SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 62448 / July 2, 2010

Admin. Proc. File No. 3-12918

In the Matter of

vFINANCE INVESTMENTS, INC.
and
RICHARD CAMPANELLA

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OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Failure to Produce Records Promptly

Failure to Preserve Records

Aiding and Abetting Recordkeeping Violations

Broker-dealer willfully violated recordkeeping and production provisions of federal securities laws. Officer of broker-dealer willfully aided and abetted and was a cause of the violations. *Held*, it is in the public interest to censure broker-dealer and officer, to bar officer from associating in any supervisory or principal capacity with a right to reapply in two years, to impose cease-and-desist orders, and to impose civil money penalties.

APPEARANCES:

Carl F. Schoeppl, of Schoeppl & Burke, P.A., and *Adam H. Smith, P.A.*, for vFinance Investments, Inc. and Richard Campanella.

Marc J. Fagel, *John S. Yun*, and *Steven D. Buchholz*, for the Division of Enforcement.

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Last brief received: April 15, 2010
Oral argument: March 30, 2010

vFinance Investments, Inc., a registered broker-dealer ("vFinance" or the "Firm"), and Richard Campanella, the Firm's former chief compliance officer and later president (together with vFinance, "Respondents"), appeal an administrative law judge's decision.[1] The law judge found that vFinance willfully violated Section 17(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 17a-4(b)(4) and 17a-4(j),[2] by failing to preserve and promptly produce electronic communications regarding its trading in the securities of Lexington Resources, Inc. ("Lexington"), and that Campanella willfully aided and abetted and was a cause of these violations. The law judge ordered Respondents to cease and desist, censured Campanella, and fined the Firm $100,000 and Campanella $30,000. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

I.

A. Background

During the period at issue, vFinance was based in Florida with approximately 120 registered representatives and about twenty-five branch offices.[3] From 2003 to July 2006, Campanella was the Firm's chief compliance officer and was responsible for the Firm's preservation of business correspondence. Campanella also oversaw annual audits of the Firm's branch offices, conducted by

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[1] *vFinance Invs., Inc.*, Initial Decision Rel. No. 360 (Nov. 7, 2008), 94 SEC Docket 11538.

[2] 15 U.S.C. § 78q(a)(1); 17 C.F.R. § 240.17a-4(a)(4) and (j).

[3] vFinance is a member of the Financial Industry Regulatory Authority, Inc. ("FINRA"), which was previously known as NASD. *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 72 Fed. Reg. 42,190 (Aug. 1, 2007) (SR-NASD-2007-053) (approving NASD proposed rule change to reflect NASD's name change to FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc.). Because the events herein took place before NASD's name change, we continue to use the designation NASD.

a vFinance compliance auditor reporting directly to Campanella. Campanella was responsible for the procedures employed during these audits and reviewed the reports prepared by the compliance auditor after each audit. Campanella coordinated the timeliness and completeness of the Firm's production of any records requested by Commission staff. He often delegated responsibility for retrieving certain documents but retained responsibility for the completion of the Firm's record production.

Respondents were aware that the Firm's Exchange Act obligations to preserve and produce documents extended to electronic communications. The Firm's chairman testified that Firm policy prohibited personnel from using non-Firm e-mail accounts for business purposes because the Firm could not readily access or preserve such messages, and that Campanella was responsible for ensuring compliance with this policy. Branch office managers also signed a questionnaire during annual audits of the branches affirming that branch associated persons "us[ed] only vFinance['s] e-mail system for communicating [electronically] with the public."

Campanella also had responsibility for assuring that instant messages ("IMs") were saved in compliance with Firm policies. In July 2003, NASD issued a notice "urg[ing] [its] members to evaluate their internal use of instant messaging in light of their supervisory and recordkeeping requirements."[4] Campanella subsequently approved revised written policies requiring representatives to either disable IM programs on their computers or to keep paper copies of their IMs.

In spring 2004, Campanella received a copy of Commission Staff Legal Bulletin No. 17: Remote Office Supervision (the "2004 Bulletin"). The 2004 Bulletin reminded broker-dealers of their obligation to monitor representatives in small, remote branch offices, who may find it easier "to carry out and conceal violations of the securities laws;" recommended unannounced inspections of branch offices (but warned against "cookie cutter inspections"); and noted the responsibility of officers to "act decisively to detect and prevent" misconduct, particularly when confronted by indications of wrongdoing, *i.e.*, red flags.

Nicholas P. Thompson, a vFinance registered representative from June 2002 through August 2006, was the manager of the Firm's Flemington, New Jersey branch office. For most of the period at issue, the Flemington branch included only one other registered representative, Thompson's father. Thompson's trading activities were supervised from the Boca Raton office by William Groeneveld, then vFinance's head trader. The Firm was entitled to 15% of the gross retail commissions generated by his branch office.

Thompson's association with vFinance was governed by an independent contractor agreement (the "IC Agreement"), which required Thompson to comply with Firm policies as well as all securities laws, rules, and regulations. Under the IC Agreement, Thompson agreed to "maintain . . . all required books and records for his retail securities business," and to submit to annual branch

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[4] NASD Notice to Members 03-33 (July 2003).

office audits. The IC Agreement also obligated Thompson to make his records available for review by the Commission and the Firm.

B. vFinance's Awareness of and Response to Thompson's Non-Compliance with its Electronic Communication Policies

vFinance audited the Flemington branch office in December 2003. The compliance auditor discovered that Thompson was communicating with Firm traders using IMs that were saved on his computer, *i.e.*, not in hard copy. Although he had authorized guidance in July 2003 requiring that IM programs be disabled or that the messages be kept in hard copy, Campanella approved Thompson's storage of IMs on his computer. During the audit, Thompson also signed the branch office manager questionnaire representing that he used only vFinance e-mail for public communications.

In January 2004, Campanella received a business-related e-mail message from Thompson that originated from a "blast.net" e-mail account. Recognizing that the message did not originate from Thompson's vFinance e-mail address, Campanella ordered Thompson to "[s]top using the above email." However, on February 3, Thompson again e-mailed Campanella from the blast.net account. Campanella responded: "We have discussed your email address on several occasions -- STOP using it -- next time I will hit you with a fine."

Campanella, however, did not discipline Thompson, even after receiving a third blast.net e-mail from Thompson regarding Firm business on March 8, 2004. Nor is there evidence that Campanella took any specific steps to monitor Thompson's subsequent use of the blast.net e-mail account. During the same period, Thompson continued to send blast.net messages regarding his orders and trading to other Firm personnel, most notably to Jonathan Matthai, who later became Campanella's compliance deputy.

When the Firm conducted an unannounced audit of Thompson's office in November 2004, neither Campanella nor anyone else at vFinance alerted the compliance auditor to Thompson's use of the blast.net account. The compliance auditor was not trained in detecting non-vFinance e-mail. He checked Thompson's desktop screen for an icon of a non-Firm e-mail account but did not find one. He did not make further checks for e-mail programs. His report directed Thompson to "continue[] to maintain the electronic file" of IMs and "contemporaneous notes of conversations with clients." Thompson once again affirmed that he used only the vFinance system to e-mail the public. As described below, Thompson sent Campanella a fourth blast.net message on September 17, 2005.

C. Red Flags Surrounding Thompson's Lexington Trading

Thompson was a Lexington market maker and represented retail clients trading in Lexington, including Liechtenstein-based Hypo-Alpe-Adria Bank ("Hypo"). Lexington was his most actively traded stock, generating him $274,334 in commissions and 578 trades between October 2003 and December 2005.

On May 12, 2004, NASD contacted Campanella to request vFinance's Lexington trading records in connection with an NASD investigation. On June 24, 2004, Groeneveld e-mailed Thompson about his Lexington trades (copying Campanella), cautioning Thompson that NASD rules regarding market manipulation were "becoming an issue." Groeneveld had discovered that vFinance had been responsible for 69% of Lexington trading for the first four months of 2004, and that the share price had steadily increased "from $4 to almost $7" from March to June 2004. Thompson agreed to limit his customers' Lexington purchase orders, and within the next five days, the share price fell from $7.50 to $3.50. Groeneveld could not explain the trading pattern but permitted Thompson to resume trading.

Groeneveld subsequently e-mailed Campanella that this pricing pattern "rais[ed] a red flag," because Lexington had "only $40,000 in revenue," the stock price increase "was orderly," and there were "numerous times when [Thompson] was both the inside bid and offer." Campanella reviewed the situation and responded to Groeneveld in September 2004 that he "looked at the trades and do not see any issues . . . go with your gut, and stop [Thompson] from trading the stock or you handle the trading for a few week[s] and then make a decision to stop trading the stock altogether." Thompson continued to trade Lexington.[5]

D. The Division's Requests for Lexington Records and vFinance's Response

By letter dated July 18, 2005, the Division contacted Campanella to request, among other things, "all paper and electronic materials related to" Lexington trading from October 1, 2003 to July 18, 2005 (the "Initial Covered Period"), including any "memoranda, correspondence, phone logs, and notes and recordings of conversations." The letter attached SEC Form 1661 ("Supplemental Information for Regulated Entities Directed to Supply Information Other Than Pursuant to a Commission Subpoena"), describing the Firm's obligations to produce records pursuant to Exchange Act Section 17(a).

Campanella assigned responsibility for the correspondence records to Thompson. On July 22, 2005, Thompson told Campanella: "I don't have anything to send you, but I would ask that all the correspondence between [Groeneveld] and I be included." Campanella responded to the Division's record request on August 2, 2005. Campanella identified Thompson as the Firm's registered representative responsible for Lexington trading. However, Campanella did not enclose any correspondence, stating that "[a]s per Mr. Thompson he does not have any correspondence,

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[5] Thompson was a respondent in this proceeding, charged with aiding and abetting the Firm's primary violations. He settled the Commission case against him without admitting or denying the charges. *vFinance Invs., Inc.*, Exchange Act Rel. No. 58403 (Aug. 21, 2008), 93 SEC Docket 8905, 8910 (imposing cease-and-desist order, $30,000 civil penalty, and associational bar with a right to reapply after five years).

phone logs, notes or recordings of any conversations."[6] Campanella invited the Division to contact him for "any questions or need [for] additional information."[7]

The Division contacted Campanella on August 17 and 18, 2005, seeking confirmation that vFinance had searched Thompson's phone records. It also requested "access to all desktop and laptop computers used by Mr. Thompson during the [Initial Covered Period] for purposes of making forensic images of the hard drives," and Thompson's appearance for testimony.

Groeneveld took the lead in procuring the requested phone records, copying Campanella on his e-mails with Thompson. On August 19, Groeneveld ordered Thompson to produce phone records and Hypo contact information, ordering Thompson not to "accept any orders from [Hypo] until we get this information compiled." Thompson replied that he was sending most of the phone records that day and promised the remainder the next week.

On August 22, Groeneveld e-mailed Thompson that the Firm "would recommend that you seek independent counsel for any questions you may have regarding your personal property." Explaining this e-mail in investigative testimony, Groeneveld said that "the firm had taken the stance that, you know, they have to watch what they make independent contractors provide . . . ."

Thompson retained counsel and subsequently asked for a copy of the Firm's complete record production to the Division and for the return of phone records he had previously produced. Thompson complained to Groeneveld, copying Campanella, that he could not respond without these materials, and asserted that "[i]t is my understanding that by using the vFinance e-mail all my email are captured [in Boca Raton] and they are not my responsibility to keep them." Groeneveld copied Campanella on his September 1 response to Thompson, which stated:

> The firm definitely captures all emails, except the ones from a personal account like the [blast.net] account, and retains them to fulfill the firm's responsibility. If you choose not to retain them yourself as a branch manager and wish to rely upon the firm then that is your choice though you are required to retain the ones from your personal account.

On September 2, 2005, Campanella, Groeneveld, and Matthai (by then a member of the compliance department) spoke with the Division. Campanella's agenda for the call noted that the Division had specifically asked him whether all of the responsive e-mails had been produced, and whether Thompson's computer would be available for imaging as requested. On September 8, 2005, the Division again contacted Campanella about outstanding requests.

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[6] Some trading records were produced with this letter.

[7] On August 11, 2005, vFinance sent the Division documents purporting to be "examples of our supervision of . . . Thompson."

vFinance produced Thompson's phone records and Hypo contact information on September 12, 2005, but failed to confirm that it had searched Thompson's phone records as the Division had requested. Although the record does not suggest that Thompson had produced additional e-mails or IMs, Campanella relaxed the Hypo trading prohibition that day, authorizing Thompson to "start trading . . . with just purchases."

Five days later, Campanella received the fourth blast.net e-mail from Thompson described above. This message, sent two months after the Division's July 2005 record request, confirmed Thompson's continued use of the blast.net account for business purposes. Campanella responded by directing Thompson and an information technology ("IT") vice president to "get together . . . and start capturing his emails from this [blast.net] domain." Thompson assured Campanella: "This email is being closed, I paid until the end of the month and . . . I'm only going to have vFin email after this month." There is no evidence of compliance with Campanella's directive that IT work with Thompson to capture existing blast.net e-mails, or the imposition of any discipline on Thompson.

On September 22, 2005, Matthai sent the Division "Emails between Bill Groeneveld and Nick Thompson." After Thompson complained that the restrictions that remained on his trading were causing his "business [to] decline[] significantly," Groeneveld replied on September 27: "It[']s up to compliance now."

The next day, the compliance auditor again audited Thompson's branch office. Despite Respondents' knowledge of the Division's still-pending requests for Thompson's correspondence, and Thompson's recent attempt to disclaim responsibility for e-mail retention and production, the compliance auditor was not given a copy of the Division's request or directed to search for responsive documents. Even though Campanella had received another blast.net e-mail that same month, neither he nor anyone else at vFinance ever asked the compliance auditor to look at Thompson's blast.net account. During the audit, Thompson again represented that he used only "vFinance e-mail to communicate with the public." Although his audit notes suggest that the IT department may have been receiving the IMs by September 2005, the compliance auditor's report encouraged Thompson to "continue[] to maintain the electronic file of his [IM]s." Noting that the branch office "[r]egistered representatives maintain contemporaneous notes of their conversations with clients," the audit report advised the branch office to "encourage your representatives to continue to document these conversations in writing."

On October 5, 2005, the Division informed Thompson's counsel that "none of Mr. Thompson's correspondence with clients who traded in the stock of Lexington Resources ha[d] been produced." That day, Thompson's counsel sent the Division vFinance and blast.net e-mails from late March through late September 2005.[8] The blast.net account e-mails included vFinance business e-mails sent to persons outside the Firm. Campanella separately produced e-mails to the Division two days later. Campanella's cover letter stated that the production was "in response to [the Division's] correspondence" and that it enclosed "Emails for Lexington Resources, Inc.," but gave no further

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[8] It is unclear from the record whether Campanella knew about this production.

description of the e-mails or explanation for the three-month delay in producing them to the Division. Campanella's letter again invited the Division to contact him with any questions.

The Division documented its frustration with the Firm's unresponsiveness in a November 10, 2005 letter to Campanella, its fifth letter to Campanella (the "Division's November Letter"). In pertinent part, the letter stated:

> As I have discussed with you and your colleague Jon Matthai on numerous occasions, the staff is concerned that it has not received all communications of vFinance personnel during the requested period . . . . [I]t does not appear that all communications between vFinance personnel and clients regarding Lexington Resources have been produced, in particular email and instant message communications of Mr. Thompson . . . . As you know, Rule 17a-4(b)(4) requires vFinance to preserve communications for at least three years, the first two years in an easily accessible place.
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> The staff requested these documents more than three months ago. Although vFinance represented on August 2, 2005 that Mr. Thompson does not have any correspondence relating to Lexington Resources, the staff later learned that Mr. Thompson in fact does possess responsive electronic communications that appear to be maintained in his vFinance office in New Jersey. In my letter of August 17, 2005, I requested that vFinance provide the staff access to computers used by Mr. Thompson to retrieve responsive electronic communications. To date, vFinance has not agreed to allow the staff . . . access to the computers.

The letter detailed deficiencies in the records that the Firm had produced, including e-mails produced without attachments and the absence of e-mails produced for April or July 2004. The Division requested certification of vFinance's "thorough search" and production of "all materials and information responsive to all staff requests."

Matthai responded on behalf of vFinance on November 18, 2005 (the "Firm's November Response"). Matthai acknowledged the existence of Thompson's responsive "personal email correspondence involving Lexington":

> As previously discussed, Mr. Thompson is an Independent Contractor (IC) and the computers that he utilized are his personal property and not that of [vFinance]. The Independent Counsel for Mr. Thompson has advised him to not allow access to his personal computers. Mr. Thompson has represented . . . that he would search his personal email correspondence involving Lexington and make it available to the [C]ommission on November 21, 2005. It [is] the position of vFinance[] that Mr. Thompson should comply completely with all [SEC] requests . . . however personal email and personal computers are outside the control of vFinance.

The letter further stated, "To the best of our abilities vFinance Investments, Inc. certifies that it has conducted a search for all material and information responsive to all the staff[']s request."

On December 22, 2005, the Division contacted Matthai and Campanella to follow up with them about other records that had yet to be produced.

Campanella discussed the still-pending requests with the Division on January 5, 2006. The next day, he threatened Thompson with termination for failure to provide his "computer and emails." On January 10, 2006, nearly six months after the Division's initial request, Thompson's counsel produced another 244 pages of Thompson's e-mails, stating that Thompson had now produced "the complete set of the written communications between the parties that could be located." This production, like the October 2005 production, included extensive blast.net e-mails communicating with both clients and Firm personnel.

Weeks later, Thompson gave the Commission access to his hard drive for imaging. This imaging revealed that, as of February 14, 2006, Thompson's vFinance e-mail inbox contained only twenty-five "live" messages, *i.e.,* messages available without forensic recovery. Some of Thompson's messages were separately saved to an archive file on his hard drive. However, a forensic analysis found that Thompson began electronically searching for e-mail files related to Lexington about one week after the Firm disclaimed control over Thompson's "personal email and personal computers." He identified "at the very least approximately 1000 emails related to this matter," which were later deleted from the hard drive and then electronically "shredded," or made unrecoverable, in a multi-step process over a period of several months. In addition, approximately 850 of Thompson's e-mails between November 2005 and February 2006 were likely "double deleted" from Thompson's inbox and were only partially recoverable, even by forensic recovery.

The Division sent a document subpoena to vFinance on July 21, 2006, requesting the same communications as its July 2005 letter and extending the request from the Initial Covered Period to 2006. On August 4, 2006, Thompson resigned. Meanwhile, Campanella was promoted to Firm president and chief executive officer, but continued to coordinate the Firm's subpoena response.

On January 18, 2007, the Division wrote vFinance:

> We understand that vFinance has never actually gone to Nick Thompson's office and searched for the documents requested by the staff. Instead, vFinance has relied on Mr. Thompson to respond to the staff's requests, despite the staff repeatedly informing vFinance that we had concerns about whether Mr. Thompson was making a good faith effort to search for and produce documents.

On January 31, 2007, vFinance agreed to provide "all emails sent by or to Nick Thompson, using his vFinance.com email address," but did not address the blast.net messages. That day, the Firm's IT department completed its search of the vFinance.com e-mail in about six hours. On February 5, 2007, vFinance produced Thompson's vFinance e-mails, but did not include attachments for messages before June 2005. Three days later, vFinance produced Thompson's August 2005 IMs

showing extensive dialogue between Thompson and vFinance's traders regarding Firm business, but did not include Thompson's IMs for any of the Initial Covered Period.

Finally, in March 2007, almost eight months after the Division's subpoena, more than six months after Thompson's resignation, and approximately two months after the Division criticized the Firm's failure to search the office, Campanella searched the branch office for paper records. He found two boxes of responsive documents.

II.

Primary Liability: Firm's Failure to Preserve or Produce Section 17 Records

Exchange Act Section 17(a)(1) requires broker-dealers to make, keep, and furnish such records of its operations as the Commission, by rule, prescribes as necessary and appropriate in the public interest and for the protection of investors. Under Section 17(a) and Exchange Act Rule 17a-4, these requirements encompass business correspondence, including electronic communications such as e-mails and IMs with outside parties and within the broker-dealer.[9] The content, rather than the format, of a message determines whether it is covered under Section 17(a).[10]

Commission access to the "basic source documents and transaction records"[11] is "a keystone of [our] surveillance of brokers and dealers."[12] We have stated, "[p]rompt access to a broker-dealer's

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[9] *Reporting Requirements for Broker or Dealers Under the Securities Exchange Act of 1934*, Exchange Act Rel. No. 38245 (Feb. 12, 1997), 62 Fed. Reg. 6469, 6472 (noting that "the Commission believes that for record retention purposes under Rule 17a-4, the content of the electronic communication is determinative, and therefore broker-dealers must retain only those e-mail and Internet communications (including inter-office communications) which relate to the broker/dealer's 'business as such'").

[10] *Id.*

[11] *Statement Regarding the Maintenance of Current Books and Records by Brokers and Dealers*, Exchange Act Rel. No. 10756 (Apr. 26, 1974), 4 SEC Docket 195.

[12] *Orlando Joseph Jett*, 57 S.E.C. 350, 396 (2004) (quoting *Edward J. Mawod & Co.*, 46 S.E.C. 865, 873 n.39 (1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979)); *see also Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media Under the Electronic Signatures in Global and National Commerce Act of 2000 with Respect to Rule 17a-4(f)*, Exchange Act Rel. No. 44238 (May 1, 2001), 74 SEC Docket 2400, 2401 (noting that "preserved records are the primary means of monitoring compliance with applicable securities laws, including antifraud provisions and financial responsibility standards").

books and records is fundamental to the Commission's ability to discharge its examination, investigative and law enforcement responsibilities."[13]

The Firm's production and preservation obligations covered all of Thompson's branch office's internal and external business electronic communications, including those sent or received from Thompson's vFinance account, his blast.net account or an instant messaging service. When Respondents received the Division's first request for records, they knew that Thompson used all of these electronic media to conduct Firm business.

A. Rule 17a-4(j): Failure to Produce Business Records Promptly

Exchange Act Rule 17a-4(j) requires broker-dealers to "furnish promptly" legible, true, and complete copies of records covered under Rule 17a-4 that are requested by the Commission.[14] We have stated that, "[g]enerally, requests for records which are readily available at the office (either on-site or electronically) should be filled on the day the request is made."[15] Moreover, a broker-dealer is "obligated to conduct its business in a manner that allow[s] it to furnish promptly required books and records upon demand from the Commission staff,"[16] and "[i]f a firm is ill-equipped to provide the full degree of cooperation necessitated by . . . an investigation . . . it has the obligation to act to

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[13] *Banc of Am. Sec., LLC*, Exchange Act Rel. No. 49386 (Mar. 10, 2004), 82 SEC Docket 1372, 1380 & n.6 (settled proceeding) (citing S. Rep. No. 94-75, 94th Cong., 1st Sess. 120 (1975)).

[14] "The Commission's authority to access a broker-dealer's books and records is unconditional, subject only to the requirement that any such examination be reasonable." *Banc of Am.*, 82 SEC Docket at 1373. The reasonableness requirement "relates to time, place and manner of the examination and not to the scope thereof. . . . Any broader construction would undercut the SEC's ability to perform its duties to effectively regulate the securities markets." *SEC v. J.W. Korth & Co.*, 991 F. Supp. 1468, 1472 (S.D. Fla. 1998).

[15] *Books and Records Requirements for Brokers and Dealers Under the Securities Exchange Act of 1934*, Exchange Act Rel. No. 44992 (Oct. 26, 2001), 76 SEC Docket 432, 440; *see also Broker-Dealer Recordkeeping and Preservation Requirements*, Exchange Act Rel. No. 19190 (Dec. 10, 1982), 26 SEC Docket 840, 840 n.4 (Final Rule) ("*December 1982 Release*") (adopting Rule 17a-4(j) and explaining that "[i]n many, if not most, instances the rule generally will require the broker-dealer to turn over copies of the required records almost immediately").

[16] *Dominick & Dominick, Inc.*, 50 S.E.C. 571, 580-81 (1991) (settled proceeding) (failure to preserve and furnish records resulting in broker-dealer cease-and-desist order, censure and undertakings; branch manager aiding and abetting and causing those violations barred in a supervisory capacity for five years and suspended from association with a broker-dealer for three months).

correct that situation . . . . Failure to do so is certainly no defense."[17] Here, the Firm's production of records was neither prompt nor complete.[18]

Campanella's assignment of responsibility to Thompson to respond to the Division's request was questionable from the outset given Campanella's knowledge of the red flags surrounding Thompson's 2004 Lexington trading -- information indicative of a motive to withhold or obstruct production of relevant records. Respondents also knew of Thompson's repeated refusals to comply with Campanella's orders to stop using the blast.net account -- a pattern indicating Thompson's unwillingness to either act in accordance with recordkeeping requirements or to heed direct instructions from Campanella himself. Thompson's July 2005 assertion that he did not have any responsive records was implausible on its face in light of his extensive Lexington trading generating him almost $275,000 in commissions during a twenty-six month period. Nonetheless, Campanella's initial response to the Division cited Thompson's claim when Campanella failed to provide any responsive correspondence.

The inappropriateness of relying on Thompson became increasingly apparent. In September 2005, Campanella received the fourth blast.net message from Thompson, making clear that the account was still open. He also was copied on Thompson's attempts to disclaim responsibility for preserving his e-mails and to delay production of phone records. Campanella's production of e-mails in October 2005, three months after the Division's request, refuted Thompson's earlier claim that no responsive correspondence existed. The Division's November Letter documented the Firm's extensive response deficiencies.

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[17] *Donald T. Sheldon*, 51 S.E.C. 59, 84 n.105 (1992), *aff'd*, 45 F.3d 1515 (11th Cir. 1995); *cf. Wedbush Sec., Inc.*, 48 S.E.C. 963, 972 (1988) (holding firm liable for delay when it could "have hired additional personnel, if necessary, either to assist in responding to the NASD's requests or to relieve others who could contribute more to that process").

[18] At oral argument, the Division suggested that, where a market maker in a branch office is involved, a firm should be able to confirm that records sought have been preserved and to identify the location of records sought within thirty days of a request. We recognize that "[t]he time to turn over the records will . . . depend on the particular circumstances." *December 1982 Release*, 26 SEC Docket at 840 n.4. Here, however, the Firm was never able to confirm that all records sought had been preserved and had not identified the location of most records sought well after thirty days from the Division's July 2005 request; the Firm did not search Thompson's office until February 2007. *See Dominick*, 50 S.E.C. at 575 (eight-month delay in producing branch office records was not prompt); *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Exchange Act Rel. No. 53473 (Mar. 13, 2006), 87 SEC Docket 1870, 1871 & 1876 (settled proceeding) (seven-month delay in producing e-mails, including many from branch office, resulted in cease-and-desist order, censure, and $2.5 million total fine); *Banc of Am.*, 82 SEC Docket at 1376 & 1383 (failure to retain and produce e-mails and other records for "nearly 2 years after the staff's original request" resulted in cease-and-desist order, censure and $10 million total fine).

Although the Division repeatedly complained to vFinance, Respondents allowed Thompson to delay production of his hard drive until February 2006, produced e-mails (most without attachments) and only one month of IMs in February 2007, and did not search the Flemington office for responsive hard copy records until March 2007. Respondents did not order a thorough search for all of Thompson's vFinance e-mails -- a search that ultimately took mere hours to execute -- until January 2007 (eighteen months after the July 2005 request). Respondents offer no credible justification for these delays.

The Firm's production of requested materials was never complete. For instance, Respondents produced only one month of IMs even though they knew that Thompson had been storing IMs on his computer since 2003. The Firm's January 2007 production of correspondence in response to the Division's subpoena covered only "emails sent by or to Nick Thompson, *using his vFinance.com email address*" (emphasis added). Moreover, despite the Firm's certification of completeness, e-mail attachments for the vast majority of those vFinance e-mails were missing. Deficiencies in the Firm's preservation of these records prevented the timely production of all of the requested materials, delay that Thompson used to destroy responsive records.

Respondents nevertheless claim to have responded appropriately and in good faith. They assert that they were "alerted that Thompson was not cooperating with the SEC for the *first and only time* on January 5, 2006" (emphasis in original), and that the Division "staff never told any member of vFinance that they in fact did not get the computer" until January 2006. The Division's November Letter flatly contradicts these claims, documenting the Division's repeated requests. Moreover, the obligation to produce the documents rested with the Firm and could not be outsourced to Thompson.

We also disagree that Respondents showed good faith. From the outset, the Firm took the "stance that . . . they have to watch what they make independent contractors provide," encouraging Thompson to "seek independent counsel" and describing the computers in the branch office as his "personal property." However, we have long held the view "that the designation of an independent contractor has no relevance for purposes of the securities laws."[19]

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[19] *Self-Regulatory Organizations: New York Stock Exchange, Inc.*, 71 Fed. Reg. 36,380, 36,382 & n.18 (June 26, 2006); *cf. Hollinger v. Tital Capital Corp.*, 914 F.2d 1564, 1574 (9th Cir. 1990) ("[W]e see no basis in the statutory scheme to distinguish between those associated persons who are employees and agents on the one hand, and those who are independent contractors on the other.") A broker-dealer "cannot permit its ability to supervise [its representatives] effectively to be negated or impeded by an 'independent contractor' whose right to engage in the securities business depends on affiliation with a registered firm charged with the duty to supervise." *Quest Capital Strategies, Inc.*, 55 S.E.C. 362, 372-73 (2001); *see also* Exchange Act Rule 17a-4(i), 17 C.F.R. § 240.17a-4(i) (stating that an "[a]greement with an outside entity" to maintain its books and records "shall not relieve such [broker-dealer] from the responsibility to prepare and maintain records as specified in" the rule).

The Firm's November Response claimed that vFinance was unable to produce Thompson's "personal emails and personal computers." Yet, the Firm was a party to the IC Agreement that obligated Thompson to make his records available to both the Firm and the Commission. Campanella acknowledged that the IC Agreement allowed the Firm access to Thompson's branch office records. The Firm in fact accessed Thompson's computer and other records during the September 2005 audit without ever directing the compliance auditor to retrieve responsive documents, hampering the Division's investigation.

Accordingly, we find that the Firm willfully failed to produce promptly Thompson's internal and external business correspondence, including blast.net messages and IMs, in violation of Exchange Act Section 17(a) and Rule 17a-4(j).

B. Rule 17a-4(b)(4): Failure to Preserve Communications in an Easily Accessible Place

Exchange Act Rule 17a-4(b)(4) requires each broker-dealer to "preserve for a period of not less than three years, the first two years in an easily accessible place . . . originals of all communications received and copies of all communications sent . . . (including inter-office memoranda and communications) relating to its business as such . . . ."[20] As discussed above, Respondents repeatedly asserted an inability to access Thompson's records directly. These assertions alone preclude a finding that such records were easily accessible within the meaning of the Exchange Act rule.[21] Moreover, Respondents authorized Thompson's storage of IMs electronically instead of in the required hard copy, acquiesced in the blast.net account although they knew the Firm was not capturing these e-mails, and failed to direct audits towards identifying and preserving these records.

Respondents argue that vFinance did not willfully violate Rule 17a-4(b)(4) because they "reasonably relied" on certifications, annual audits, and e-mail and IM policies to detect violative conduct, including the use of non-vFinance e-mail accounts. However, a broker-dealer cannot fulfill its regulatory recordkeeping obligations by failing to respond to known violations of such policies and regulatory requirements.[22] Respondents knew that Thompson was routinely using his blast.net account for Firm business, a fact more than sufficient to alert them to the possibility that the Firm

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[20] 17 C.F.R. § 240.17a-4(b)(4).

[21] *Cf. Dominick*, 50 S.E.C. at 580 (stating that Respondent that "itself contended that it was legally impossible to furnish the required records from Switzerland, cannot claim that the required books and records it chose to keep only in Switzerland were 'easily accessible'").

[22] *Cf., e.g.*, *Houston A. Goddard*, 51 S.E.C. 668, 673 (1993) (finding that reliance on "regular firm procedures" without "respond[ing] to the increasing evidence of [representative's] unfitness" did not shield supervisor from violation of NASD rule); *Michael H. Hume*, 52 S.E.C. 243, 248-49 (1995) (finding that "mechanically fulfilling [a] checklist" cannot fulfill supervisory responsibility in light of known red flags regarding representative's conduct).

was not capturing all of his business correspondence. Yet, because Respondents did not inform the compliance auditor about the blast.net account, his audits never focused on it.

Respondents argue that Campanella's "stern warnings" to Thompson about his blast.net usage demonstrate the Firm's commitment to recordkeeping. These "stern warnings" confirm Respondents' recognition that Thompson's was using blast.net messages for business correspondence. However, in spite of Thompson's refusal to heed Campanella's warnings, Campanella never imposed the threatened discipline on Thompson, nor implemented a system to preserve Thompson's business related blast.net messages.

The Firm also knew about, and Campanella expressly authorized, Thompson's storage of business-related IMs solely on his own computer beginning in 2003, although its own compliance policy required hard copy preservation. Moreover, electronic storage of these IMs violated the Exchange Act requirements unless they were "preserve[d] . . . exclusively in a non-rewritable, non-erasable format" and available to the Commission at all times.[23] In authorizing Thompson's electronic storage of IMs, Campanella made no attempt to verify that they were in a non-erasable format, and subsequent events demonstrate that they were not.[24]

Accordingly, we find that vFinance willfully violated its Exchange Act Section 17(a) and Rule 17a-4(b)(4) obligation to preserve Thompson's electronic business correspondence in an easily accessible place.

C. Respondents' Arguments

Respondents claim that Thompson is responsible for the recordkeeping violations. They view the destruction of Thompson's computer files as the sole basis for these violations, going so far as to assert at oral argument that "Thompson is the person that's alleged to have been the primary

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[23] *See* 17 C.F.R. § 240.17a-4(f)(2)(ii)(A) and (f)(3)(i); *see also See Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media Under the Electronic Signatures in Global and National Commerce Act of 2000 with Respect to Rule 17a-4(f)*, Exchange Act Rel. No. 44238 (May 1, 2001), 74 SEC Docket 2400, 2405 ("*May 2001 Release*") ("[T]he Commission's regulatory function is undermined to the extent that these records are inaccurate, retained in a non-accessible manner, or capable of alteration. The Commission's enforcement record against unscrupulous broker-dealers that have changed or destroyed records demonstrates how such conduct can harm investors and the public interest.").

[24] Respondents further argue that the Firm's write-once-read-many ("WORM") drive was capturing any blast.net e-mails to vFinance accounts of the Firm's other employees. This assertion is contradicted by Groeneveld's September 2005 e-mail to Thompson, copied to Campanella, stating that "[t]he firm definitely captures all emails, except the ones from a personal account like the [blast.net] account." Campanella's directive to IT that they start collecting Thompson's blast.net e-mails further confirms that the Firm knew it was not collecting Thompson's blast.net e-mails.

violator here." Disclaiming "any knowledge of or . . . any role at all in Thompson's destructive acts," Respondents assert that they acted in good faith reliance on Firm policies and procedures.

Under Exchange Act Section 17(a), the broker-dealer has the primary responsibility for its business records. Accordingly, as the OIP alleged, the Division litigated, and the law judge found, the Firm is the primary violator in this case. The gravamen of these violations are the Firm's failures to preserve and produce the Firm's internal and external business-related correspondence. As demonstrated above, the Firm, acting through Campanella and others, engaged in a litany of violative conduct.

Respondents cite the law judge's *respondeat superior* analysis, asserting that agency principles only apply in cases of customer loss, complaint or fraud. However, "[i]t is well-established that a firm may be held accountable for the misconduct of its associated persons because it is through such persons that a firm acts."[25] Thus, Section 15(b)(4) of the Exchange Act authorizes us to discipline a broker-dealer for proscribed conduct by "any person associated with such broker or dealer."[26] The statute makes no distinction between fraud and non-fraud based violations.

Here, Respondents assigned Thompson responsibility for record production. Despite abundant red flags and months-long delays in Thompson's production, they failed to assign anyone else to search his premises for responsive documents for over a year and a half. They previously had acquiesced in his storing IMs electronically and using a personal e-mail service for business. For these reasons, we reject Respondents' claim that Thompson "was acting totally for his own benefit and entirely outside the authorized scope of his relationship with vFinance."

Moreover, Campanella himself produced documents for the Firm in October 2005, three months after the Division's request. As of December 2005, Respondents had failed to produce requested trading reports. The Firm's production of additional responsive records in February 2007 was incomplete, lacking most e-mail attachments and Thompson's IMs. No explanation was ever given for these delays.

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[25] *SIG Specialists, Inc.*, Exchange Act Rel. No. 51867 (June 17, 2005), 85 SEC Docket 2679, 2692 & n.35; 15 U.S.C. § 78*o*(b)(4)(D); *see also SEC v. Wash. Invest. Network*, 475 F.3d 392, 393 (D.C. Cir. 2007) (noting that a corporation "could only act through its officers"); *A.J. White & Co. v. SEC*, 556 F.2d 619, 624 (1st Cir. 1977) (noting that a firm "can act only through its agents, and is accountable for the actions of its responsible officers"); *Armstrong, Jones & Co. v. SEC*, 421 F.2d 359, 362 (6th Cir. 1970) (stating that it "has long been the position of the Commission that a broker-dealer may be sanctioned for the wilful violations of its agents under the doctrine of *respondeat superior*"); *see also Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 566 (1982) (applying agency principles to antitrust law and stating that "a principal is liable for an agent's fraud though the agent acts solely to benefit himself, if the agent acts with apparent authority").

[26] 15 U.S.C. § 78*o*(b)(4).

Respondents' claim of good faith is similarly misplaced. A finding of "[s]cienter is not required to violate Exchange Act Section 17(a)(1) and the rules thereunder."[27] Respondents cite the initial decision in *Raymond James Financial Services, Ltd.*[28] In that case the law judge declined to find a Section 17(a) violation for e-mail recordkeeping in light of contemporaneous Commission staff guidance indicating that, during the period at issue there (1999-2000), "Commission[] staff was (1) informing the industry that Rule 17a-4(b)(4) would be modified, and (2) requesting that NYSE not enforce the rule" because of ongoing discussion with respect to the available technology to preserve e-mail.[29] The recordkeeping failures in this case took place well after guidance was issued confirming the applicability of Rule 17a-4 to electronic correspondence.[30]

III.

Campanella's Aiding and Abetting Violations

Whether Campanella willfully aided and abetted the Firm's violations rests on whether (1) vFinance, in fact, committed the primary violations; (2) Campanella substantially assisted the conduct constituting the primary violations; and (3) Campanella provided that assistance with the requisite scienter.[31] The scienter requirement is satisfied if Campanella "knew of, or recklessly

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[27] *E.g., Jett,* 57 S.E.C. at 396 (citing *SEC v. Drexel Burnham Lambert Inc.*, 837 F. Supp. 587, 610 (S.D.N.Y. 1993), *aff'd sub nom. SEC v. Posner*, 16 F.3d 520 (2d Cir. 1994), *cert. denied*, 513 U.S. 1077 (1995)).

[28] Initial Decision Rel. No. 296 (Sept. 15, 2005), 86 SEC Docket 711, 782-83, *Finality Order*, Exchange Act Rel. No. 52810 (Nov. 21, 2005), 86 SEC Docket 2274.

[29] *Raymond James*, 86 SEC Docket at 782.

[30] *See May 2001 Release*, 74 SEC Docket 2400, 2401. Respondents also cite the good faith defense in Exchange Act Section 20(a). That section by its terms applies to allegations of control person liability, not to allegations of primary liability, or aiding and abetting or causing violations. 15 U.S.C. § 78t(a); *see generally SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1473 (2d Cir. 1996) (stating that, "[t]o meet the burden of establishing good faith, the controlling person must prove that he exercised due care in his supervision of the violator's activities in that he 'maintained and enforced a reasonable and proper system of supervision and internal controls'"); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 200 (1976) ("Ascertainment of congressional intent with respect to the standard of liability created by a particular section of the Acts must therefore rest primarily on the language of that section.").

[31] *Graham v. SEC*, 222 F.3d 994, 1000 (D.C. Cir. 2000); *see also Brendan E. Murray*, Investment Advisers Act Rel. No. 2809 (Nov. 21, 2008), 94 SEC Docket 11961, 11968; *Warwick Capital Mgmt., Inc.*, Advisers Act Rel. No. 2694 (Jan. 16, 2008), 92 SEC Docket 1410, 1421; *Phlo Corp.*, Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1103.

disregarded, the wrongdoing and [his] role in furthering it."[32] The preceding discussion establishes vFinance's primary violations.

A. Substantial Assistance

We find that Campanella substantially assisted the Firm's delays in producing records to the Division under Exchange Act Rule 17a-4(j). Campanella asked Thompson to search and then relayed to the Division Thompson's improbable claim that he had no responsive records. Campanella failed to alert the auditor to the Division's request during the September 2005 audit. That same month Campanella eased Thompson's Lexington trading restrictions, signaling the Firm's indifference to Thompson's failure to produce correspondence records. Campanella delayed threatening Thompson with any disciplinary consequences for this failure until January 2006. Campanella delayed any physical search of the Flemington branch office for twenty months from the date of the Division's initial record request, and well after these records had been subpoenaed.[33] Accordingly, we find that Campanella's conduct substantially assisted the Firm's failure to promptly produce the records to the Division.

Campanella also substantially assisted the Firm's failure to preserve the correspondence records. Campanella was responsible for the effectiveness and enforcement of the Firm's record retention policies. He oversaw the annual audits and had the authority to discipline Thompson for non-compliance with Firm or Commission rules. However, having known since at least January 2004 that Thompson used blast.net messages for business purposes, he failed to alert the compliance auditor to the existence of the blast.net account, did not order preservation of these communications until September 2005, and even then did not follow up on that order. He did not act on any of his repeated threats of discipline despite his knowledge of Thompson's continuing violations. Campanella's decision to authorize storage of IMs on Thompson's hard drive rather than in a non-writable, non-erasable format was a substantial causal factor in the Firm's failure to preserve Thompson's IMs in an easily accessible place and facilitated the destruction of records critical to a Division investigation.

Respondents describe Campanella's role as a mere failure to act, emphasizing that he did not assist in the destruction of documents. These claims misperceive the primary violations that Campanella aided and abetted, *i.e.*, failure to preserve and produce Firm documents. They also understate Campanella's role in them. In any event, we have frequently found aiding and abetting

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[32] *Phlo*, 90 SEC Docket at 1103 & n.49 (citing *Monetta Fin. Servs., Inc. v. SEC*, 390 F.3d 952, 956 (7th Cir. 2004)); *see also Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004) ("A secondary violator may act recklessly, and thus aid and abet an offense, even if he is unaware that he is assisting illegal conduct."); *Graham*, 222 F.3d at 1000; *Geman v. SEC*, 334 F.3d 1183, 1195 (10th Cir. 2003) (upholding Commission determination that respondent "aided and abetted [books and records] violations with a state of mind of recklessness, if not willful disregard").

[33] *See Phlo*, 90 SEC Docket at 1105 (stating that "[p]ersons subject to Commission examination are not at liberty to set their own schedules for responding").

liability for a failure to act where, as here, the respondent has a clear duty to act and the failure to act itself constitutes the underlying primary violation.[34] Accordingly, we find that Campanella substantially assisted the Firm's violations of Exchange Act Section 17(a) and Rules 17a-4(j) and 17a-4(b)(4).

B. Scienter

Campanella also acted with the requisite scienter to establish aiding and abetting under Exchange Act Section 15(b). We find that Campanella's conduct, particularly given his status as chief compliance officer, was extremely reckless, and often knowing. He must have known of and ignored obvious risks and clearly knew of others. For example, he assigned Thompson responsibility for document production and had repeated indicia of Thompson's non-compliance. He received or was copied on correspondence establishing, and participated in telephone calls evidencing, red flags regarding the Firm's and Thompson's record preservation and production that Campanella recklessly disregarded. Moreover, Campanella personally approved the storage of IMs on Thompson's computer in violation of Commission rules and Firm policy.

Campanella contends that the appropriate standard for scienter is "actual knowledge." He focuses on the scienter standard under Exchange Act Section 20(e).[35] However, Section 20(e) applies to cases brought in federal district court for "knowingly provid[ing] substantial assistance" to securities law violations.[36] In Commission administrative proceedings under Exchange Act Section

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[34] *See Marc N. Geman*, 54 S.E.C. 1226, 1258-59 (2001) (finding that officer willfully aided and abetted firm's recordkeeping violations by his "inaction, which was at the very least reckless" because he was "an active 'hands-on' manager" who remained responsible for firm's recordkeeping despite his attempts to delegate responsibility), *aff'd*, 334 F.3d 1183, 1195 (11th Cir. 2003); *Phlo*, 90 SEC Docket at 1105 & 1118-19 (finding vice president and general counsel charged with responding to the Commission, "rendered substantial assistance" to firm's Exchange Act Section 17(b)(1) violation "by her delays in responding and by ultimately submitting incomplete responses" to Commission staff; revoking transfer agent registration, and barring senior officer from association with a registered transfer agent and assessing $100,000 for aiding and abetting violations of turnaround rule and failure to produce records); *Zion Capital Mgmt., LLC*, 57 S.E.C. 99, 116 (2003) (holding that president aided and abetted firm's recordkeeping violations because he failed to "retain his contemporaneous trading notes" and "copies of [his] written communications" as required by Advisers Act).

[35] 15 U.S.C. §§ 78t(e), 78u(d)(1) & (3). For instance, Respondents cite cases brought under 20(e) as establishing a requirement that the respondent "[c]onsciously intended to assist in the perpetration of a wrongful act." Quoting *SEC v. Pasternak*, 561 F. Supp. 2d 459, 502 (D.N.J. 2008).

[36] Exchange Act § 20(e), 15 U.S.C. § 78t(e) (limiting its scope to "any action brought by the Commission under paragraph (1) or (3) of section 21(d)"); Exchange Act § 21(d)(1)

(continued...)

15(b), recklessness is sufficient to establish aiding and abetting liability, and here we find Campanella's conduct was variously knowing and extremely reckless.[37]

He further asserts that the "willfulness" standard applied in administrative proceedings "implicitly connotes actual knowledge rather than recklessness."[38] Willfulness in this context means "intentionally committing the act which constitutes the violation" but does not require knowledge that such actions constitute a rule or statutory violation.[39] Accordingly, we find that Campanella willfully aided and abetted the Firm's primary violations of Exchange Act Section 17(a) and Rules 17a-4(b)(4) and 17a-4(j), and that he was a cause of these violations.[40]

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[36] (...continued)
& (3), 15 U.S.C. § 78u(d)(1) & (3) (describing standards for injunctions and for money penalties in United States district court). At oral argument, Respondents also asserted that the "standard for liability should be the same, regardless of the forum, regardless of the nature of the proceeding," but have not provided authority or analysis in support of this proposition. As the Division pointed out, the different scienter requirements for aiding and abetting liability under Sections 20(e) and 15 are consistent with differing scope of the respective sections.

[37] *SEC v. Johnson,* 530 F. Supp. 2d 325, 332-34 (D.D.C. 2008) (noting that the "willful" standard applied in administrative hearings "is less burdensome than the 'knowingly' standard imposed by Congress in Section 20(e)") (citations omitted); *Ponce v. SEC*, 345 F.3d 722, 737-38 (9th Cir. 2003) (upholding Commission's determination that respondent aided and abetted filing of false periodic reports because he "had knowledge, or at least was reckless in not recognizing, the misleading nature of the statements," and "played an essential and integral part of the" reporting and recordkeeping responsibilities); *Graham*, 222 F.3d at 1004-06 ("We have held that knowledge or recklessness is sufficient to satisfy [the scienter] requirement.").

[38] In their reply brief, Respondents argue for the first time that the "applicable legal standards are so 'muddied' that even the courts are unable to discern a uniform code of conduct," making it unfair to find liability. Respondents' citation of cases addressing the scienter standard under Exchange Act Section 20(e), however, does not suggest confusion regarding the scienter standard for aiding and abetting liability under Section 15.

[39] *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000).

[40] Respondents argue that Campanella could not be found to be a cause of the violations when he did not have "actual knowledge of wrongdoing." The statute, however, defines "cause" as an "an act or omission the person know or should have known would contribute to" a violation. 15 U.S.C. § 78u-3(a). The record evidence establishes both that Campanella knew and certainly should have known that his actions would exacerbate the violations in this case.

IV.

Sanctions

The law judge censured Campanella, ordered Respondents to cease and desist, and fined the Firm $100,000 and Campanella $30,000. In granting Respondents' petition for review, we determined on our own motion to review "what sanctions, if any, are appropriate in this matter," and on April 1, 2010, we issued an order directing the filing of additional briefs addressing sanctions.[41] As we have previously observed, "[w]hen Congress grants an agency the responsibility to impose sanctions to achieve the purpose of a statute, 'the relation of remedy to policy is peculiarly a matter for administrative competence.'"[42] Respondents characterize the sanctions imposed by the law judge as "disproportionate and overly severe." We disagree.

A. Censure and Associational Bar

Exchange Act Sections 15(b)(4) and 15(b)(6) authorize us to censure, place limitations on, suspend, or revoke the registration of any broker-dealer, or bar a person associated with a broker-dealer[43] if we find conduct willfully violating or aiding and abetting a violation of the securities laws, and that such sanction is in the public interest.[44] In determining whether a sanction is in the public interest under Section 15(b), we consider such factors as: the egregiousness of respondent's actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of respondent's assurances against future violations; the respondent's recognition of the wrongful nature of his conduct; and the likelihood that respondent's occupation will present opportunities for future violations.[45]

We have made clear that "the failure to cooperate with a [Commission] examination is serious misconduct that justifies strong sanctions because of its potential to thwart the protection of shareholders and market participants."[46] A bar serves a remedial purpose of protecting investors

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[41] *Order Granting Petition for Review* (Jan. 6, 2009), Admin. Proc. File. No. 3-12918; *Order Directing Filing of Additional Briefs* (Apr. 1, 2010), Admin. Proc. File. No. 3-12918.

[42] *See Leslie A. Arouh*, 57 S.E.C. 1099, 1119 & n. 44 (2004) (quoting *Butz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 185 (1973) (internal citations omitted)).

[43] 15 U.S.C. § 78*o*(b)(4); (b)(6)(A).

[44] 15 U.S.C. § 78*o*(b)(4)(D); (b)(6)(A) and (b)(4)(E).

[45] *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979).

[46] *Phlo,* 90 SEC Docket at 1110 (barring officer for aiding and abetting company's violations of turnaround rule and for failing to provide records to Commission until after it

(continued...)

from persons who have refused to cooperate with investigations of possible securities law violations, and deters other securities participants subject to regulatory investigations from engaging in similar conduct. Securities professionals should be incentivized to cooperate with regulatory investigations such that the sanction for a failure to produce documents or information are likely to be greater than, or at least comparable to, the potential sanction for any wrongdoing that might be uncovered during such investigation.[47]

Respondents' conduct was egregious. Rather than prioritizing compliance, Respondents authorized lapses in recordkeeping, engaged in dilatory tactics stalling production, and disregarded clear red flags demonstrating the impropriety of their reliance on Thompson to preserve and produce records. Respondents' Exchange Act violations ultimately facilitated the destruction of the only version of certain records critical to a Commission fraud investigation.

The violations were not isolated. The Rule 17a-4(b)(4) violations continued for several years after Respondents were first alerted to the deficiencies in the Firm's preservation of blast.net messages and IMs in 2004, and the Rule 17a-4(j) violations persisted for almost two years after the Division's July 2005 record request. Although the Firm's primary liability under Section 17(a) need not be based on a scienter finding, the evidence that Respondents knew about the conduct constituting the violations and recklessly disregarded their regulatory obligations weigh in favor of meaningful remedial sanctions.

Respondents neither offer assurances against future violations nor recognize the wrongfulness of their conduct. Rather, throughout the proceeding, Respondents have attempted to shift all responsibility to Thompson, and to hide behind policies and procedures that the Firm and Campanella failed to enforce. As we have stated, "attempts to shift blame are additional indicia of [a

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[46] (...continued)
commenced an investigation); *see also Schield Mgmt. Co.*, Exchange Act Rel. No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 (barring former president, based on injunction, for failing to keep required records and make them available to Commission staff; stating that "the failure to cooperate with a Commission examination constitutes 'serious misconduct' justifying strong sanctions" (citing *Barr Fin. Group, Inc.*, 56 S.E.C. 1243, 1262 (2003))); *Gary M. Kornman*, Exchange Act Rel. No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14247 (barring associated person in a follow-on proceeding for criminal conviction for a false statement during a Commission investigation), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

[47] *See, e.g.*, *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5128 ("The possibility of receiving a bar for a failure to cooperate may have a very specific deterrent effect on all current and future SRO members and associated persons. NASD members and associated persons who know of wrongdoing and are approached by NASD with requests for information as part of an investigation should be deprived of any incentive to fail to cooperate."); *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005) (noting that "the SEC has expressly adopted deterrence, both specific and general, as a component in analyzing the remedial efficacy of sanctions").

respondent's] failure to take responsibility for his actions."[48] This pattern further underscores the risk that Respondents will continue to engage in similar misconduct and, together with the above factors, indicates a strong likelihood of future violations.[49]

Given these circumstances, we believe the public interest supports barring Campanella from associating with a broker-dealer in any supervisory or principal capacity with a right to reapply in two years. This limited bar is tailored to serve the specific remedial purpose of discouraging Campanella, who aided and abetted Exchange Act violations while serving as chief compliance officer and later as president, from repeating similar misconduct in the future.

Based on the foregoing, we also find it appropriate and in the public interest to censure both vFinance and Campanella. In this regard, we note the Firm's recent disciplinary history, including 2005 and 2008 settlement of Commission charges of failures to reasonably supervise sales of unregistered stock and market manipulation, respectively.[50] As we have stated, "repeated violations

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[48] *Clyde J. Bruff*, 53 S.E.C. 880, 887 (1998).

[49] We have emphasized repeatedly that the obligation to provide information to regulatory authority is so critical to the functioning of the regulatory system that violations such as Respondents' can only be adequately addressed by meaningful sanctions. For example, we have often sustained SRO decisions to expel firms from membership and to bar individuals from association for complete failures to provide requested information and dilatory tactics like those engaged in here. *See, e.g., PAZ*, 93 SEC Docket at 5127 (sustaining expulsion of NASD member firm and bar of its president for failing to respond to information requests where there were no mitigating circumstances; stating that "[d]elay and neglect" in response to information requests undermines a regulator's ability "to conduct investigations and thereby protect the public interest"), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009); *Toni Valentino*, 57 S.E.C. 330, 339 (finding "attempts to delay and ultimately avoid . . . appearance are especially troubling given the importance of" NASD investigation rule).

In explaining the rationale for strong sanctions, we have agreed with the judgement of SROs that misconduct by individuals responsible for providing information to the SRO "renders the violator presumptively unfit for employment in the securities industry." *PAZ*, 93 SEC Docket at 5126; *see also Geoffrey Ortiz*, Exchange Act Rel. No. 58416 (Aug. 22, 2008), 93 SEC Docket 8977, 8989 (observing "that [NASD's] ability to request and obtain information from its members and associated persons is crucial to NASD's performance of its regulatory mission, and that the complete failure to respond to such requests is 'fundamentally incompatible' with that mission").

[50] *vFinance*, Exchange Act Rel. No. 57727 (Apr. 28, 2008), 93 SEC Docket 5465, 5470-72 (ordering censure, $19,787 disgorgement, and undertakings, among other things, to retain an independent consultant to review the Firm's supervisory procedures "regarding its compliance with Section 5 of the Securities Act"); *vFinance*, Exchange Act Rel. No. 51530 (Apr. 12, 2005), 85 SEC Docket 742, 744-45 (ordering censure, $50,000 penalty, and undertakings, among other

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indicate the need for sanctions severe enough to deter further misconduct, and to impress . . . the need for scrupulous compliance in the future."[51]

Respondents' primary challenge to sanctions is based on their claim of ignorance of Thompson's dilatoriness. As noted above, the Division reminded Respondents early and often that its request for Thompson's correspondence remained outstanding.

Respondents also complain there was "no indication that the Division's request was in connection with anything other than a routine investigation -- the Division did not express urgency." Exchange Act Rule 17a-4(j) does not differentiate between "routine" and "urgent" record requests. It requires broker-dealers to "furnish promptly" required records upon request by Commission staff, and the onus for ensuring prompt compliance falls on the broker-dealer, not the Division. In any event, Respondents' claim is unfounded. Record evidence establishes Respondents' knowledge of possible market manipulation activities in connection with Thompson's Lexington trading beginning as early as NASD's May 2004 document request. As early as August 2005, the Division had expressed concern with the Firm's responsiveness to its July request.

Respondents argue that severe sanctions are not warranted in the "absence of any specifically delineated standards or actions that a broker-dealer such as vFinance could take to respond to a Division request." However, as noted above, we have issued several statements delineating the standards for the violations here. The authorities we have cited are ample to put Respondents on notice that the conduct at issue here was not compliant.

Respondents' failure to acknowledge the plain language of the rule and this body of authority interpreting these standards is particularly disturbing. A chief compliance officer and president of a

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[50] (...continued)
things, to retain an independent consultant to review the Firm's supervisory procedures and recommend changes "to prevent and detect manipulative activity by traders").

These settlements belie Respondents' claim that an asserted lack of disciplinary history obviates the need for sanctions. The 2005 settlement was entered while Campanella was chief compliance officer and before the Division's first July 2005 request for Lexington records. Campanella was at least on notice of problems in the Firm's compliance culture when he received the record request. In any case, we have stated that "the absence of disciplinary history is not mitigative as securities professionals should not be rewarded for complying with securities laws." *Mitchell M. Maynard*, Advisers Act Rel. No. 2875 (May 15, 2009), 95 SEC Docket 16844, 6860 & n.39 (citation omitted) (barring associated person in follow-on proceeding for state antifraud violations); *see also Siegel v. SEC*, 592 F.3d 147, 157 (D.C. Cir. 2010); *Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006).

[51] *Lowell H. Listrom*, 48 S.E.C. 609, 613 (1986); *see also Schield Mgmt. Co.*, 87 SEC Docket at 864 ("We note further that this is not the first time that Respondents have been subject to disciplinary proceedings.").

registered broker-dealer must possess a thorough grasp of the firm's regulatory requirements,[52] and during its investigation the Division repeatedly reminded Respondents of the Firm's obligations to preserve records in an "easily accessible place" and to "promptly produce" these records under the Exchange Act rules. Respondents' claims of unfamiliarity with applicable standards suggest an indifference to fundamental broker-dealer obligations presenting a serious risk of future violations and threat to the public interest that we believe can only be ameliorated by the censure of Respondents and limited bar on Campanella discussed above.[53]

B. Cease-and-Desist Orders

Exchange Act Section 21C(a) authorizes the Commission to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate" any provision of the Exchange Act or any rule or regulation thereunder, or against any person who "is, was, or would be a cause of [a] violation, due to an act or omission the person knew or should have known would contribute to such violation."[54] In our public interest analysis for cease-and-desist orders, we assess, in addition to the above factors, "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions."[55] We believe that cease-and-desist orders are appropriate in this case.

As discussed above, the violations in this case were recent and recurrent, continuing through at least March 2007. Respondents had ample opportunity to correct blatant deficiencies in the Firm's recordkeeping and delays in its production. Instead, Respondents compounded these deficiencies and delays by falsely asserting that Thompson's status as an independent contractor prevented them from accessing the branch office records -- even after they actually accessed these records in September 2005 without searching for responsive documents.

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[52] *See* NASD Conduct Rule 3013 (adopted Dec. 1, 2004), NASD Manual at 4374 (2006 ed.) (now codified in FINRA Rule 3130.05) (stating "[t]he chief compliance officer is the primary advisor to the member on its overall compliance scheme and the particularized rules, policies, and procedures that the member adopts"); *see also Thomas F. White*, 51 S.E.C. 1194, 1197 (1993) ("As the firm's chief compliance officer, [a non-respondent] also shouldered the bulk of the responsibility for ensuring that the firm's salesmen complied with applicable requirements.").

[53] *See Schield Mgmt. Co.*, 87 SEC Docket at 866 (stating that respondents' failures to cooperate with a Commission examination "demonstrate[] either that [they] fundamentally misunderstand the regulatory obligations to which they are subject or that they hold those obligations in contempt" (internal punctuation omitted) (quoting *Barr Fin.*, 56 S.E.C. at 1261-62)).

[54] 15 U.S.C. § 78u-3(a).

[55] *KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1192 (2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002).

The absence from the record of evidence demonstrating any direct customer harm is not mitigating, as our public interest analysis "focus[es] . . . on the welfare of investors generally."[56] In reviewing failures to produce information to SROs, we have observed that such a failure

> will rarely, in itself, result in direct harm to a customer. Rather, failing to respond undermines [the regulator's] ability to detect misconduct that may . . . have resulted in harm to investors or financial gain to respondents. Thus, even if the failure to respond does not result in direct improper financial benefit to respondents or harm to investors, it is serious because it impedes detection of such violative conduct.[57]

Cease-and-desist orders here serve the additional remedial function of encouraging future compliance with record preservation obligations and prompt responses to record production requests. Respondents give no indication of a desire to leave the industry, and as previously noted, such continued participation in the industry will present them with future opportunities for similar violations.

Respondents contend that Campanella is no longer associated with vFinance and that it is "unlikely that the precise situation will arise again in the future," thereby eliminating the risk that Respondents would commit future violations. We disagree. Our examination and investigative staffs routinely request records as part of our core mission to protect investors, deter, detect, and prosecute violative conduct, and monitor developments in the industry. Broker-dealers and their associated persons have ongoing obligations to maintain, preserve, and produce accurate records. We believe a cease-and-desist order will reinforce the importance of our record-keeping requirements. A cease-and-desist order against Campanella is appropriate because he may have future opportunities for similar violations if he acts in a supervisory or principal capacity after the two-year bar has elapsed, and/or if he associates in any other capacity with a broker-dealer while the limited bar is in effect.[58]

C. Civil Penalties

Under Exchange Act Section 21B, we may impose civil monetary penalties when a respondent has willfully violated or aided and abetted Exchange Act violations, and such penalties

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[56] *Kornman*, 95 SEC Docket at 14259; *see also Graham*, 222 F.3d at 1001 n.15 (stating that "unlike a . . . private damages action, the SEC need not prove actual harm").

[57] *Paz*, 93 SEC Docket at 5129.

[58] In disputing the propriety of cease-and-desist orders in this case, Respondents cite *WHX Corp. v. SEC*, 362 F.3d 854 (D.C. Cir. 2004), which vacated a Commission cease-and-desist order. The rationale for *WHX* is inapplicable here. In contrast to this case, *WHX* involved "a single, isolated violation" that was voluntarily and expeditiously corrected upon notification by Commission staff, suggesting a *de minimus* risk of recurrence. *Id.* at 861.

are in the public interest.[59] The public interest considerations under Section 21B(c) include (1) whether the violation involved fraud, deceit, manipulation or deliberate or reckless disregard of a regulatory requirement, (2) the direct or indirect harm to other persons, (3) any unjust enrichment, (4) any prior record of violations by the Commission, other regulatory agencies or SROs, (5) the need to deter the respondent or respondents and other persons from committing similar misconduct, and (6) such other matters as justice may require.[60] Section 21B establishes a three-tier system for calculating the maximum penalty. For each act or omission involving deliberate or reckless disregard of a regulatory requirement occurring after February 14, 2005, a second-tier civil penalty may be assessed in maximum amounts of $325,000 against a corporation or $65,000 against an individual.[61]

Respondents' knowledge and recklessness with respect to the repeated and longstanding violations, in light of the other recent charges against the Firm, demonstrate a pernicious pattern of non-compliance that continued at the Firm until 2007. These considerations call for meaningful monetary penalties to encourage Respondents to prioritize compliance with Section 17(a) rules.[62] We find that Respondents' reckless disregard of these regulatory requirements merit second-tier penalties.

Accordingly, we have assessed one $50,000 penalty against the Firm and one $15,000 penalty against Campanella for each of the two Exchange Act rules violated, for total penalties of $100,000 and $30,000 respectively.[63] In determining the penalty amounts, we have taken into consideration the likelihood of future violations and the other sanctions imposed in this case, including Campanella's limited two-year bar. We find these penalties warranted to create a monetary incentive for Respondents and other industry participants to fulfill their recordkeeping obligations and cooperate with regulatory inquiries -- particularly when, as in this case, such person is aware that compliance may reveal regulatory violations potentially resulting in disgorgement or

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[59] 15 U.S.C. § 78u-2(a)(1); (a)(2).

[60] Exchange Act Section 21B(c), 15 U.S.C. § 78u-2(c).

[61] *See Debt Collection Improvement Act of 1996*, Pub. L. No. 104-134, 110 Stat. 1321-373 (1996) (codified at 28 U.S.C. § 2461); 17 C.F.R. § 201.1002.

[62] *See The Securities Law Enforcement Remedies Act of 1990*, S. REP. NO. 101-337, at 11 (1990) ("For some firms, a censure may provide relatively little deterrence against future violations. However, revocation of a firm's registration or temporary suspension of its operations could impose hardship on a firm's customers, public shareholders, and innocent employees. With the option of imposing a monetary penalty, the SEC may appropriately sanction a violation requiring a penalty more severe than censure, but without the adverse consequences of a suspension or revocation.").

[63] *Cf. Mark David Anderson*, Exchange Act Rel. No. 48352 (August 15, 2003), 80 SEC Docket 3250, 3270 (assessing separate penalty for each of 96 violative trades).

monetary penalties.[64] With respect to the Firm, the base $50,000 penalty amount is greater than the Firm's estimated share of the remuneration for Thompson's Lexington trading, which record evidence suggests was approximately $48,412 from October 2003 through December 2005.[65] With respect to Campanella, we believe that a base $15,000 penalty amount

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[64] *See* S. REP. NO. 101-337, at 15, 10, 11 (1990) (noting that the "effectiveness of deterrence may be a function of the economic gain to be derived from a violation and the probability that a violation will be detected," and that "[t]o the extent that violations . . . are motivated by a desire to maximize profits by reducing costs, the possibility of civil money penalties will improve compliance . . . and have a significant remedial effect").

[65] Record evidence produced by the Firm indicates that Thompson received approximately $274,334 in commissions for his Lexington trading during this period. The Firm was entitled to retain 15% of the gross commissions generated by Thompson under the IC agreement, suggesting that Thompson's Lexington trading had generated gross commissions of approximately $322,746, and that the Firm retained $48,412 of this amount.

appropriately reflects his knowledge, recklessness and responsibility for the Firm's recordkeeping policies and its responses to the Commission record requests.[66]

An appropriate order will issue.[67]

By the Commission (Chairman SCHAPIRO and Commissioners CASEY, AGUILAR and PAREDES); Commissioner WALTER not participating.

Elizabeth M. Murphy
Secretary

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[66] *See* S. REP. NO. 101-337, at 10 (noting that penalties are appropriate for violations such as bookkeeping violations that "may reflect an unwillingness to incur the cost of full compliance with the securities laws" that may expose investors "to significant risk of loss, even though the violations may not involve affirmative conduct to defraud investors").

[67] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 62448 / July 2, 2010

Admin. Proc. File No. 3-12918

In the Matter of

vFINANCE INVESTMENTS, INC.
and
RICHARD CAMPANELLA

c/o Carl F. Schoeppl, Esq.
Schoeppl & Burke, P.A.
4651 North Federal Highway
Boca Raton, FL 33431-5133

Adam H. Smith, P.A.
2650 N. Military Trail, Suite 125
Boca Raton, FL 33432

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that vFinance Investments, Inc. be, and it hereby is, censured; and it is further

ORDERED that vFinance Investments, Inc. cease and desist from committing or being a cause of any violations or future violations of Section 17(a) of the Securities Exchange Act of 1934 and Rules 17a-4(b)(4) and 17a-4(j) by failing to preserve or produce required records; and it is further

ORDERED that vFinance Investments, Inc. pay a civil money penalty in the amount of $100,000; and it is further

ORDERED that Richard Campanella be, and he hereby is, censured and barred from association with any broker or dealer in any principal or supervisory capacity with a right to reapply after two years; and it is further

ORDERED that Richard Campanella cease and desist from committing or being a cause of any violations or future violations of Section 17(a) of the Securities Exchange Act of 1934 and Rules 17a-4(b)(4) and 17a-4(j) by failing to preserve or produce required records; and it is further

ORDERED that Richard Campanella pay a civil money penalty in the amount of $30,000.

Payment of the civil money penalties shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding. A copy of the cover letter and check shall be sent to John S. Yun, 44 Montgomery Street, Suite 2600, San Francisco, CA 94104.

By the Commission.

Elizabeth M. Murphy
Secretary