believed that Elliott attempted to fully comply with the Suspension Order. (Tr. 1341.)

About nine months later, on February 26, 1999, Hill had a revised Offer of Settlement hand delivered to Spencer Barasch (Barasch), Assistant Administrator of the SEC office in Fort Worth, as Barasch had become more involved as the issues increased in importance.[11] (Tr. 1252-57; DX. 2.)

**4. *Hill Informs the Division of the Northstar/DIS Arrangement***

On March 5, 1999, one week after the revised Offer of Settlement was delivered to the Division and more than two months before the Commission entered the Suspension Order, Hill had a letter with attachments hand delivered to Barasch. Hill stated therein, "The purpose of this letter is to seek the Staff's approval of the business arrangements which have been made by Powell and Elliott. . . . On behalf of Powell and Elliott, we are requesting that you review this information and provide us with the Staff's opinion as to whether the business relationships described in the attachments and this letter will be prohibited under the proposed terms of the order." The letter advised the Division that Dominion Capital had ceased operating as a broker-dealer, except to resolve customer disputes, and that most of Dominion Capital's registered representatives had become associated with Northstar. (EX. 201.)

The letter also explained to the Division that DIS was controlled by Powell and Elliott and that it had loaned Mills-Barry $20,000 to complete the purchase of Northstar and an additional $50,000 to capitalize it. The attachments included the two promissory notes signed by Mills-Barry, the Right of First Refusal, and the Services Agreement. (Tr. 1268; DX. 20; EX. 201.) The letter also represented that it was Powell's and Elliott's intention to "eventually obtain an ownership interest in Northstar and become active in [its] business affairs" upon completion of the Suspension Period. They would, however, play "[no] role in the management, business decisions, or activities of Northstar during the [Suspension Period]."[12] (Tr. 593-96; EX. 201.)

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[11] Barasch is currently the Associate District Administrator of the SEC's Fort Worth office. (Tr. 567.)

[12] The Right of First Refusal and Services Agreement that Hill provided with his letter described in detail Powell's, Elliott's, and DIS's business relationships with Mills-Barry and Northstar that existed for the previous year. The Services Agreement stated, inter alia, that DIS would provide and maintain personal property in the form of office equipment to Northstar and provide office staffing "customarily [] required in the conduct of a securities business." The personnel had to be acceptable to and approved by Northstar. The Services Agreement went on to state: "Such personnel shall be employees of DIS which shall be solely responsible for payment of, and accounting and reporting for, all salary, wages and fringe benefits of such personnel." It also disclosed that DIS would make office space available at 5000 Quorum Drive, Suite 620, Dallas, Texas. Finally, as previously discussed, it detailed the compensation arrangement between DIS and Northstar. (DX. 23.)

The Right of First Refusal, which was never exercised, disclosed that Mills-Barry would borrow the funds from DIS to purchase and capitalize Northstar as well as the conditions under which DIS could purchase Northstar stock. (DX. 22.) These were personal loans to Mills-Barry, which were later assumed by Tarbett. There is no evidence that DIS provided Mills-Barry or Tarbett with any financing to operate Northstar as alleged.

Hill further advised that, if the Staff deemed it appropriate, Powell and Elliott would place the Right of First Refusal in a blind voting trust similar to what had been previously discussed with Offill if a collateral bar had been imposed. The letter concluded, "Powell and Elliott's primary concern is that they be in complete compliance with the Commission's Order upon its entry." (EX. 201.)

Because the Staff had provided guidance and assistance on other matters during the negotiations, Hill's intention was to disclose the business arrangement, which involved a broker-dealer, the focus of the Suspension Order. Hill sought to determine if the Staff had any problems before the Commission imposed the suspensions. By submitting the letter, Hill sought to ensure that his clients were in full compliance the day the Suspension Order was issued. At no time was Hill seeking a no-action letter or legal advice from the Staff. (Tr. 1269-72, 1277, 1282-83.)

Barasch testified, "Late in the settlement process I remember receiving a call from [Hill] in which he asked if he could run some things by me about the 'future business activities' of Mr. Powell and Elliott under a contemplated suspension. I didn't really give him a chance to [run a scenario past]. I explained to him that I couldn't . . . provide any kind of legal advice or guidance . . . which he, I believe, knew because he accepted that right away when I told him that." (Tr. 568-69.)

According to Barasch, Hill said, "Well, would you mind if I put something in writing to you? And [Barasch] said, it wouldn't make a difference, but you can, you know, send a letter if you want, but I can't really give any advice or guidance on that matter." (Tr. 569.) Hill testified, repeatedly, that he does not recall any conversation with Barasch prior to sending the March 5th letter and the letter also makes no mention of any prior call. (Tr. 1299-1302; EX. 201.) I do not credit Barasch's testimony that he spoke to Hill on the telephone prior to receiving the letter. I further find that Barasch's description of this purported conversation is an attempt to justify why no response was ever given to Hill.[13]

According to Barasch, he received the March 5th letter "shortly after the conversation" he had with Hill. (Tr. 570; EX. 201.) He read it and "skimmed" the attachments. He did not consider the letter with attachments to be a request for a no-action letter. (Tr. 572-73.) Barasch agrees that Offill previously gave guidance to Powell and Elliott when he provided a copy of the voting trust agreement and in his May 14, 1998, letter to Hill summarizing the SEC's Division of

[13] Q [By Division counsel]: Apart from this letter, the text of the letter . . . and the attachments, what facts, if any, did Mr. Hill tell you with regard to this proposal?

A [Barasch]: Well, in our earlier conversation, we never got into any details, so, you know, the only thing I knew about any possible arrangement involving Mr. Powell and Mr. Elliott . . . as what was in this letter.

Q [By Division counsel]: And the attachments thereto?

A [Barasch]: Correct, which as I said, I skimmed. I don't recall studying them or looking at them very carefully, but I think I just flipped through them, and I was resting on what I had told him earlier, that I just wasn't in a position to comment on them, that, you know, it was up to them to determine what would be appropriate or legal and what would not. (Tr. 572.)

Investment Management's position on disclosure requirements if Powell and Elliott were reelected or reappointed to the Dominion Financial board. (Tr. 589-91.)

On April 27, 1999, Hill wrote to Powell and Elliott and advised them that he had received a call from Barasch and Victoria Prescott (Prescott), also a Division attorney. They had informed Hill that the Commission had approved the Offer of Settlement, but they did not know when the Suspension Order would issue. Hill further advised Powell and Elliott that he discussed with Barasch the business arrangement issue set out in the March 5th letter. Barasch had not yet responded, "but did say he would be talking with others to provide us with at least some feedback. I do not expect the feedback to be in written form." (Tr. 1269, 1275-77, 1299-1302; DX. 2; EX. 222.) Barasch, however, does not recall having any conversation with Hill after he received the March 5th letter. (Tr. 573.)

I credit Hill's testimony and the contents of the April 27th letter that he did have a conversation with Barasch and Prescott on or about April 27, 1999, when Barasch represented to Hill that "feedback" in some form would be provided pertaining to the issues raised in the March 5th letter. I find that Hill would not have made this representation to his clients if he had not had the conversation with Barasch. Hill testified, "I checked my time records and I actually had that conversation on the same date." (Tr. 1277.)

In another letter to Powell and Elliott dated May 13, 1999, Hill informed them that he learned from Prescott that the Commission had signed the Suspension Order and that Powell and Elliott were now subject to it. Hill further stated that Prescott promised to have Barasch call him regarding the business arrangement issue. However, as a result of a comment made to him by Prescott, or possibly Barasch or Offill, and because the Suspension Order was signed, Hill instructed Powell and Elliott, "[Y]ou should assume that we will not be getting any response or guidance from Spence [Barasch] on the issues addressed in my letter to him dated March 5, 1999." Hill testified, "I remember there was some reluctance on their part to send us a 'stamp of approval' in writing. [W]hat I took from those conversations was that if they had a problem and felt like this business arrangement violated the [Suspension Order], they were going to tell us." No response was ever received. (Tr. 1278-82, 1302-06; EX. 223.) By cover letter, dated May 17, 1999, Hill forwarded a copy of the Suspension Order to Powell and Elliott. He concluded the letter by stating, "I have not yet heard from Spencer Barasch on the related issues." (Tr. 1281; EX. 230.)

**B. Violation of Exchange Act Section 15(b)(6)(B)(i)**

When entered on May 13, 1999, the Suspension Order suspended Powell and Elliott from (1) associating with any broker or dealer, in any capacity beginning from that date through August 13, 1999; and (2) associating with any broker or dealer, in any supervisory or proprietary capacity, beginning August 14, 1999, through February 13, 2000. (DX. 3 at 9.) The Division argues that Powell and Elliott violated Section 15(b)(6)(B)(i) of the Exchange Act throughout the Suspension Period by virtue of their business arrangement with Northstar. (Div. PHB 1-2.)

Section 15(b)(6)(B)(i) of the Exchange Act makes it unlawful for any person who is subject to a Commission suspension order prohibiting association with any broker or dealer to willfully associate as such while the suspension order is in effect, without the consent of the Commission. "Willfully" under the federal securities laws signifies that the respondent intended

to commit the act which constitutes the violation. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000). A person associated with a broker-dealer is defined by Section 3(a)(18) of the Exchange Act as: (1) any partner, officer, director, or branch manager of the broker-dealer (or any person occupying a similar status or performing similar functions); (2) any person directly or indirectly controlling, controlled by, or under the common control with such broker-dealer; and (3) any employee of such broker-dealer. Moreover, although there is no precise definition of "supervisory capacity" in the Exchange Act, the Commission has taken the position that a person's classification as a "'supervisor' depends on whether, under the facts and circumstances of a particular case, that person has a requisite degree of responsibility, ability, or authority to affect the conduct of [employees]." John H. Gutfreund, 51 S.E.C. 93, 112-13 (1992) (holding in dicta that legal and compliance officers may be supervisors for purposes of Exchange Act Sections 15(b)(4)(E) and 15(b)(6)); see also SEC v. Yu, 231 F. Supp. 2d 16, 18 (D.D.C. 2002).

In SEC v. Telsey, the court identified several factors relevant to its finding that Telsey "associated" with a broker-dealer in violation of a Commission consent order barring such conduct. These factors included: (1) utilizing a desk and telephone at the broker-dealer's offices; (2) soliciting accounts; (3) preparing order tickets; (4) filling out new account forms; (5) using the broker-dealer's NASDAQ machine to make markets in stocks; (6) trading for the broker-dealer's proprietary account; (7) quoting bids and offers for stocks; (8) trading in stocks for customers' accounts; (9) being in the broker-dealer's offices on a daily basis; (10) having a registered representative number at the broker-dealer for purposes of receiving commissions; (11) receiving commissions; (12) describing oneself as a "principal" of the broker-dealer; and (13) indicating a desire to purchase an interest in the broker-dealer in the future. 1991 WL 72854, at *1 (S.D.N.Y. Mar. 13, 1991).

The presence, however, of these factors is not necessarily dispositive. SEC v. Nappy, 1993 WL 535401, at *4 (N.D. Ill. Dec. 17, 1993). In Nappy, the SEC sued a former CEO of a broker-dealer for violating a Commission consent order that had barred him from associating with a broker-dealer. During his disbarment, Nappy wrote a letter to the SEC seeking an understanding of the consent order's boundaries and outlining certain intended conduct that included trading from his personal account. The SEC did not answer Nappy's letter. The court construed the SEC's failure to answer as consent to Nappy's intended conduct, which was similar to conduct undertaken in Telsey. Nonetheless, the court held that Nappy did associate with a broker-dealer in violation of his associational bar, finding that Nappy's actual conduct, consisting of trading from the broker-dealer's customer accounts rather than his personal account, fell clearly "outside the scope of actions authorized by the SEC by its lack of response to Nappy's [letter]." Id.

**1.** ***Northstar/DIS Arrangement Before Suspension Order***

The Division contends that the Northstar/DIS business arrangement, outlined in Hill's March 5th letter, constituted a "plan" by Powell and Elliott "to hide their de facto control of [Northstar]" while the Suspension Order was in effect through placement of "nominal" or figurehead ownership of Northstar with Mills-Barry[14] and later with Tarbett. (Div. PHB at 1.)

[14] The Division argues, "Even though Mills-Barry was the owner, president, and compliance officer of Northstar, she received her salary and sole source of income from DIS. When she agreed to purchase Northstar, she negotiated the terms of her compensation with Powell and

This "plan" included providing Mills-Barry and Tarbett with "all the financing to operate the business" as well as office staff.[15] The plan also allowed the "taking of the firm's excess capital through a non-arms length Service[s] Agreement." (Div. PHB at 1-2.) The Division's position is that this arrangement meant that Powell and Elliott were in direct or indirect control of Northstar during the Suspension Period and, therefore, "associated" with it in violation of Section 15(b)(6)(B)(i) of the Exchange Act. (Div. PHB at 8.)

The Division further argues that Powell and Elliott should have terminated the Right of First Refusal and Services Agreement and demanded payment of the loans the day the Suspension Order was entered. Failure to do so, the Division maintains, meant that the Suspension Order was effectively violated beginning May 13, 1999, the first day of the Suspension Period, and continued thereafter. (Tr. 1724-25; Div. PHB at 12.) The Division's position, however, implies that it recommended the Offer of Settlement to the Commission to suspend both Powell and Elliott while it possessed information about their business relationships with Northstar that the Division believed would violate the Suspension Order when entered. The Division did not express any concern or reservation to Powell or Elliott during the time leading

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Elliott, and requested an override on commissions, which they refused. Certainly, this is not the conduct of a woman who fully controls her own business." (Div. PHB at 10.)

On August 27, 1999 (after the first part of the Suspension Period had expired), Mills-Barry advised Powell and Elliott in a memorandum of her intention to withdraw from Northstar over the next three months. (DX. 68.) Her reason for withdrawal was that she was "stressed beyond anything" resulting from recently finishing an NASD and SEC audit, brokers circumventing her and going to Elliott and Powell about problems, as well as issues involving her personal life. (Tr. 650-51, 747-49.) Her intention was to withdraw from Northstar by November 30, 1999, and transfer her stock so she would no longer own any interest in Northstar. (Tr. 650-51; DX. 68, 78-81; EX. 320.)

[15] On December 31, 1999, Tarbett, an employee of DIS at the time, bought all 10,000 shares of Northstar stock from Mills-Barry and, as consideration, assumed her indebtedness to DIS on the two promissory notes totaling $70,000. Powell signed the agreement for DIS releasing Mills-Barry from the notes. (Tr. 179-80; DX. 81, 105.) With Tarbett's purchase, the Division argues that Mills-Barry's "charade of ownership" merely transferred from one figurehead to another.

Tarbett had moved to Northstar as a broker in the summer of 1998 when he learned that Dominion Capital was going out of business. (Tr. 380-84.) Because of his extensive recruitment of brokers, Tarbett was promoted to CEO on January 2, 1999. Mills-Barry promoted him to deal with wholesalers and other callers as well as other matters not involving the firm's day-to-day operations. However, he did not perform CEO duties until he bought Northstar from Mills-Barry. Northstar's Consent in Lieu of Special Meeting, dated January 2, 1999, shows Mills-Barry as president and Tarbett as CEO. Another Consent, dated April 28, 1999, shows that Mills-Barry designated Tarbett as president and CEO. Tarbett never saw this entry until he prepared for this hearing. (Tr. 636-37, 641, 1635, 1658; DX. 50; TX. 303.) Tarbett left Northstar in January 2001 when it went out of business because of a net capital deficiency; he has since registered with another broker-dealer. (Tr. 1637, 1687, 1694.)

up to the entering of the Suspension Order, nor did the Division forward this information to the Commission.[16] (Tr. 1722-23.)

It was over two months prior to the entry of the Suspension Order that Hill in the March 5th letter informed the Division of relevant details concerning the business relationship that had existed between DIS and Northstar for the previous year. (Tr. 1723.) Hill also informed the Division that, after the nine-month Suspension Period, Powell and Elliott intended to eventually obtain an ownership interest in Northstar. The Division was in possession of the Offer of Settlement and Hill's letter with the Right of First Refusal and Services Agreement at essentially the same time. Although the Offer of Settlement itself did not seek approval of the business arrangement with Northstar, the obvious purpose of Hill's letter was to ensure compliance with the impending order and, if possible, obtain agreement to continue the business arrangement while the Suspension Order was in effect. (Tr. 596.) Because the Division failed to respond to Hill or even to send the information to the Commission for consideration along with the Offer of Settlement, Powell and Elliott could, and obviously did, reasonably construe that the Division had no objection to continuance of the business arrangement while the Suspension Order was in effect.[17] (Tr. 1722.)

In the context of the pending settlement offer and in keeping with the collegial relationship up to that point between the parties, Hill's letter was a reasonable request for additional guidance about Powell's and Elliott's business relationships with Northstar during the Suspension Period. This business relationship, in fact, existed for almost an entire year prior to the date the guidance was sought. It was not a "future activity" or a recent development that could be construed as an effort to circumvent the Suspension Order. There is no credible evidence to explain why the Division refused to comment on information contained in Hill's March 5th letter or why the information, which was obviously pertinent to the Offer of Settlement it was recommending to the Commission, was not forwarded to the Commission for its consideration along with the offer. There was also no indication from the Division that continuing the business arrangement would be construed as a direct or indirect violation of the Suspension Order at the time it was entered, much less several years later. I find that the

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[16] Barasch agrees that the Staff previously provided Powell and Elliott with guidance on issues in the Dominion Capital case, and Hill testified that the Staff worked with him to avoid any undue hardships on the registered representatives if a collateral bar was imposed. (Tr. 588-591, 597.) Clearly, the Division's failure to respond to Hill's letter was inconsistent with the collegial relationship that existed during the course of the settlement discussions.

[17] The Division's post-hearing brief states: "Powell and Elliott's settlement offer to resolve the initial SEC investigation is silent about seeking approval of their business arrangement with Northstar. The Commission's May 13, 1999, Suspension Order is similarly silent on allowing any limited association by Respondents. . . . In response to Hill's telephone inquiries and March 5, 1999, letter, Barasch advised him that he was unable to give any legal advice about whether the business arrangements violated the proposed Suspension Order. . . . There is nothing in this series of correspondence or Hill's conversations with Barasch from which Powell and Elliott could construe that the Commission had consented to some kind of limited association with Northstar during the Suspension Period." (emphasis added) (Div. PHB at 20-21.)

institution of this administrative proceeding predicated on the very facts disclosed to the Division in 1999 raises a question of fundamental fairness.[18]

An illegal plan or scheme usually involves stealth or deception. I find neither here. Powell and Elliott acted in good faith when they provided the Division with the details of the very business arrangement at issue here as well as their intention to acquire an ownership interest in Northstar when the Suspension Period ended. I conclude that the business arrangement itself between Northstar and DIS relative to Powell and Elliott was not, as the Division contends, a plan to surreptitiously hide their de facto control of Northstar in violation of Section 15(b)(6)(B)(i) of the Exchange Act. Under these circumstances, I cannot fairly conclude that the business arrangement, and any actions authorized thereunder, constituted associating with Northstar in willful violation of Exchange Act Section 15(b)(6)(B)(i).

**2. *The Division Cites Additional Evidence of Control***

In addition to the business arrangement, the Division contends that Powell and Elliott willfully acted as Northstar principals or supervisors in a manner that violated the Suspension Order or required them to be registered with the Commission. Such evidence includes: (a) hiring staff for DIS who then worked for Northstar; (b) interviewing prospective Northstar brokers; (c) attending Northstar-related conferences; (d) circumventing Mills-Barry's compliance demands to brokers; and (e) attempting to resolve broker-related problems. (Div. PHB.)

**a. *Hiring Staff for DIS***

The Division contends that the facts surrounding the hiring and supervision of Kirt Hinckley (Hinckley) in April 1999 as Chief Financial Officer (CFO) for the Dominion Companies and as Northstar's Financial Operations Principal (FINOP) and the hiring of LuAnn Laney (Laney) as Northstar's compliance officer evidence Powell's and Elliott's de facto control of Northstar and their failure to separate themselves from Northstar's business operations during the Suspension Period. (Div. PHB at 14, 18.)

Hinckley began work on April 19, 1999, which was about three weeks before the Suspension Order was entered. Prior to taking the position, he met with Elliott, Powell, and Mills-Barry. (Tr. 898-901; DX. 61.) When Mills-Barry met Hinckley, she knew that he was being considered to be the CFO for DIS and the Dominion Companies. She believed that he was

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[18] Hill was asked at the hearing, "Did anybody from the Staff ever even suggest to you that the structure as outlined in your letter and the attachments would violate the terms of the Order?" Hill responded, "No. And if that's what is happening today—and there is not other grounds, that's really the focus of this—that really on a personal level offends my sense of fairness, after all of the discussions that we had with the SEC Staff attorneys and worked really together in many instances, trying to put something together that solved these issues of having these different companies and the collateral bar and then the eventual settlement that we had—you know, we tried to put everything on the table and be as up front with them to try to address these concerns as we went along. And if that's what's happening here today, that bothers me as an attorney." (Tr. 1283-84.)

qualified to be the FINOP for Northstar and approved him to assume that role. To qualify as FINOP, he had to register with a broker-dealer. (Tr. 644-45, 678-79, 701.)

Hinckley's responsibility was to determine what DIS could be paid in order to avoid any net capital problems for Northstar. Hinckley never dealt with Elliott on financial issues with respect to Northstar, but Powell did assist Hinckley by prioritizing payments to stay within the net capital requirements. (Tr. 915-17, 981-82, 1017-18.) Hinckley reconciled the bank statements monthly and knew that Powell and Elliott were not taking extra monies out of the Northstar account. Tarbett and Hinckley generally reviewed Northstar financials on a monthly basis. (Tr. 1010-13, 1018-19.) The amounts on the invoices presented to Northstar for payment were based on DIS's cash flow needs to meet the payroll and other expenses it incurred for the benefit of the Dominion Companies and Northstar. There was no allocation of expenses between the Dominion Companies and Northstar. (Tr. 938-40, 970-73.) Ninety percent of Northstar's expenses fell into three categories: commissions, facilities agreement expenses, and federal income taxes. For the period January to April 2000, the commissions amounted to 70 percent of revenue, and the Services Agreement was 15.85 percent.[19] (Tr. 1007-08; TX. 319.)

Laney was hired about six weeks before Powell's and Elliott's Suspension Period ended. Licensed in the securities industry since 1984, she has approximately ten to fifteen years of experience as a FINOP and in compliance matters. On November 30, 1999, she met Powell who spoke to her briefly about her experience. He then brought her to Hinckley to interview for the Northstar compliance officer position. Elliott sat in on the interview for about five minutes and asked her one question about resolving a new time-stamp rule but did not ask anything about her qualifications or discuss job duties. (Tr. 480-84, 523-24.) After Laney interviewed with Hinckley, Powell hired Laney as a DIS employee to replace Mills-Barry as Northstar's compliance officer. (Tr. 168-69.)

Laney served as the compliance officer for Northstar from January 3, 2000, the same day Tarbett acquired ownership, until about April 2001. (Tr. 480-81.) Laney was responsible for filling out and filing amendments to the Form BD, which ultimately required Tarbett's signature. As compliance officer, Laney sometimes signed these filings in Tarbett's absence. (Tr. 499-500, 503-04.) Laney's review of Powell's and Elliott's relationship with DIS and DIS's relationship with Northstar made her "comfortable enough" to certify to the answers she gave on the

[19] Kerry Matticks (Matticks), a staff accountant with the Division, testified as a summary witness for the Division. In preparation for his testimony, he reviewed DIS's and Northstar's financial records. Such records included DIS and Northstar bank records and financial statements, DIS ledgers, and Northstar tax returns. (Tr. 1031.) Some records were missing and he could not account for every document. The summary exhibit notes these as "unknown item." The exhibit categorizes monies that left DIS's bank account during the time period at issue. (Tr. 1033, 1038-39; DX. 126, 127 128, 147, 169.) At the hearing, Elliott and Tarbett moved to strike Matticks's testimony and Division Exhibits 128 and 169. They argue that his testimony and the schedules he created are based on Hinckley's memory and Hinckley was basically guessing as to which expenses and employees were attributable to Northstar. They object on the additional grounds that Matticks construed the Services Agreement as one for expense reimbursement as opposed to one for fees. I sustain the motion to strike Matticks's testimony and Division Exhibits 128 and 169 on the grounds proffered. (Tr. 932, 1011, 1214, 1224.)

amendments to the Form BD. (Tr. 738, 751-52.) She did not believe that she or Tarbett filed any false reports. (Tr. 752.)

Because of the high degree of arbitrations, customer complaints, and pending litigation pertaining to Dominion Capital against registered representatives who were now with Northstar, Laney suggested to Powell and Elliott that, after the Suspension Period ended, they should register with a broker-dealer other than Northstar. She was concerned that the arbitrations could involve Northstar. (Tr. 507-09.) Based on this concern, Laney also suggested to Tarbett that Northstar create a holding company for Northstar, which would issue salary checks to its registered salaried employees, and separate Northstar physically from the Dominion Companies. Laney also believed that the promissory notes Tarbett assumed from Mills-Barry could be questioned unless there was a payment schedule or the ability to collect on demand. However, as compliance officer, she also knew that the NASD had reviewed these matters in examinations and had not raised any concerns. (Tr. 486-87, 537-41, 550-51.)

In addition, Laney knew that Powell and Elliott owned an investment adviser and insurance company that they operated in office space shared with Northstar. (Tr. 530-31, 545-46, 551-52.) Weekly meetings were held to discuss issues involving personnel from Northstar and the Dominion Companies. Elliott and Powell attended the meetings for the Dominion Companies, and Tarbett, among others, represented Northstar. Laney attended about six or eight of these meetings. (Tr. 487-88, 562-63.) Laney believed that Elliott made an earnest effort not to cross any line and involve himself in any management functions or decisions of Northstar when he attended group meetings. When questions about the broker-dealer arose, Elliott indicated that they should be referred to Tarbett or Laney. Powell would also refer questions to Tarbett or Laney.[20] (Tr. 531.)

The Division contends that Powell and Elliott interviewed and hired Hinckley in April 1999, before the Suspension Period, and then actively oversaw Hinckley's activities throughout the Suspension Period despite Hinckley's registration as FINOP for Northstar. The Division argues that Powell's conduct amounted to "those of a de facto officer or director." (Div. PHB at 14.) As to Laney, the Division argues that her employment interview during the latter half of the Suspension Period, her weekly meetings in the presence of Elliott and Powell, and compliance examinations with Powell lends further evidence "of Powell['s] and Elliott's involvement in the supervision of the brokerage firm contrary to [the Suspension Order]." (Div. PHB at 18.) However, I find Powell's and Elliott's conduct, relative to Hinckley and Laney, was consistent

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[20] Elliott's motion to strike Division Exhibit 109 is sustained as to all Respondents. It does not appear to relate to any one of them. (Tr. 532-34; DX. 109.)

Laney also participated in compliance examinations with Powell, but Powell was only involved with the investment adviser portion and not the broker-dealer aspects. Powell told the brokers that they had to respond to Laney unless the matter involved the investment adviser. (Tr. 510.) Any additional meetings involving Elliott and registered representatives concerned insurance products for brokers who also had an insurance license, or the investment adviser, but not Northstar. (Tr. 511, 526-27.) Elliott's motion to strike certain investigative testimony by Laney that purports to be inconsistent with her hearing testimony is denied. Her hearing testimony is not inconsistent with the previously sworn testimony. (Tr. 514-15.)

with the Services Agreement by which DIS hired Northstar's administrative staff. (DX. 23.) Accordingly, I cannot conclude that their actions fell outside the scope of actions disclosed in Hill's March 5th letter to the Division or that Powell and Elliott were in de facto control of or otherwise willfully associating with Northstar in violation of the Suspension Order.

**b.** ***Interviewing Prospective Northstar Brokers***

The Division also claims that, in violation of the Suspension Order's restriction on associating in a supervisory capacity, Powell and Elliott participated in interviews with brokers who were then hired by Northstar. Included among these brokers were Michael Dyer (Dyer), Harrell Hansen (Hansen), and Chris Lewis (Lewis). (Div. PHB at 18-20.)

Dyer currently is a registered representative with SWS Financial in Marble Falls, Texas. He was recruited for Northstar by Laney. Dyer signed a contract with Northstar on January 3, 2000, Laney's first day at Northstar as compliance officer, to open an office in Marble Falls. (Tr. 790-95, 806-07.) In late fall 1999, during the Suspension Period's restriction on associating in any supervisory capacity, Powell, at Laney's request, flew to Marble Falls to interview Dyer. According to Dyer, "[W]e just talked generalities . . . the business and everything. And that was basically it. We mostly shot the bull." (Tr. 790-92.) Powell asked what type of products Dyer dealt in, and Dyer responded, "bonds and equities, but mostly bonds." (Tr. 791-93.) They also talked about a tape recording requirement that had been imposed due to "some trouble in the past." (Tr. 793.) At this meeting, Dyer advised Powell that he needed an eighty-seven percent commission payout. Powell thought it would be fine, but he would have to check with Laney or Tarbett. (Tr. 799, 809.) Laney gave Dyer a registered representative agreement and a Form U-4 when he visited the office. He believes that Tarbett signed them on behalf of Northstar. He never spoke with Elliott during this time period. (Tr. 800-03.)

In December 1999, during the latter part of the Suspension Period, Hansen met with Powell and Elliott concerning employment. Powell and Elliott talked about "premium finance life insurance," a Dominion Agency product. (Tr. 815.) In order to begin working for Northstar, Powell and Elliott referred him to others. Hansen then spoke with Hinckley, Barb Huber, Betty Holman, and Tarbett. One of them provided him with the items necessary for him to join Northstar, such as fingerprint cards and the Form U-4. Someone from Northstar approved his commission, but not Powell or Elliott. (Tr. 816-18, 832-33.) He was hired as a registered representative with Northstar in January 2000. After joining Northstar, he did not have much contact with the home office, nor does he recall any problems with the back-office operations. (Tr. 824-25.)

Lewis spoke with Elliott about joining Northstar near the end of 1999, during the Suspension Period's ban on associating in a supervisory capacity. Lewis had been terminated by his previous employer, SWS Financial. (Tr. 841-42.) Elliott advised that he would speak with Tarbett, and someone would contact him. Thereafter, Tarbett contacted Lewis, but Elliott never offered him employment as a Northstar representative. (Tr. 843, 876.) Northstar then hired Lewis in February 2000 after he met with Tarbett in Lewis's office in Addison, Texas. (Tr. 846-47.) After joining Northstar, Lewis spoke with Powell about resolving operational problems only after he failed to reach Tarbett. Additionally, Lewis would communicate with Powell and Elliott by e-mail to resolve back-office problems, but the only time Elliott was involved was in March or April 2000, after the Suspension Period, when he set up a meeting in an effort to

facilitate solutions for recurring back-office problems. (Tr. 848, 856-57, 877-80; DX. 113.) He had no information about Powell or Elliott being principals with Northstar. (Tr. 854.)

The testimony of Dyer, Hansen, and Lewis establishes merely that Powell and Elliott referred them to Northstar personnel for employment inquiries or other matters pertaining to Northstar. The minimal contacts with these brokers, as well as those relating to the hiring of Hinckley and Laney, will not support a finding that Powell and Elliott were in de facto control of Northstar at anytime. Accordingly, I cannot conclude that their actions fell outside the scope of actions contemplated in Hill's March 5th letter to the Division.

**c.** ***Attending Northstar-Related Conferences***

The Division cites to Powell's and Elliott's attendance at three joint Northstar and Dominion Companies conferences as evidence that they were in de facto control of and associated with Northstar before and during the Suspension Period. The conferences included the 1998 Bulls and Bears Conference held in September 1998 (before the Suspension Period); the Top Producers Meeting held on May 27-28, 1999 (during the Suspension Period's ban on associating in any capacity); and the 1999 Bulls and Bears Conference held in September 1999 (during the Suspension Period's ban on associating in any supervisory capacity). (Div. PHB at 14-15.)

At the 1998 Bulls and Bears Conference, Elliott informed Thomas Williams (Williams), currently a registered representative with IMS Securities and a former Dominion Capital employee, along with the other attendees that the Commission would likely suspend him. Powell did not play any active role at this conference. (Tr. 1451, 1456-57.) Also at the conference, Elliott introduced Mills-Barry as the owner and person in charge of Northstar. Elliott told the attendees that all questions regarding Northstar should be directed to Mills-Barry or Tarbett. Williams described Northstar as "the best broker-dealer he ever worked for" and the back-office staff as "highly professional and competent." (Tr. 1450-54.)

Grace Barnard (Barnard), along with two other partners, owned fifty percent of the Dominion Agency. (Tr. 1388-90.) Powell and Elliott owned the other fifty percent. Barnard, then vice president of the Dominion Agency, testified that at the 1998 Bulls and Bears Conference, Powell and Elliott advised the representatives that they were to be suspended by the Commission and would be removed from any dealings with the broker-dealer. After Dominion Capital registered representatives transferred to Northstar, Barnard went to Mills-Barry with broker-dealer issues, but would not go to Powell or Elliott. (Tr. 1391-94.) Barnard was in the offices of the Dominion Agency, which it shared with Northstar, on a daily basis throughout the Suspension Period and observed Elliott during that time. Barnard testified that Elliott was not running, supervising, or controlling Northstar nor did he involve himself in Northstar's day-to-day business. (Tr. 1403-04.) Likewise, Powell had no involvement in any capacity with Northstar. (Tr. 1412.)

In attempting to recruit insurance representatives, Elliott went on trips with Barnard and helped with fixed products and marketing concepts, but was not involved with variable products or in recruiting representatives for Northstar. Insurance agents and Northstar registered representatives attended the Top Producers Conference in May 1999. Elliott helped Barnard train those involved in selling insurance products. (Tr. 1397; DX. 63.) She testified that Elliott

had a similar role dealing with insurance products at the September 1999 Dominion Companies-Northstar Bulls and Bears Conference. (Tr. 1401-03.) Barnard was aware of the Suspension Order and believed that Elliott took it seriously. She is not aware of anything he did during the Suspension Period to violate that order. (Tr. 1406-07.)

I cannot conclude that the foregoing conduct rose to a level of willful association in any capacity with Northstar in violation of the Suspension Order or any other regulatory requirement. The preponderance of evidence establishes that Powell and Elliott were not acting in de facto control of Northstar by their attendance and conduct at the conferences, but that they made a good faith attempt to limit their presence to insurance-related issues. I credit Williams's and Barnard's testimony that Powell and Elliott sufficiently distanced themselves from Northstar during the course of these conferences.

**d.** ***Circumventing Mills-Barry's Compliance Demands to Brokers***

The Division also seeks to establish that Powell and Elliott circumvented Mills-Barry's authority, thereby evidencing Powell's and Elliott's de facto control, by citing that: (i) Mills-Barry instructed Elliott not to "harass" a broker about hiring a principal for his office; (ii) a broker told Mills-Barry that Powell gave him permission to submit paperwork a week after Mills-Barry wanted it; (iii) Mills-Barry, between September 1998 and the end of 1999, "confronted" a broker about problems with grouping people in a partnership, after the broker supposedly quoted Powell's instructions that the people could be grouped in a larger investment; and (iv) a trading desk employee on several occasions went to Tarbett or Elliott with problems and not to Mills-Barry. (Tr. 651-52, 692-93, 786-87; Div. PHB 15-17.)

The context for Powell's and Elliott's remarks to her appears to stem from occasions when the brokers or trading desk staff, on their own initiative, contacted them or Tarbett with problems. There is nothing in these comments that constitutes interference with her authority such that Powell and Elliott were associating in any capacity during the first part of the Suspension Period or in a supervisory capacity during the latter part. Mills-Barry testified that she could not recall any specific instance of Elliott inserting himself into the management of Northstar. (Tr. 651-52, 691.) Furthermore, as discussed more fully below, the comments by Powell or Elliott to infrequent questions posed to them by brokers simply do not rise to the level of interfering with Mills-Barry's authority. I do not credit this evidence to support a finding that Powell or Elliott circumvented Mills-Barry's authority in dealing with Northstar registered representatives or that they willfully associated in a supervisory capacity with Northstar.

**e.** ***Attempting to Resolve Broker-Related Problems***

The Division cites evidence of e-mails referencing broker commissions and other activities as further proof that Powell and Elliott were in control of Northstar before and during the Suspension Period.[21] The Division asserts that this "pattern of communication" demonstrates

[21] Hill's letter of March 5, 1999, informed the Division that Powell and Elliott would continue to work on issues involving brokers and customers. (EX. 201.)

Powell's and Elliott's failure to separate themselves from Northstar's business while they were not registered with it.[22] (Div. PHB at 16-17.)

The first e-mail communication involved a broker, who was dually registered with Dominion Capital and Northstar in July 1998. In the e-mail, the broker sought approval for outside activity and sent the request to Powell with a carbon copy sent to Mills-Barry. (DX. 35.) In October 1999, an employee sent Elliott, Powell, and Tarbett her resignation letter from the Dominion Companies and Northstar. The Division speculates that because she sent one letter to all three, it shows that the "brokers saw no distinction between the entities and Powell and Elliott's roles with them." (DX. 74.) The broker did not testify and the Division introduced no evidence to explain why one letter was addressed to all three.

On December 30, 1998, Elliott sent an e-mail to Robyn Edens (Edens), the Northstar FINOP, with copies to Powell, Tarbett, Mills-Barry, Grace Kruger, and Barb Huber. (DX. 48.) Elliott's e-mail requested that Edens clear up some confirmation and commission issues that a broker raised with Elliott when they met in California the previous week. The broker also requested a copy of his complete commission runs while he was employed at Dominion Capital and Northstar. Shortly after Elliott met with him, however, the broker died of a heart condition. Elliott testified that he met with him because the broker was a very large insurance producer and was having trouble obtaining a California license. Elliott wanted to assist in obtaining the license. Elliott stated, "My conversations with him were in terms of business development which related to his insurance business, his family, his impending heart surgery, and a variety of other issues." During this conversation the broker mentioned the issues about the commissions and the accounting for his business at Dominion Capital and Northstar. Elliott does not know if the commission issues were ever resolved. I credit Elliott's testimony explaining why he met with the broker. There is no evidence contained in this e-mail that would support a finding that Elliott was in de facto control of or otherwise associating with Northstar by relaying the request from the broker to a Northstar official. (Tr. 301-03; DX. 48.)

On December 31, 1998, Elliott sent an e-mail to David Schultz (Schultz), a Northstar broker, advising that Elliott along with Leah Shores (Shores), who worked at Northstar's trading desk, resolved a problem with one of Schultz's clients who was extremely upset about a problem involving the purchase of GNMA bonds that apparently was caused by Northstar's clearing broker, Southwest Securities. A copy of the e-mail was sent to Powell, Tarbett, Mills-Barry, and Shores. Schultz had been a broker at Dominion Capital. (Tr. 303; DX. 49.) According to Elliott, Shores described the problem to Elliott and asked for advice on what she should do about it. Elliott suggested that the principal be replaced in the account. Elliott testified that Shores conferred with her supervisors and managers and did what was necessary. Elliott did not talk to the customer or the clearing broker. (Tr. 303-04.) I credit Elliott's testimony that he had no involvement in the transaction other than to make a suggestion.

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[22] Powell testified that during the period May 13, 1999, to February 2000, only three items of correspondence in this record referenced Powell's name. He was the addressee on one and copied on two. An additional twenty-one documents were introduced into the record pertaining to outside the sanction period; only two of these were authored by Powell, both of which Powell claims were incidental. (Tr. 1464.)

On January 22, 1999, Mills-Barry sent an e-mail to Edens with a copy to Powell asking Edens to advise about a request from a broker about advancing him $500.00 for future business. Powell responded by e-mail on the same day stating Dominion Capital's policy in this regard. He testified that Mill-Barry wanted to be consistent. (Tr. 132, 775-77; DX. 51.)

On February 3, 1999, Elliott sent an e-mail to Edens to reconcile a trading error with a broker's commission. A copy of the e-mail was sent to Powell, Tarbett, and Mills-Barry. (DX. 52.) Elliott stated, "I agreed to cut him some slack and split this between his February and March commission runs. He appreciates it and it was a far more reasonable answer than his first request to have us cover it!! Please make this happen. Thanks. [Elliott]." The broker in question previously worked at Dominion Capital and was a friend of Elliott's and, according to Elliott, "He needed an ear." The broker had made a trading mistake and Elliott suggested a different remedy to another that was being discussed. Elliott describes his language in the e-mail as "very direct, as opposed to suggestive. But at the end of the day . . . it was a recommendation. I don't know how it was resolved. . . . And I never talked to [the broker] again about it." (Tr. 305-06.)

On February 3, 1999, Elliott began a series of e-mails to Powell and Mills-Barry about a request he received to have Northstar brokers sell Pawnsmart stock. On February 12, 1999, Elliott sent his second e-mail in the series to Mills-Barry with copies to Powell and Tarbett, suggesting that Northstar not sell it. On February 16, 1999, Mills–Barry e-mailed Powell and Elliott stating that selling Pawnsmart was a "no go." (DX. 54.)

On February 12, 1999, Elliott sent an e-mail to Powell, Tarbett, and Mills-Barry with a copy to Edens regarding turning on the order entry module at a Northstar branch office run by broker Mike Hill. The purpose of the entry module was to connect Mike Hill's branch office with the clearing firm. According to Elliott, Mike Hill was to provide $25,000 that could be considered as Northstar capital in the event of any errors. The e-mail stated that Elliott "needed help in setting up the account, details, and moving the money." According to Elliott, the purpose of the e-mail was to document the file for this matter, which originated while Mike Hill was still at Dominion Capital. Tarbett and Mills-Barry could do what they wanted, such as asking for a larger deposit from Mike Hill. (Tr. 306-10; DX. 53.)

The Division also cites to Elliott's and Tarbett's discussions in December 1998 and January 1999 in regard to setting up a new branch office with brokers Richard Madden (Madden) and Rick Rivera (Rivera). (Div. PHB at 32.) Elliott was involved because DIS intended to loan them $19,000 as start-up capital with a payback schedule. The office was to represent both Northstar and Dominion Agency. (Tr. 300-01; DX. 46.) Tarbett had recruited Madden and Rivera to be Northstar brokers and referred them to Powell or Elliott to obtain leases and other things needed to operate the branch. (Tr. 395-96.)

The above communications pre-date the Suspension Order and could not violate it. I find that they do not constitute conduct establishing that Powell and Elliott exercised de facto control of or were otherwise willfully associated with Northstar. Elliott testified that all the e-mails related to Dominion Capital or when brokers were transitioning out of Dominion Capital (Tr. 307-09.) This testimony is unrebutted and I credit it. The e-mails are, for the most part, predicated on requests for information that came to Elliott or Powell and were passed on to Northstar personnel. Also, these brief, minimal contacts with Mills-Barry or brokers will not

support a finding that Powell or Elliott had to be registered with Northstar. The evidence of discussions whereby DIS would loan Madden and Rivera money to capitalize a future Northstar and Dominion Agency office and other business needs also does not support a finding that Powell and Elliott were willfully in control of or otherwise associating with Northstar during the Suspension Period.

### C. Aiding and Abetting and Causing Violations of the Securities Laws

The crux of the Division's case is that before, during, and after the Suspension Period, Powell and Elliott were, in fact, controlling Northstar by virtue of their business arrangement with Northstar and by having Mills-Barry and Tarbett serve in ownership roles of Northstar. Through this arrangement, the Division contends that Powell and Elliott directly contravened the Suspension Order in willful violation of Exchange Act 15(b)(6)(B)(i), and that Tarbett willfully aided and abetted and caused this violation. The Division further contends that this business arrangement, and the conduct arising thereunder, aided and abetted and caused Northstar to violate Exchange Act Sections 15(b)(1), 15(b)(6)(B)(ii), and 17(a)(1) and Rules 15b3-1, 15b7-1, 17a-3 and 17a-5 thereunder. I previously concluded that Powell and Elliott did not willfully violate Exchange Act Section 15(b)(6)(B)(i) by virtue of this business arrangement.

For an aiding and abetting violation of the federal securities laws, three elements are required: (i) an independent primary securities law violation committed by some other party; (ii) general awareness by the accused aider and abettor that his or her role was part of the overall activity that was improper or illegal; and (iii) knowing and substantial assistance by the accused aider and abettor in the conduct that constitutes the violation. Abraham & Sons Capital, Inc., 75 SEC Docket 1481, 1492 (July 31, 2001) (citing Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000)); see also SEC v. Fehn, 97 F.3d 1276, 1287-88 (9th Cir. 1996); The Rockies Fund, Inc., 81 SEC Docket 703, 729 n.63 (Oct. 2, 2003); Terence Michael Coxon, 80 SEC Docket 3288, 3300 n.32 (Aug. 21, 2003). For a causing violation, three similar elements are required: (i) a primary violation occurred; (ii) an act or omission of the respondent contributed to the violation; and (iii) respondent knew, or should have known, his conduct would contribute to the violation. Robert M. Fuller, 80 SEC Docket 3539, 3545 (Aug. 25, 2003), pet. denied, No. 03-1334 (D.C. Cir. 2004) (citing Erik W. Chan, 77 SEC Docket 851, 859-60 (Apr. 4, 2002)). I will address each alleged aiding and abetting and causing violation in turn.

#### 1. *Exchange Act Section 15(b)(6)(B)(i) and Section 15(b)(6)(B)(ii)*

Exchange Act Section 15(b)(6)(B)(ii) prohibits a broker-dealer from associating with a person it knows or should know is violating Exchange Act Section 15(b)(6)(B)(i). The OIP charges Powell, Elliott, and Tarbett with willfully aiding and abetting and causing Northstar's violation of Section 15(b)(6)(B)(ii) by permitting Powell's and Elliott's association with it while the Suspension Order was in effect. Additionally, Tarbett is charged with willfully aiding and abetting and causing Powell's and Elliott's violations of Section 15(b)(6)(B)(i). (OIP at 2-4.)

Powell and Elliott did not associate with Northstar within the meaning of Exchange Act Section 3(a)(18) and did not willfully violate the Suspension Order. Therefore, there is no primary violation by Northstar and the charge that Powell, Elliott, and Tarbett willfully aided and abetted and caused a violation by Northstar of Exchange Act Section 15(b)(6)(B)(ii) by allowing them to associate with it during the Suspension Period must be dismissed. For the same reason,

the charge that Tarbett willfully aided and abetted and caused Powell's and Elliott's violation of Exchange Act Section 15(b)(6)(B)(i) must also be dismissed.

**2. *Exchange Act Section 15(b)(1) and Rule 15b3-1***

Exchange Act Section 15(b)(1) and Rule 15b3-1, in conjunction, require broker-dealers to file and keep current and accurate applications of registration with the Commission. The OIP alleges that between April 23, 1998, and March 16, 2001, in violation of Section 15(b)(1) and Rule 15b3-1, Northstar filed nineteen inaccurate amendments to its application for broker-dealer registration on Form BD. Eight of the amendments listed changes to direct owners, executive officers, and indirect owners. Northstar's alleged violation is that its amendments to the Form BD failed to disclose Powell's and Elliott's purported direct or indirect control of the management of Northstar and financing of the business of Northstar. (OIP at 4-5.)

As previously discussed, the Division contends that Powell and Elliott provided substantial assistance to Northstar's alleged violation by having DIS make personal loans to Mills-Barry, and later to Tarbett, for the purchase of Northstar and for an additional sum to increase its net capital. Hill, however, made the Division aware of the loans and business arrangement and that Powell and Elliott intended to have an ownership interest in Northstar well in advance of the effective date of the Suspension Order. Nevertheless, the Division asserts that the structure of these loan arrangements made "no economic sense" and was designed to make Powell and Elliott the de facto direct owners of Northstar, with Mills-Barry and Tarbett serving as mere nominal owners and titular chief executives. (Div. PHB 9, 26-28.)

I credit Hill's letter and the fact that Mills-Barry prepared the notes, the Right of First Refusal, and the Services Agreement more than one year before the Suspension Order was entered as evidence of the contrary. She did not purchase Northstar as part of a plan to circumvent the Suspension Order. Her intent was to operate Northstar and payback both loans. (Tr. 617-18, 665-66, 678.) Powell did not believe that the personal loan arrangement from DIS to Mills-Barry needed to be disclosed on Northstar's Form BD because the loan was not to Northstar, the Form BD applicant. Nor does Powell believe that the loan arrangement made DIS an indirect owner of Northstar or place it in any control of Northstar's management policies. (Tr. 85-87; DX. 12, 87-104.) If the Division had problems with these arrangements, it had ample opportunity in 1999 to point them out.

Tarbett is charged with providing substantial assistance to Northstar's violation by signing and/or causing the electronic submission of eleven of the nineteen amendments that failed to disclose the alleged ownership interests of Powell and Elliott. (Div. PHB at 27.) Laney, Northstar's compliance officer, did not believe that any amendments to the Form BD filed by her or Tarbett were false in any way. (Tr. 554-55, 559-60, 1684-85.)

Because I have concluded that neither Powell nor Elliott were willfully associating with or otherwise controlling Northstar, the charge that a series of amendments to Northstar's Form BD were false because Northstar did not list them as its direct or indirect owner fails. There was no primary violation of Exchange Act Section 15(b)(1) and Rule 15b3-1 by Northstar and, therefore, no willful aiding and abetting or causing violation by Powell, Elliott, or Tarbett. Accordingly, this charge must be dismissed.

### 3. *Exchange Act Section 15(b)(1) and Rule 15b7-1*

Exchange Act Section 15(b)(1) and Rule 15b7-1, in conjunction, prohibit registered broker-dealers from effecting securities transactions unless the natural person associated with the firm effecting transactions is also registered or approved in accordance with the standards of training established by a national securities association (i.e., self-regulatory organization) of which the broker-dealer is a member. Rule 1021 of the NASD's Registration Requirements provides that all persons engaged in the securities business of an NASD member who function as principals shall be registered in such regard. Rule 1021 defines a principal as any person associated with an NASD member who actively engages in the management of the NASD member's securities business including supervision, solicitation, conduct of business, or the training of persons for any of these functions.

The OIP charges Powell, Elliott, and Tarbett with willfully aiding and abetting and causing Northstar's primary violation of Exchange Act Section 15(b)(1) and Rule 15b7-1 because Northstar, as a member of the NASD, a national securities association, failed to register Powell and Elliott as principals with the NASD as they were de facto principals of Northstar before and after the Suspension Period. (OIP at 5-6; Div. PHB at 31.) The Division argues, inter alia, that Powell and Elliott acted as unregistered principals during this time frame when they: (i) hired, paid, and oversaw staff for DIS who then worked for Northstar, such as Mills-Barry, Tarbett, Laney, and Hinckley; (ii) advised brokers from Northstar and resolved their problems; (iii) negotiated broker commissions and set up new branch offices for brokers; (iv) reviewed and approved broker letters and selling agreements; (v) participated in compliance visits and chose branch office supervisors; and (vi) in the end, negotiated the transfer of Northstar brokers to a new firm, Rushmore Securities. (Div. PHB at 32-33.) Combined with the conduct previously alleged, the Division contends that, in effect, Powell and Elliott managed Northstar's securities business unabated from April 1998 through November 2000, and consequently also willfully violated Exchange Act Section 15(b)(1) and Rule 15b7-1.

I have previously considered and rejected the Division's argument when I concluded that neither Powell nor Elliott were in de facto control of or otherwise associated with Northstar at any time. I incorporate that conclusion, predicated on the same facts, here. The multitude of witnesses in this case have testified that Powell and Elliott were not involved with the day-to-day operations of Northstar such that their actions would rise to the level of actively engaging in the management of Northstar's securities business including its supervision, solicitation, conduct of business, or the training its employees. Their relationship to Northstar, if any, was limited to minimal contacts that failed to rise to the level of association, let alone to the level of a principal. Because there was no primary violation of Exchange Act Section 15(b)(1) and Rule 15b7-1 by Northstar, the charge of willfully aiding and abetting or causing a violation by Powell, Elliott, or Tarbett fails. Accordingly, this charge must be dismissed.

### 4. *Exchange Act Section 17(a)(1) and Rule 17a-3(a)(12) and 17a-3(a)(12)(i)(d)*

Exchange Act Section 17(a)(1) mandates that broker-dealers make, keep, and furnish accurate books and records of their transactions. Rule 17a-3(a)(12) thereunder requires a broker-dealer, in making and keeping accurate records of its business, to keep on file an executed employment questionnaire or application for each associated person. Rule 17a-3(a)(12)(i)(d) further requires the broker-dealer keep in its file any record of any disciplinary action, or

sanction levied thereupon, by any federal or state agency against such an associated person. The OIP charges Powell, Elliott, and Tarbett with willfully aiding and abetting and causing Northstar's violation of Exchange Act Section 17(a)(1) and Rules 17a-3(a)(12) and 17a-3(a)(12)(i)(d), during the period April 1998 to November 2000, for failure to keep executed employment applications or questionnaires for Powell and Elliott as well as a copy of their Suspension Order on file.

Mills-Barry did not keep a copy of the Suspension Order in Northstar's files because Elliott and Powell were not registered with Northstar. (Tr. 674, 726.) For disclosure purposes, Laney understood that Tarbett was the owner and control person for Northstar, not Powell or Elliott. They were neither employed by nor received a salary from Northstar. Therefore, Laney did not believe that Northstar was required to keep an employment application for Powell or Elliott in its records. She recalls that a copy of the Suspension Order was in the Dominion Companies' files but could not be certain if one was filed with Northstar. (Tr. 549.) As Northstar's compliance officer, Laney did not believe that Northstar was required to keep a file copy of the Commission's Suspension Order for Elliott and Powell because neither was registered with Northstar. (Tr. 726.) She was not aware that Northstar failed to keep any required records. (Tr. 554-55, 559-60.)

I previously concluded that Powell and Elliott were neither in willful association with nor employees of Northstar during the period April 1998 to November 2000. Accordingly, there was no requirement during this period for Northstar to maintain Powell's and Elliott's employment application, questionnaire, or a copy of the Suspension Order while it was in effect. As a result, I conclude that Northstar did not violate Exchange Act Section 17(a)(1) or Rules 17a-3(a)(12) or 17a-3(a)(12)(i)(d). Therefore, the charge that Powell, Elliott, and Tarbett willfully aided and abetted and caused such violations must be dismissed.

**5.** ***Exchange Act Section 17(a)(1) and Rule 17a-5***

Exchange Act Section 17(a)(1) and Rule 17a-5, in conjunction, require broker-dealers to file annual reports with the Commission. Rule 17a-5(e)(2), inter alia, states that such reports not covered by an accountant's opinion are required to include an oath or affirmation of an officer, or director that financial statements and schedules are true and correct. The OIP alleges that Northstar failed to file an annual report for its fiscal year ended December 31, 2000, and charges Powell, Elliott, and Tarbett with willfully aiding and abetting, and causing the alleged violation as to Northstar. (OIP at 6; DX. 151.)

The job of filing Northstar's annual report was Hinckley's, but as CEO, Tarbett had the responsibility to ensure compliance with the regulation. (Tr. 437-38, 1637, 1675.) Tarbett knew that an audited annual report was required to be filed with the Commission for the fiscal year ending December 31, 2000, by March 1, 2001. He had previously signed the annual report for the 1999 fiscal year. (Tr. 437.) Tarbett understood that Hinckley and Brad Kinder (Kinder), the Northstar auditor, began to assemble the information but, because of the condition of the company, they decided against filing the report. Hinckley does not recall if he told Tarbett that he and Kinder decided not to file the annual report. (Tr. 965-66, 1000-01.) Tarbett did not learn until later in the year that the report was never filed. Working with NASD compliance to "shut down" Northstar was Tarbett's priority. He does not recall whether he asked Hinckley if the annual report was filed. (Tr. 1695-96.)

Northstar was completely out of business by the end of January 2001. It had no assets or employees. The brokers, including Tarbett, had moved to Rushmore Securities and, according to Tarbett, Northstar "had basically already forfeited [its registration] at that time." (Tr. 1674, 1694.) Northstar's Form BDW withdrawing its registration was effective on May 29, 2001.

I conclude that Northstar did willfully violate Exchange Act Section 17(a)(1) and Rule 17a-5 in so far as it failed to file the audited annual report for the year 2000 while it was still in business.[23] (DX. 151.) There is, however, no evidence that Powell or Elliott had any responsibility to prepare or file the annual report for the year 2000; thus, the aiding and abetting and causing charges must be dismissed as to them.

Although Tarbett, as president and CEO of Northstar, was responsible to see that Northstar's filing was made, Northstar was effectively out of business by January 2001, and at the time, Tarbett was working with the NASD to close it. (Tr. 1637, 1694-96; TX. 318.) Under the circumstances at that time, I conclude that it was reasonable for Tarbett to expect that Hinckley had filed the report as he had in the past. His failure to inquire whether Hinckley had made the filing, under these circumstances, does not rise to the level of knowledge or awareness that he was participating in any improper activity or illegality as articulated in Howard v. SEC, 2004 WL 1698205, *5 (D.C. Cir. July 30, 2004) (requiring "extreme recklessness" when accused aider and abettor was unaware of wrongdoing). Nor was Tarbett a cause of the violation under a classic negligence standard as set forth in KPMG Peat Marwick LLP, 74 SEC Docket 384, 421 (Jan. 19, 2001). Tarbett did not willfully aid and abet or cause Northstar's failure to file the 2000 annual report. Accordingly, this charge as to Tarbett must also be dismissed.

## RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I hereby certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on June 17, 2004.

## ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED that the proceeding brought against Respondents Douglas W. Powell, Charles D. Elliott, III, and Russell S. Tarbett be, and it hereby is, DISMISSED.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party,

[23] Exchange Act Section 17(a)(1) and Rule 17a-5 are non-scienter based provisions when determining if a primary violation of such has occurred. Orlando Joseph Jett, 82 SEC Docket 1211, 1255 & n.45 (Mar. 5, 2004).

then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Robert G. Mahony
Administrative Law Judge