



Issue Date: 17 December 2004

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Case No.: 2004 SOX 9  
In the Matter of

**JOHN HUGHART**  
Complainant

v.

**RAYMOND JAMES &  
ASSOCIATES, INC.**  
Respondent

Appearances: Mr. John Hughart,  
*Pro Se*

Mr. Paul L. Matecki, Attorney  
For the Respondent

Before: Richard T. Stansell-Gamm  
Administrative Law Judge

**INITIAL DECISION AND ORDER –  
GRANT OF MOTION TO DISMISS  
DISMISSAL OF COMPLAINT**

This matter arises under the employee protection provision of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, (Public Law 107-204), 18 U.S.C. § 1514A (“Act” or “SOX”) as implemented by 29 C.F.R. Part 1980 (Final Rule 69 Fed. Reg. 163, August 24, 2004)<sup>1</sup>. This statutory provision, in part, prohibits an employer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 from discharging, or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to alleged violations of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or

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<sup>1</sup>The interim final rule under 29 C.F.R. Part 1980 (Interim Final Rule, 68 Fed. Reg. 31860, May 28, 2003) was in effect at the time of the hearing. Since the hearing, the final rule has been promulgated. Because the final rule does not conflict with the interim final rule in any matter pertinent to the issues for determination before me, I will reference the final rule without addressing the retroactive nature of the rule. See *Thorson v. Gemini, Inc.*, 205 F.3d 370, 376 (8th Cir. 2000) (citing *Bowen v. Georgetown University Hospital et al.*, 488 U.S. 204, 208 (1988)).

television), 1344 (bank fraud), 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission (“SEC”), or any provision of federal law relating to fraud against shareholders.

### **Procedural History**

In his January 23, 2003 SOX complaint, Mr. Hughart alleged Raymond James & Associates, Inc. (“Raymond James” or “Respondent”) constructively terminated his employment on or about October 25, 2002. On September 30, 2003, the Regional Administrator for the Occupational Safety and Health Administration (“OSHA”), U.S. Department of Labor (“DOL”), who investigated Mr. Hughart’s complaint, notified the parties that the complaint had no merit. Specifically, the Regional Administrator determined that Raymond James did not constructively terminate Mr. Hughart and therefore did not take adverse action against him. Mr. Hughart objected to the stated findings and requested an administrative hearing on November 4, 2003.

Pursuant to a Notice of Hearing, dated November 21, 2003, I set a hearing date of December 16, 2003 (ALJ 1).<sup>2</sup> However, on December 12, 2003, at Mr. Hughart’s request, I continued the hearing until January 27, 2003 (ALJ 2). Meanwhile, on January 2, 2004, Raymond James submitted a Motion to Dismiss on the basis that Raymond James is not an entity subject to the provisions of SOX, to which Complainant responded on January 8, 2004. In an order issued on January 9, 2004, I deferred a decision on the Motion to Dismiss so that an evidentiary record could be developed pertaining to the relationship between Raymond James, a subsidiary, and its parent company, Raymond James Financial, Inc. (“RJF”) (ALJ 5).<sup>3</sup> After holding a telephone conference with the parties on January 26, 2004, I again continued the hearing and issued a Discovery Order and revised Notice of Hearing setting the hearing date as March 16, 2004 pursuant to Mr. Hughart’s telephone request and subsequent letter on February 9, 2004 (ALJ 3). After Complainant’s subsequent continuance request on February 28, 2004, I issued a final revised Notice of Hearing on March 8, 2004, setting the hearing for April 13, 2004 (ALJ 4). On April 13 and 14, 2004, I conducted a hearing in Tampa, Florida. Mr. Hughart and Mr. Matecki were present.

### **Parties’ Positions**

#### Complainant<sup>4</sup>

Through his job as senior operations support specialist, and based on his research, Mr. Hughart became aware of multiple investment security violations being committed by Respondent. Due to the nature of his job, Mr. Hughart felt he had fiduciary obligations towards the company’s investors, which included taking steps to remedy company breaches of its fiduciary responsibilities. As a result, his last two years of employment were strained and

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<sup>2</sup>The following notations appear in this decision to identify exhibits: CX – Complainant exhibit; RX – Respondent exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

<sup>3</sup>I will address the deferred motion as part of this Initial Decision and Order.

<sup>4</sup>TR at 18-25 and May 10, 2004 written closing argument.

difficult because he refused to overlook or ignore violations of that responsibility and persisted in his requests for management to properly address the issues. Mr. Hughart took the proper steps to bring management's attention to the violations by discussing the problem with his immediate supervisor or her supervisor. When his effort proved fruitless, he spoke with Ms. Barbara Galloway, vice president of human resources, about the situation. Mr. Hughart also enrolled in a workshop, entitled "Integrity in the Workplace," scheduled for October 29, 2002. He intended to use that forum to present the securities violations directly to senior management members and directors sitting on the Board of his employer's parent company, RJF.

These actions eventually resulted in the adverse action taken on October 25, 2002. Respondent extorted a resignation from Mr. Hughart by threatening to fire him based on his use of an improper tone in the "fraud alert" e-mail.

By a preponderance of the evidence, Mr. Hughart has established entitlement to his requested relief under SOX. First, Mr. Hughart engaged in protected activity when he reported his reasonable belief of security violations, which included the unclaimed property, Canadian tax withholding, and limited partnership trading issues. Respondent was aware of Mr. Hughart's protected activity as evidenced by e-mail correspondence and Ms. Tharp's testimony.

Second, Mr. Hughart has established that an unfavorable personnel action was taken by Respondent. Respondent's basis for action on October 25, 2002 was not the "fraud alert" e-mail as they have indicated. Instead, the company took the action due to ongoing SEC investigations, settlement negotiations, and the desire to get rid of an employee who presented concerns about fiduciary impropriety, security violations, criminal activity and poor service.

Mr. Hughart was passed over for promotion because of his protected activity. Other employees received promotions but he moved from Supervisor to senior operations support specialist, "a somewhat less lucrative position." During his last few years as an employee of Raymond James, Mr. Hughart was "harassed, intimidated, humiliated and made to feel as if he were not a 'team player' from [sic] specific managers in an effort to stifle his zeal for client service." This environment led to Mr. Hughart's resignation "under distress during a dismal nationwide economic period," after Ms. Tharp threatened to fire him. Mr. Blain was Ms. Tharp's immediate supervisor and Mr. Hughart's department supervisor at the time of his departure from Raymond James. Mr. Blain reported to Mr. Dennis Zank who managed multiple department heads and also sat on RJF's Board of Directors. Mr. Zank no longer sits on the Board of Directors.

Third, Mr. Hughart's persistence in pursuing the protected activity with senior managers caused his constructive termination on October 25, 2002. His desire to make senior managers aware of violations and poor client service without relying on middle management itself to bring the matter to the higher ups resulted in the termination of his employment.

Mr. Hughart seeks reinstatement, back pay and benefits. He was unemployed from October 25, 2002 until May 25, 2003 when he began working for a Marine Contractor. During that seven month period, Mr. Hughart looked for employment by applying for over 100 positions in various fields including securities, marina and government work.

## Respondent<sup>5</sup>

Raymond James is a separate entity from its parent company, RJF. Mr. Hughart received his paychecks from Raymond James. All of the individuals to whom Mr. Hughart reported were employees of Raymond James. Mr. Hughart's supervisor, Christine Tharp, her supervisor, Bill Blain, and his supervisor, Tom Tremaine, all worked for Raymond James, in addition to Dennis Zank and John Nolan, two other employees with whom Mr. Hughart had worked. During his eleven year tenure with Raymond James, Mr. Hughart did not have contact with people employed by the parent company, RJF.

Mr. Hughart made a lateral move from a supervisor position in the Retirement Plan Services Department to an operations support specialist in that department after becoming overwhelmed with his workload and not receiving the assistance he requested. The purpose of his new position was to uncover and report operational issues. While in this position, Complainant discovered three issues that he believes constitute protected activity under SOX: recovery of escheated property from the state of Florida, withholding of Canadian tax on IRA accounts and problematic limited partnership trades. Complainant was supposed to identify problems and advise his supervisors about it so that they could refer the problem to the correct department to handle. Mr. Hughart did not accept that others were responsible for determining the necessary corrective action.

Mr. Hughart felt that he was harassed when his supervisor told him to play only a limited role after his discovery of the escheated property issue. He believed that his supervisor, Lisa DuFaux, was being directed by her supervisor, Ms. Tharp, to stop Mr. Hughart's investigative activities. However, before he resigned, Ms. Tharp had engaged Mr. Hughart concerning his recovery efforts when she asked him about a displaced check.

Another instance occurred with regard to withholding of Canadian taxes on IRA accounts when Mr. Hughart was chastised for the process he used in addressing the problem. His supervisor learned about the tax problem from another department's supervisor who called to complain about Mr. Hughart's input. No disciplinary action was taken despite Mr. Hughart's overstepping the responsibilities and authority of his job.

Mr. Hughart testified that a hostile work environment existed because of the conflict between him and managers. In his self-assessment performance appraisal, Mr. Hughart recognized that his inability to follow direction contributed to the ongoing friction. Nonetheless, Mr. Hughart's performance reviews, which were prepared by the supervisors with whom he believes he was in conflict, were positive and his ratings got increasingly better over time. In his final evaluation, he was even exceeding expectations. His supervisors acknowledged Mr. Hughart's need to know that he was valued for identifying problems. Ms. Lehman, Mr. Hughart's cubicle neighbor, never noticed him being treated differently than other employees by his supervisor.

Ms. Tharp became concerned about Mr. Hughart's performance when he sent an e-mail entitled "fraud alert" to her, in which he concluded there was possible fraud involved in the

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<sup>5</sup>May 28, 2004 trial brief.

limited partnership share trades and that Raymond James was an active participant. Mr. Hughart recalls Ms. Tharp starting the meeting, which was set up to discuss the e-mail, by indicating she was going to fire him. Mr. Hughart believes they discussed the limited partnership trading issue but Ms. Tharp was concerned by Mr. Hughart's process, not the substance of the e-mail. After the meeting, Mr. Hughart offered his resignation as an alternative to being fired and Ms. Tharp stated that she would take the weekend to decide.

Ms. Tharp provided a different account of their meeting. In expressing her concern over the tone of the "fraud alert" e-mail, she mentioned that if Mr. Hughart continued sending alarming e-mails without thinking about how they could be interpreted, it may lead to his termination. Moreover, when Mr. Hughart offered his resignation to her, Ms. Tharp said that she was not firing him and questioned whether he was really resigning. She stated that if he left the resignation with her, she would accept it. Mr. Hughart walked out, leaving his letter of resignation with her.

The Motion to Dismiss should be granted for two reasons. First, the provisions of SOX do not apply to Mr. Hughart because he was not an employee of a publicly traded company. He worked for a subsidiary of RJF. Second, Mr. Hughart failed to name RJF in his complaint. A publicly traded entity must be named in any complaint involving its subsidiaries to be held liable.

The ultimate question of whether the parent corporation acts as the agent of its subsidiary rests on the parent's involvement in the subsidiary's employment practices. RJF had no input or control over the labor relations issues alleged by Mr. Hughart. Case law indicates that corporations are considered a single entity only when their separate existence is a sham. Generally, a parent corporation is not liable for the torts of its subsidiary because a corporation is an independent legal entity whose form cannot be disregarded.

Furthermore, a recent decision out of the Office of Administrative Law Judges held that because the parent was not added as a respondent until after the OSHA investigation, the parent company was not properly before it and any attempt to add the parent to the complaint would be untimely. Here, only Raymond James is the investigated respondent.

Finally, even if the Act applies and Mr. Hughart is a protected employee, he still has not established there was adverse action. The employment action must be materially adverse as viewed by a reasonable person in the circumstances. The Eleventh Circuit has defined adverse action in cases arising under environmental whistleblower protection acts, stating that an employee who receives criticism, which merely makes that employee unhappy, including oral reprimands, does not constitute adverse action. The work environment that Mr. Hughart believes is hostile existed because of the differences of opinion between himself and his supervisors and does not rise to the level of materially adverse conditions sufficient to constitute adverse action. There was no disciplinary action taken against him; the action merely consisted of a verbal warning from a supervisor. A reasonable person would not interpret the actions taken by Raymond James as adverse. Mr. Hughart's unreasonable belief is evidenced by his inability to fathom that his conclusions were wrong. Because the action taken by his supervisors consisted of no more than a scolding, there was no reasonable adverse action.

Additionally, Mr. Hughart was not constructively discharged because the conditions of his work environment were not so hostile that he was compelled to resign. Mr. Hughart's supervisors were reasonable in addressing their concerns about his tone and other employees never saw hostile or discriminatory actions being taken against Mr. Hughart. Additionally, because of the manner in which Mr. Hughart presented his whistle blowing actions, which was unreasonably disruptive and disloyal, Mr. Hughart's activities fall outside the protection of the Act. Without discussion with his supervisors, Mr. Hughart reached the conclusion that Raymond James was an active participant in a fraud. Therefore, the verbal warnings Mr. Hughart received from his supervisor did not rise to the level of an adverse action.

In summary, Raymond James was not acting as an agent for RJF with regard to Mr. Hughart's activities, so he is not covered by the Act. Moreover, Mr. Hughart did not name RJF in his complaint, which is fatal to this complaint. Finally, the verbal warnings given to Mr. Hughart do not constitute adverse action under the Act and did not compel his resignation. Thus, Mr. Hughart has failed to state a claim under the SOX whistle blowing provisions.

### **Issues**

1. Motion to Dismiss.
2. Whether Mr. Hughart engaged in a protected activity under the Act.
3. Whether Raymond James & Associates took an adverse personnel action against Mr. Hughart.
4. If Mr. Hughart engaged in a protected activity and Raymond James & Associates took an adverse personnel action, whether the protected activity contributed to the adverse personnel action.
5. If Mr. Hughart's protected activity was a contributing factor in the adverse personnel action taken against him, whether Raymond James & Associates has demonstrated by clear and convincing evidence that it would have taken the adverse personnel action against Mr. Hughart in the absence of the protected activity.

### **Preliminary Evidentiary Issues**

I deferred a decision on the admission of CX 20 with regard to the September 30, 2002 letter from the OSHA Regional Administrator informing Mr. Hughart that after investigation his complaint was being dismissed because there was no adverse action by Raymond James. The letter also appears in the file transmitted to the Office of Administrative Law Judges. Although I now admit the correspondence into evidence, it has little relevance other than for procedural history purpose. Specifically, the OSHA determination has no bearing on my adjudication of Mr. Hughart's SOX discrimination complaint. CX 20 also contained two letters from John Hughart to Barbara Galloway, one dated September 30, 2002 and the other dated October 29, 2002, which I also admit without objection as part of CX 20 at this time.

I indicated at the hearing that an employee badge, identified as CX 26, would be admitted only if a copy was produced (TR at 166-168). I had Mr. Hughart retain the original badge. Because I never received a copy of the badge, CX 26 is not admitted.

As I began my adjudication, I discovered attached to CX 1, an October 8, 2004 e-mail from Mr. Hughart to Ms. Dena Salfer, requesting that she put him down for the “super supper.” Ms. Salfer confirmed Mr. Hughart’s registration for the Super Supper on October 29, 2002. Since that e-mail did not relate to the contents of CX 1; it is not admitted as part of CX 1.<sup>6</sup> The email is attached to the record behind the exhibits labeled, “offered, not admitted.”

At the close of the hearing, I kept the record open for 30 days, through May 15, 2004, to give Mr. Hughart an opportunity to submit additional e-mails for my consideration (TR at 349-352, and 440). On May 18, 2004, Mr. Hughart submitted two e-mails.<sup>7</sup> The e-mail chain beginning May 28, 2002 dating back to May 16, 2002 is admitted as CX 29. The other e-mail series Mr. Hughart submitted, dated May 16, 2002 through July 12, 2002, is admitted as CX 30.

In light of the above determinations and my evidentiary rulings at the hearing, my decision in this case is based on the sworn testimony presented at the hearing and following documents admitted into evidence: CX 1 to CX 10, CX 12 to CX 14, CX 16, CX 17, CX 20 to CX 25, CX 27 to CX 30, and RX 1 to RX 6.

## **SUMMARY OF DOCUMENTARY EVIDENCE AND TESTIMONY**

### **Complainant’s Case**

#### Documentary Exhibits

CX 1 – On February 12, 2004, *In the Matter of Raymond James Financial Services, Inc.*,<sup>8</sup> the U.S. Securities and Exchange Commission (“Commission”) issued an “Order Instituting Administrative and Cease-And-Desist Proceedings, Making Findings and Imposing Remedial Sanctions and a Cease-And-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Section 15(b)(4) of the Securities Exchange Act of 1934.” During 2001 and 2002, an investigation of mutual broker-dealers that sold mutual funds with front-end loads revealed “widespread failures to deliver breakpoint discounts to eligible customers.” Raymond James Financial Services was identified as one of the broker-dealers engaged in this failure. Specifically, Raymond James Financial Services sold shares issued by mutual funds without providing certain customers the benefit of reductions in sales charges, known as “breakpoint” discounts. The Commission concluded Raymond James Financial Services had violated Section 17(a)(2) of the Securities Act by not disclosing to customers that they were not receiving the

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<sup>6</sup>At one point in the hearing, Mr. Hughart referenced this e-mail but couldn’t find it (TR, page 115). As he stated in his argument, he intended to present some issues to high level management individuals at this dinner. However, by the date of the dinner, October 29, 2002, he was no longer an employee of Raymond James.

<sup>7</sup>Mr. Hughart dated the submission May 10, 2004 but it was not received in my office until May 18, 2004.

<sup>8</sup>According to Respondent’s counsel, in a manner similar to Raymond James & Associates, Raymond James Financial Services is another subsidiary of RJF (TR, page 18).

benefit of applicable discounts. Raymond James Financial Services agreed to pay a total penalty of \$2,595,129 in conjunction with a related disciplinary action by NASD (National Association of Security Dealers) and to take remedial actions for the benefit of affected investors pursuant to the NASD action. The SEC censured Raymond James Financial Services, ordered them to cease and desist committing or causing any future violations, and to pay a penalty fee plus other associated costs.

CX 2 – RJF published a Member Handbook for their Pharmacy Benefit Program, setting out the program’s provisions exclusively for John R. Hughart.

CX 3 – An annual statement of Mr. Hughart’s total compensation accompanied by a letter from Thomas James, Chairman and CEO of RJF, advising of the purpose for the statement. The stationary used for the letter bears only the name Raymond James at the top but states Raymond James Financial, Inc. (RJF) with corresponding address at the bottom.

CX 4 – A cover page entitled “Raymond James Financial, Inc. and Affiliates Employment Stock Ownership Plan – Summary Plan Description” was issued in November 1998. A cover page entitled “Raymond James Financial, Inc. and Affiliates Profit Sharing Plan – Summary Plan Description” was issued in November 1998.

CX 5 – Mr. Hughart received a confirmation of shares he purchased on March 2, 1999 under the terms of the Employee Stock Purchase Plan of RJF on RJF letterhead. On April 14, 2000, Mr. Hughart received a buy confirmation for his purchase of RJF shares from Raymond James. It indicates that John Nolan is Mr. Hughart’s financial advisor.

CX 6 – Accompanying Mr. Hughart’s 2003 Profit Sharing Plan and Employee Stock Ownership statements and distribution forms, Ms. Nancy Gillis, Assistant Plan Coordinator for RJF, wrote a letter on RJF letterhead dated January 2004.

CX 7 – A summary of benefits package issued by RJF for the plan year April 1, 2002 through March 31, 2003, which includes medical plan comparisons and a description of various types of leave and other benefits that are available to employees.

CX 8 – The cover page of the Group Health Plan Description for Employees of RJF issued April 1, 2000 with attached provisions relating to eligibility for coverage.

CX 9 – Personnel records. Mr. Hughart received a 3.38 rating on his performance appraisal conducted in May 1998.<sup>9</sup>

A note to Mr. Hughart regarding his July 1, 1999 salary information, which indicated “4.5 % or new monthly of \$2,271.83.”

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<sup>9</sup>This document is incomplete; it contains only the first and final pages of the evaluation.

In a six month update completed on December 15, 1999<sup>10</sup>, Ms. DuFaux finds that Mr. Hughart has initiative to discover problems and find solutions. She notes that he is a “good communicator” and “able to sort out and convey complex subjects.” “In his eagerness to do the right thing, he sometimes conflicts with management policies,” but Ms. DuFaux believes that he is aware of and working on that issue. Mr. Hughart reflected on his own performance, “I don’t always agree...but, at best, I’ve invoked thought, communication, and change.” He sought to be a productive and valued resource.

On May 19, 2000, Ms. DuFaux evaluated Mr. Hughart for his yearly Performance Appraisal. Mr. Hughart received a score of 3.841. She stated that Mr. Hughart has extensive experience in the industry, which makes him a very valuable resource. He is constantly looking for issues that may lead to problems and focuses on a problem until it is solved. Others appreciate his willingness to help. In an associated self-assessment form, Mr. Hughart noted that he fulfilled a personal goal to assist where needed through the RPS (Retirement Planning Services) tax season and was re-dedicating himself to acquiring a “more fulfilling position along the lines of [his] experience and education.”

On December 11, 2000, in a six month update assessment, Ms. DuFaux stated that Mr. Hughart was persistent in his research, and discovered and corrected errors that could have lead to fines. She notes that he is the “primary contact for limited partnership issues,” in addition to troubleshooting on a variety of client accounts. He not only solves problems but analyzes situations in an effort to correct and improve things. Subjectively, she notes that Mr. Hughart cares about clients and associates and strives to improve service to both, which adds great value to the department. A handwritten note suggests that his “investigative skills and tenacity” have enabled him to reclaim federal withholdings that were believed to be lost. In his self assessment form, Mr. Hughart vows to make the firm better and stronger from questions he raises. He believes that he needs to “care less about the job” to gain perspective.

A transcript report from Raymond James University for John Hughart indicated a graduation cutoff date of April 27, 2001 and showed that Mr. Hughart earned 98.5 credit hours.

In his Associate Performance Appraisal conducted on May 25, 2001 by Ms. DuFaux and reviewed by Ms. Tharp, Mr. Hughart received a numerical total of 3.977, reflecting a performance evaluation well above standard and just below consistently exceeds the standard. Mr. Hughart is diligent in monitoring his tasks, including utilizing resources to watch for price changes with the limited partnerships and being able to balance deposits against withholding reflected in client accounts. He is a valuable resource on whom others rely and adept at identifying areas that need improvement and exploring options. In the communication section, “John listens well and verifies mutual understanding by restating what was said. He expresses himself well and is making an effort to see the other person’s point of view.” His creative search for solutions is sometimes more than the firm’s resources can handle but he continues trying. Ms. Tharp additionally notes that Mr. Hughart is a “tremendously valuable resource” and his “solution-oriented demeanor lend well to his position.” In an associated Self Assessment Form

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<sup>10</sup>The annual performance appraisal completed around May 1999, which precedes this six month update was not submitted into evidence.

completed as part of this review, Mr. Hughart continues to give himself satisfactory marks in attitude and job performance. For self-improvement, he planned to have more realistic perceptions of himself and management.

The six month update to Mr. Hughart's performance summary was completed by Ms. DuFaux and reviewed by Ms. Tharp in December 2001. Objectively, Mr. Hughart continues his diligent maintenance of withholding reconciliation, coordinated other projects and initiated special projects to improve client service. Subjectively, Mr. Hughart is committed to "service 1st" and has a positive attitude and willingness to tackle projects as needed. In his self assessment form, he states that he wants to "whine less...fish more." His goal is to successfully utilize the ability of the DTC (Depository Trust Company) to reclaim withholding on eligible foreign investments.

On May 20, 2002, Mr. Hughart received his semi-annual performance summary in his position as senior operations specialist. The comments were generally positive and note his contribution in saving the firm a lot of money through his maintenance of limited partnerships and balancing "perfectly" the federal withholding deposits and entries in client accounts. In addition, Mr. Hughart worked to improve the department's accountability, devising solutions and maintaining his motivation to do the right thing for clients. Additionally, Mr. Hughart has many contacts within the firm and is therefore very resourceful and well liked by co-workers. He prioritizes well, exploring new issues while maintaining a follow-up system. Mr. Hughart sees in black and white, which can lead to conflict with those who see shades of gray. His total numerical score was 4.078 out of 5, reflecting a rating between consistently exceeding the standard and superior.

In his Associate Self Assessment Form from that review, Mr. Hughart acknowledges the personal reward he found in revamping the defective foreign withholding process and encourages himself to "fish more." He also notes that he met 50 percent of his goals.

CX 10 - United States/Canada Income Tax Convention. The treaty became effective January 1, 1985 and states that income derived by a trust, company, or other organization constituted and operated exclusively to administer or provide benefits under one or more funds or plans established to provide pension, retirement or other employee benefits shall be exempt from tax in a Contracting State if it is resident in the other Contracting State and its income is generally exempt from tax in that other State.

On November 6, 2001, Heather Peisner wrote to Ms. Tharp providing information regarding the foreign tax withholding situation. She stated that the project is massive and complicated because of the lack of method for recovery. She also noted her belief that either all claims should be filed or none should be. She also recognized the risk because if a client had already reclaimed the funds, Raymond James would incur a reject fee in addition to the processing fee.

In another series of e-mails, Mr. Hughart alerted Dale Skinner, an assistant supervisor in Dividend Services, of the need to file with the Canadian government to recover funds withheld in error for the previous three years on November 1, 2001. On November 6, 2001, Mr. Hughart

informed Ms. DuFaux and Ms. Tharp of the procedures that needed to be followed to recover the tax withholdings within the applicable statute of limitations. Ms. Tharp responded to Mr. Hughart on November 9 inquiring as to whether Mr. Hughart had been in touch with Dale Skinner or Bonnie Warren. Mr. Hughart forwarded Mr. Skinner's previous response which had indicated that more research needed to be done on the process. At that point, Mr. Hughart suggested calling on "Blain/Nolan/Pate types to organize a consensus of thought," to which Ms. Tharp replied that Mr. Hughart should meet with her, Ms. DuFaux and Mr. Blain to decide how to pursue the situation.

On November 14, 2001, Mr. Hughart and Ms. DuFaux exchanged e-mails<sup>11</sup> regarding foreign tax withholding on client accounts. Mr. Hughart replied to an e-mail Ms. DuFaux had sent him six months earlier on the subject in which Ms. DuFaux asked Bonnie Warren in Dividend Services how a client could make sure that taxes were not being withheld from his/her retirement account. Mr. Hughart expressed that he was "hurt by [Ms. DuFaux's] 'ramming down their throat' analogy." Mr. Hughart noted that the situation had been going on for one year and that during the year, he had increased expectations for another department [Dividend Services] to recover client funds. Instead, they [Dividend Services] cost IRA clients a lot of money by not recovering available funds. Ms. DuFaux responded immediately to Mr. Hughart, apologizing for her words, but indicating she was concerned that he find a better way to address major problems, which would be more in synch with the politics and diplomacy present in the business world. She believed a "long string of e-mails with an assistant supervisor is probably not the best way to approach an issue that requires a major paradigm shift for their department" and the implementation of new policies.

On November 16, 2001, Mr. Blain wrote to Mr. Hughart to tell him how much he appreciated his hard work and diligent follow-through in researching the foreign tax withholding issue. Mr. Hughart responded on November 19, 2001, indicating his appreciation for the "kinder words" and expressing his frustration in pursuing the issue.

CX 12<sup>12</sup> – On December 26, 2001, Mr. Blain sent an e-mail to Ms. Tharp, copy to Ms. DuFaux, indicating they were going to attempt recovery of the 2000 tax withholdings but would not submit anything by year end to recover funds from the years prior to 2000. They would use the DTC system where applicable. Mr. Blain asked Ms. Tharp and Ms. DuFaux for their reaction as well as inquiring about how Mr. Hughart was dealing with the situation.

CX 13 and RX 2 - On October 24, 2002, Mr. Hughart exchanged a series of e-mails with Mika Carter regarding the trading of Krupp shares without required certificates. Mr. Hughart and Ms. Carter questioned whether this type of trading was allowed OTC (over-the-counter) or whether there was something illegal/criminal taking place. Mr. Hughart called Krupp to find out if the issue was trading on the OTC; they agreed to fax something stating they never authorized an exchange to trade shares. Mr. Hughart told Mr. Carter that they should get Laura to "flip the switch."

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<sup>11</sup>I only admitted the text of the e-mail correspondence. The notes written on the e-mail copies are not in evidence (TR at 87).

<sup>12</sup>The e-mail correspondence without regard to the handwritten notes is admitted (TR at 111).

Mr. Hughart then e-mailed Laura Wendorf later that day to inform her of the trading problem with Krupp, likening it to the PLM issue, and asking her to “please show KRPI as non-tradable.” Ms. Carter replied to Mr. Hughart’s earlier e-mail stating that their options were limited and that she planned to ask trading to bust the trade. Mr. Hughart did not think that the shares could be successfully traded, and he “proclaim[ed]...this is a scam.” He then asked for the phone number for OTC trading so that he could alert them to the problem if Raymond James’ trading department would not address the issue.

Mr. Hughart wrote an e-mail the morning of October 25, 2002 to Lisa DuFaux and Chris Tharp, with the subject line, “fraud alert,” in which he disclosed the possible criminal fraud occurring because certain partnerships were wrongly being traded OTC. He stated that “RJ [Raymond James] has some liability/responsibility as well and should act to protect our clients from the scam.” When the undeliverable status of the trade is discovered, “we” go back to the market to cancel the trade and are forced to buy back the shares at a higher cost from the person Mr. Hughart suspects is the fraud perpetrator. Mr. Hughart stated in his e-mail that he has been working with Ms. Carter in broker clearance to resolve the issue but believes that the situation should be dealt with by refusing delivery and forcing the issue to the forefront. He recognizes that is a decision for senior management. Ms. Tharp responded that she would like to discuss the details of Mr. Hughart’s conclusion in a meeting with him later that day.

Mr. Hughart forwarded the e-mail he sent to Ms. Tharp and Ms. DuFaux to Ms. Carter “FYI” later that morning. Mr. Hughart also reported to Ms. Carter that he received transfer paper work from Krupp but is questioning allowing the delivery to the “scam artist at all.” Mr. Hughart separately e-mailed Laura Wendorf around that time asking for her to “get a list produced of security type of 39’s that are currently listed as trading on an exchange.” Ms. Wendorf then informed Mr. Hughart that he should go through his IT person to generate the report he was requesting. Mr. Hughart then forwarded this e-mail to Ms. Tharp asking whether this was his department’s responsibility or “more of a P & S” issue. He separately responded to Ms. Wendorf, telling her that he would take the problem to the “higher ups” in his department, but he was not sure they would feel it was an RPS issue.

CX 14 – In January 2004, Mr. Hughart e-mailed “acssecurities” to find out which of the PLM Equipment Partnerships were eligible to trade on an exchange on October 25, 2002. Sherry Wakeland responded. Mr. Hughart then clarified that the information he sought was which PLM partnerships were authorized by the general partner to trade on an official exchange. Ms. Wakeland replied again stating that the only three partnerships that could ever trade are PLM funds 1, 2 and 3.

CX 16 - Joseph M. Hughart wrote a statement on December 15, 2003 that was signed and notarized, to certify that he had discussed the accounting and operational irregularities at Raymond James with Complainant Hughart. He has been in public accounting since 1993 and researched a tax problem for a client who retained him to prepare his Canadian Non-Resident Income tax return. In April 2001, Joseph Hughart gave Complainant Hughart information about Canadian Customs and Revenue Agency. Complainant Hughart was concerned about breaches of the fiduciary duty the firm had to clients by their “erroneous collection and payment of foreign withholding tax” to the Canadian government. They spoke again at the beginning of July after

Complainant Hughart had done some research on the issue. He learned about the procedures necessary to recover funds from the previous three years and that a statute of limitations was nearing its deadline. Complainant Hughart told Joseph Hughart that he advised the Dividend Department at Raymond James and his manager of the situation and they appeared to be concealing the improper withholding and refused to disclose the information to ERISA account holders. Complainant discussed this situation with Joseph Hughart because he was very concerned about what actions should be taken “given the irresponsible and improper reactions of his employer.”

CX 17 – Jim Hughart wrote a statement on December 8, 2003 that was signed and notarized. Jim Hughart is a business owner and former public accountant. He engaged in numerous conversations with Complainant Hughart about the serious concerns he had about his job at Raymond James. Complainant Hughart was upset by “his employer’s erroneous fiduciary duties of collecting and paying foreign withholding taxes to the Canadian government on client’s retirement accounts.” He believed that appropriate action should have been taken once the problem was brought to his employer’s attention but it was not. “[Mr. Hughart] felt the need to ‘sound an alarm’ on behalf of Raymond James clients.” Jim Hughart advised Complainant Hughart not to pursue the issues, but he insisted because he felt he had a moral obligation.

CX 20 – The Regional Administrator informed Mr. Hughart that after investigation, his complaint was being denied on September 30, 2003. The evidence did not show that a reasonable person in Complainant’s position would have felt he was forced to quit because of intolerable and discriminatory working conditions as needed to establish a “constructive discharge.”

In a letter dated September 30, 2002, Mr. Hughart wrote to Barbara Galloway regarding insurance coverage of his children. Mr. Hughart inquired about particular health plans and requested copies of written communication from the benefits department to his ex-wife or any of her representatives.

In a letter dated October 29, 2002, Mr. Hughart wrote to Barbara Galloway making a second request for review and revision of the current eligibility policies because he deemed the “policy to be biased and discriminatory of divorced families.”

CX 21 – On November 15, 2001, Mr. Hughart exchanged e-mails with Barbara Kutzer at the DTC. Mr. Hughart asked how long relief from withholding has been available at the DTC and Ms. Kurtzer replied that she believed it first became available in 1988.

CX 22 – Information from the Krupp Funds Group web site shows that there are two ways to liquidate an investment. The first is by selling to the Dividend Reinvestment Plan run by Krupp Funds and the second is to sell through a secondary market firm, though Krupps is not affiliated with any of the firms on the list which they provide.

CX 23 – A Krupp Funds Group document lists the secondary market firms. Krupp is not affiliated with any of the listed and does not approve or disapprove of any of them. Raymond James is not listed.

CX 24 – Mr. Hughart had e-mailed Kathy Wilson on September 17, 2001 about the foreign withholding tax issue. The following day, Kathy Wilson wrote to Bonnie Wilson to let her know that Mr. Hughart was volunteering to help out with the project. Mr. Hughart followed up with Ms. Warren on September 26, 2001 to reiterate his willingness to “assist in any way possible to get Tax Relief up and running for our Custodial foreign investors.”

CX 25 – Hundreds of e-mails<sup>13</sup> that reflect Mr. Hughart’s business communication exchanges from September 25, 2002 through October 25, 2002. Throughout the extensive collection of e-mail, almost all of Mr. Hughart’s correspondence reflected a normal business tone. Mr. Hughart departed from his professional manner in only four e-mails.

During an October 1, 2002 e-mail exchange, Mr. Hughart noted, “all’s fair in love and partnership pricing. . .:)”

On October 9, 2002, in response to a party not providing requested financial information, Mr. Hughart responded, “That stinks. We have every right to know who signed and where the case went. Get ‘em!”

In an October 10, 2002 exchange, Mr. Hughart referenced an individual as trying to “ramrod acceptance” of an asset into an IRA account.

Concerning unit pricing for a partnership, Mr. Hughart stated on October 23, 2002, “A lot of ‘used car’ salesman tender offers at low-ball prices are out there for PT Barnbaum’s favorite clientele. . .tell your client to use the offer to train the family dog.”

CX 27 – Mr. Hughart listed his job applications to date, beginning November 6, 2002 through January 14, 2003.<sup>14</sup> Job positions ranged from assistant administrative manager to accountant to auditor to business manager in a variety of fields.

CX 28 – “The Human Resources/Employee Relations-Ethics Policy-RJF Ethics Policy” was issued by Thomas James on July 8, 2002 and sets forth an internal ethics policy. It is issued annually to and signed by all RJF Associates. It references Raymond James & Associates specifically, stating that those representatives need to review additional information. The “Business Ethics Policy of Raymond James Financial, Inc.” states in the opening paragraph that the “actions of all our Associates should be above reproach.” The policy indicates the RJF associates should exercise the highest degree of professional business ethics in all actions they undertake on behalf of the Company and to act in accordance with the policies set forth in this document. The policy also requires compliance with all applicable legal requirements and securities laws of the United States and other foreign countries, expects compliance with generally accepted principles of accounting, prohibits false or misleading accounting entries, and

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<sup>13</sup>Without directing my attention to any specific e-mails, Mr. Hughart submitted about 500 pages of e-mails which were in no particular order and contained multiple copies.

<sup>14</sup>The document states the last application was sent on January 14, 2002 but the dates are listed chronologically beginning in November 2002, therefore, it appears the final entries written as January 2002 actually occurred in January 2003.

stresses that all company business records and customer data are considered to be, and will be treated as, “trade secrets.”

CX 29 – Mr. Hughart sent an e-mail on May 16, 2002 to inform Laura Wendorf that there was a problem with certain PLM accounts being traded over the counter. Lisa DuFaux and Mika Carter were copied on the e-mail. Ms. Carter responded on May 28, 2002 telling Mr. Hughart about the \$800 loss and seeking Mr. Hughart’s insight into determining the party at fault and correcting the problem. Mr. Hughart “smell[s] a ‘set up’” and indicates he will look into the issue further. Another e-mail from Bill Alter to Dave Di Sciascio deals with how to remedy the situation of a loss in a client account because of the trade. Mr. Alter then e-mails Mr. Hughart to see if he agrees with the resolution they devised, which was to move the loss out of the client’s account. Mr. Hughart replies expressing his agreement because “the firm (as a whole) should not have allowed the trade.”

CX 30 – Ms. Carter’s May 28, 2002 response Mr. Hughart’s May 16, 2002 e-mail (*see* CX 29), followed by Mr. Hughart’s reply. Ms. Carter e-mailed Mr. Hughart again on May 28, 2002 to let him know her department had busted the trade because the shares were not deliverable and that they were now trying to determine who would be the appropriate person to decide whether the trade should have been busted. She sought Mr. Hughart’s advice on the matter. Mr. Hughart followed up on June 4, 2002, inquiring about any developments in the matter. Ms. Carter responded that they were writing the loss off as a “branch error.” Mr. Hughart, in response, suggested P & S split the loss with the branch and raised the possibility that this was a “setup.” The next e-mail was sent by Ms. Carter on July 11, 2002 asking Mr. Hughart if he had any further information on the issue. Mr. Hughart did not have any other information. Then, Ms. Carter and Mr. Hughart write back and forth to each other about how the computer should have prevented the completion of the trade and how the loss should be split. On July 12, Mr. Hughart expressed his frustration for how the problem occurred, contemplating where to place blame: “OTC for allowing it to be listed...traders illegally scamming innocent firms...or [Raymond James] back office.” Ms. Carter thanks Mr. Hughart for his input. Mr. Hughart, in a final e-mail, states, “I wonder if Bob might be interested in the trade fraud issue.”

#### Sworn Testimony of Mr. John Hughart

[ALJ examination] Mr. Hughart began working for Raymond James as a stock receipts clerk in 1979 in St. Petersburg, Florida, upon graduation from college where he received his B.A. in finance. (TR at 32-34, 46). He worked there for eleven months before quitting to start his own business. His responsibilities included receiving securities, examining them for good delivery and authorizing payment of trades where clients had sold their securities. Mr. Hughart returned to this position briefly in 1981 for eight months. (TR at 34). On September 16, 1991, Mr. Hughart again went to work for Raymond James and continued his employment through October 25, 2002. He was hired to help implement an industry wide program to automate the mutual fund systems by bringing mutual fund networking online. Basically, Mr. Hughart downloaded mutual fund transactions from the mutual fund financial computers to Raymond James computers so that information appeared on the Raymond James statement. (TR at 34-5, 46).

Some time in 1981 or 1982, the son of Raymond James, Thomas James, took the firm public. He formed Raymond James Financial which trades on the New York Stock Exchange under "RJF"; a public company that is the parent/holding company of several subsidiaries, including Raymond James & Associates. That is, Raymond James & Associates became an operational subsidiary of its parent RJF. Both Raymond James and RJF were housed together at the same location in St. Petersburg, Florida, where approximately 3,300 employees worked. (TR at 35-38).

Paychecks to Mr. Hughart during that time were issued by Raymond James Trademark, Raymond James & Associates. (TR at 47-48). Mr. John Nolan, senior vice president of operations, facilitated Mr. Hughart's rehire in 1991 as an assistant supervisor, which was essentially a senior processing clerk position. Cheri McCormack, an employee of Raymond James and Mr. Hughart's immediate supervisor, actually offered him the position. (TR at 48-49). In 1995 or 1996, Mr. Hughart received a promotion to senior coordinator for mutual funds, receiving new responsibilities and an increased salary of about \$20,000.

Sometime in 1996, Mr. Hughart transferred to the retirement plan service area under the supervision of Chris Tharp. As an operational subsidiary, Raymond James was the custodian for the retirement accounts. Mr. Hughart started as an assistant supervisor and eventually became a supervisor over new accounts and cashiering. In 1998, Mr. Hughart made a lateral move within the retirement services department, becoming a senior operations support specialist for the administrative area, in which he researched and addressed problems in the department. (TR at 50-52). In this new position, Mr. Hughart was under Ms. Tharp's supervision at first until Lisa DuFaux took over Ms. Tharp's position.

Occasionally, Mr. Hughart was assigned problems to resolve from his supervisor, but he spent the majority of his time looking into issues that he discovered based on his dealings with six supervisors within the retirement plan services division who came directly to him for assistance on different issues. (TR at 54-56). Mr. Hughart stayed in this position until he separated from Raymond James on October 25, 2002. (TR at 35, 56).

Mr. Hughart received work reviews twice a year from his supervisor. Therefore, after 1999, Ms. DuFaux rather than Ms. Tharp completed them; the last one was completed on May 20, 2002. (TR at 58-59, 61). The performance reviews were generally very positive.

At the time of Mr. Hughart's separation from Raymond James, he was making \$35,968.80 annually plus other employment benefits, totaling about \$42,000. (TR at 62).

#### *Escheatment Action*

The first security violation that Mr. Hughart believes he found involved unclaimed property of clients that had escheated to the state. In late 1998 or early 1999, Ms. Tharp asked Mr. Hughart to research an issue concerning a client who had unclaimed property, which had escheated to Florida; Mr. Hughart was to reclaim it. (TR at 64-65). In his research, he found that the State of Florida had a website where a person could type in a name and determine whether that person had unclaimed property. When Mr. Hughart put in the name of Raymond

James & Associates, “hundreds of thousands of dollars appeared, numerous items, over two, three hundred items of unclaimed property that were in Raymond James & Associates’ name for beneficial clients.”

Mr. Hughart explained that unclaimed property arose when companies sent dividends, interest payments and other disbursements to individuals but the proceeds were undeliverable, for example due to a changed address. Since the disbursing company was not permitted to retain the returned disbursements, the proceeds were turned over to the state as unclaimed property. If the property remained unclaimed for a period of time, after notice, it escheated to the state. Some of the disbursements were sent to Raymond James, as nominee or custodian for a client, but apparently not delivered and became unclaimed property. Then, because the state of Florida’s annual newspaper notices listed the unclaimed property under the name of Raymond James, the affected clients were unaware of the unclaimed property’s existence. Mr. Hughart went to Ms. Tharp and informed her that he had found evidence that many of the unclaimed property items belonged to clients who were still active. Mr. Hughart was concerned that Raymond James did not have the right to keep funds that were undeliverable to clients. He contacted the accounting department who advised him that there was no escheatment department responsible for recovery of unclaimed property or escheated items; no one was responsible for reclaiming those assets. (TR at 64-68).

Mr. Hughart brought the situation to the attention of Chris Tharp because he believed it was his fiduciary obligation to recover those funds on behalf of clients. However, Ms. Tharp did not believe the issue was her department’s responsibility and did not want to pursue it. In response, Mr. Hughart became stressed that an important issue was being ignored. Ms. Tharp, however, informed the senior head of accounting Mr. Tom Tremaine, of the situation in an e-mail on which Mr. Hughart was copied. Finally, in early 1999, Ms. Tharp enticed Mr. Hughart to stay with Raymond James when he considered leaving the company by allowing him to recover unclaimed property funds that belonged to active clients in the retirement plan services area. So, Mr. Hughart decided to stay with his employer (TR at 68-70). This plan, however, did not resolve the situation. Mr. Hughart continued to be harassed by his immediate supervisor, Ms. DuFaux, who periodically informed him that her supervisor, Ms. Tharp, “threatened to shut [him] down.” Mr. Hughart also believed that he was denied transfer requests after this time. (TR at 71-72).

In his spare time and during the day when his other work was completed, Mr. Hughart continued to pursue the recovery of unclaimed property. In the summer of 2002, Mr. Hughart filed claims to recover the assets for a group of clients. However, the state declined to pay because they had already paid out those claims but the funds were not in the client accounts. The state of Florida indicated that it had paid the claims to Mr. Dennis Zank, a person who sat on the Board of Directors of RJF. (TR at 72-75). Mr. Hughart told Ms. DuFaux about the situation and spoke with Mr. Dennis Zank’s subordinate, John Nolan, who was the operational vice president of the securities processing area and Mr. Hughart’s close friend. Mr. Hughart also spoke with a subordinate of Mr. Nolan who was a vice president over the dividend area of securities; she told Mr. Hughart that the company believed the money to be theirs. After Mr. Hughart showed evidence that the clients were the proper recipients of the funds, the money was forwarded to him to distribute to the clients that were entitled to it in a corporate account, termed the “error”

account, which contained one-hundred percent of the amount to be returned to clients. (TR at 76-78).

Mr. Hughart was also concerned about the practice of having a private firm identify unclaimed property. Earlier, in 1998, when Mr. Hughart first discovered that the firm had been employed by Raymond James, Mr. Hughart sent an e-mail to Mr. Matecki, corporate counsel for RJF, informing him of the ease in using the website to ascertain escheated funds; thus, indicating that additional money did not need to be spent on the investigator's services. Even though one-hundred percent of the recovered funds were sent to clients, Mr. Hughart still believed a securities violation was occurring. If a fee was being paid to the investigative firm based on a percentage of the recovered funds, and since clients recovered the full amount of the recovered funds, then Raymond James was paying that fee out of some other part of the company's funds. When Mr. Hughart expressed his concerns to Ms. DuFaux, her reaction was "nil." (TR at 76-82).

Throughout his tenure working to recover funds for client retirement accounts, Mr. Hughart felt as though he was in trouble despite the fact that he recovered \$30,000 to \$40,000 for clients of Raymond James. (TR at 82-83).

#### *Withheld Foreign Tax*

On June 13, 2001, Ms. DuFaux asked Mr. Hughart to research why Raymond James allowed foreign tax withholding on exempt assets in their custodial accounts after a client complained that a prior firm had not withheld foreign tax. (TR at 83-84). Over the course of several months, Mr. Hughart discovered that improper taxes may have been paid to the Canadian government from client accounts for about 13 years. Mr. Hughart began receiving "flack" for investigating the issue from his immediate supervisor Ms. DuFaux, when Bonnie Warren, supervisor of the Dividends Department, complained to Mr. Bob Blain who was Ms. DuFaux's boss. Mr. Hughart believed Ms. Warren's concern arose from the effect such a finding would have on her department since her department had improperly instructed paying agents to withhold Canadian foreign tax withholdings for all those years. As a result, Ms. DuFaux asked Mr. Hughart to attend a meeting on Wednesday, November 14, 2001, to further thwart his efforts for "ramming policy down the dividend department's throat." (TR at 90-98).

Despite that encounter, Mr. Hughart was still able to present his findings to Ms. DuFaux, Ms. Tharp and Mr. Blain in an effort to bring about change in the policy. Ms. DuFaux was receptive to the facts presented; Ms. Tharp was confrontational at the beginning of the meeting but seemed to understand the problem by the end; and Mr. Blain rebuked Mr. Hughart for overstepping his bounds. (TR at 98-105). After the meeting, Mr. Hughart began the next phase of research, which included assessing the damage by determining how much money was improperly paid to Canada, but Ms. DuFaux stopped Mr. Hughart from continuing with the project, referring it to the Dividends Department for further resolution. (TR at 106-108).

After having stopped work on the project, Mr. Hughart got involved in the issue again towards the end of 2001 when he learned that the recovery of funds was limited to refunding payment in that year and the previous two years. The end of the year was approaching and Mr.

Hughart knew that if a claim was not filed by the end of the year, recovery of funds for another entire year would be lost. On December 26, 2001, Mr. Hughart received a forwarded e-mail, in which Mr. Blain explained that they would not complete the necessary documents before the end of the year to recover the other withheld taxes. Mr. Hughart told his supervisor, Ms. DuFaux, that he believed it was the company's responsibility to at least file the claim to preserve recovery for the year that would be lost by waiting, even if all of the paperwork was not completed. (TR at 108-112; CX 12).

Again, Mr. Hughart stopped working on the issue for a while but became interested once again after learning that the Dividend Department planned to let the end of 2002 pass without filing a claim, which would preclude the return of improperly paid foreign taxes in 2000. (TR at 113-114). So, in October 2002, Mr. Hughart brought the issue to the attention of the human resources vice president, Barbara Galloway. During this meeting, which occurred about ten days before Mr. Hughart's separation from the company and was arranged to discuss some personal insurance issues, he "spilled the beans" regarding the foreign tax issue. (TR at 119-120 and 153).

Around this time, he also signed up to attend a company sponsored dinner where RJF executives were going to speak on company integrity. Mr. Hughart planned to confront the senior management executives about the situation at the dinner scheduled for October 29, 2002, but he never went because he stopped working for Raymond James four days before the event. (TR at 115-117).

#### *Limited Partnership Share Trades*

Mr. Hughart began researching another issue in early 2002 that was brought to his attention when the company suffered an \$800 loss because it had to cancel a trade and buy back shares. Mr. Hughart discovered this issue because limited partnerships had been traded on the over-the-counter bulletin board. This was problematic because assets that trade in this particular forum require a three-day delivery date but limited partnership shares could not be delivered in less than four weeks. Mr. Hughart concluded that the only way such a scheme could have taken place was through fraud. He believed someone was using the scheme to make money. He expressed this concern in an e-mail he wrote to Ms. Tharp, in the absence of Ms. DuFaux, his immediate supervisor, on October 25, 2002, the same day that Mr. Hughart was terminated. (TR at 125, 128, 138; *see also* CX 13).

On October 24, 2002, the day before Mr. Hughart's termination, he had exchanged e-mails entitled "Fraud Alert" with Mika Carter, an employee in the brokerage clearance department, with whom he was working on the issue. (TR at 137-139). The following morning, Friday, October 25, 2002, Mr. Hughart sent an e-mail alerting Chris Tharp to the fraud issue occurring on the OTC bulletin board. She responded by asking him to meet with her later that day, to which he agreed. When Mr. Hughart sat down with Ms. Tharp, she was agitated and not interested in discussing the issue of fraud. Instead, she stated, "John, I wish you weren't such a nice guy because firing you would be so much easier." Rather than respond, Mr. Hughart tried to discuss the trading fraud issue and the propriety of using the OTC board for trading of limited partnership shares. Ms. Tharp believed such trading was proper; Mr. Hughart did not. Although

Ms. Tharp took some notes about the issue, they remained polarized. Ms. Tharp raised a concern about his e-mail and subject line entry of “fraud alert.” She believed that if the “wrong” people obtained a copy of his e-mail they would not understand what Mr. Hughart was really trying to convey. She objected to the tone of his e-mail and indicated that the tone was sufficiently improper that she was going to terminate him. At the end of the half hour meeting, Mr. Hughart “didn’t know whether he had a job.” He believed termination was imminent. When the meeting ended, Ms. Tharp said she planned to think over the weekend about whether Mr. Hughart would still have a job and would let him know on Monday. (TR at 140-144).

After the meeting, which had started at 2:00 p.m., Mr. Hughart was in shock; he felt blindsided by Ms. Tharp’s reaction to his e-mail. Mr. Hughart thought about what he should do. When a co-worker, Ms. Jane Lehman, asked Mr. Hughart what was troubling him, he passed a note stating he was about to be fired. She thought he was kidding.

Mr. Hughart finally packed his personal items in a bag, typed up a resignation letter, and offered it to Ms. Tharp at 5:00 p.m. on his way out that day “as an alternative to being fired.” He did not believe being fired would look good on his resume. At the same time, Mr. Hughart indicated to Ms. Tharp that if he was fired, he might be eligible for unemployment compensation. He was so stressed and confused, Mr. Hughart didn’t really know whether he wanted to be fired or have his resignation accepted. Mr. Hughart then departed before Ms. Tharp had the opportunity to respond.

Mr. Hughart felt the resignation was extorted from him because his relationship with Ms. Tharp and other supervisors had become strained and created such a stressful situation that he needed some type of change or relief. He also felt alienated and abandoned by the team to which he had been loyal.

[Cross-examination] In 1998, because Mr. Hughart had been frustrated with the resources available to him as supervisor, Raymond James gave him the option to laterally move into the position of senior operations support specialist, rather than requiring him to continue in the supervisor position or termination of his employment. He believed both he and Raymond James had a fiduciary obligation to every client.

Mr. Hughart had heard the term, “passive custodian,” which means the custodian has no investment authority, applied to some accounts. (TR at 200-204).

Mr. Hughart was aware that RJF had multiple “child” corporations and that some of RJF’s other subsidiaries conducted business at the 800 Carillon address as did Raymond James, however, he believed that some of the other entities operated at other locations as well. Mr. Hughart did not report to anybody at RJF in a day-to-day business capacity. He provided some information to a chairman of the board on one occasion but that had to do with the chairman’s personal assets. (TR at 206-208).

Mr. Hughart received some type of written evaluation every six months. In a December 15, 1999 update to his annual review, in the personal evaluation section, Mr. Hughart admitted that sometimes he conflicted with management policies. He became frustrated when trying to do

the right thing with company policies. These comments probably related to the unclaimed property issue. (TR at 209-213). Another review, dated May 9, 2000, showed Mr. Hughart performing at a level of 3.841, which indicates that he was exceeding expectations. The comment about his personal opinion clouding his objectivity probably refers to the Canadian tax issue. (TR at 213-216). In another six-month update performance review dated December 11, 2000, Ms. DuFaux recognized his efforts to get money back from third parties that had been withheld from clients. She was not referring to the foreign tax issue but to an unrelated matter. In Mr. Hughart's self-evaluation, he described himself the way he believed management perceived him as difficult and highly opinionated. (TR at 217-224). On May 25, 2001, Mr. Hughart again exceeded expectations, receiving a 3.977 on a scale of one to five. One of his projects included unclaimed property. Ms. DuFaux indicated that sometimes Mr. Hughart's plans were unrealistic because the company did not possess the resources needed to implement them. (TR at 224-228).

In a December 3, 2001 review, Mr. Hughart, in the self-assessment section, addressed how he would like to improve the process used in recovering withheld foreign taxes. Ms. DuFaux positively reinforced Mr. Hughart's work, pointing out that he was making a contribution by identifying problem issues, whether or not they were able to be immediately resolved. Mr. Hughart disagreed with that comment and thought the company was admitting to not acting in its appropriate capacity as fiduciary to its clients. (TR at 228-231). Mr. Hughart's last performance review, dated May 20, 2002, reflected a rating of 4.078, his highest rating in the last few years.

Mr. Hughart's position as operations support specialist was not only to identify and research problems but to fix them. He felt that this obligation extended to fixing problems companywide, not only in his department. Some of the other comments in the self-assessment section reflected Mr. Hughart's growing frustrations with Raymond James. (TR at 231-236).

#### *Escheatment Action [Cross]*

In 1998, Chris Tharp, Mr. Hughart's supervisor at that time, assigned him to research a client's asset that had been escheated to the state of Florida. As Mr. Hughart continued to actively pursue the assignment and found other Raymond James clients whose property had been escheated to the state of Florida after the passage of three to seven years, Ms. DuFaux harassed him for engaging in such activities. Mr. Hughart believed there was no department to handle the recovery of escheated property from clients based on such representations by Mr. Tom Tremaine, the head of accounting, and Mr. Tom Takich, a supervisor in accounting. He never consulted anyone in the operations department about whether they had a process for the recovery of those funds. He is familiar with the group that gives escheated funds to the state when a client cannot be found. In only two instances did Mr. Hughart know that Raymond James was involved with Barris Investigations. (TR at 236-241).

The information Mr. Hughart researched was between three and seven years old because a check had to go unclaimed for at least that long before it escheated to the state. It was often difficult to gather needed information to identify the property owner for certain claims, so when it appeared that the owner of a particular asset could not be identified, Mr. Hughart stopped

looking into that particular case. In 2002, although Ms. DuFaux did not tell Mr. Hughart to stop his research into the unclaimed property issues as evident in the performance reviews, she continually informed him that he “was in trouble” because her supervisor, Ms. Tharp, was upset by his activities; however, Ms. Tharp never personally discussed the matter with him despite the close proximity of her office to his. (TR at 241-244).

Neither Mr. Hughart’s salary nor bonus was impacted by his activities, though Mr. Hughart believes that his upward mobility may have been affected. (TR at 224-246). He continued his efforts to recover unclaimed property with such vehemence because he believed that he, as an employee of Raymond James, had a legal obligation, a fiduciary duty, to recover the funds. Even if Raymond James had no legal obligation to pursue the refund of unclaimed property, Mr. Hughart still believes it would be an obligation of the company based on moral conviction. (TR at 247-248).

In an e-mail sent on October 24, 2002, Ms. Tharp asked Mr. Hughart whether a particular check was related to an abandoned property inquiry because nobody else knew where it belonged. There was nothing in the e-mail criticizing or questioning Mr. Hughart’s involvement in recovering the property. (TR at 329-330; RX 3).

*Withheld Foreign Tax [Cross]*

This issue had come to the attention of Ms. DuFaux by a client from California who was concerned that the Canadian tax withholding on retirement accounts may be improper. (TR at 250-251). An investment income tax was being withheld by Canada for interest and dividends flowing from Canadian securities. U.S. clients of Raymond James were affected by this policy. Raymond James instructed the depository to withhold the taxes but they were not the actual party who withheld the taxes. (TR at 248-250).

A meeting attended by Mr. Blain, Ms. Tharp and Ms. DuFaux occurred in November 2001 prompted by a complaint from Bonnie Warren in the Dividends Department to Mr. Blain about the policy that Mr. Hughart was attempting to implement with regard to the Canadian tax issue. (TR at 252-244). At the meeting, Mr. Blain expressed negativity towards Mr. Hughart regarding the process he used in trying to get the department to change its practices. At the same time, he acknowledged the seriousness of the potential problem if the facts Mr. Hughart presented were accurate. Mr. Blain suggested to Mr. Hughart other means by which he could have effected his goal. (TR at 260-261). It was not Mr. Hughart’s job function to dictate to the Dividend Department what they were supposed to do and how they should be handling withholdings. Mr. Hughart believed that the company either had an obligation to participate in the depository program to prevent withholding at the source or had a fiduciary duty, as custodian of the funds, to recover the amounts paid to the Canadian government that need not have been paid. He was not aware of any other entities that did not utilize an outlet for notifying Canadian issuers that particular accounts should be exempt from withholding. (TR at 256-259).

At the conclusion of the meeting on November 18, 2001, it was made clear to Mr. Hughart that he would no longer be working on the issue. He continued to work on the project while it transitioned to the Dividend Department for resolution. During that period, he became

privity to an e-mail Mr. Blain sent on December 26, 2001, indicating that Raymond James would not attempt to recover the funds withheld in 1999 because they were unable to submit claims by the end of the year. He did state, however, that in the upcoming year, Raymond James would attempt to submit claims. Mr. Hughart is not sure how he learned about this e-mail since he was no longer assigned to work on the issue. (TR at 261-264).

Mr. Hughart was not involved in the project after the end of 2001 until the mid-to-end of 2002 when he engaged in discussions with the Dividends Department about the status of filing claims during the year. Mr. Hughart does not remember whether he initiated the contact or they requested something from him, prompting a conference call. Regardless, Mr. Hughart remained a part of the process because it was personal to him and he wanted to ensure another year did not pass without claims being filed by Raymond James to recover their client's funds. (TR at 264-268).

Raymond James had about one million customer accounts. To recover funds for customers would be an extensive process. The largest individual recovery would be \$33,000. It should not make a difference how much money could be recovered by a client because Mr. Hughart understood "client funds [to be] golden." Due to the company's fiduciary obligation, Mr. Hughart believed they had "to maintain the client's funds properly, even if it was expensive." (TR at 268-270).

Canadian companies automatically deducted 15 percent of dividends to turn over to the Canadian government prior to the treaty, but after the agreement, the assets were exempted from the tax. Raymond James participated in the depository program whereby all of their customer's shares were grouped together and registered rather than being registered individually. After the treaty was ratified in 1984, Depository Trust Company ("DTC") set up a system for participants in the program, effective in 1988, where participants identified how many shares were taxable and how many were not, so that exempt funds would not be taxed. Raymond James had been submitting the wrong code for the past 13 years, which caused all of the shares to be taxed. The paying agent, which is the issuer of the shares, had no way of knowing whether shares were exempt unless the depository told them and Raymond James did not distinguish between exempt and non-exempt shares. Instead, all funds were classified the same and all were taxed the same. The only benefit Raymond James reaped from its failure to provide correct information to the DTC was not having to provide a "programmer." To correct the problem, a (computer) programming change would have to be made. Once the problem was discovered, Raymond James made the necessary changes and began providing the correct information; the residual issue was determining which funds had been improperly taxed and how to go about recovering those funds. (TR at 270-276, 278).

What bothered Mr. Hughart about the failure of Raymond James to reclaim client funds was that he felt like an active participant in the fiduciary negligence by being asked "to look the other way." Mr. Hughart brought up his concerns to Ms. Galloway, in the Human Resources Department, during a meeting with her on an unrelated issue. Mr. Hughart and Ms. Galloway exchanged a series of e-mails prior to their meeting. During their meeting, Mr. Hughart explained the issue to Ms. Galloway after she inquired about what was bothering him. "I felt like this was unjustified and I'd done a good job in researching it and expecting to be patted on

the back and instead, was kicked in the ribs.” Because she did not understand the nature of his concerns, their conversation regarding the issue did not continue after that date. (TR at 279-285, 287).

Mr. Hughart was reprimanded orally by Mr. Blain during the November 2001 meeting for pursuing the Canadian tax issue; but his job duties did not change, he was not demoted, and his reporting lines remained the same, afterwards. Coincidentally, Mr. Blain later turned around on the issue and e-mailed Mr. Hughart to thank him for his work. (TR at 287-289; RX 2). Mr. Hughart felt the turnaround by Mr. Blain was a personal affront to him. (TR at 320-321). Mr. Hughart expressed his frustration with senior management’s lack of moving forward on the issue in an e-mail to Ms. DuFaux on October 21, 2002. (TR at 321-322; RX 3). In another e-mail to Ms. DuFaux on October 23, 2002, Mr. Hughart again expressed his uneasiness regarding the major impasse with management he had over several years on important issues that were very likely security violations. (TR at 323-324; RX 3).

Mr. Hughart believes that some time after he met with Ms. Galloway and expressed his concerns regarding the foreign tax withholding issue to her, she contacted Ms. Tharp to suggest that Mr. Hughart’s employment be ended with Raymond James. This belief stems from an earlier dealing with the Human Resources Department that Mr. Hughart had where Ms. Galloway suggested to him, as a supervisor, that he “find a reason to help [his employee] out the door.” (TR at 288-290).

Mr. Hughart had signed up for a Service First dinner where he would have the opportunity to communicate with the CEO of RJF. Based on his prior experience as a supervisor, Mr. Hughart believed that his supervisor was aware that he planned to attend the dinner and his impending attendance played a role in his termination soon thereafter. When Mr. Hughart was a supervisor prior to 1998, he received lists of his employees who had signed up to attend various company functions. Mr. Hughart planned to bring up the issues that he had been having with Raymond James because he wanted to discuss with senior management the negligent way in which Raymond James was carrying out its fiduciary duty to clients. He could have used some other forum to communicate with senior management, such as writing a letter, but he planned to address the issues in person at this particular function. He had signed up to attend the meeting on October 8. He was not prompted to bring the matter to the attention of senior management before this point because it was “not in my personality.” However, because this dinner focused on “integrity,” he felt compelled to bring up the ethical issues that he had been trying to resolve. Firing him would have been a way for middle management to prevent him from speaking to senior management at that meeting. At the same time, his dismissal would not preclude him from using other means to contact senior management, as evidenced by the letter that he wrote to Mr. James the Monday after he was fired. (TR at 290-295).

#### *Limited Partnership Trades [Cross]*

In the “fraud alert” e-mail written by Mr. Hughart and sent to his supervisors, he reported possible criminal fraud. Mr. Hughart was not sure whether the fraud that was being perpetrated was criminal in nature, though he was certain that a scam was occurring. He also stated in that e-mail, “it’s Raymond James’ liability/responsibility” because in at least one incident where a loss

was suffered because of improper trading, the financial advisor individually, rather than the company as a whole, was held responsible. (TR at 298-301; RX 2).

In response to the e-mail, Ms. Tharp said that she wanted to speak with Mr. Hughart and would be available at 2 p.m. that day. After bringing up the idea of firing Mr. Hughart, she also expressed concern about what effect it would have if someone outside the firm read the e-mail. Ms. Tharp appeared to be upset over "the way I wrote the e-mail." Mr. Hughart did not think the e-mail should have come as such a shock to Ms. Tharp because a similar issue regarding a limited partnership interest had just been raised and discussed by them. Ms. Tharp did not actually state that she was firing him. She just mentioned that if he was not such a nice guy it would be easier to fire him. Ms. Tharp also indicated that she was going to reserve judgment and think about it over the weekend. (TR at 302-306, 309, and 310).

Mr. Hughart was shocked by Ms. Tharp's response to the e-mail despite previous harassment he had received because he did not expect the e-mail to evoke such a harsh response. She didn't appear to be interested in understanding how he reached his conclusion. They eventually proceeded to argue over whether trading on the bulletin board for a partnership interest was proper or not. Ms. Tharp did not discuss alternative ways Mr. Hughart could have better brought the information to her attention because she seemed interested in only Mr. Hughart's termination. (TR at 306-307).

After the meeting, which lasted between 15 and 30 minutes, Mr. Hughart went back to his cubicle where he proceeded to write a resignation letter, bag up his stuff and turn in the letter of resignation, in that order. Mr. Hughart submitted his resignation after Ms. Tharp said she would consider his termination over the weekend because he was concerned about the effect that being fired would have on his reemployment and because he wanted the conflict to end. After Mr. Hughart met with Ms. Galloway earlier in the week and addressed his concerns with the company, he regretted speaking up because he remembered the similar situation when he was a supervisor, which led to his employee's termination. (TR at 308-311).

At about 3:00 p.m. on October 24, 2002, the day before Mr. Hughart's termination, he sent an e-mail to Mika Carter confirming her suspicion that certain shares (PLM shares) were being traded illegally, surmising that the activity was probably criminal. Ms. Carter replied to Mr. Hughart, asking him to call Krupp and inquire about the issue of trading on the OTC market. Following this exchange of e-mails late in the day on October 24, Mr. Hughart wrote the "fraud alert" e-mail to Ms. Tharp the next morning. During his investigation into the matter, Mr. Hughart asked Krupp to document that they had not authorized OTC trading. Ms. Carter and Mr. Hughart talked about canceling the trade, like they had done with the PLM trade where there had been an \$800.00 loss. Mr. Hughart does not remember whether Krupp had gotten back to him on that issue before he sent the "fraud alert" e-mail the next morning. (TR at 325-328; RX 3).

After Mr. Hughart submitted his resignation letter to Ms. Tharp about 5:00 p.m. on October 25, 2002, he called Ms. Tharp Sunday evening to determine whether he was to attend work the following Monday. She advised Mr. Hughart that she had accepted his resignation. In response, Mr. Hughart said something to the effect of, "I'm sorry to hear that," but he was not

surprised because he figured that they wanted to find a way to end his employment relationship with Raymond James. He also told Ms. Tharp that he did not hold her responsible for the decision and knew that she had to answer to her superiors. The handwritten notes at the bottom far left of Mr. Hughart's resignation letter showed the phone number of Mr. Hughart's then current residence. (TR at 332-333; RX 4).

On October 29, 2002, Mr. Hughart wrote a letter to Tom James to tell him about the security violations on which he had been working. In the first sentence of the letter, Mr. Hughart indicated that he had resigned with Ms. Tharp's assistance and mutual agreement. He referred to his "encouraged resignation," by which he meant that his resignation had been extorted. Mr. Hughart did not indicate anywhere in the letter that his supervisor had threatened to fire him. (TR at 333-335 and RX 5).

[ALJ examination] Mr. Hughart was out of work until after the first of the year, when he worked some in marina construction for a friend and another subcontractor doing day labor on two occasions in January and February 2003, making a total of \$400. On May 27, 2003, Mr. Hughart obtained permanent employment with Shoreline Marine Construction. With the exception of possibly two unemployment compensation pay checks, Mr. Hughart subsided on savings during that period.

Mr. Hughart prepared CX 27, a spreadsheet of the jobs that he applied for in an effort to obtain reemployment after November 6, 2002. Before that, he also applied for a few jobs. Most of the jobs involved accounting and financial work. He applied for some positions that pertained to his boating hobby. At Shoreline Marine Construction, Mr. Hughart is a forklift operator and repair technician. When he started, he made \$11.00 per hour plus overtime. After six months, Mr. Hughart began earning \$12 per hour and two weeks before the hearing, his pay increased to \$13 per hour. He qualified for health benefits after one year of employment but receives no other benefits.

To search for jobs, Mr. Hughart mostly used the Internet and local newspapers. He went on a lot of job interviews, including one with Coca Cola and some with the state of Florida. Mr. Hughart does not know why he did not get more job offers. In the Coca Cola interview, the conversation ended shortly after he explained why he had left Raymond James and indicated that he had suspected SEC violations and was pursuing a DOL action for employment discrimination. (TR at 336-346).

[Cross-examination] Mr. Hughart conducted his job search from St. Petersburg to Englewood, Florida. He applied for a position at Franklin Templeton Mutual Funds, located within ½ mile of Raymond James, but did not apply to another securities firm, Aegon Securities, also located close to Raymond James, because they had previously denied him an employment opportunity. He did not send out a blind mass mailing of his resume.

While working at Raymond James, Mr. Hughart earned dividend income and some money from fishing with a friend who owned a commercial fishing boat. He did not earn any income on the commercial fishing boat after his employment with Raymond James ended. (TR at 346-349).

Sworn Testimony of Ms. Jane Sharp Lehmann

[Direct examination] Ms. Lehmann worked in the cubicle next to Mr. Hughart at the time of his separation from the company. She is a trainer for the new associates and works on special projects, including team building activities. Ms. Lehmann was specifically working on a team building project in the retirement services area. The team had eleven members, including Mr. Hughart and two managers, Ms. DuFaux and Ms. Tharp. In August 2002, at a breakfast team function, Mr. Hughart posed a question to his managers in a public forum about why action was not being taken regarding a certain matter. He did not specify what the matter was to which he was referring, so Ms. Lehmann did not really understand what he was asking. Ms. Tharp answered him but their communications appeared to be strained. (TR at 168-173).

On the afternoon of October 25, 2002, Mr. Hughart's final day as an employee of Raymond James, Ms. Lehmann initiated a conversation with him late in the day as was typical on a Friday afternoon. When she observed that Mr. Hughart was not responsive, she inquired as to what was bothering him. He threw a note over the cubicle wall, which said, "I think I'm going to be fired." Ms. Lehmann threw a note back over the wall, responding, "You're kidding." He then wrote something about wanting to do the right thing and following God. After that, the two did not speak. Ms. Lehmann left the office that day at 4:30 p.m. and never saw Mr. Hughart again. (TR at 174-176).

[Cross-examination] Mr. Hughart expressed a general reluctance to participate in the team building activities organized by Ms. Lehmann. Ms. Lehmann acknowledged that when Mr. Hughart began questioning Ms. Tharp publicly, the other employees who were present became uncomfortable by the nature and tone of Mr. Hughart's questions. Mr. Hughart had expressed his frustrations with the company because of the problems he was experiencing trying to obtain insurance for his children. During the conversation between Ms. Lehmann and Mr. Hughart just before his final departure from Raymond James, Ms. Lehmann was shocked that Mr. Hughart would be fired because "everybody loved John." (TR at 176-180, 183).

[Redirect examination] After Ms. Lehmann suggested to Mr. Hughart that he must be kidding about being fired, he indicated then that he was being serious. At that point, she believed him. (TR at 184).

Sworn Testimony of Ms. Pamela Jackson

[Direct examination] Ms. Jackson was a teller supervisor at South Trust Bank at the time of Mr. Hughart's separation from Raymond James. She has since retired. She had previously worked for Raymond James opening new accounts for about three months. Ms. Jackson believed, based on her twenty years of banking experience, eleven of those years as a teller supervisor (not related to her Raymond James employment), that it was common in the industry to send an e-mail entitled "fraud alert" to deal with situations where a fraud was potentially being perpetrated. (TR at 185-189).

Mr. Hughart came to her house when he left Raymond James on Friday evening, October 25, 2002, because they had been planning to take a trip that weekend. He had a box of his

belongings and placed it in the garage. She described his demeanor as distraught. Mr. Hughart explained that Ms. Tharp was going to fire him after taking the weekend to think about it. He stated that since he didn't want to be fired and have that on his resume, he resigned and gave Ms. Tharp a choice. If she was going to fire him, then she could accept his resignation otherwise he might be back at work on Monday. As a result, he did not know whether he would have a job on Monday and whether Ms. Tharp would fire him or accept his resignation. Because she had been around Mr. Hughart for a while, Ms. Jackson couldn't believe it since everyone at Raymond James liked him. Ms. Jackson suggested that he call Ms. Tharp on Sunday evening to determine whether he should attend work the following day. She did not see any reason for him to go in on Monday if his resignation had been accepted. Mr. Hughart called Ms. Tharp. (TR at 190-193).

[Cross-examination] Ms. Jackson has known Mr. Hughart for 15 years. She has never come across a fraud alert that alleges that the bank itself is part of the fraud or scheme. Mr. Hughart brought home all of his belongings from his workplace. However, at that time, he was not sure if he still had a job. Mr. Hughart did not go to work on Monday because Ms. Tharp told him she had accepted his resignation. (TR at 193-197).

[Redirect examination] Mr. Hughart stated that he had brought all of his belongings from work in case Ms. Tharp decided to terminate Mr. Hughart's employment relationship with Raymond James. By Sunday evening at his home, no messages had been left on the phone answering machine. (TR at 198).

## **Respondent's Case**

### Documentary Exhibits

RX 1 – Ms. Barbara Galloway, assistant vice president of Human Resources, exchanged e-mails with Mr. Hughart, which indicate that prior to October 7, 2002, the two had conversed about an insurance issue dealing with the coverage of Mr. Hughart's children.

RX 2 – Mr. Hughart wrote an e-mail on October 25, 2002 to Lisa DuFaux and Chris Tharp, with the subject line, "Fraud Alert," in which he disclosed the possible criminal fraud occurring because certain partnerships were wrongly being traded on the OTC market. He states that "[Raymond James] has some liability/responsibility as well and should act to protect our clients from the scam." Mr. Hughart explained that when the undeliverable status of the trade is discovered, "we" go back to the market to cancel the trade and are forced to buy back the shares at a higher cost from the person Mr. Hughart suspects is the fraud perpetrator.

Shortly after Mr. Hughart sent the e-mail, Chris Tharp replied, indicating that she wanted to understand Mr. Hughart's conclusions better and sought to meet with him later that afternoon at either noon or 2:00 pm. Mr. Hughart was immediately amenable to a meeting as indicated in a reply e-mail.

RX 3 – On November 16, 2001, Mr. Bob Blain, senior vice president of retirement plan services, commended Mr. Hughart on his "hard work and diligent follow-through in researching the foreign withholding issue."

On October 21, 2002, Mr. Hughart e-mailed Ms. DuFaux following up on the Canadian tax withholding reclaim process because he had not heard back on the issue. Kathy Wilson had indicated on July 30, 2002 that she would get back to Mr. Hughart on how best to proceed with reclaiming the funds by August 15th.

On October 23, 2002, Mr. Hughart forwarded to Ms. Lehmann an e-mail that he had written to Katherine O'Neill in response to her inquiring of his opinion on a particular stock. He asked Ms. Lehmann if she thought he had been too opinionated. The e-mail contained the following language, "A lot of 'used car' salesman tender offers at low-ball process are out there for PT Barnham's favorite clientele...tell your client to use the offer to train the family dog." (*See also* CX 25).

On October 23, 2002, Mr. Hughart e-mailed Ms. DuFaux to explain why he had been sensitive regarding the foreign withholding tax issue when it came up at a meeting a year later. He expressed his regret at how the situation never seemed to get resolved.

On October 24, 2002, Ms. Tharp sent Mr. Hughart an e-mail inquiring as to whether a displaced check floating around the company belonged to him as part of his abandoned property recovery effort.

On October 24, 2002, Mr. Hughart exchanged a series of e-mails with Mika Carter regarding trading of Krupp shares without required certificates. They discussed whether this type of trading was allowed OTC or whether there was something illegal taking place.

RX 4 – Mr. Hughart's signed letter of resignation, dated October 25, 2002, stating, "Please accept this letter as my resignation from employment with Raymond James & Associates effective immediately." Three handwritten annotations appear on the letter. The first note states, "Accepted CTharp." The second comment lists a phone number and indicates a message was left at the home number "that we accept it." The third note indicates that on October 27, 2002, at 5:00 p.m., Mr. Hughart called Ms. Tharp at her home "to confirm he didn't need to come in 10/28/02."

RX 5 – Mr. Hughart wrote a letter to Mr. Thomas James on October 29, 2002, informing him of his October 25 resignation and concern about several "fiduciary integrity" issues. He states, "I resigned Friday, October 25th from the Retirement Plan Services Department aided in mutual agreement with Ms. Chris Tharp's assistance." According to Mr. Hughart, he experienced "on-going frustration and fear" that the identified issues might not "be brought to corporate conscientiousness past the levels of middle management." His "soapbox grandstanding (efforts to be heard) led to mutual frustration (managers and self) and my subsequently encouraged resignation." Despite his departure, Mr. Hughart believed the following issues needed to remain in the limelight and be addressed:

1) Foreign tax withholding which occurred for the previous 12 years wherein 15 percent of dividend income for retirement account Canadian investments held by Raymond James as custodian was unnecessarily paid to the government. In addition, Raymond James could have recovered taxes paid back through 1999 when Mr. Hughart discovered the problem but Raymond

James allowed the statute of limitations on recovery to run. He requested Mr. James to “oversee successful recovery of the past 2 1/2 years of tax paid in error.”

2) Unclaimed property escheatment which occurred when Raymond James processed abandoned accounts, escheating them to the state. The firm did not have a recovery process in place to benefit clients. Mr. Hughart’s supervisors hesitatingly “tolerated” his efforts to recover only certain RPS items but he encouraged Mr. James to look into the issue in greater depth.

3) Trade and delivery issues with bulletin board listed limited partnerships that occurred when OTC trading of undeliverable limited partnership shares were allowed. The way to resolve the problem is to bust the trade by buying back the undeliverable shares. Mr. Hughart holds Raymond James partially responsible for allowing trades to occur that “hinted of scam or fraud” because the trades were executed at much lower prices than were being offered on the secondary market. The company should have been suspicious because clients were not getting a fair value.

4) Improved accountability engineering needed better methods.

RX 6 – Ms. Tharp’s handwritten notes, dated October 25, 2002, describing her interactions with Mr. Hughart that day.

A little after 10:00 a.m., Ms. Tharp received an e-mail from Mr. Hughart, entitled, “fraud alert.” Mr. Hughart was concerned about a “scam” involving the acceptance by the Raymond James system of OTC trades that couldn’t be settled. Based on her reading of the e-mail, Ms. Tharp thought Raymond James might be a party to the scheme and Mr. Hughart believed the company was supporting fraud by permitting the practice to continue.

Ms. Tharp had several reactions. First, she needed to obtain more information, determine and understand what may or may not have occurred, and resolve the problem. Second, Ms. Tharp was aggravated because she had not previously heard of the problem before Mr. Hughart “felt compelled to use such sensational language.” Third, Ms. Tharp was frustrated by Mr. Hughart’s action because it “was another occurrence in a history of where his valuable research skills were used as judge and righteous jury before he took the time to present them to his managers to help work on them with the responsible parties.”

Concerned about her reactions and in an effort to “balance” them, Ms. Tharp took Mr. Hughart’s e-mail to her supervisor, Mr. Blain “for his conclusion.” Based on her discussion with Mr. Blain, she concluded that they felt the same about Mr. Hughart. Mr. Hughart’s “value was losing or being overshadowed by the way he felt compelled to fight for a cause before any of his managers had a chance to work with him.” Though the supervisors were “glad” to hear what his research had produced, they “didn’t like his judgment” because “it set everyone in a defensive, non-productive, non-solution oriented mode.” However, Mr. Blain and Ms. Tharp agreed that it was more important to focus on the information Mr. Hughart was presenting about the partnership trades, discover who he had contacted, and determine what should be done.

Upon return to her office, Ms. Tharp sent Mr. Hughart a reply e-mail asking to discuss the issue in greater detail with him. When Mr. Hughart came to her office shortly after 1:00

p.m., she asked for more explanation. They went back and forth on the issue of market pricing and determined the problem involved all sides of the trade. While Ms. Tharp indicated it was good that Mr. Hughart “alerted us to his concern,” she told Mr. Hughart that they were not the appropriate people to determine whether the trade was proper or not and the problem would be turned over to the experts. Ms. Tharp expressed her concern that since they were not the experts, Mr. Hughart “should not have used the type of expression he did in his e-mail.” At first, Mr. Hughart did not see what was wrong with the e-mail because he thought it was his job to investigate such activities and bringing them to his manager’s attention in the way that he did. He believed he was now getting into trouble for bring the issue to the managers’ attention. Ms. Tharp disagreed; she was receptive to his investigation of issues. However, she did not like his failure to let Ms. DuFaux or herself work with him to help their understanding of issues. Instead, he had arrived at “conclusions accusatory in nature.”

Mr. Hughart believed that Ms. Tharp had misinterpreted his intent and was surprised that they were so far apart “on what he thought he was doing.” She replied that the “essence” of the problem was that she had to rely on his work history to understand that his motivation was a desire to address a problematic process for the benefit of clients and not anything else. However, a third party who was unaware of his “communication style” and looking for “the negative” could have interpreted his e-mail as a statement that Raymond James was a party to the fraud and may intend to continue the practice.

Believing they remained far apart, Mr. Hughart then asked how to fix the situation and asked whether Ms. Tharp wanted him to resign. Ms. Tharp summarized her response as follows:

I said that though I would hate to lose a valuable associate, I considered his communication style a liability to the firm and that since he had such a long history of his managers trying to get him to understand that – that if he didn’t resign and upon review of this or the next such misrepresentation, that I would need to terminate him, so I was leaving the next step up to him at this moment.

Mr. Hughart then asked how else the situation could be remedied. He suggested that he could stop using e-mail. Instead, he would discuss his concerns with his managers in person. Ms. Tharp thought the direct communication was a good idea, but she did not want to dictate that he couldn’t use e-mail because it “could later be interpreted incorrectly.”

According to Ms. Tharp, “we seemed at an impass [sic].” She suggested they both think about their conversation over the weekend. Meanwhile, she intended to talk with Mr. Blain about Mr. Hughart’s limited partnership shares trading issue concern in order to fix any problem.

Around 5:15 p.m., Mr. Hughart came to Ms. Tharp’s office with his letter of resignation. After she read it, Ms. Tharp asked if he was sure he wanted to do this. Mr. Hughart replied that he was leaving it up to her. For unemployment purposes, he preferred that she fire him. Whatever she decided, Mr. Hughart asked Ms. Tharp to leave him a message at his home before he had to come in on Monday morning. Ms. Tharp then summarized, “I said John, if your [sic] giving me your resignation, then your [sic] giving me your resignation. He shrugged his shoulders and said his personal items were packed. Then left.”

Ms. Tharp then called Mr. Blain and updated him about their conversations and told him about the resignation. Mr. Blain indicated that it was “for the best and agreed that I just accept it.” Ms. Tharp then went to see Mr. Hughart since he usually didn’t leave until 5:30 p.m. However, he was gone. “A brief scan of his desk led me to believe he indeed didn’t intend to come back.” Ms. Tharp looked up his home telephone number, called the number, and left a message on the answering machine indicating that she had accepted the resignation.

In a supplemental annotation, Ms. Tharp reported that on October 27, 2002, Mr. Hughart called her at home to find out if he should report to work. She confirmed her acceptance of his resignation letter and that he did not need to report to Raymond James on Monday. Ms. Tharp wished him well. Mr. Hughart replied that the situation wasn’t her fault and she should not feel bad, “that it was him.”

#### Sworn Testimony of Ms. Christine Tharp

Ms. Tharp is the vice president of retirement plan services at Raymond James. At one point in time, she directly supervised Mr. Hughart. She has worked for Raymond James for about 20 years. She reports to Mr. Bob Blain, who reports to Mr. Tom Tremaine. Both Mr. Blain and Mr. Tremaine work for Raymond James & Associates, Inc., as does Mr. John Nolan, senior vice president in securities processing, and Mr. Dennis Zank, now President of Raymond James & Associates. During Mr. Hughart’s tenure with Raymond James, Mr. Zank served as an Executive Vice President of RJF. (TR at 353-354).

On November 16, 2001, Ms. Tharp participated in a meeting with Mr. Blain, Ms. DuFaux and Mr. Hughart to review the Canadian tax withholding findings that Mr. Hughart had made and determine a course of action. The meeting came about because Mr. Blain received a call from the supervisor of the Dividend Department who was concerned about the way Mr. Hughart was handling the investigation into the Canadian tax withholding issue.

Mr. Blain conducted the meeting, which began with Mr. Hughart providing an explanation of the issue. Soon thereafter, Ms. Tharp tried to state her understanding of the issue but Mr. Hughart kept interrupting her. Then, Mr. Blain started asking questions about the withholding requirements and followed up by questioning the manner in which Mr. Hughart disseminated the information he had obtained, specifically inquiring about why he brought the information directly to the Dividend Department rather than to his supervisor. Mr. Hughart did not respond to Mr. Blain’s procedural concerns; he just “reiterated that it was the right course of action to obtain these refunds and to require the Dividend Department to expend this time.”

The meeting ended with Mr. Blain stating that he would work with the senior vice president in the dividend area, John Nolan, and the dividend vice president, Heather Piesner, to review Mr. Hughart’s findings and determine how to proceed on the issue. Mr. Hughart no longer needed to play a role in the matter unless someone asked him for further information. Mr. Hughart was not reprimanded for the substance of his findings but he was basically reprimanded for taking the information directly to the Dividend Department. (TR at 355-60).

After her October 25, 2002 meeting with Mr. Hughart, Ms. Tharp wrote down notes about the meeting. (RX 6). In their conversation, Ms. Tharp did not make any statement concerning the difficulty of firing Mr. Hughart. Instead, she started the meeting by asking Mr. Hughart to help her understand the substance of his e-mail regarding the problem with the limited partnership share trades and the alleged fraud to which he was alerting her. She first told him, "I want to understand what you wrote in this email." He proceeded to explain that a fraud was occurring. She asked for further explanation and Mr. Hughart responded by explaining how the trades were happening on the OTC market and why they should not be taking place in that forum. Ms. Tharp told Mr. Hughart that it was not her or his place as employees in the retirement services area to dictate where trades should or should not take place. There was an impasse between them at the end of the meeting because Mr. Hughart stood firm in his position that the trades were inappropriate, and Ms. Tharp did not think an assessment could be made so quickly without more information. The meeting lasted more than half an hour and took about an hour (TR at 361-366).

During the meeting, Mr. Hughart seemed deflated by her questioning of his research. Then the conversation centered on the manner in which Mr. Hughart conveyed his concerns in the e-mail. Ms. Tharp was concerned about the title of the e-mail, "fraud alert," which seemed to implicate Raymond James in a criminal scheme. When she asked Mr. Hughart if he felt that Raymond James was a part of the fraud, he said no, but he believed if Raymond James continued to participate, they would be perpetrating a fraud. Ms. Tharp explained that she understood he was attempting to bring attention to a serious matter; however, a third person reading the e-mail might interpret the e-mail as an assertion that Raymond James was participating in a fraudulent scheme. Though the e-mail was addressed only to Ms. Tharp and Ms. DuFaux, all e-mails are archived and subject to review by others. (TR at 366-369).

After Ms. Tharp explained her concerns regarding the tone of the e-mail, Mr. Hughart indicated that he did not believe Raymond James was actually participating in the fraud. However, he used the term to bring attention to the substance of his e-mail. Towards the middle of the conversation, she told Mr. Hughart that "using sensational language to convey an important point that wasn't accurate was improper, and that I couldn't allow him to miscommunicate these issues with this....style." She went on to say further communications with this style may lead to his termination. Mr. Hughart offered not to use e-mail as a form of communication as an alternative but Ms. Tharp did not want to restrict his access to an important tool. (TR at 369-371).

Around 5:00 p.m. that day, October 25, 2002, Mr. Hughart came back to Ms. Tharp's office and handed her his letter of resignation. Ms. Tharp asked him if he was certain that he wanted to do this and he stated that he wanted her to think about it over the weekend. She replied, "Your giving me this is telling me that you're resigning. I think you're the one that needs to think about it over the weekend." He then indicated that maybe it would be better if he were fired, to which Ms. Tharp responded, "Well, I'm not firing you. Are you giving me your resignation?" She then stated that if he left the resignation letter with her, that meant he had resigned. He left the letter on her desk and left the office. (TR at 371-372).

Ms. Tharp contacted her supervisor and then went to Mr. Hughart's cubicle to see if he was still there. He was not. At that time, about 6:00 p.m., she placed a call to him at home to confirm that he had submitted his resignation and that she was accepting it. He didn't answer so she left a message indicating that she had received his letter of resignation and had accepted it. She took these extra measures because of Mr. Hughart's demeanor upon leaving her office. He had shrugged his shoulders, suggesting the decision on whether he had resigned was up to her. However, she wanted to emphasize that the decision belonged to him and that if he left the resignation letter with her, she would accept it. She wanted to reconfirm with Mr. Hughart that he had resigned and she was accepting the resignation; she left him a phone message to that effect. She wanted him to really understand what was happening. Ms. Tharp accepted the resignation because it was offered to her.

Ms. Tharp made some notes on the resignation letter Mr. Hughart handed to her. She noted, "Accepted C. Tharp." She also wrote Mr. Hughart's number in the left corner where she had tried to reach him. There were also a few notes Ms. Tharp made on October 27, 2002, when Mr. Hughart called to find out whether his resignation had been accepted. Ms. Tharp told him that he had resigned and she accepted the resignation. At that time, she did not give him the opportunity to renege on his resignation as she was willing to do on Friday evening when she had called him. She was surprised to hear from him on Sunday since she told him she accepted the resignation on Friday and left a message indicating the same Friday evening.

When Mr. Hughart left her office on Friday evening, Ms. Tharp does not think that he understood that she was accepting his resignation. When he first presented his resignation, Mr. Hughart stated she should think about it over the weekend, but Ms. Tharp replied that he was the one who should think about it. She did not ask him on Sunday morning whether he still intended to resign because she had already told him that by walking away and leaving the letter of resignation with her, he was effectively resigning. Yet, on Friday, when Mr. Hughart first left his resignation letter with her, Ms. Tharp felt the need to get reassurance from Mr. Hughart that he intended to resign. She never reached him. By Sunday, when they had their next exchange, she was no longer willing to give him the opportunity to indicate he was not really resigning. Ms. Tharp was okay with never finalizing Mr. Hughart's desire to resign because she rethought the need to contact him after considering how the conversation ended on Friday. (TR at 372-381).

[Cross examination] The first page of the notes (RX 6) that Ms. Tharp took in reference to the October 25, 2002 meeting had to do with the "fraud alert" e-mail, not the meeting that took place between Mr. Hughart and herself. The notes state that she took the e-mail to her supervisor, Mr. Blain, immediately after receiving it, before meeting with Mr. Hughart. Ms. Tharp interpreted the line from the e-mail stating that Raymond James has some liability/responsibility to mean that Raymond James is a party to the fraud. Ms. Tharp believed that Mr. Hughart intended for the e-mail to be shared with someone other than Ms. DuFaux and herself, the only addressees. Ms. Tharp figured that Mr. Hughart wanted her to act on the information, which would involve sharing the e-mail with others. Ms. Tharp could have used other means to communicate the information contained in the e-mail to another person with whom she wanted to share since she believed the e-mail was written badly. She was concerned with a third party reading the e-mail because company e-mails were business property and could

not only be read by other employees and forwarded to anyone but also subpoenaed in other forums such as a SEC or NASD investigation. She had no knowledge of an investigation occurring at that time but knows that Raymond James operates in a highly regulated industry. (TR at 382-388).

At the October 25 meeting, Ms. Tharp used the words, “terminate” and “fire.” However, Ms. Tharp did not have any impression that Mr. Hughart thought she was going to fire him when the meeting ended. Later, while Ms. Tharp was not confused about Mr. Hughart’s intention to resign, she was concerned that he didn’t understand that she was accepting his resignation. (TR at 388-389).

Ms. Tharp has some knowledge about the SEC investigation that was taking place regarding mutual funds with one of RJF’s entities. While she is not sure, Ms. Tharp believes the investigation involved Raymond James Financial Services. At the time of Mr. Hughart’s termination, Mr. Dennis Zank was an Executive Vice President at Raymond James and also sat on RJF’s Board of Directors. (TR at 390-392).

Mr. Hughart may have met with Ms. DuFaux the week before the November 16, 2001 meeting with Mr. Blain, Ms. DuFaux and Ms. Tharp because of complaints she had received from the Dividends Department about Mr. Hughart’s process of investigation into the issue. When Mr. Hughart first started working as an operations specialist, after researching his first assignment concerning the federal tax withholding issue, he presented creative alternatives for reconciling the general ledger. (TR at 392-396).

In 1998, when the unclaimed property issue first arose, Mr. Hughart and Ms. Tharp had a meeting regarding the results of his investigation. He presented his belief that the firm had an obligation to retrieve the unclaimed funds on behalf of their clients because they were in Raymond James’ name and not the name of the beneficial client. Ms. Tharp believes that the clients were aware or should have been aware that the Canadian tax withholding was being taken from their proceeds because Raymond James furnished the clients with statements indicating such withdrawals. She did not then know whether the withholding was correct or not. On occasion, she has received inquiries from clients or their financial advisors about how to reclaim the withheld funds and she has provided information about the reclamation process. Ms. Tharp believed the company was correctly informing clients about how to reclaim funds, however the process has been changed since that time. Because of Mr. Hughart’s investigation and the Dividend Department’s ability to learn how to utilize the DTC system, the company is now able to avoid taxes being withheld on exempt shares. Before the change in policy, Ms. Tharp was not aware of that procedure to avoid the withholding tax. In the years prior to 2001 when this issue was brought to the forefront, Canadian taxes were being withheld to some extent. (TR at 397-402).

Ms. Tharp did not express disapproval of Mr. Hughart’s investigative activities into the escheatment of property to Ms. DuFaux. However, she did tell Ms. DuFaux that she did not want the responsibility of combing state sites for all of the firm’s unclaimed funds. What made Ms. Tharp unhappy about Mr. Hughart’s activities was the burden placed on her department

when he discovered unclaimed funds of a client who was not actually a client of her department. (TR at 402-403).

Though the mission statement of Raymond James (which is signed by each employee) included service to clients, each department was responsible for their portion of the mission. Each department could only take responsibility for that portion of the firm's business they were assigned to operate. It was possible that a client could be unaware that some of their funds had escheated to the state. Raymond James' obligation to its clients extends only to the funds that they actually hold for them. Ms. Tharp does not know whether Raymond James had an obligation to inform its clients that it was aware that the state of Florida may be holding property in the client's name. (TR at 404-410; CX 28).

After Ms. Tharp became aware of the property escheatment issue, she passed the information on to Mr. Blain, who she believes reviewed it with Mr. Tremaine. She understood that upon review, they concluded that the practice that was in place was sufficient. She does not know what mechanisms were in place to recover unclaimed funds but believes that it was being done in some capacity. Ms. Tharp remembers being asked about the PLM partnership issue in the context of an \$800 loss before receiving the fraud alert e-mail. Previously, she did not remember knowing about the issue or having any understanding of the issue. (TR at 410-413).

During the exchange between Mr. Hughart and Ms. Tharp at the October 25, 2002 meeting, Ms. Tharp did not agree with Mr. Hughart that the OTC was an improper forum for limited partnership trades. The limited partnership trade that Mr. Hughart had brought to Ms. Tharp's attention through the fraud alert e-mail was never actually delivered. It was canceled at no cost to the client or the firm but Ms. Tharp does not know why it was canceled. Although some "master limited partnerships" continue to be traded in that forum, Raymond James does not allow Krupp partnerships (which was the subject of the "fraud alert" e-mail) to be traded. If you had no negotiable certificate to deliver within the three day time period required with OTC trading, you would not be able to participate in it. The problem of having no certificate could result from either Raymond James not having possession of the certificate or there not being a certificate issued with the limited partnership. (TR at 413-417).

Ms. Tharp is not aware of whether Raymond James reclaimed any of the funds withheld by the Canadian government during the years 1999, 2000, and 2001 or whether that information was disclosed to the clients affected. (TR at 417).

[ALJ examination] Ms. Tharp met Mr. Hughart when he transferred to the retirement services area in 1996. At that time, she was his supervisor. After Ms. Tharp was no longer Mr. Hughart's supervisor, she continued to review Mr. Hughart's performance appraisals, which were conducted by his direct supervisor. Ms. Tharp characterized his job performance as good but noted an area of improvement which required work was communication. Mr. Hughart had problems communicating with managers and associates in other departments. When he discovered a problem, he did not allow the manager to take ownership of the problem and deal with how to proceed. If Mr. Hughart was unsatisfied with the resolution of an issue he raised, he should have continued to communicate these concerns to his manager, even after the problem was taken out of his hands. (TR at 417-420).

Ms. Tharp began as a supervisor 14 years ago and is currently a vice president. She has received about six letters of resignation and has never declined to accept one. After she received the e-mail from Mr. Hughart on October 25, before meeting with him, she took it to Mr. Blain, her manager, to get his assessment of the e-mail. Mr. Blain concurred that Mr. Hughart thought that Raymond James had done something wrong.

Raymond James subscribed to a team approach, which involved the development of a unified mission statement and making an effort to have all associates obtain a common understanding, so that everyone understands one another and is working towards the same goal. Empowerment, meaning giving employees enough education to make decisions, was encouraged at Raymond James. The November 2001 meeting, which ended with Mr. Blain telling Mr. Hughart that he was no longer to be involved in the recovery of foreign taxes was consistent with Raymond James team work approach because senior management reviewed his findings, tried to educate themselves and then worked with the Dividend Department to resolve the situation. Ms. Tharp knows that the Dividend Department tried to recover withheld funds for 2000 but does not know whether they attempted to retrieve the 1999 funds. (TR at 420-424).

Ms. Tharp was not surprised when Mr. Hughart returned to her office at 5:15 p.m. on October 25 and presented his resignation because they had a heated exchange during their meeting earlier in the day. Specifically, as she tried to explore and better understand the problem he presented, Mr. Hughart became angry. In response, Ms. Tharp got frustrated because she was unable to probe the situation. Ms. Tharp and Mr. Hughart had not had heated exchanges about the foreign tax or escheated property issues. Their heated conversation on October 25, 2002 led to a discussion about the tone of Mr. Hughart's e-mails. At that point, she asked him to improve his method of communication. Mr. Hughart appeared to be surprised that they were talking on two different planes. Previously, they had generally been in synch with each other but during this meeting he stated that he was blown away by the fact that we weren't in sync. That situation appeared to be "very devastating to him." Because Mr. Hughart was a valuable resource, Mr. Blain was disappointed when Ms. Tharp told him that he had resigned. Yet, because it was the "only" resolution, acceptance of the resignation was a good solution. (TR at 424-427).

At the October 25th meeting, Ms. Tharp neither threatened to fire Mr. Hughart nor told him that she would think about whether to fire him over the weekend. (TR at 427).

[Redirect examination] The Securities Processing Department is best suited to address issues regarding whether dividends get paid and how best to channel them. Mr. Hughart had difficulty accepting someone challenging his conclusions about the investigations he conducted. After the October 25th meeting, Ms. Tharp felt that she and Mr. Hughart had come to an impasse and this influenced her decision to accept his resignation. (TR at 428-429).

[Re-cross examination] Ms. Tharp was not offended by Mr. Hughart's research but believed that he expected her to accept his research without investigation of her own. In his May 20, 2002 performance review, Mr. Hughart received a 3.7 score for his communication skills, which means that he exceeded expectations. (TR at 429-432; CX 9).

### Sworn Testimony of Ms. Barbara Galloway

Ms. Galloway is the managing human resources partner. She has worked for Raymond James for 18 years. Ms. Galloway came into contact with Mr. Hughart around August 2002 to deal with an issue regarding the health insurance coverage for his college-age daughter. The issue had been referred to Ms. Galloway because Mr. Hughart had become combative with another associate attempting to address the issue. Ms. Galloway and Mr. Hughart exchanged a few e-mails and then met face-to-face on multiple occasions. Ms. Galloway was able to successfully resolve Mr. Hughart's insurance concerns. During their meetings, Mr. Hughart expressed his concerns about some of the insurance policies being discriminatory against divorced parents. She does not remember other issues they discussed except for having a vague recollection of Mr. Hughart generally expressing frustration with his job. (TR at 433-437).

[Cross examination] It is possible that Mr. Hughart discussed specifics regarding the tax withholding issue with Ms. Galloway but she does not recall. (TR at 438-439).

[ALJ examination] Ms. Galloway may have discussed Mr. Hughart's frustrations with the insurance policy with one of his supervisors but she did not discuss his general job frustrations with anyone. (TR at 439).

## **FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

### **Stipulation of Fact**

Based on the Respondent's admission, I find that Mr. Hughart had a reasonable belief that violations of securities law occurred in three areas: the withholding of federal tax on foreign custodial accounts, escheatment (unclaimed property) actions involving the state of Florida, and limited partnership share trades (TR, pages 23 and 24).

### **Specific Findings**

Based on the evidence in the record and the probative sworn testimony, I make the following findings of fact.

September 16, 1991. Mr. Hughart returns to work at Raymond James, where he had been previously employed for an eleven month period in 1979 and an eight month period in 1981. He works for Raymond James & Associates, the subsidiary of Raymond James Financial, Inc., as a mutual fund associate. At that time, and continuing, Raymond James Financial, Inc. (RJF) is a public holding company with shares traded on the New York Stock Exchange and Raymond James & Associates, Inc., (Raymond James) is one of its wholly-owned subsidiaries.

1996. Mr. Hughart transfers to the retirement plan services area at Raymond James as an assistant supervisor. Soon thereafter, he becomes a supervisor over new accounts and cashiering. However, in 1998, being disenchanted with the supervisor responsibilities and lack of resources, Mr. Hughart makes a lateral move to the position of senior operations support specialist.

Late 1998 through 1999. Ms. Chris Tharp, Mr. Hughart's supervisor, asks him to look into the recovery of unclaimed property for a particular client. Upon investigation, Mr. Hughart discovers that property belonging to many of Raymond James' clients has been unclaimed and escheated to the state of Florida because the funds are listed under the name of Raymond James rather than the names of the clients. Believing Raymond James has an obligation to restore the unclaimed funds to its clients, Mr. Hughart discusses the situation with Ms. Tharp and advocates for the recovery of the funds. In response, Ms. Tharp is concerned about whether her department has the resources to engage in a recovery effort. However, she agrees that Mr. Hughart can attempt to return unclaimed property to clients of Raymond James. Sometime in 1999, Ms. Lisa DuFaux replaces Ms. Tharp as Mr. Hughart's supervisor. Eventually, Ms. DuFaux raises a concern about the amount of effort Mr. Hughart is expending in the pursuit of the unclaimed property. As Mr. Hughart completes other tasks, he returns to identifying and recovering clients' unclaimed property. Over the course of the next few years, Mr. Hughart recovers between \$30,000 and \$40,000 in unclaimed property of Raymond James' clients.

June and summer 2001. Due to a client inquiry, Ms. DuFaux asks Mr. Hughart to research why Raymond James was allowing foreign tax to be withheld on custodial accounts which may have been exempt from such withholding. Through his research, Mr. Hughart discovers that Raymond James has been permitting the withholding and payment of Canadian taxes. Due to a treaty between Canada and the United States, some of Raymond James' custodial accounts were exempt from such tax withholding. Mr. Hughart concludes that Raymond James has permitted improper tax payments to the Canadian government for the previous 13 years. Additionally, Mr. Hughart determines that the withheld taxes could only be recovered for the current year and the previous two years. Mr. Hughart contacts the Dividend Services Department of Raymond James to identify the affected accounts, preclude further withholding, and recover the previously withheld foreign taxes.

November/December 2001. After Mr. Bob Blain, a senior vice president and the supervisor of Ms. Tharp and Ms. DuFaux, receives a complaint from the Dividend Services Department about Mr. Hughart's contacts, he conducts a meeting with Mr. Hughart, Ms. DuFaux, and Ms. Tharp in mid-November 2001.<sup>15</sup> At that time, Mr. Hughart explains the improperly withheld foreign tax issue and describes his efforts to fulfill the company's fiduciary duty to its clients to aggressively seek recovery of the improperly withheld taxes. Mr. Blain acknowledges the potential seriousness of the withheld foreign tax issue. He does not fault Mr. Hughart for identifying and developing the withheld foreign tax issue. However, Mr. Blain criticizes Mr. Hughart's decision to take the problem directly to another department in the company without first sending the issue to his supervisors. Believing Mr. Hughart has overstepped his bounds, Mr. Blain expresses his dissatisfaction with the way Mr. Hughart attempted to dictate policy to another department, indicating it was not Mr. Hughart's job to tell the other department what they were supposed to do and how they were to handle the situation. Mr. Hughart responds that he took the action because he believed recovery of the improperly withheld taxes for the benefit of the clients was the right thing to do. After this meeting, Ms. DuFaux takes Mr. Hughart off of this project and the issue is referred to the Dividend Services Department.

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<sup>15</sup>The exact date of the meeting is unclear from the testimony.

Also, a few days after the meeting, in an e-mail, Mr. Blain commends Mr. Hughart for his hard work and diligence on the withheld foreign tax issue.

On December 26, 2001, while no longer assigned to the project, Mr. Hughart learns that Raymond James may not attempt to file a timely claim to recover withheld taxes by year end. Such inaction would make the taxes withheld in 1999 unrecoverable. Mr. Hughart informs Ms. DuFaux that he believed the company has a responsibility to file something to preserve recovery of funds withheld in 1999; however, the task is not accomplished at the close of the year.

Summer 2002. Having been reassigned to the task of recovering client property that had escheated to the state of Florida, Mr. Hughart discovers Raymond James has already reclaimed the funds but the money has not been distributed to the clients. After Mr. Hughart identifies the appropriate clients, he is given the responsibility to distribute the funds.

Mr. Hughart learns that a client suffered an \$800 loss because Raymond James had to cancel a trade and buy back shares of a limited partnership that had been traded over the counter. Based on his research, Mr. Hughart realizes that the problem is more widespread and finds that Raymond James is allowing limited partnership shares to be traded on the OTC market where they could not be validly traded in some circumstances. This situation required the company to pay a premium to cancel the trade. Mr. Hughart becomes concerned that someone is using this process to commit some type of fraud.

October 2002. On October 8, 2002, Mr. Hughart signs up to attend a company sponsored dinner to be held on October 29 with RJF executives. The dinner's theme is company ethics and Mr. Hughart intends to present his concerns to senior management about the various securities violations he believes the company has committed and ignored.

By October 2002, Mr. Hughart had discovered that once again the Dividend Services Department planned to let the year expire without filing a claim for the improperly withheld foreign taxes. During a mid-October 2002 meeting with Ms. Barbara Galloway, a vice president for human resources, to discuss a family insurance matter, Mr. Hughart tells Ms. Galloway about the withheld foreign tax problem and his frustration with the inaction concerning recovery. Afterwards, while Ms. Galloway may have discussed the family insurance problem with Mr. Hughart's supervisor, she tells no one about his other job frustrations.

On October 21, 2002, Mr. Hughart also informs Ms. DuFaux that he has not heard back from an individual that he contacted in July 2002 about the status of the recovery efforts concerning the withheld foreign taxes.

On October 24, 2002, when attempting to resolve a problem with a displaced check, Ms. Tharp asks Mr. Hughart whether the check was related to his efforts concerning abandoned property.

October 25, 2002, Friday morning. Around 10 a.m., Mr. Hughart e-mails Ms. Tharp to alert her about his concerns about the over-the-counter limited partnership share trades. He

entitles the e-mail, “fraud alert” and refers to the situation as a “scam.” Mr. Hughart expresses his belief that Raymond James has some liability and responsibility in the matter.

When Ms. Tharp receives the e-mail, she has several reactions. First, Ms. Tharp decides she needs more information from Mr. Hughart about the limited partnership share trade issue. Second, she is aggravated because she had not previously heard about the issue in terms of fraud. Third, Ms. Tharp is frustrated by Mr. Hughart’s use of accusatory language in the e-mail which she considers another occurrence of Mr. Hughart making a value judgment before permitting managers to work on the issue.

Concerned about her reactions, Ms. Tharp discusses the communication with Mr. Blain. He shares her interpretation of the e-mail and concern about Mr. Hughart’s communication style. At the same time, he encourages Ms. Tharp to focus on the limited partnership trade issue presented in the e-mail. As a result, in a subsequent e-mail reply, Ms. Tharp asks to see Mr. Hughart that afternoon about the limited partnership trade problem in order that she might understand his conclusions.

October 25, 2002, 1:00 to 3:00 p.m. [[Mr. Hughart and Ms. Tharp presented credible, though slightly different, accounts of the events that occurred in the afternoon of October 25, 2002. In resolving any differences, I have given greater probative weight to the notes prepared by Ms. Tharp between October 25 and 27, 2002 due to their contemporaneous nature.<sup>16</sup>]]

Between 1:00 and 2:00 p.m., Mr. Hughart meets with Ms. Tharp for about a half hour to an hour. On the issue of the limited partnership share trades, Mr. Hughart explains that the trades are improper and expresses his belief someone is benefiting from the transactions. Noting that she and Mr. Hughart work in retirement services and are not experts on the propriety of the limited partnership trades, Ms. Tharp believes they are not the appropriate parties to conclude the trades are improper. Mr. Hughart disagrees, claiming they know whether such trades are legitimate.

As Mr. Hughart and Ms. Tharp continue to disagree and argue about the characterization of the trades, Ms. Tharp turns to Mr. Hughart’s use of the term “fraud” in his e-mail. While indicating that raising the trade issue was good, Ms. Tharp again stresses that Mr. Hughart is not an expert in the area and tells him that he should not have broadcast his conclusion about fraud in his e-mail. She objects to the tone of his e-mail.

Caught off-guard by her apparently angry reaction to his e-mail, Mr. Hughart states that he didn’t mean Raymond James was engaged in fraud; it would only become a problem if once being aware of the trade issue, Raymond James permitted the practice to continue. He doesn’t really understand Ms. Tharp’s response and tells her that he was just doing his job of investigating an issue and making managers aware of the situation. Now, he appears to be getting into trouble for attempting to accomplish his work.

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<sup>16</sup>I have considered whether the notes were produced much later than October 25-27, 2002. However, I consider various aspects of the notes, including the structure, hurried writing style, terse construction, contractions (“s/b” for “should be”) and occasional crossed-out correction, indicative of its purported contemporaneous nature.

Ms. Tharp replies that he is not an expert on the matter. She expresses her concern that other persons might misinterpret his e-mail communication as an accusation that Raymond James was engaged in fraud.

Surprised they are so far apart on what he was trying to do, Mr. Hughart asks what can be done to correct the situation and asks whether Ms. Tharp wants him to resign. Ms. Tharp responds that it would be difficult to lose Mr. Hughart because he is a valuable associate and nice guy. However, she adds that his communication style has become a liability for Raymond James. Additionally, Mr. Hughart had a long history of not responding to supervisors' efforts to get him to understand the problem with his use of sensational and inaccurate language to gain attention. Ms. Tharp indicates that she can not permit him to use that manner of miscommunication. She tells Mr. Hughart that if he chose not to resign, she would have to consider the present e-mail and decide what to do; and, any future misrepresentation would lead to his termination.

As a possible solution, Mr. Hughart offers to communicate directly with managers and supervisors rather than use e-mail. Not wanting to restrict Mr. Hughart's use of e-mail, Ms. Tharp does not believe that alternative will work. Believing they are at an impasse, Ms. Tharp suggests they think about their conversation over the weekend. In the meantime, she will discuss the problem concerning limited partnership trades with Mr. Blain.

October 25, 2002, 3:00 p.m. to 6:00 p.m. As he leaves his confrontational meeting with Ms. Tharp, Mr. Hughart is stressed, confused, and uncertain whether he still has a job. Believing his termination is imminent, he decides to resign for several reasons. First, based on Ms. Tharp's reaction to his e-mail, Mr. Hughart feels that his management team has abandoned him and will no longer reciprocate his loyalty. Second, he dislikes the stress associated with the meeting and sees his resignation as a means to bring the conflict to an end. Third, while resignation may preclude unemployment benefits, Mr. Hughart is also concerned about the effect a termination action will have on his re-employment efforts.

Mr. Hughart prepares his short resignation letter and packs his personal property in the cubicle. When a co-worker asks how he is doing, Mr. Hughart replies that he thinks he is going to be fired.

Around 5:00 p.m., Mr. Hughart returns to Ms. Tharp's office and gives her his resignation. After she reads the letter, Ms. Tharp asks Mr. Hughart if he is sure that he wants to take the resignation action. Mr. Hughart states that he is leaving the decision up to her and asks that she leave a message over the weekend about his employment status. Ms. Tharp tells Mr. Hughart that if he is going to give her his resignation that she'll consider it a resignation. Mr. Hughart shrugs his shoulders, states he's packed his personal items, and leaves.

After Mr. Hughart leaves, Ms. Tharp discusses the transactions with Mr. Blain. Mr. Blain believes Mr. Hughart's resignation is the best resolution of the problem and agrees that Ms. Tharp should accept it. Later, when Ms. Tharp passes by Mr. Hughart's desk, she notices that it has been cleaned out. Ms. Tharp calls Mr. Hughart's home phone number and leaves a telephone message stating that she has accepted his resignation.

October 25, 2002, early evening. When Mr. Hughart arrives at Ms. Jackson's residence he places a box of his personal property in her garage. He is distraught and tells Ms. Jackson that Ms. Tharp was going to fire him after thinking about it for the weekend. Since he didn't want to be fired and have that on his resume, he gave Ms. Tharp his resignation so she could choose what to do. Mr. Hughart believes that if Ms. Tharp decided to fire him, she could use his resignation; otherwise he might go back to work on Monday. He was uncertain whether Ms. Tharp would fire him, accept his resignation, or do neither.

On his last day with Raymond James, Mr. Hughart's salary was approximately \$36,000 a year; additional benefits raised his total annual compensation to \$42,000.

October 27, 2004, Sunday. Mr. Hughart calls Ms. Tharp to find out whether he still had a position with Raymond James. Ms. Tharp tells Mr. Hughart that she has accepted his resignation and he doesn't have to report to work. Mr. Hughart states that he doesn't blame Ms. Tharp and indicates it was him.

October 29, 2004. Mr. Hughart writes a letter to RJF's CEO, Mr. Thomas James, to inform him of his "encouraged resignation" and his concern about several "fiduciary integrity issues." Specifically, Mr. Hughart wants to ensure that the issues he discovered during his tenure, including foreign tax withholding, unclaimed property escheatment and improper trades of limited partnership shares, remain in the limelight and are addressed.

### **Issue #1 – Motion to Dismiss**

Prior to the hearing, counsel for Respondent submitted a Motion to Dismiss Mr. Hughart's claim because Raymond James is not an entity subject to the provisions of the Sarbanes-Oxley Act. In response, Mr. Hughart objected to the Motion to Dismiss alleging in part that the parent corporation, Raymond James Financial, Inc. (RJF), is subject to SOX and permitted the practices that were the subject of some of his whistle blowing activities. Additionally, he asserts that part of his compensation came from the parent corporation and other indicia of an employment relationship between himself and RJF existed. As previously stated, I deferred a decision on the motion until after the hearing in order to develop evidence on the relationship between Raymond James & Associates and Raymond James Financial.

The Respondent's motion represents a jurisdictional challenge. Although 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, does not contain a section pertaining to such a motion to dismiss, 29 C.F.R. § 18.1 (a) indicates that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. In turn, FED. R. CIV. P. 12 (b) (1), addresses a motion to dismiss for lack of subject matter jurisdiction. The courts recognize two approaches in considering a 12 (b) (1) motion.<sup>17</sup> The first consideration of a 12 (b) (1) motion is whether the pleading, or complaint, on its face is sufficient. In reviewing a "facial" motion to dismiss, the allegations in the complaint are considered to be true. The second consideration under 12 (b) (1) concerns a factual evaluation of the complaint. In this "factual" analysis, no presumption of truthfulness applies to the allegations in the complaint. Instead, I

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<sup>17</sup>See *Ohio National Life Insurance Co. v. United States*, 922 F.2d 320 (6th Cir. 1990).

may rely on affidavits and other documents submitted in support of the motion. Since I have developed a factual record by conducting a hearing, I will focus on the second consideration of whether sufficient evidence exists to establish that Raymond James & Associates is subject to SOX.

According to the Sarbanes-Oxley Act, 18 U.S.C. § 1514 A (a), whistleblower protection provisions apply to a company which either: 1) has a class of securities registered under section 12 of the Securities Exchange Act of 1934; or, 2) is required to file reports under section 15 (d) of the Securities Exchange Act. The named respondent in this case, Raymond James & Associates, Inc., is neither a publicly traded company with registered securities nor required to file reports under the Securities Exchange Act of 1934. Consequently, it does not appear to be subject to the employee (whistleblower) protection provisions of the Act. However, Raymond James & Associates is a wholly owned subsidiary of Raymond James Financial, Inc., which is a publicly traded corporation that satisfies the applicability criteria and is subject to the SOX provisions.

Mr. Hughart did not name Raymond James Financial, Inc., as a respondent, and is not seeking relief from the parent company.<sup>18</sup> As a result, I believe Mr. Hughart can establish the applicability of SOX to Raymond James & Associates only if the parent company and its wholly owned subsidiary are so intertwined as to represent one entity. In examining such commonality, I first note that typically a parent company is not insulated from liability for its subsidiary when the two corporate identities are used interchangeably. *United States v. Bestfoods, et. al.*, 524 U.S. 51, 61 (1998) (holding that a parent corporation could be held liable for the actions of its subsidiary where the parent significantly controls the subsidiary). *See Liability of Corporation for Torts of Subsidiary*, 7 A.L.R..3d 1343. However, liability will only be extended in an area where the parent has exerted its influence or control. *Bestfoods*, 524 U.S. at 59. Therefore, in an employment discrimination case, the parent company will only be held liable where it controlled or influenced the work environment of, or termination decision about, an employee of its subsidiary company.

In Mr. Hughart's case, there are some indicia that the identities of the Raymond James Financial and Raymond James & Associates are used interchangeably and some instances in which the parent appeared to control some operational aspects of the subsidiary. For example, as an employee of Raymond James, Mr. Hughart's employee benefits, including pharmacy benefits, health insurance, stock purchase plans and profit sharing plans, were provided by RJF. Employees of Raymond James were obligated to abide by an ethics policy that all employees under RJF were required to follow. Additionally, letterhead used by Raymond James contained both its own logo at the top of the page and the RJF logo with address at the bottom.

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<sup>18</sup>Several administrative law judges have determined that a parent company subject to SOX may be held liable under the Act for violations of the SOX whistleblower provision by its wholly owned subsidiaries. *See Gonzales v. Colonial Bank & The Colonial Bancgroup, Inc.*, 2004-SOX-39 (ALJ Aug. 20, 2004); *see also Morefield v. Exelon Services, Inc. and Exelon Corp.*, 2004-SOX-2 (ALJ Jan. 28, 2004); *see also Klopenstein v. PCC Flow Technologies Holdings, Inc. and Allen Parrott*, 2004-SOX-11 (ALJ July 6, 2004). However, the judges have found that jurisdiction under SOX only extends to the parent company if the parent company is also named in the complaint. *See Powers v. Pinnacle Airlines, Inc.*, 2003-SOX-18 (ALJ March 5, 2003); *see also Gonzales*, 2004-SOX-39 (holding that publicly traded parent company could be held liable for the acts of its subsidiary after parent company was added as a Respondent and Complainant showed sufficient commonality of management and purpose).

Additionally, portions of the two corporate entities were housed at the same location in St. Petersburg, Florida.

At the same time, while many of the employment benefits provided to employees of Raymond James appear to have come directly from RJF, over evidence shows a separation of the two corporations in regards to their employees. For example, Mr. Hughart's paychecks were issued by Raymond James and there is no evidence that the funds of the two entities were commingled. Additionally, nearly all the workers Mr. Hughart had contact with on a day-to-day basis were employees of Raymond James. Finally, and most significant, all the supervisors who directed Mr. Hughart's work were employees of Raymond James. During his tenure with Raymond James & Associates, Mr. Hughart only very occasionally came into contact with employees of RJF. One instance was presented in the record where Mr. Hughart provided some information to the CEO of RJF; however, that contact arose because the CEO had requested the information in his personal capacity as a stock holder rather than as a superior of Mr. Hughart's. Thus, the individuals who supervised Mr. Hughart and the employees with whom he worked were employed by Raymond James, the subsidiary company. Mr. Hughart's direct supervisor Lisa DuFaux, her supervisor, Chris Tharp, her supervisor, Mr. Bob Blain, and his supervisor, Mr. Tom Tremaine, were all employed by Raymond James, and not its parent corporation, RJF.

Furthermore, despite the commonality of some aspects of management, there is no indication that Raymond James & Associates was acting as an agent for its parent company, Raymond James Financial, with respect to employment practices towards Mr. Hughart. *See Fike v. Gold Kist, Inc.*, 514 F.Supp. 722, 727 (ND Ala 1981). Raymond James & Associates had its own human resources department that was solely responsible for interacting with its employees. As a result, I conclude the two corporate entities had a sufficient degrees of separation such that they were not one entity for consideration of the applicability of SOX. Absent such integration and because the whistleblower protection provisions of the Act apply only to those companies with securities registered under §12 or companies required to file reports under §15 (d) of the Securities Exchange Act,<sup>19</sup> Raymond James & Associates, Inc., is not subject to the provisions of SOX. Accordingly, the Respondent's motion to dismiss Mr. Hughart SOX discrimination complaint must be granted.<sup>20</sup>

### **Case in Chief**

According to 18 U.S.C. §1514A (b) (2) (B), the applicable rules and procedures to be applied during the adjudication of a SOX whistleblower complaint are governed by 49 U.S.C. §42121 (b), which is part of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).

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<sup>19</sup>*See Flake v. New World Pasta Co.*, ARB No. 03-126 (ARB Feb. 25, 2004).

<sup>20</sup>Although I am granting Respondent's motion to dismiss, I will still adjudicate the case on its merits. Because the Sarbanes-Oxley Act was only recently enacted, applicable precedent is almost non-existent. Therefore, for purposes of judicial efficiency, should this case be allowed to proceed beyond the jurisdictional hurdle on appeal, the case will have been adjudicated in its entirety.

Under 42 U.S.C. § 42121 (b), as applied by 18 U.S.C. § 1514A, and 29 C.F.R. §1980.102, to establish that a respondent has committed a violation of the employee protection provisions of SOX, a complainant must prove by a preponderance of the evidence that an activity protected under SOX was a contributing factor in the unfavorable personnel action alleged in the complaint. Courts have defined “contributing factor” as “any factor which, alone, or in connection with other factors, tends to affect in any way” the decision concerning the adverse personnel action, *Marano v. U.S. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993). The activities protected under 18 U.S.C. § 1514A (1) include providing information to a federal regulatory or law enforcement agency, any member of Congress, or a person with supervisory authority over the employee regarding any conduct the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (security fraud), or any rule or regulation of the Securities and Exchange Commission (“SEC”) or any provision of federal law relating to fraud against the shareholders.

Based on these principles, to establish a violation of SOX, a complainant must prove three elements: 1) he engaged in a protected activity; 2) he was subjected to an unfavorable personnel action; and 3) his protected activity was a contributing cause for the unfavorable personnel action.

### **Issue #2 – Protected Activity**

The first requisite element to establish illegal discrimination against a whistleblower is the existence of a protected activity. The Secretary, U.S. Department of Labor, (“Secretary”) has broadly defined protected activity as a report of an act, which the complainant reasonably believes is a violation of the subject statute. Although the allegation need not be ultimately substantiated, the complaint must be “grounded in conditions constituting reasonably perceived violations.” *Minard v. Nerco Delamar Co.*, 92 SWD 1 (Sec’y Jan. 25, 1995), slip op. at 8. The alleged act must also at least “touch on” the subject matter of the related statute. *Nathaniel v. Westinghouse Hanford Co.*, 91 SWD 2 (Sec’y Feb. 1, 1995), slip op. at 8-9; and *Dodd v. Polsar Latex*, 88 SWD 4 (Sec’y Sept. 22, 1994).

The implicit purpose of the employee protection provisions of SOX, to encourage the reporting of matters involving or related to violations of any federal law or SEC violation, regulation, or standard concerning fraud against the shareholders, also affects the scope of protected activity. 18 U.S.C. §1514A. The Supreme Court noted in a parallel statute, that the statute’s language must be read broadly because “[a] narrow hyper-technical reading” of the employee protection provision of the Act would do little to effect the statute’s aim of protecting employees who raise safety concerns. *Kansas Gas & Electric Co.*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986). Such statutes have a “broad, remedial purpose for protecting workers from retaliation based on their concerns for safety and quality.” *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984). As a result, the courts and the Secretary have broadly construed the range of employee conduct which is protected by the employee protection provision contained in nuclear and environmental acts. See *S. Kohn, The Whistle Blower Litigation Handbook*, pp. 35-47 (1990).

Although the above principles were developed in environmental and safety whistleblower cases, the underlying purpose for whistleblower protection and associated principles are readily adaptable to SOX cases. Consequently, a protected activity under SOX has three components. First, the report or action must involve a purported violation of a Federal law or SEC rule or regulation relating to fraud against shareholders. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complainant must communicate his safety concern to either his employer, the Federal Government or a member of Congress.

From the evidence presented in this case, and based on my preliminary findings of fact, Mr. Hughart engaged in three actions<sup>21</sup> which are protected activities under SOX. First, Mr. Hughart reasonably believed that Raymond James was not meeting its fiduciary obligation by failing to take sufficient steps to protect its clients' unclaimed property from being escheated to the state of Florida. Second, through his investigation, Mr. Hughart reasonably determined that Raymond James was improperly permitting the withholding of foreign taxes from its clients' investment funds and failing to effectively recover the improper tax payments. Third, Mr. Hughart reasonably believed that Raymond James was permitting improper over-the-counter trades of limited partnership shares that were producing losses for its clients. Accordingly, Mr. Hughart has established the first two elements of a SOX protected activity.

Concerning the remaining requisite element of a protected activity, the preponderance of the evidence also establishes that Mr. Hughart aggressively presented his concerns and efforts in all three of his protected activities to supervisors. In all three instances, there is overwhelming evidence that Mr. Hughart's supervisors knew about Mr. Hughart's protected activities because each time Mr. Hughart discovered an issue, he contacted his supervisors and engaged in comprehensive discussions with them.

In 1998 and 1999, Mr. Hughart kept Ms. Tharp advised of his work in identifying and recovering clients' escheated property. After he substantiated his research to his supervisors, they eventually gave him the authority to distribute collected funds to their rightful owners. Even after she no longer directly supervised Mr. Hughart, Ms. Tharp remained aware of his continuing

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<sup>21</sup>Mr. Hughart suggested that his request to attend a Service First dinner to be held on October 29, 2002 also contributed to his encouraged resignation. Based on his past experience as a supervisor, he believes his supervisors, Ms. Tharp and Ms. DuFaux, would have been aware that he had signed up for the dinner where he would have had access to the senior management of RJF. His termination precluded such an encounter. While I have considered his representation, I note that his act of signing up for the dinner itself was not a protected activity. Further, the record contains no evidence that Mr. Hughart informed any of his supervisors of his intention to raise his concerns with senior management. Also, as Mr. Hughart acknowledged, his resignation did not preclude his raising his concerns to Mr. James in the October 29, 2002 letter (RX 4).

Additionally, Mr. Hughart's letter to RJF's CEO Thomas James dated October 29, 2002, does not constitute protected activity because Mr. Hughart's employment with Raymond James had already ended. With the exception of blacklisting or other active interference with subsequent employment, the SOX employee protection provisions essentially shelter an employee from employment discrimination in retaliation for his or her protected activities, while the complainant is an employee of the respondent (emphasis added). See *Egenrieder v. Metropolitan Edison/G.P.U.*, 1985 ERA 23 (Sec'y Apr. 20, 1987) (blacklisting a former employee for protected activities is prohibited) and *Robinson v. Shell Oil Co.*, 117 S.Ct 843 (1997) (a former employee may sue a former employer for alleged retaliatory post-employment actions.) As a result, the letter he wrote after his termination is not protected activity.

work with escheated property recovery as evidenced by her October 24, 2002 inquiry on whether a displaced check was connected with his escheated property work.

In the summer of 2001, Ms. DuFaux initiated Mr. Hughart's inquiry into the potential problem of inappropriately withheld foreign taxes. Eventually, later in 2001, other managers in his supervisory chain also became aware of concerns when a complaint from the Dividend Department prompted a meeting with Mr. Hughart, Ms. DuFaux, Ms. Tharp, and Mr. Blain to discuss the problems concerning withheld foreign taxes. Even though Mr. Hughart was taken off the recovery project, he again expressed his concerns in October 2002 to Ms. DuFaux about Raymond James' apparent inaction in recovering withheld taxes from the Canadian government.

Finally, through his e-mail message the morning of October 25, 2002, Mr. Hughart informed Ms. Tharp, his acting supervisor at the time, about his research and conclusions regarding the trading of limited partnership shares in the OTC market. He alerted Ms. Tharp about the seriousness of his concern by captioning the email with "fraud alert."

In summary, Mr. Hughart has established that he was engaged in protected activities regarding escheated property, withheld foreign taxes, and over-the-counter limited partnership trades. In each case, he reasonably believed violations of rules relating to protecting shareholders and clients from fraud were occurring and reported the information to multiple supervisors.

### **Issue #3 – Unfavorable Personnel Action**

The Act prohibits an employer from discharging, demoting, suspending, threatening, harassing or in any manner discriminating against an employee in the terms and conditions of employment. 18 U.S.C. §1514A (a); *see also* 29 C.F.R. 1980.102. Mr. Hughart alleges three potential categories of adverse, or unfavorable, personnel actions. First, due to his aggressive and persistent pursuits of issues relating to the company's fiduciary duties, Mr. Hughart was not promoted. Second, over the course of his employment, and prior to October 25, 2002, Raymond James subjected Mr. Hughart to a hostile work environment. Third, on October 25, 2002, through his forced or coerced resignation, Mr. Hughart suffered a constructive discharge.

#### Failure to Promote

To demonstrate that he suffered an adverse personnel action through non-promotion, Mr. Hughart must prove: 1) that he applied and was qualified for a job for which the employer was seeking applicants; 2) that he was rejected; and 3) that after his rejection the position was filled by an applicant with similar qualifications or remained open and the employer continued to seek similarly qualified applicants. *Williams v. Administrative Review Board*, 376 F.3d 471, 480-481 (5th Cir. 2004).

Mr. Hughart testified that he was passed over for promotions during the last few years of his tenure at Raymond James and instead was moved into a "somewhat less lucrative position," as a senior operations support specialist. However, he did not present sufficient evidence to establish that he actually applied for a position to which he met the requisite qualifications. I

also note his assignment as senior operations specialist developed when Mr. Hughart decided he no longer wanted to be a supervisor at Raymond James. Consequently, Mr. Hughart has not proven the existence of an non-promotion adverse action.

### Hostile Work Environment

To establish a hostile work environment, a complainant must show that he suffered intentional harassment related to his protected activity, that the harassment was sufficiently severe or pervasive so as to alter the conditions of his employment and create an abusive working environment, and lastly that the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, 1997-CAA-2 (ARB Feb. 29, 2000) and *West v. Philadelphia Electric Co.*, 45 F.3d 744 (3d Cir. 1995). Relevant factors include the frequency and severity of the harassment, whether the harassment was physically threatening or humiliating, or merely offensive, and whether it unreasonably interfered with complainant's work performance. *Id.* As the Supreme Court noted in *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998), a hostile work environment is one that is both objectively and subjectively offensive such that a reasonable person would find, and the victim actually found, the environment to be offensive. However, Respondent "can avert vicarious liability by showing that (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the harassed employee unreasonably failed to take advantage of any preventive opportunities provided by the employer." *Williams*, 376 F.3d at 478 (aff'ing *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, 1997 ERA 14 (ARB Nov. 13, 2002)) (citing *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 758-9 (1998) and *Faragher*, 524 U.S. at 799) (upholding the use of the *Ellerth/Faragher* standard in whistleblower discrimination cases).

On different occasions, in keeping with the responsibilities of his job as a senior operations support specialist, Mr. Hughart discovered problems within the operation of Raymond James which affected the investments of the company's clients in two areas: escheated property and withheld foreign taxes. Mr. Hughart asserts that as a consequence, he suffered a hostile work environment

During his investigation into the escheatment of unclaimed property after its discovery in early 1999, Mr. Hughart's newly appointed supervisor, Ms. DuFaux criticized his continued attempts to recover clients' escheated property and stated an intention to "shut him down." In stating her concerns, Ms. DuFaux indicated that she was being pressured by her supervisor, Ms. Tharp, to stop his investigative activities. In her hearing testimony, Ms. Tharp explained she did not express disapproval of Mr. Hughart's activities; however, she was concerned about her department taking on the enormous responsibility of finding and recovering client property on such a large scale.

Upon consideration of the presented testimony, I find that the expressed displeasure of Ms. DuFaux and Ms. Tharp about Mr. Hughart's escheated property efforts was not sufficiently severe as to create a cognizable hostile work environment. Notably, by 2002, when Mr. Hughart discovered that Raymond James had recovered escheated property from Florida but had not distributed the funds to clients' accounts, Mr. Hughart presented evidence to Ms. DuFaux about

what had transpired and he eventually was given authority to distribute the funds to entitled clients. The amicable resolution to this situation supports a finding that contrary to Mr. Hughart's assertions, his supervisors were willing to work with him to resolve an escheated property issue and gave him authority to fix it.

When Mr. Hughart learned that exempt assets of clients were being improperly withheld by a foreign government and had been for thirteen years, he raised these concerns to his supervisor and discussed the situation with an individual in the Dividend Department. Subsequently, in response, Mr. Hughart was called to a meeting by Ms. DuFaux, Ms. Tharp and Mr. Blain to address the foreign tax issue and his efforts to solve the problem. Ms. DuFaux harshly characterized his work as Mr. Hughart's "ramming down their [Dividend Department] throats" policies. Ms. Tharp was confrontational during the meeting. And, Mr. Blain admonished Mr. Hughart for overstepping his bounds. After the meeting, Mr. Hughart was removed from the project and the recovery effort was turned over to the Dividend Department.

Again, while Mr. Hughart may not have been expecting this response from his three supervisors, their critique of how he handled inter-departmental communications and the managerial decision to transfer the issue to another department does not rise to the level of a hostile work environment. The severity of the critique was somewhat alleviated by subsequent responses from the supervisors. After Mr. Hughart let Ms. DuFaux know that his feelings had been hurt by her comment, she apologized in an e-mail reply for the characterization; explaining she was not implying he was an ogre. Concerning Ms. Tharp's reaction, Mr. Hughart noted that over the course of the meeting, as she began to understand the extent of the problem, she became more receptive. Mr. Blain similarly e-mailed Mr. Hughart following the meeting to tell him how much he appreciated his hard work on the foreign withholding issue.

Concerning the transfer of responsibility for recovery of the withheld foreign taxes to another department, Mr. Hughart failed to establish how that managerial decision adversely impacted the terms and conditions of his employment. Although Mr. Hughart interpreted his removal from the project by his superiors as offensive action, the decision does not appear to be abusive since his position was specifically designed to discover and research pending problems. Once the source of a problem was found, the supervisors operated within their reasonable discretion to transfer the matter to another department better suited in their opinions to proceed with resolution of the issue. In this case, Mr. Blain forwarded the problem to the Dividend Department where he thought the issues could be more appropriately handled.

Moreover, during the entire period that Mr. Hughart engaged in protected activities, ranging from late 1998 and into 2002, he consistently received positive performance appraisals in which his supervisors acknowledged his value to the company. At the same time, the appraisals identified Mr. Hughart's tendency to be overzealous in doing the "right" thing. His intense manner sometimes conflicted with the behavior expected of him and the resources available to him and his department. Mr. Hughart's supervisors were appropriately reacting to the situations created by his methods and procedures. At times, after discussing their process concerns with Mr. Hughart, they determined resolution of the issues identified by him required the expertise and resources of other employees and departments within Raymond James. The assignment of responsibility for the resolution of problems discovered by Mr. Hughart did not

adversely affect his principle responsibility to identify and investigate such diverse issues. Accordingly, I find that Mr. Hughart has failed to establish that he was subject to harassing behavior so pervasive as to constitute a hostile work environment.

### Constructive Discharge

Establishing a constructive discharge claim requires the showing of an even more offensive and severe work environment than is needed to prove a hostile work environment. *Berkman* (ARB Feb. 29, 2000); *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 566 (5th Cir. 2001). To demonstrate that he was constructively discharged, a complainant must show that his employer created “working conditions so intolerable that a reasonable employee would feel compelled to resign.” *Williams*, 376 F.3d at 480 (quoting *Hasan v. U.S. Dept. of Labor*, 298 F.3d 914, 916 (10th Cir. 2002)); see also *Talbert v. Washington Public Power Supply System*, 1993-ERA-35 (ARB Sept. 27, 1996). In other words, the working conditions were rendered so difficult, unpleasant, and unattractive that a reasonable person would have felt compelled to resign, such that the resignation is effectively involuntary. *Johnson v. Old Dominion Security*, 1985 CAA 3 to 5 (Sec’y May 29, 1991). Such an environment may be established by evidence of a pattern of abuse, threats of imminent discharge, and marked lack of response by supervisors to the complainant’s concerns (emphasis added). *Taylor v. Hamilton Recreation and Hamilton Manpower Services*, 1987 STA 13 (Sec’y Dec. 7, 1988). If the resignation was not a constructive discharge, then a complainant is not eligible for post-resignation damages, pay, and reinstatement. *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 343 (10th Cir. 1986).

Mr. Hughart’s claim of constructive discharge, or “encouraged” resignation, arose from his October 25, 2002 confrontation with Ms. Tharp during their conversation about limited partnership share trades. By the later part of 2002, Mr. Hughart had determined that certain shares of limited partnerships were trading on the over-the-counter bulletin board despite the fact that those shares did not meet the requirements for trading in that forum. When such trades became undeliverable, Raymond James was required to pay a premium, representing a windfall profit to someone. To alert his supervisors about his discovery, Mr. Hughart sent an e-mail outlining his concerns and entitled the message, “fraud alert.”

As set out in the specific findings, Mr. Hughart’s e-mail led to a meeting in the afternoon of October 25, 2002 with Ms. Tharp. Their conversation consisted of two parts, substance and process. Concerning the substance, Ms. Tharp did not agree with Mr. Hughart’s assessment that the limited partnership share trades amounted to, or involved, fraud. Believing neither she nor Mr. Hughart were experts in the area of limited partnership shares trading, Ms. Tharp reserved judgment and questioned Mr. Hughart’s conclusions. In response, Mr. Hughart reaffirmed his conclusions about the trades and adamantly disagreed with Ms. Tharp’s assessment.

In terms of process, and based in part on her uncertainty about the propriety of the trades, Ms. Tharp criticized Mr. Hughart’s use of the term “fraud alert” as a means to call attention to the substance of his message. She considered the phrase misleading and Mr. Hughart’s use of the term “fraud” both inappropriate and an example of his tendency to overstate and miscommunicate. Ms. Tharp conveyed that she could no longer permit Mr. Hughart to continue to communicate in this manner. Consequently, she had to consider his employment status over the

weekend and threatened to terminate him if he continued to mis-communicate. Mr. Hughart did not understand her criticism about his process and felt his message was consistent with his job responsibility. As a result, Mr. Hughart believed they were “far apart” on the import of his e-mail and Ms. Tharp concluded they had reached an impasse. Based on Ms. Tharp’s unexpected reaction which focused on his process in regards to the message rather than its substance, at the conclusion of their meeting, Mr. Hughart felt abandoned by his supervisor, misunderstood, and on the verge of being fired.

While Mr. Hughart’s responses and feelings at the end of their meeting are understandable, I conclude the October 25, 2002 afternoon discussion with Ms. Tharp did not objectively create a work environment so completely hostile that he had no choice but to resign. Ms. Tharp highlighted her supervisory perceptions about Mr. Hughart’s inappropriate communication style and explained the seriousness of the problem by indicating termination was a possibility and stating that another such communication would lead to his termination. Considering the previous problem Ms. Tharp had encountered with Mr. Hughart concerning his assertive communications with the Dividend Department in regards to the withheld Canadian tax issue, her reaction to the “fraud alert” e-mail was not unreasonable.

Significantly, Ms. Tharp did not indicate that she was planning to fire Mr. Hughart at that point.<sup>22</sup> Ms. Tharp told Mr. Hughart that it was not her to desire to end his employment relationship with Raymond James because he was a valued employee. As a result, she left his employment situation open-ended and stated her intention to consider his employment status over the weekend. Although Mr. Hughart believed Ms. Tharp’s statements indicated that he was going to be fired, I find Ms. Tharp’s presentation objectively indicates a contrary decision – as of Friday afternoon, October 25, 2002, Ms. Tharp had decided not to terminate Mr. Hughart at that moment. If Ms. Tharp had already decided to discharge Mr. Hughart at the conclusion of her conversation that Friday afternoon, she could have done so. Instead, consistent with her initial reaction to his message that morning, Ms. Tharp appears to have decided to give herself additional time to balance her various, and apparently conflicting, reactions to Mr. Hughart’s message, their conversation Friday afternoon, his value to the company, and her assessment that Mr. Hughart continued to have significant problems with his communication style.

Confronted with Ms. Tharp’s reaction to his e-mail, Mr. Hughart had several possible responses. He first tried to offer to stop using e-mail to communicate with supervisors and managers. When Ms. Tharp declined that solution, Mr. Hughart appears to believe that he had no other option but resignation. However, objectively at least one other apparent solution was his acceptance of Ms. Tharp’s feedback about his process and a corresponding commitment to change his e-mail communication style. In other words, objectively, Mr. Hughart could have reasonably resolved the dispute through other means short of resignation.<sup>23</sup>

Returning to Ms. Tharp’s office at the close of the business day that day to submit his resignation, Mr. Hughart told her that he knew the situation needed to be resolved and indicated

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<sup>22</sup>Mr. Hughart acknowledged that Ms. Tharp never stated that she was going to fire him.

<sup>23</sup>See *Williams*, 376 F.3d at 481 (where a complainant could have “reasonably and effectively handled [the] incident” in a way short of resignation, his resignation does not constitute constructive discharge).

he was giving her the option of accepting his resignation rather than terminating him. Once again, significantly, Ms. Tharp did not simply reply “ok,” which would indicate that she had already decided to discharge Mr. Hughart. Instead, Ms. Tharp reiterated to Mr. Hughart that she was not firing him and he needed to think about what he was doing. She specifically warned him that if he left his resignation with her, he was effectively resigning.

Finally, while Ms. Tharp’s October 25, 2002 statement that she intended to consider Mr. Hughart’s employment situation over the weekend may be considered a threat of termination, the record does not establish either a series of such threats or a pattern of abuse by Ms. Tharp in regards to Mr. Hughart such that he was compelled to resign on October 25, 2002. Mr. Hughart asserted that his decision was motivated in part to relieve the stress associated with his conflict with Ms. Tharp. Although Mr. Hughart’s perception of stress may be subjectively accurate, objectively, Ms. Tharp’s criticism of his October 25, 2002 e-mail does not rise to the level of abuse that justifies resignation. Notably, Mr. Hughart acknowledged that in his exchange with Ms. Tharp on October 27, 2002, upon learning that she had accepted his resignation, he told Ms. Tharp it was not her fault. Accordingly, I find Mr. Hughart’s resignation on October 25, 2002 did not constitute a constructive discharge.

#### **Issue No. 4 - Causation**

Having determined that the evidence is insufficient to establish that Mr. Hughart suffered any adverse personnel action in terms of promotion, hostile environment, or constructive discharge, I do not really need to address causation. However, since the crux of Mr. Hughart’s complaint is based on his apparently sincere belief that he was forced to resign, some discussion of causation is warranted. In that regard, even if Mr. Hughart had been constructively discharged or Ms. Tharp’s uncertainty about his continued employment constituted an adverse action,<sup>24</sup> his claim of illegal discrimination under SOX would nevertheless fail because the preponderance of the evidence indicates that Mr. Hughart’s three protected activities did not cause, or contribute to, Ms. Tharp’s statements about his employment status on the afternoon of October 25, 2002.

First, concerning the clients’ escheated property, Mr. Hughart first raised his concern to Ms. Tharp in 1998 and 1999. Some evidence demonstrates that over the course of the following years, Ms. Tharp had some concern about the amount of resources within her division that was available to support the recovery effort. Additionally, in mid-October 2002, Ms. Tharp did tangentially touch on his recovery work when she queried him about a displaced check. However, the preponderance of the evidence fails to establish that Mr. Hughart’s protected activity in regards to escheated property played any viable role in generating the October 25, 2002 afternoon conversation between Mr. Hughart and Ms. Tharp.

Second, in the summer and fall of 2001, Mr. Hughart’s actions concerning the issue with Canadian tax withholding and his attempts to have the Dividend Department aggressively recoup the funds caused Ms. DuFaux, Ms. Tharp, and Mr. Blain to focus on his activities. Based on their meeting in the fall of 2001 and subsequent comments by Mr. Blain, all three supervisors

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<sup>24</sup> See *Helmstetter v. Pacific Gas & Electric Co.*, 1986 SWD 2 (Sec’y Sept. 9, 1992) (warning letter that serves to progress a complainant toward suspension or discharge may be an adverse action even though the letter did not result in a suspension or discharge).

were interested in the substance of the issue but did not appreciate his directing action by another department without first seeking to resolve the problem with them. In the fall of 2002, although he no longer had the responsibility to recover the funds, Mr. Hughart again looked into the matter and was discouraged by the lack of recovery effort by the Dividend Department. This time, he broached his concern with Ms. DuFaux in mid-October 2002. About the same time, he expressed his frustration to Ms. Galloway, a company vice president, about the failure of the company to make a steadfast effort to retrieve the withheld foreign taxes.

Prior to her October 25, 2002 meeting, Ms. Tharp may have recalled her meeting a year earlier with Mr. Hughart regarding the withheld foreign taxes. That session also had two parts. While Ms. Tharp seemed to agree with Mr. Hughart on his substance about the taxes, Mr. Blain had critiqued his process in dealing directly with the Dividend Department. As a result, other than serve as background for Ms. Tharp's perception about Mr. Hughart's communication problems, his protected activity in the fall of 2001 of reporting improperly withheld Canadian taxes (the substance) did not cause, or contribute to, his October 25, 2002 meeting with Ms. Tharp.

I have considered whether Mr. Hughart's more recent contacts with Ms. DuFaux and Ms. Galloway about foreign tax withholding issue could have contributed to Ms. Tharp's reactions on October 25, 2002. However, there is little evidence that Ms. DuFaux passed on to Ms. Tharp that Mr. Hughart was resurfacing his concerns about foreign tax withholding. Similarly, despite Mr. Hughart's suspicion to the contrary, Ms. Galloway testified that she did not share his reported frustration about the foreign tax issue with any other person. Further, neither Mr. Hughart nor Ms. Tharp mentioned any specific reference to the foreign tax withholding issue when recalling the events of October 25, 2002.

Third, in contrast, Ms. Tharp's request to meet with Mr. Hughart on October 25, 2002 is clearly related to his protected activity of reporting a problem about limited partnership trades. However, as previously discussed, their meeting consisted of two separate parts. This distinction is significant. While bringing the substance of the limited partnership shares trade issue to the attention of his supervisor was a protected activity, the manner in which Mr. Hughart chose to convey his concerns was not necessarily protected under SOX. Prior to deciding to ask for a meeting with Mr. Hughart, as she struggled with her response to Mr. Hughart's use of the term "fraud alert," Ms. Tharp contacted Mr. Blain who helped her focus on this distinction. He stressed to her that the most important response was to obtain information from Mr. Hughart about the substance of the problem he had identified. As a result, Ms. Tharp asked Mr. Hughart for a meeting that afternoon in order that she might better understand the issue. The initial part of their discussion covered the substance of the limited partnership shares trade problem and produced a heated disagreement between Mr. Hughart and Ms. Tharp on whether the trades were improper or involved fraud. During the course of this portion of the meeting, Ms. Tharp made no mention of Mr. Hughart's continued employment.

The second part of their conversation focused on how Mr. Hughart had presented the issue to Ms. Tharp. Believing Mr. Hughart overstated, and possibly mis-represented, the nature of the limited partnership issue, Ms. Tharp indicated the use of the term "fraud" in his e-mail was both inappropriate and possibly harmful. Within this context, Ms. Tharp presented the question

of whether Mr. Hughart's continued employment was within the company's best interest. The question of Mr. Hughart's continued employment related to the manner in which he presented his concern by using the phrase "fraud alert" in the October 25, 2002 e-mail subject line. Thus, Ms. Tharp's concern about Mr. Hughart's employment status and his subsequent resignation were caused by the process Mr. Hughart employed to raise his concern about limited partnership trades and not the substance of the report itself, which is the protected activity under SOX. Ms. Tharp did not react adversely to the protected activity – identification and notice of the foreign tax withholding issue. Rather, she responded to the manner in which Mr. Hughart presented the protected activity. Accordingly, I conclude Mr. Hughart's protected activity of identifying an issue concerning the propriety of limited partnership shares trading did not cause or contribute to Ms. Tharp's decision to question the value of Mr. Hughart's continued employment on the afternoon of October 25, 2002.

### CONCLUSION

The named Respondent, Raymond James & Associates, is not a corporation subject to the employee protection provisions of SOX. Further, due to the absence of sufficient commonality between Raymond James Financial, Inc., the parent company which is subject to the employee protection provisions of SOX, and its wholly owned subsidiary, the named Respondent, Raymond James & Associates, applicability of the Act to the parent company does not extend to its subsidiary in this particular case. As a result, the Respondent's Motion to Dismiss must be granted.

The preponderance of the more probative evidence establishes that Raymond James did not take adverse action against Mr. Hughart by failing to promote him, creating a hostile work environment or constructively discharging him. Additionally, none of Mr. Hughart's three protected activities caused or contributed to the situation which arose in the afternoon of October 25, 2002 and Mr. Hughart's subsequent offer of resignation. Accordingly, Mr. Hughart has failed to carry his burden of proof and his SOX discrimination complaint must be dismissed.<sup>25</sup>

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<sup>25</sup>Since Mr. Hughart cannot establish that his employer took adverse action against him based on a SOX protected activity, I need not address the fifth issue, whether the employer would have taken the same action against Mr. Hughart in the absence of his protected activities.

## ORDER

1. Motion to Dismiss the discrimination complaint of MR. JOHN HUGHART against RAYMOND JAMES & ASSOCIATES, INC., brought under the employee protection provisions of SOX, is **GRANTED**.

2. The discrimination complaint of MR. JOHN HUGHART against RAYMOND JAMES & ASSOCIATES, INC., brought under the employee protection provisions of SOX, is **DISMISSED**.

**SO ORDERED:**

**A**  
RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Date Signed: December 17, 2004  
Washington, D.C.

**NOTICE OF APPEAL RIGHTS:** This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.110, unless a petition for review is timely filed with the Administrative Review Board (“Board”), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or order to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile, transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210. *See* 29 C.F.R. §§1980.109(c) and 1980.110(a) and (b) as found in “OSHA, Procedures for the Handling of Discrimination Complaints under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002”; Final Rule, 69 Fed. Reg. 163 (August 24, 2004).