HEMMING MORSE, LLP
CERTIFIED PUBLIC ACCOUNTANTS,
FORENSIC AND FINANCIAL CONSULTANTS

Proposal to Serve as the
Independent Compliance Auditor for Herbalife
Dan Ray, Hemming Morse, LLP

A. Introduction / Executive Summary

My name is Dan Ray and I am a partner in the litigation department of Hemming Morse, LLP ("Hemming"). Hemming is a Certified Public Accounting, forensic, and financial consulting firm based in San Francisco, CA. I have been a partner with Hemming for approximately 20 years. I am a CPA and hold other credentials detailed in this proposal. I have provided forensic accounting services as a consultant, expert witness and corporate monitor for the past 26 years. As a forensic accountant, I have testified as an expert on numerous occasions in both Federal and State courts throughout the United States and have presented to Boards, Audit Committees, and U.S. Regulatory organizations such as the Department of Justice and the Securities and Exchange Commission. See **Exhibit A** for my curriculum vitae.

Prior to entering public accounting, I was a Special Agent with the FBI from July 1982 to October 1990. While serving as an FBI Agent, I specialized in the investigation of complex white collar crime matters, spending the bulk of my early career in the Los Angeles Field Office. During my FBI career, I investigated numerous complex investor fraud matters as well as several failed financial institutions.

In addition to my forensic accounting and expert witness work, a significant part of my practice involves the Foreign Corrupt Practices Act ("FCPA"). As detailed more fully below, I have been appointed to serve as an FCPA Compliance Monitor on two separate occasions. In addition, I served for approximately four years as an FCPA Compliance consultant for a pharmaceutical company (i.e., SciClone) that was under investigation by the DOJ and SEC.

Both of the formal appointments as the FCPA Compliance Monitor involved working closely with both the company which I was monitoring as well as with the DOJ and SEC attorney's assigned to the matter. Each of these prior matters involved submitting written reports of findings (and recommendations) on a periodic basis to the government. Each of these monitorships were very successful. Included as references for this proposal are corporate officers with the companies that I monitored as well as a DOJ lawyer that was overseeing the monitorship.

My approach to this assignment as the Independent Compliance Auditor ("ICA") would be very similar to the approach taken by me on the two other occasions in which I served as a monitor. The starting point would likely include meeting with both Herbalife and FTC officials to ensure that there is a "meeting of the minds" as to the scope of work for the ICA. This will help ensure that the ICA is fulfilling the required duties under the Stipulated Order for Permanent Injunction and Monetary Judgment ("Settlement Agreement") and that there is hopefully a consensus as to what those duties are. This initial, and thereafter continuous, communication with the parties involved will help ensure that there is no "scope creep" in the work being performed. The Settlement Agreement identifies a number of prohibited business practices, and sets forth requirements for changes to be implemented on a going forward basis. In its simplest description, my work as the ICA will be performed with a focus towards ensuring

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that Herbalife makes the appropriate organizational changes to comply with the requirements set forth in the Settlement Agreement. As the ICA, I will oversee and be intimately involved with all of the work to be performed and will take a lead role in drafting the required reports. To accomplish this, I will be assisted by a team of my partners with the requisite experience and expertise who will be assigned "ownership" and responsibility for certain aspects of the scope of work. I will also seek to identify, where possible, discreet areas of analysis to be assigned to other Hemming personnel with the appropriate level of experience and expertise. These partner level individuals will then have "ownership" and responsibility for that particular scope of work. As the ICA, I would be actively involved in all aspects and would have responsibility for the entire body of work.

My approach during my prior service as a monitor in the FCPA context was quite similar. The two key items I would assess and report on were: (1) whether the organization was making the necessary changes to help prevent future violations of the FCPA; and (2) whether there was an appropriate commitment by the members of the organization being demonstrated or whether the proper "culture of compliance" existed. I would then identify discreet scopes of work, or segregation of duties, that could be assigned to the appropriate staff. In the Herbalife matter, it appears that the Settlement Agreement can generally be broken down into four broad categories for which the ICA is to assess compliance. These broad categories appear to include:

1. An assessment of the compensation payments being made (i.e. funds *paid out* by the organization);

2. An assessment of whether there is a proper classification of customers and whether retail sales amounts are being properly recorded (i.e. funds *received* by the organization);

3. As assessment as to whether the proper level of self-monitoring and training is being performed internally by the Herbalife officials (i.e. similar to assessment of culture of compliance); and

4. An assessment of the prohibition or rules governing the leasing or purchase of physical space.

In summary, I believe that I am very well qualified to serve as the Independent Compliance Auditor for Herbalife, and I appreciate this opportunity to submit this proposal and for your consideration. I would be happy to provide any additional information you may require.

B. Personnel

For this assignment, I anticipate utilizing staff from Hemming to assist me in carrying out my duties as the ICA. The staff would include financial consulting and litigation professionals from both the San Francisco and Los Angeles offices. As with my prior monitoring engagements, I anticipate that the staff

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on this engagement would remain during the tenure of the assignment thereby maximizing the efficiency and effectiveness of the procedures.

Hemming is based in San Francisco, but has offices throughout California, including downtown Los Angeles in close proximity to the Herbalife headquarters. Our firm has approximately 40 professionals in its financial consulting and litigation department. The firm's professionals have a wide variety of credentials and expertise. The profiles and curriculum vitae's of our professionals, as well as other information on our firm, can be downloaded directly from our website at www.hemming.com.

Given the nature of this particular assignment, it would not appear that an attorney or a law firm would be required to be added to the engagement team as I did on my prior FCPA monitorships. However, if during the term of the ICA assignment a need should arise for legal assistance, I have very good relationships with numerous lawyers throughout the country.

Presented below are the Hemming personnel I have identified to assist me in carrying out the responsibilities as the ICA. As each of the following team members are part of Hemming's financial consulting and litigation department, each has demonstrative experience and expertise in evaluating the operations of companies and conducting detailed testing of accounting and other records. Additionally, due to the nature of our work being associated with high stakes litigation with rigid deadlines and budgets, each member of the team is experienced with managing their time and that of their respective teams to ensure high quality work products within defined time and cost parameters. All team members are very familiar with the litigation process and have participated in numerous court proceedings, and a few have testified in state and federal actions as well as at arbitrations.

Steven Boyles

Steven is a Partner at Hemming in the San Francisco and Walnut Creek offices. He has provided support for both the monitorship of the medical device company as well as the FCPA consulting services performed for SciClone. Steven travelled with me on numerous occasions to China on the SciClone matter. Steven was responsible for the assessment and reporting of the Company's revenue and expense claims details from review of the general ledgers and other documentation within multiple subsidiary company systems. He additionally assisted in conducting interviews of company personnel, report writing, and presentations of findings and recommendations to the Company's Board.

Steven is a CPA, and maintains other specialized certifications including CFF ("Certified in Financial Forensics"), ABV ("Accredited in Business Valuation") and ASA ("Accredited Senior Appraiser"). In addition to his experience with corporate monitorships, Steven has a background in auditing and in connection with the valuation analyses and consulting he conducts, has tremendous experience in evaluating corporate performance, data analytics, and assessment of large amounts of detailed transactions. See **Exhibit B** for his curriculum vitae.

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Travis Armstrong

Travis is a Partner at Hemming in the San Francisco office. Travis is a CPA, CFF and CFE ("Certified Fraud Examiner"). He provided critical support to me as the monitor for the medical device company. In addition, Travis was very involved in an FCPA consulting assignment where the client was a Fortune 100 Space and Defense Company. Travis was involved with the medical device monitorship since its inception and travelled with me on all site visits including China and throughout Europe on multiple occasions. Additionally, Travis led a project that consisted of FCPA due diligence and training of manufacturers and sales partners in Hong Kong and China. Travis is the current Chair of the Economic Damages Section for the California Society of CPA's. Travis is involved in the current matter in which the FTC has engaged Hemming as a consultant. See **Exhibit C** for his curriculum vitae.

David Callahan

David is a partner in the Los Angeles Office of Hemming. David is a CPA, CFF and has received his MBA. He works frequently with the SEC and DOJ on various matters. His primary focus is on evaluating accounting irregularities, participating in audit committee investigations and complex accounting issues. He is currently the Chair of the Fraud Section for the California Society of CPA's. See **Exhibit D** for his curriculum vitae.

Rachel Hennessy

Rachael is a Manager in the Los Angeles office of Hemming. She has an Economics Degree from Occidental College. Rachel has more than 12 years of consulting experience related to accounting and fraud investigations. She works closely with David Callahan on complex accounting matters involving the SEC and DOJ.

Julie Oleinikova

Julie is a Manager in the San Francisco Office of Hemming. She has more than 10 years of experience in various litigation investigation matters, including FCPA. Julie is a CFE and has provided significant assistance on the FCPA consulting matter for a Fortune 100 Space and Defense Company. Prior to joining Hemming, Julie worked for a law firm in Moscow that performed due diligence related to the FCPA and the UK Bribery Act. Julie is a native Russian speaker.

I anticipate that this team of professionals will remain with the engagement throughout, thus providing consistency in our responses and procedures. This structure is expected to benefit the quality of the work and cost efficiencies in a number of ways, including, but not limited to: (1) the continuity of a partnership between a small group of key individuals; (2) expedient access to professionals experienced with the requirements in the Settlement Agreement as well as with Herbalife's processes in particular; and (3) maximum efficiency of the overall cost structure.

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With reference to the four broad categories identified above of work to be performed for which assessments by the ICA are to be made, it is unclear at the present time the precise division of labor to be assigned to the professionals listed above. In addition, other Hemming professional not detailed above have extensive experience which might be called upon to assist the work I would perform as the ICA. This additional experience includes partners and staff who frequently deal with very large data sets utilizing a SQL database (David Breshears), and partners with extensive experience with accounting and auditing standards, including a partner who is the current Chair of California Society of CPA's (Andy Mintzer).

C. Qualifications

Included with this proposal is a copy of my current curriculum vitae. Highlights of the information on the CV are as follows:

- I hold certifications as Certified Public Accountant ("CPA"); CFF; CFE; and Certified Insolvency and Restructuring Advisor ("CIRA")
- July 1982 – October 1990: I was a FBI Special Agent in the Baltimore, Houston and Los Angeles Field offices, with the majority of my career time in the Los Angeles office.
- October 1990 – September 1995: I was a Manager with Neilson Elggren Durkin & Co. This was a forensic accounting firm with two of its name partners also being former FBI Special Agents.
- September 1995 – Present: Partner with Hemming Morse (became partner after 1 year)
- Past Chair of the Litigation Services Committee for the California Society of CPA's
- Served as the FCPA Compliance Monitor for Diagnostic Products Corporation ("DPC") / Siemens HealthCare Diagnostics from 2005 – 2008 pursuant to a DPA with the DOJ and a Cease and Desist Order from the SEC. The original company to be monitored was DPC, but this entity was acquired by Siemens approximately 6 months after the commencement of the monitorship.
- Served as the FCPA Compliance Monitor for a medical device company based in Europe from 2012 – 2014 (I have been asked by the Chief Legal Officer for this company to keep the name of the company confidential from the public. I can disclose the name upon request)
- Served as the "Informal" Independent Compliance Consultant for SciClone Pharmaceuticals from 2012 – 2016. This company was under investigation by the DOJ and SEC for suspected violations of the FCPA. In this capacity I reported to the Audit Committee of the Board of Directors for this publically traded company. Based is significant part on the recommendations made by me and the

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Hemming team, the DOJ did not proceed with their investigation and the company recently settled with the SEC. There was no requirement of a Monitor in the settlement agreement, only a period of self-reporting.

- Was quoted in the March 2013 edition of the FCPA Report about my approach to serving as a monitor in an article titled, ***How to Find a Business-Minded Compliance Monitor and Minimize Reporting Requirements When Negotiating an FCPA Settlement*** (See **Exhibit E**)

- Was featured in the cover story in California Lawyer Magazine in December 2014 in an article titled, ***The Secret Life of Corporate Monitors***. (See **Exhibit F**)

Hemming Morse was formed in 1958. It has provided forensic accounting services for approximately 40 years. We provide services to law firms and other clients throughout the country and internationally. In addition, we are frequently retained by state and federal governmental agencies on a regular basis. These governmental agencies include, but are not limited to:

- FTC (this is a current matter for which our involvement has not been disclosed. Please contact me for additional details)
- Securities and Exchange Commission
- U.S. Department of Justice
- FDIC
- PCAOB
- California Attorney General's Office
- Various District Attorney's Offices
- Various states Board of Accountancy
- IRS
- Municipalities
- Department of Insurance

D. Prior Experiences and References

As a CPA, CFE and former FBI Special Agent, I have significant experience with both understanding complex business transactions as well as communicating effectively with people. Having successfully served as an FCPA Compliance Monitor on two separate occasions demonstrates that I can navigate the challenge between not interfering with the operations of the business being monitored, while at the same time fulfilling the mandates required of me as the Monitor. The reports I submitted to the DOJ and SEC, which totaled approximately 12, were always well received. The reports often included recommendations, and each was fully discussed with the company officials prior to the submission of the report to ensure that the company agreed that there was an identified weakness and that the recommendation would represent an improvement. All of the recommendations I have made in both of

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the formal monitorships, as well as those made to the Audit Committee in the FCPA consulting assignment for SciClone Pharmaceuticals, have been fully implemented.

My goal in my monitor assignments is to ensure that I fully carry out my required obligation, while at the same time helping to make the company a better company. I have succeeded in doing this in each of the monitoring matters identified in this proposal. This would also be my goal if I were to serve as the ICA for Herbalife.

Below are select references. I selected these particular individuals because they are each involved with the prior monitorships or independent consulting assignments that I have described.

- **John Dwyer, Managing Partner of the Palo Alto Office of Cooley**, (650) 843-5228, dwyerj@cooley.com – John serves as the outside counsel to SciClone. He negotiated the recent settlement agreement reached with the SEC. I was recently informed that the SEC is very pleased with the dramatic improvements made to the internal control environment. The work performed by me as the compliance consultant drove many of the necessary changes to the finance, internal audit, and compliance departments.
- **Jon Saxe, Chairman of the Board, SciClone Pharmaceuticals, Inc.**, (650) 949-1655, jssaxe@sbcglobal.net – Jon, on behalf of the Audit Committee, retained me as the FCPA Compliance Consultant for SciClone. I have made more than 10 trips to China on this matter. Following each site visit, I prepare a report of findings and then appear before the Audit Committee to present my findings which usually includes recommendations.
- **REDACTED, Chief Legal Officer, Medical Device Company in Europe.** This individual served as the Chief Legal Officer for the company during my tenure as its Monitor. I was requested to not disclose the fact that I was the monitor for this company. Because this proposal may be made public, I am redacting the name. However, if you contact me I will provide the details to you for purposes of this person serving as a reference.
- **Angela Burgess, Davis Polk**, (212) 450-4885, angela.burgess@davispolk.com – Angela Burgess and Scott Muller were outside counsel to Siemens AG during its large FCPA investigation. In addition, Ms. Burgess served as outside counsel to the Medical Device company for which I served as its monitor. They were both aware of the work I performed for Siemens Healthcare Diagnostics, and recommended me to the Chief Legal Officer of the Medical Device company. Scott Muller informed me that the reports I had prepared for Siemens HealthCare Diagnostic Division was review by him and was elevated to the Board of Directors for Siemens AG.
- **Dan Garen, Global Compliance Leader, Danaher Corporation**, (202) 419-7651, danielgaren@gmail.com – Dan was the Chief Compliance Officer for Siemens HealthCare

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Diagnostics ("HDX") during my monitorship of that entity. Dan travelled frequently with me during the three year period in which I monitored the company. His written response to my final report of findings submitted to the DOJ stated, "HDX is committed to carrying forward the lessons learned from the DPC experience, as well as those gleaned over the Monitor's term. The Monitor has been instrumental in this regard by providing considered feedback and analysis, which has been built into our compliance program and systems."

- **Kathleen Hamann, Pierce Atwood LLP,** (202) 530-6409, khamann@PierceAtwood.com – Kate was an attorney with the Department of Justice and was responsible for the Deferred Prosecution Agreement entered into with the Medical Device company. She was also responsible for oversight of the monitorship of the company. All of my monitor reports were submitted to Kate at the DOJ and Tracy Price with the SEC. I participated in numerous meetings and discussions with Kate during the pendency of the monitorship. If contacted, Kate could identify for you the name of the company that I monitored.

In addition to my personal experience detailed above, other professionals at Hemming have described to me matters that they have worked on that are in similar industries as Herbalife. Overviews of select experiences in a similar industry include the following:

- Hemming Morse was engaged by the former owner of a business that manufactured and marketed branded, dietary supplements, specialty combination formulations and sports nutrition products following its sale to another entity. In connection with a purchase price dispute, we were hired, in part, to review and assess the appropriateness of the successor entity's accounting for, and reporting of, the acquired business's post-acquisition results of operations under U.S. Generally Accepted Accounting Principles. Specific accounting areas of focus included the entity's accounting for revenue recognition, inventory, and loss contingencies.

- Plaintiff brought a claim against companies that sell personal care products (e.g., lotion, shampoo, and conditioner). Allegations included that the products were packaged and marketed as "natural" and/or organic, when the products in question were alleged to in fact not meet particular ingredient criteria. A Hemming expert analyzed the amount of economic benefit that defendants received as a result of the claims/packaging in question, including price premia and enhanced sales volumes, each of which were elements of incremental profits.

- Plaintiff alleged that an employment agreement entitled her to a particular ownership stake in the company which manufactured vitamins and nutritional supplements that are sold under a variety of brands, and that her shares were not included in a transaction between her husband and the company.

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- In a highly publicized case, plaintiff accused defendant, whose artificial sweetener was advertised as being "made from sugar so it tastes like sugar" of false advertising. A Hemming expert quantified financial remedies available to plaintiffs (which represented over half of the sugar suppliers in the US), including lost profits, disgorgement of defendant's profits (ill-gotten gains), price erosion, and the cost of corrective advertising.

None of these matters summarized above involved Herbalife. Additional details can be made available upon request.

E. Proposed Activities

As the identified ICA, I would actively oversee all aspects of the work to be performed in carrying out the mandates of the Settlement Agreement. I would then assign senior level Hemming professionals to take responsibility for specific aspects of the work to be performed. As detailed above, the scope of work called for in the settlement agreement appears to consist of the following broad categories:

- An assessment of the compensation payments being made (i.e. funds *paid out* by the organization);
- An assessment of whether there is a proper classification of customers and whether retail sales amounts are being properly recorded (i.e. funds *received* by the organization);
- As assessment as to whether the proper level of self-monitoring and training is being performed internally by the Herbalife officials (i.e. similar to assessment of culture of compliance); and
- An assessment of the prohibition or rules governing the leasing or purchase of physical space.

I would anticipate having a partner level professional at Hemming be assigned responsibility for each of the above four broad categories. These partners would then be supported by a manager level person and then likely staff level personnel. As of the date of this proposal, I would anticipate that David Callahan will have responsibility for the gathering of the relevant information and perform the required analysis relating to the collection of retail sales information. The primary emphasis will be on the accuracy of the information relating to funds being received by Herbalife. David will also assist with the drafting of select portions of the report of findings. His efforts will be primarily supported by Rachel Hennessy and staff.

It is anticipated that Steven Boyles will have primary responsibility for gathering the relevant information and perform the required analysis relating to the classifications of the customers versus business opportunity participants. This work will also focus on the analysis of whether the reported

sales to preferred customers are genuine. In addition, Steven will have responsibility for the analysis regarding compliance with rules governing the purchasing or leasing of properties. He will also assist with drafting select portions of the report of findings. His efforts will be primarily supported by Julie Oleinikova and staff.

It is anticipated that Travis Armstrong will have primary responsibility for the gathering of the relevant information and performing the required analysis of payments related to multi-level compensation, or funds being paid out by Herbalife. In addition, he will also be responsible for ensuring that the rewardable personal consumption in a downline is calculated properly according to the designation and monthly limit requirements. He will also assist with drafting select portions of the report of findings. His efforts will be primarily supported by Julie Oleinikova and staff.

As the ICA, I will have overall responsibility for the required scope of work, and will be appropriately involved with those aspects assigned to other partners. I will also take primary responsibility of ensuring that Herbalife is performing the proper level of self-monitoring of its policies and procedures. I will also have primary responsibility for drafting the report of findings, and communications with Herbalife and the FTC.

Given the fact that we have not had any access to the general ledgers or data file of Herbalife, and do not have specific knowledge about the number of transactions involved, it is very difficult to accurately state the procedures that will be employed to carry out the required analysis. However, Hemming professionals (including those identified in this proposal) have performed similar types of analyses on numerous occassions. Our engagements involve a wide variety of industries and the litigate matters in which we serve as consultants and expert witnesses typically involve gathering accounting and other data from computer systems and other sources and performing an analysis of that data. We then form and express opinions about the accuracy and reliability of that data. Sometimes the analysis is performed on the entire population of data, and on other occasions sampling techniques are utilized. Hemming has the experience and capabilities to deal with large volumes of data. For example, a current matter in which I am a consultant involves the receipt and analysis of an Access data file with 17 million rows of data.

Because the work we perform often involves a litigation or the monitoring of a company, these matters always have strict deadlines and due dates for when reports are to be prepared or testimony is to be proffered. Hemming is accustomed to working in this environment and is able to meet these deadlines.

Methods of Obtaining Information

In almost all of our engagements, a critical aspect is to obtain the information needed for which an analysis is to then be performed. Because we do not have any information about the accounting systems or computer capabilities of Herbalife, we cannot specifically set forth the methods for obtaining

the required data. However, the starting point would involve meeting and working with the Herbalife individuals responsible for the data to be analyzed. We would then determine, collaboratively, the best way to access the data. On some occasions we are limited to accessing the data from an on-site terminal only. Most often, the data can be exported to a program that does not require proprietary licenses and can be uploaded to a secure shared site for analysis at a Hemming office.

Methods of Analyzing Information

Typically the first step in the analysis of the information or data is to reach an appropriate level of confidence that the data provided accurately represents the data in the accounting system. Once that level of assurance is obtained, the actual methods utilized vary greatly. For this matter, the settlement agreement clearly defines both prohibited conduct and the proper methods for recording and recognizing as revenue funds received by Herbalife, as well as the proper classification of funds being paid out. The analysis would have to commence with a clear understanding of the requirements set forth in the settlement agreement, which would include interviews with the relevant personnel about the modifications made to the business to bring it into compliance with the rules. We would then consider what portion of the process for recording and classifying revenues and expenses is automated versus manual. For the automated processes, we would seek to ensure that the system parameters and controls are correct. For those classifications and items that are dependent on manual efforts, we would seek to identify those decision makers and ensure that the methods they are using to classify revenue and expense items are both accurate and transparent. The analysis of the data might be made on the entire population or on an appropriate sized sample.

One key aspect of the work to be performed is to understand how Herbalife is performing its analysis of the data to ensure, for example, that reported sales to end users for which receipts are to be submitted are genuine. This may involve coordination with Herbalife on sharing our experiences with performing similar tasks on other engagements. For example, a key concern on the SciClone consulting assignment was assessing the validity of expense receipts being submitted by its sales staff throughout China. Hemming helped SciClone to develop both system controls as well as risk-based auditing procedures.

Methods of Reporting Information

As consultants and testifying experts, we are very accustomed to preparing reports of findings as well as supporting schedules which clearly set forth key information such as the source of the data, the analysis performed, the sampling methodology utilized (if a sample is utilized), the incorporated assumptions, the conclusions reached and the basis for those conclusions. The methods for reporting the results of analysis can be in the form of Excel spreadsheets with supporting schedules, PowerPoint presentations or written reports with imbedded schedules that are linked to the supporting document.

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Frequency of Proposed Activities

As detailed more fully in the Estimated Costs section of this report, the first year of this assignment will involve the highest level of activity. These hours will be needed to learn the Herbalife business, meet with the Herbalife officials, become familiar with the accounting and other systems, and gather the required data. The first three years of the monitoring term requires written reports to be submitted every six months. Given this timetable, I would anticipate that some (but likely not all) of the Hemming personnel assigned to this matter will spend a portion of their time on site, with perhaps half of the required hours in Hemming offices. In my other monitoring matters, we would typically commence our site visits about two months before each report was due.

With all aspects of the work to be performed, it is critical that we endeavor to not be disruptive to the business and to work collaboratively with the Herbalife officials. This is something I was able to accomplish on all of my other formal and informal monitoring assignments. I believe that this assignment requires good communication skills. I am confident that my references, if contacted, will advise you that I successfully monitored their companies in a manner that was both efficient and non-disruptive. They will also tell you that the work we performed help make their organization better as a results of the recommendations made and the discussions we had.

F. Potential Conflicts of Interest or Bias

I have performed a conflicts check on Herbalife and its counsel, and there are no conflicts to report. In addition there is no bias by either myself or other professionals at Hemming. I testify frequently as an expert, along with numerous other partners, and have a balance of working for both plaintiff's and defense. There is also no bias with respect to the specific industry in which Herbalife operates. I do not have any connections whatsoever with Herbalife. I have no family members or any other relatives that have any association with Herbalife.

In addition, in conducting my conflicts check for this matter I have not been made aware of any family or other relationships with Herbalife. I was informed by one of my partners in my Los Angeles office that back in 2002 – 2003, while he was another firm, he was hired by counsel for Herbalife to assist in an investigation involving an employee theft. Another matter for Herbalife during the same time period involved performing a statistical analysis of a downturn of a particular product. These matters have long since been resolved with no other matters either for or against Herbalife.

As identified above, Hemming is currently serving as a consultant for the FTC. However, I am not involved in this matter. Our involvement has not been publically disclosed but I can share the details with you upon request.

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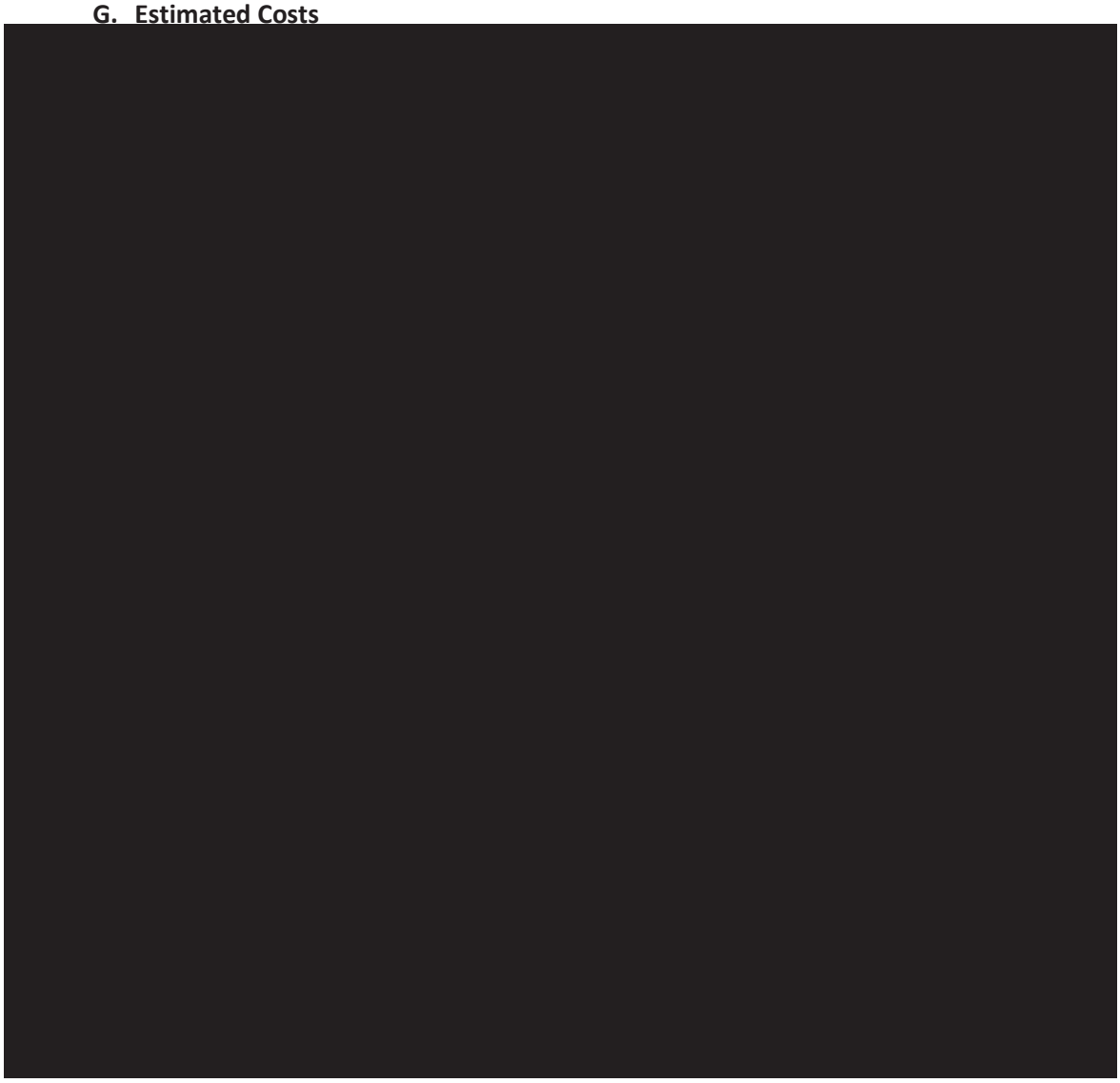
G. Estimated Costs



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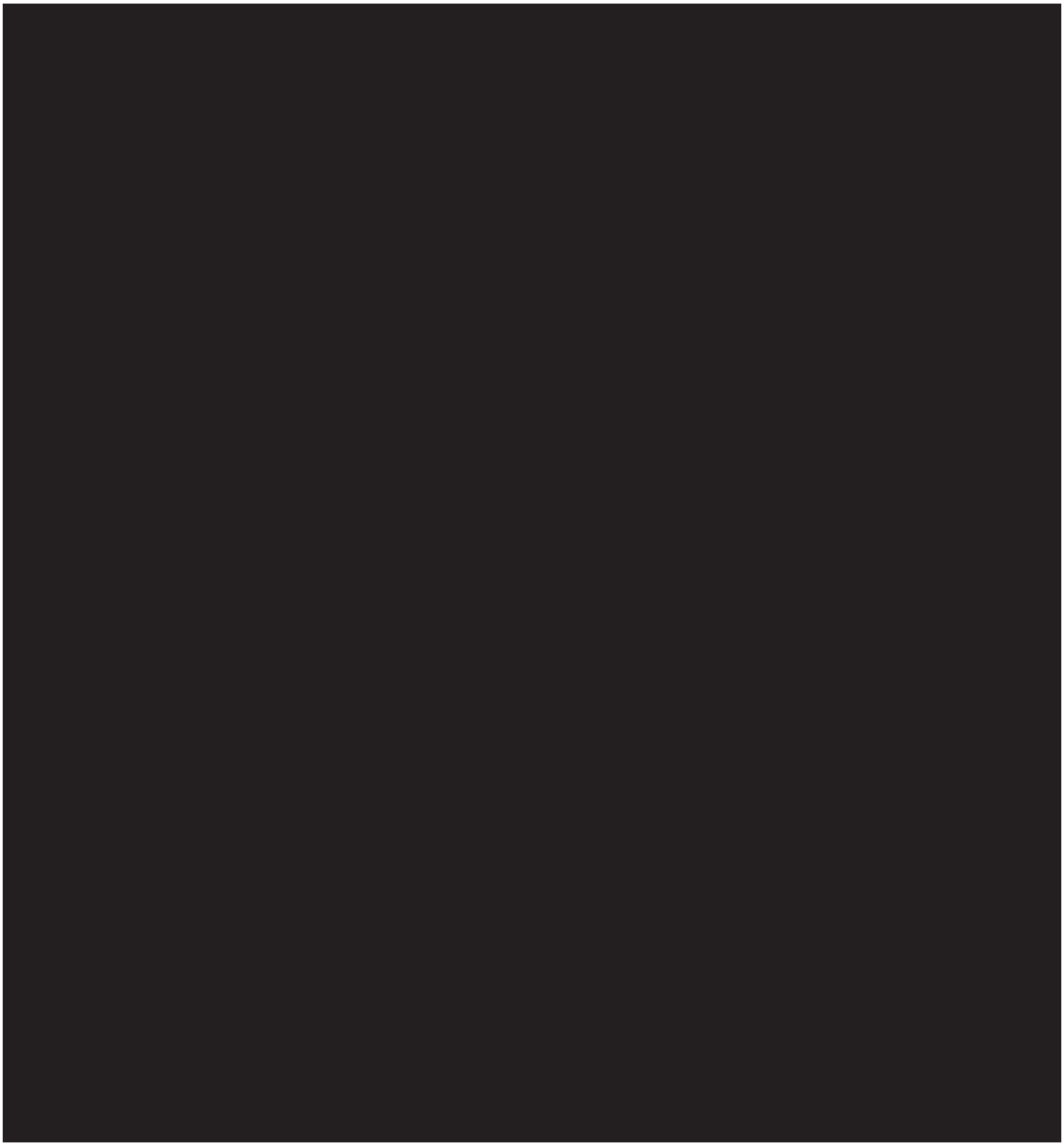

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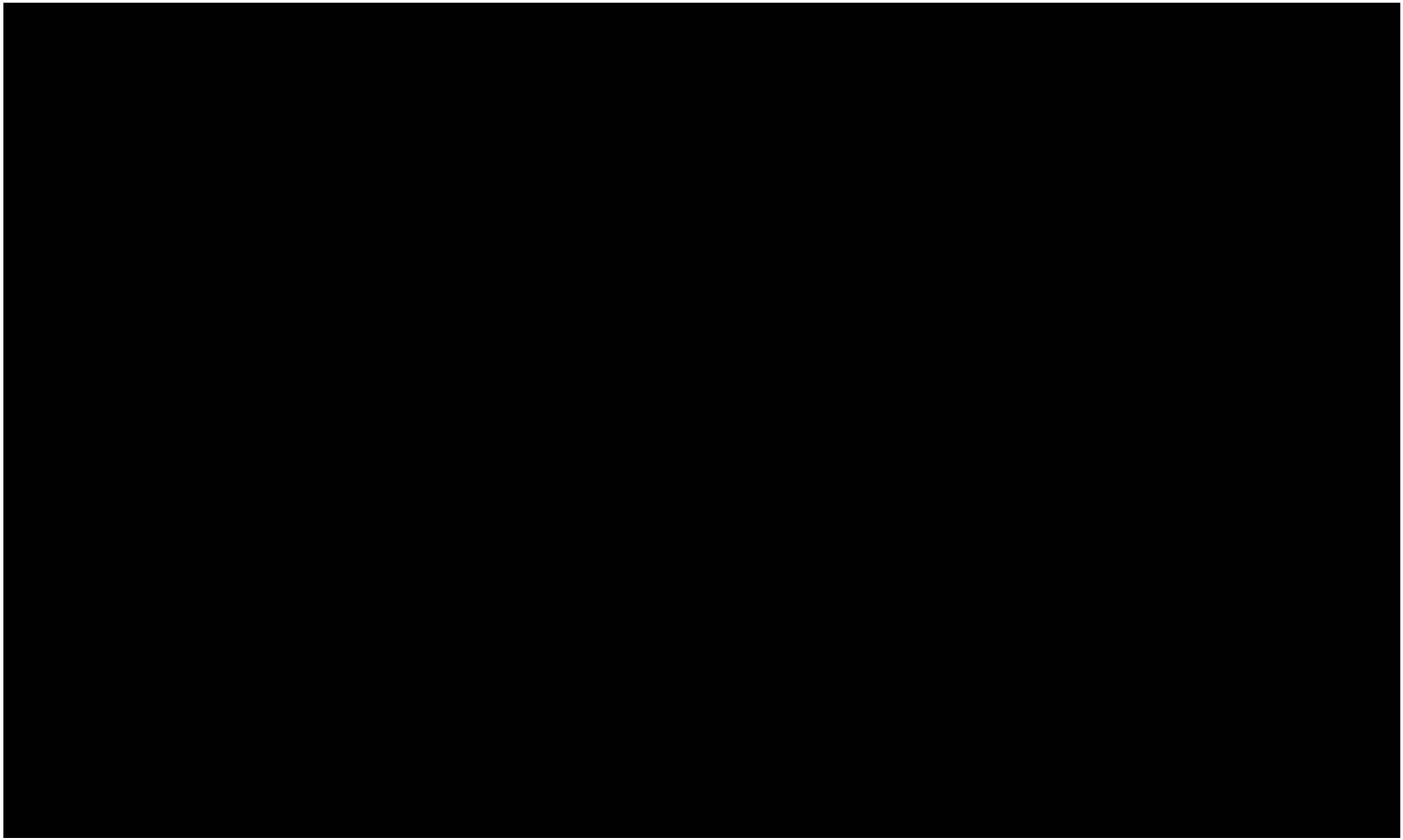
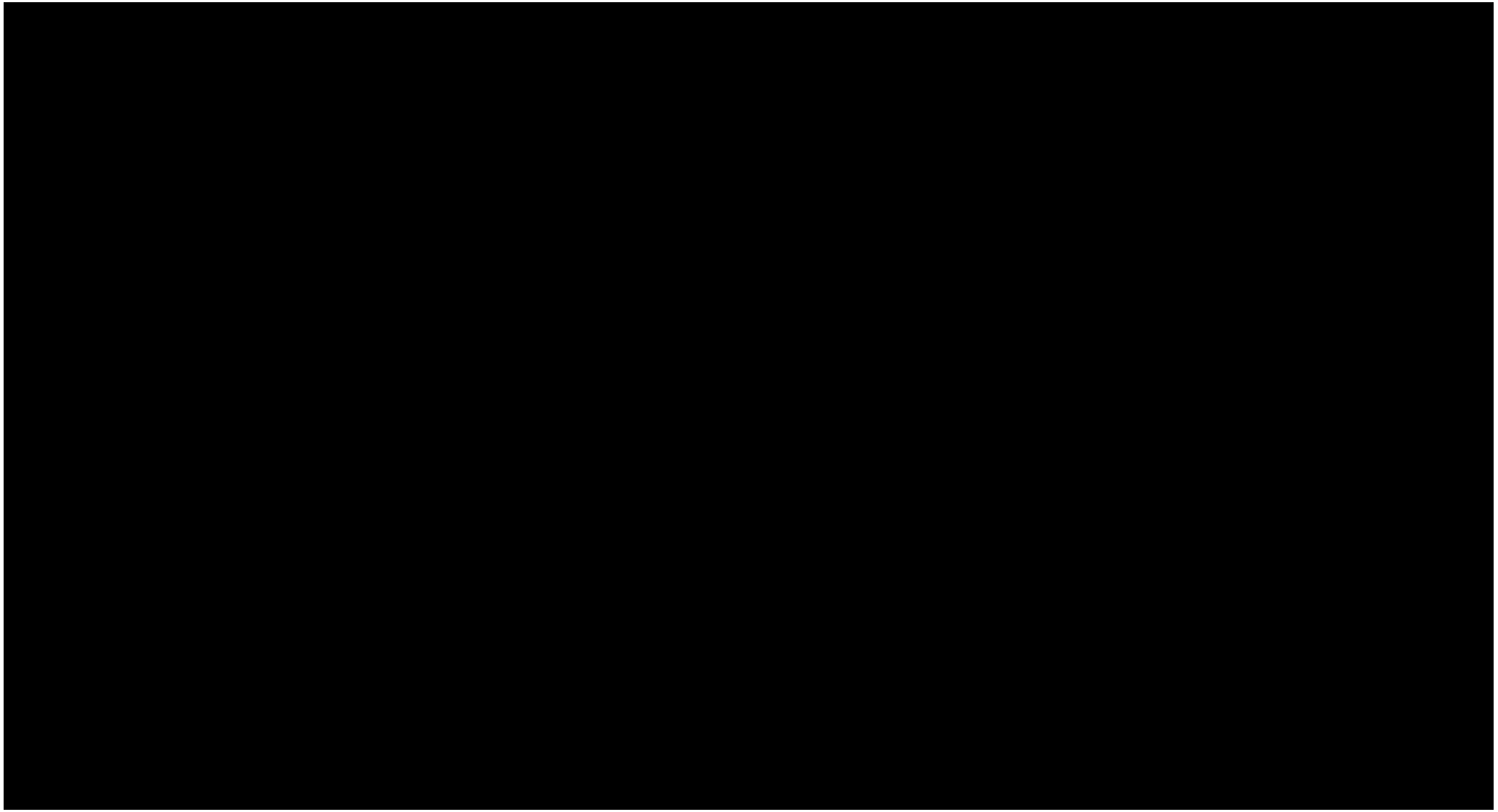
H. Conclusion

As detailed in this proposal, I have had very unique opportunities to have twice served as an FCPA Compliance Monitor for the DOJ and SEC. I have been informed that I am the only accountant (non-lawyer) in the country to have twice been selected to be a Monitor. In addition to these assignments, the four years I served as the FCPA Consultant for SciClone has further demonstrated that I can work collaboratively with an organization to help identify issues through both interviews and data analysis, and make pragmatic and meaningful recommendations. While doing this, I fulfilled my duties and responsibilities to the governmental agencies to whom I had a reporting obligation. The references I have included herein will speak to my achievement of success on these critical assignments. It is understood that the role of the ICA for Herbalife is somewhat different than that of an FCPA Compliance Monitor. However, the work performed as a Compliance Monitor is quite similar to that of an ICA in that the assigned individual needs to work collaboratively within the organization, fulfill obligations mandated in the Settlement Agreement, and report findings to the governmental agency. In addition, the data testing required by this ICA assignment is consistent with the type of assignment we perform on a regular basis at Hemming.

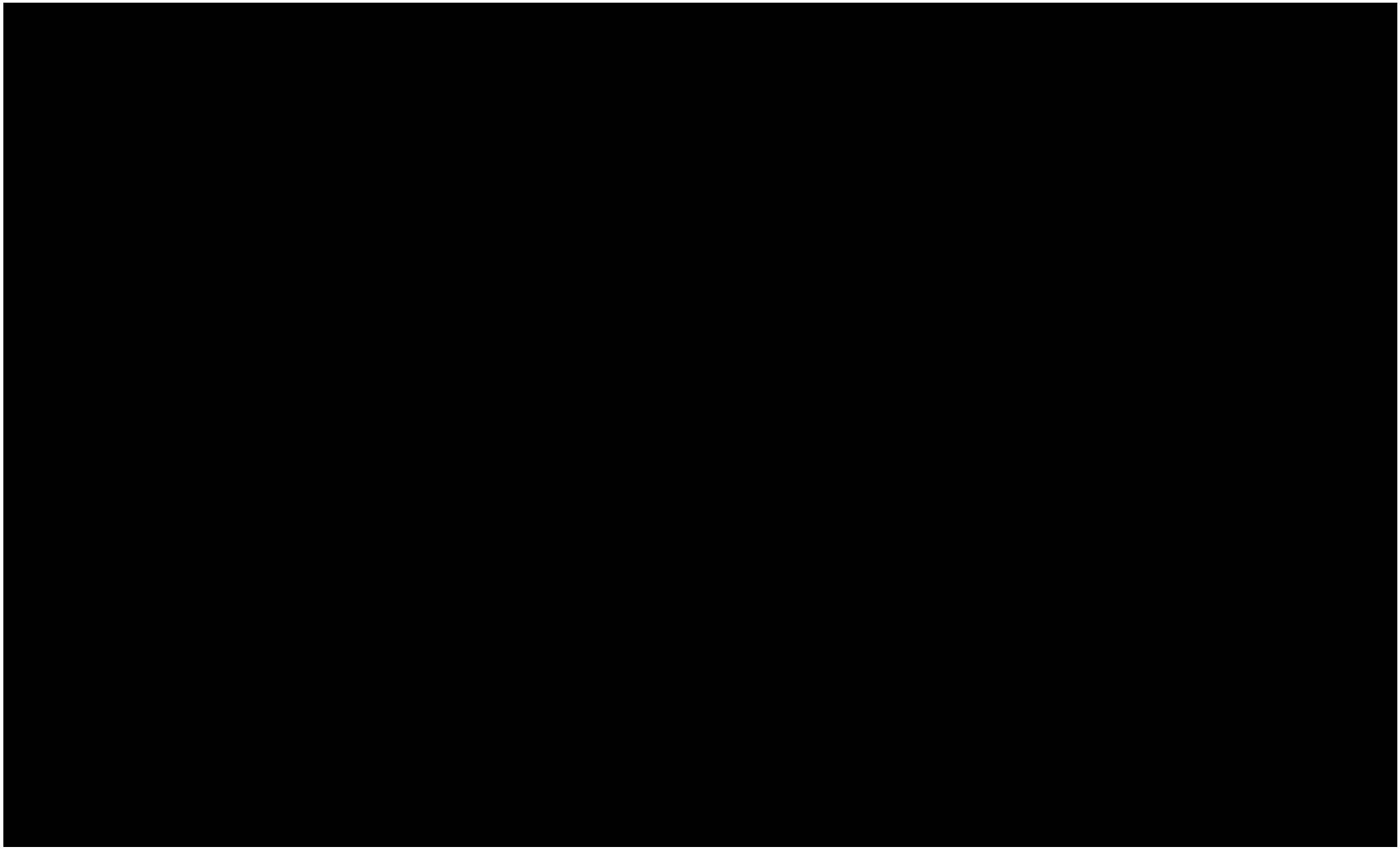
Hemming Morse Proposed Budget / Estimate of Fees



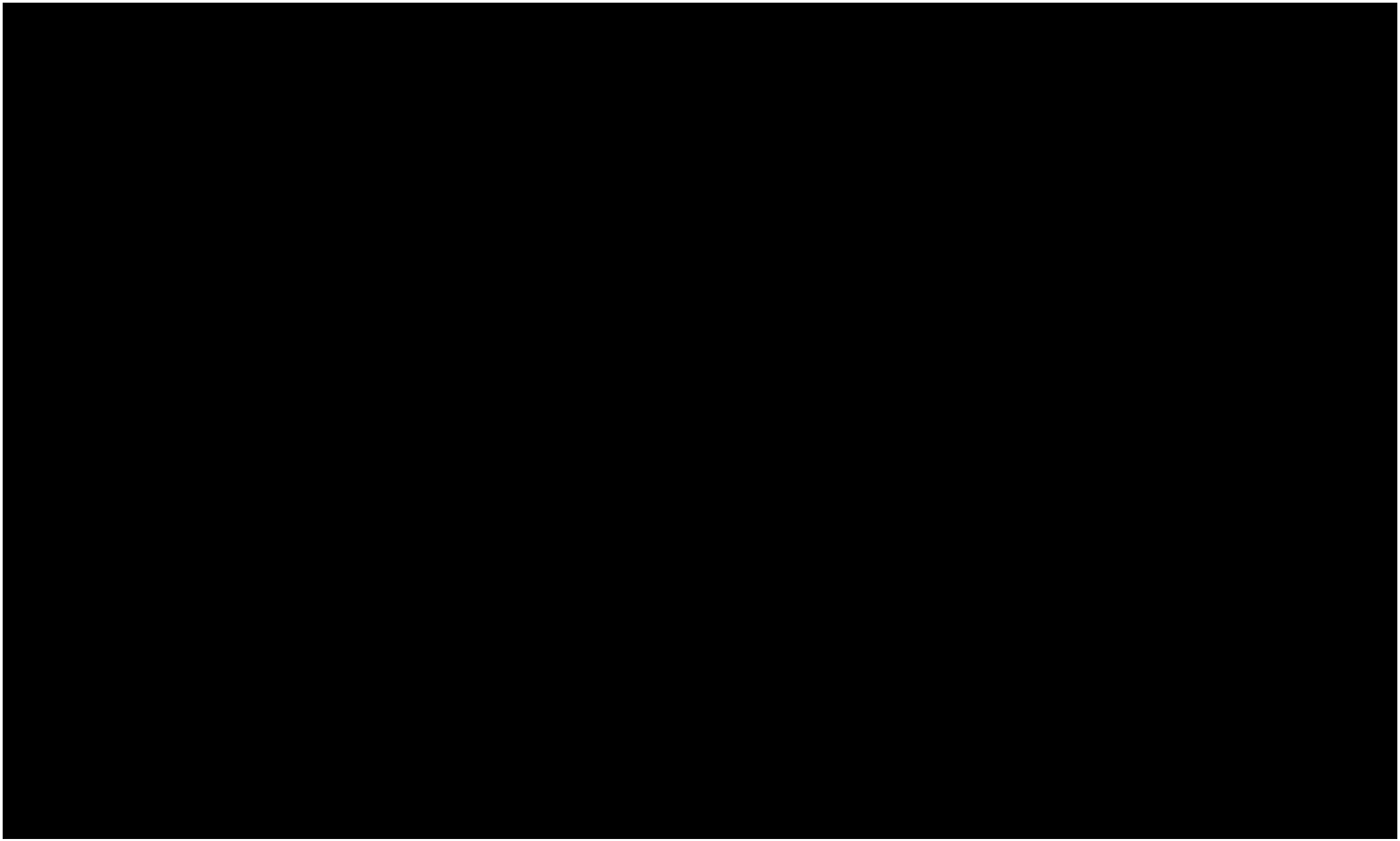
Hemming Morse Proposed Budget / Estimate of Fees



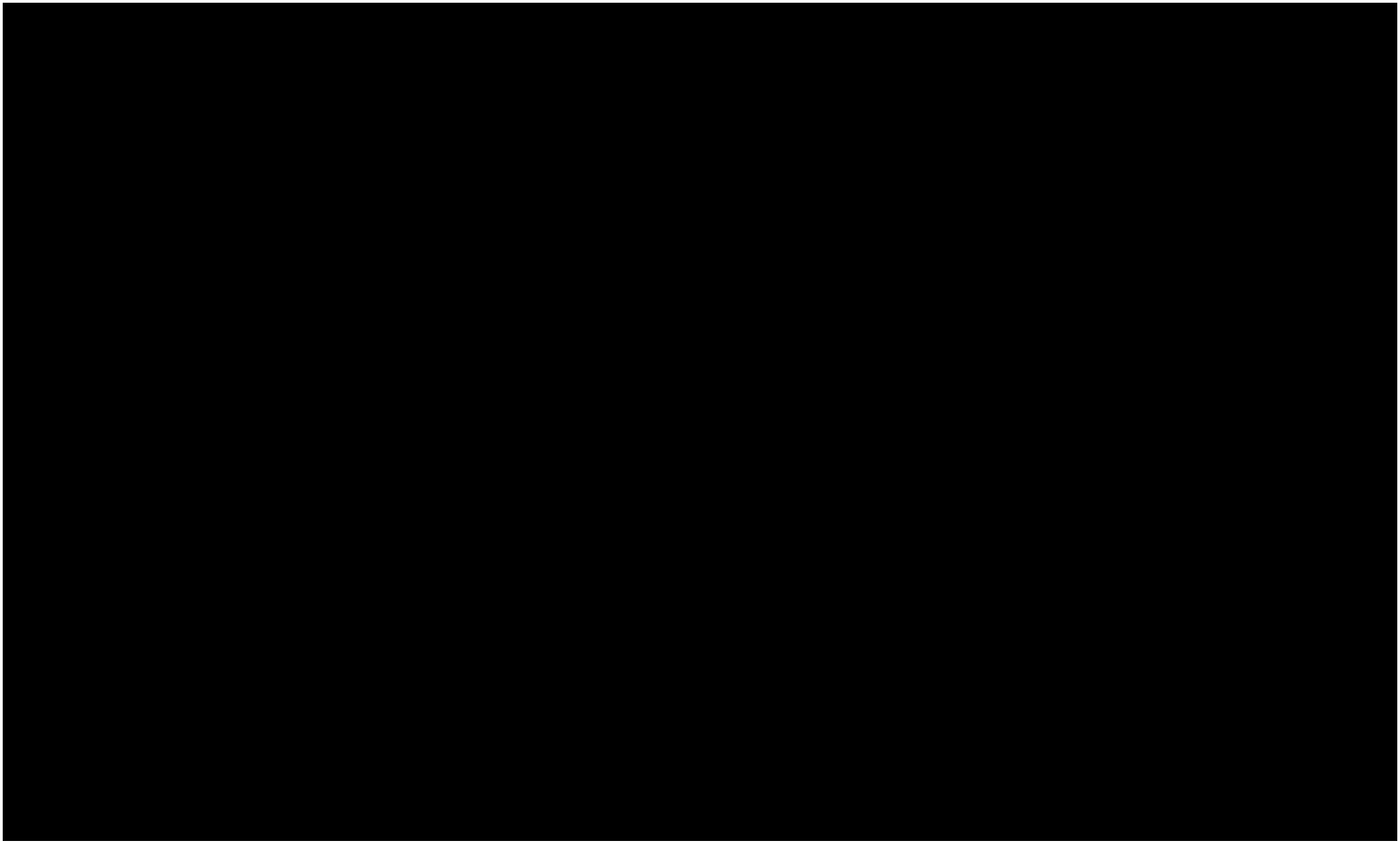
Hemming Morse Proposed Budget / Estimate of Fees



Hemming Morse Proposed Budget / Estimate of Fees



Hemming Morse Proposed Budget / Estimate of Fees



Hemming Morse Proposed Budget / Estimate of Fees

Daniel W. Ray, CPA/CFF, CFE

Employment & Education

2012 – Present	**Hemming Morse, LLP** *Certified Public Accountants,* *Forensic and Financial Consultants* Partner
1995 – 2011	**Hemming Morse, Inc.** Director, 1997-2011 Manager, 1995-1996
1990 – 1995	**Neilson Elggren Durkin & Co.** Manager, 1992-1995 Supervisor, 1990-1992
1982 – 1990	**Federal Bureau of Investigation** Special Agent
1978 – 1982	**Maryland Center for Public Broadcasting** Senior Accountant
1978	**Towson State University, Baltimore, Maryland** B.S. Business Administration

Professional & Service Affiliations

- Certified Public Accountant, State of California
- Certified Fraud Examiner
- Certified in Financial Forensics
- California Society of Certified Public Accountants
  - Past Chair of Litigation Steering Committee
  - Past Chair of Fraud Operating Committee
- American Institute of Certified Public Accountants
- Association of Certified Fraud Examiners
- Society of Former Special Agents of the FBI
- Northern California Fraud Investigators Association

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Daniel W. Ray, CPA/CFF, CFE

Seminar Instruction

- *"Foreign Corrupt Practices Act - Latest Trends"*
  California Society of CPAs
  Newport Beach, CA, March 2016
- *"Case Study - The Shopping Center King: Insurance Fraud and a Host of Other Bad Things"*
  California Society of CPAs
  Los Angeles, CA, August 2015
- *"Law and Technology"*
  Tel Aviv and Berkeley Law Schools Joint LL.M. Program
  Berkeley, CA, August 2015
- *"Finding Fraud Through Interviewing... Detecting Deception (Part 2)"*
  AICPA Webcast (Panelist)
  New York, NY, July 2012
- *"Finding Fraud Through Interviewing... Tales From Fraudsters and Those Who Catch Them (Part 1)"*
  AICPA Webcast (Panelist)
  New York, NY, May 2012
- *"Internal Controls, Governance and Management Structure" (Panelist)*
  Thompson Reuters - The China Deal 2012: Legal and Economic Outlook For Inbound and Outbound Deals
  San Francisco, CA, May 2012
- *"From Suspicion to Conviction"*
  Institute of Internal Auditors, Hawaii Chapter
  Honolulu, HI, February 2012
- *"Foreign Corrupt Practices Act - A Monitor's Perspective"*
  Institute of Internal Auditors, Hawaii Chapter
  Honolulu, HI, February 2012
- *"Interviewing for CPAs: Cutting Through the Rhetoric"*
  California Society of CPAs - Combined Section Meeting, Marina Del Rey, CA, October 2011
- *"From Suspicion to Conviction: Fraud Case Studies"*
  AICPA National Governmental and Not-For-Profit Training Program, Orlando, FL, October 2011
- *"Developing Your Fraud Investigation Through Percipient and Subject Interviews"*
  AICPA National Governmental and Not-For-Profit Training Program, Orlando, FL, October 2011
- *"The Role of Forensic Accountants"*
  GE Capital Americas Risk / Loss Mitigation Retreat
  Tarrytown, NY, June 2011
- *"The Foreign Corrupt Practices Act - A Monitor's Perspective"*
  22nd Annual ACFE Fraud Conference
  San Diego, CA, June 2011
- *"For Profit Frauds in a Not-For-Profit World"*
  AICPA National Not-For-Profit Financial Executive Forum, San Francisco, CA, November 2010
- *"Financial Fraud Investigations Methodology"*
  California Society of CPAs, San Francisco, CA
  January 2010
- *"The Foreign Corrupt Practices Act: An Independent Monitor's Perspective"*
  The PIPEs Conference 2009, Las Vegas, NV
  November 2009
- *"Foreign Corrupt Practices Act and Other Ethical Considerations"*
  The China Deal 2010 Conference, San Francisco, CA
  October 2009
- *"The Role of the Monitor in Federal Cases"*
  CalCPA Litigation Steering Committee, Los Angeles, CA, August 2009

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Seminar Instruction continued

- *"Introduction to Financial Forensic Accounting"*
  Golden Gate University, San Francisco, CA
  April 2009, August 2009
- *"Crisis Management - What to do when Fraud is Detected"*
  Governance Conference, Bellevue, WA, October 2008
- *"An Independent Monitor's Perspective on Compliance with the Foreign Corrupt Practices Act"*
  California Society of CPAs and Bar Association of San Francisco, San Francisco, CA, January 2008

Publications

- *"The Foreign Corrupt Practices Act: Opportunities for Accountants and Lawyers"*
  The Witness Chair, Winter 2016
- *"Tips for an Efficient and Effective Fraud Investigation"*
  Law 360, July 2015 (Co-author)

News Media Contacts

- KPIX Channel 5 News, San Francisco, California
  Investigative report by Anna Werner on Fremont Football League; interviewed regarding forensic accounting procedures, February 2006
- KRON Channel 4 News, San Francisco, California
  Interviewed regarding forensic accounting; aired May 30, 2002
- ABC News Productions
  Interviewed for Court TV production; October 19, 2001
- NBC Nightly News
  Special report by Jim Avila – *"Following the Terrorists' Money Trail,"* September 24, 2001
- The Los Angeles Times
  "Tracing the Money Trail of Terrorism," September 24, 2001
- The New York Times
  "And Now, a Case for the Forensic Accountant," May 27, 2001

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Testimony

Trial

- **Rincon EV Realty LLC, et al. v. CP III Rincon Towers, Inc., et al. (July 2012)**
  San Francisco Superior Court
  Case No. 10-496887
- **City of Glendale v. Marcus Cable Associates, LLC, dba Charter Communications (February 2012)**
  Los Angeles County Superior Court
  Case No. EC 051903
- **People v. Howard Douglas Porter (July 2008)**
  Stanislaus County Superior Court
  Case No. 1219173
- **BHE Group, Inc., et al. v. MTS Products and Ben Hsia (February 2008)**
  Los Angeles County Superior Court
  Case No. EC 041097
- **People of the State of California v. Roland Clark Colton, and Paul McNeece Roesser (October 2007)**
  San Diego County Superior Court, Central Division
  Case No. CD204432
- **Chevron U.S.A., Inc. v. SSD & Associates (August 2006)**
  U.S. District Court, Northern District of California
  Case No. C05-3276 WHA
- **United States Ex. Rel DRC, Inc., et al. v. Custer Battles, LLC, et al. (March 2006)**
  U.S. District Court, Eastern District of Virginia
  Case No. CV-04-199-A
- **People v. David Mark Levey (July 2005)**
  Contra Costa County Superior Court
  Case No. 1123341-0 F
- **The People of the State of California v. Hanson Building Materials America, Inc., et al. (June 2005)**
  Contra Costa County Superior Court
  Case No. MSC04-00524

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Testimony continued

Deposition

- **IAS Services Group, LLC v. Jim Buckley & Associates, et al. (July 2015)**
  U.S. District Court, Western District of Texas
  Case No. 5:14-CV-180-FB
- **Cambridge CM, Inc. v. Basil P. Fthenakis, et al. (July 2014)**
  Santa Clara County Superior Court
  Case No. 112 CV 223040
- **Rincon EV Realty LLC, et al. v. CP III Rincon Towers, Inc., et al. (June 2012)**
  San Francisco Superior Court
  Case No. 10-496887
- **Abarca, et al. v. Merck & Co., et al (February 2012)**
  Eastern District of California Fresno Division
  Case No. 1:07-CV-0388 DOC DLB
- **City of Glendale v. Marcus Cable Associates, LLC, dba Charter Communications (July 2011)**
  Los Angeles County Superior Court
  Case No. EC 051903
- **Alfa Tech Consulting Engineers, Inc. v. Cambridge CM, Inc. (February 2011)**
  JAMS Arbitration - San Jose, CA
  Case No. 1110012203
- **CNA Insurance, et al. v. Lloyds London, Ace American Insurance Company, Travelers Indemnity Company (December 2009)**
  Circuit Court of Cook County, Illinois
  Case No. 2005 L 011044
- **Shinazy Enterprises, Inc.; Botta's Auto Body v. Truck Insurance Exchange; Farmers Insurance Group (September 2009)**
  San Francisco Superior Court
  Case No. CGC-07-461955
- **Banco De Mexico v. Orient Fisheries, Inc., et al. (August 2009)**
  U.S. District Court, Central District of California
  Case No. 2:07-CV-07043 GAF
- **Carolyn Vertuca, Trustee of The Louis R. Laeremans Trust dated December 12, 1997, et al. v. Citigroup Global Markets, Inc. dba Citi Smith Barney, et al. (July 2009)**
  Alameda County Superior Court
  Case No. RG07335879
- **Community Memorial Health System, et al. v. Bartlett, Pringle & Wolf LLP, et al. (2008)**
  Ventura County Superior Court
  Case No. 56-2008-00318564-CU-FR-VTA
- **BHE Group, Inc., et al. v. MTS Products and Ben Hsia (November 2007)**
  Los Angeles County Superior Court
  Case No. EC 041097
- **Norris Houk v. CSAA (August 2007)**
  Arbitration, San Francisco, CA
- **Gerald Laframboise, dba Laframboise Construction v. Alan Van Vliet, et al. (February 2007)**
  Mono County Superior Court, Case No. 15092

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Daniel W. Ray, CPA/CFF, CFE

Testimony continued

Deposition continued

- **New World TMT Limited v. PrediWave Corporation, et al. (September 2006)**
  Santa Clara County Superior Court
  Case No. 104 CV020369
- **Patricia Davis Raynes, et al. v. Marvin Davis, Kenneth Kilroy, et al. (September 2006)**
  JAMS Arbitration, Los Angeles, CA
  Case No. 1220034665
- **Chevron U.S.A., Inc. v. SSD & Associates (July 2006)**
  U.S. District Court, Northern District of California
  Case No. C05-3276 WHA
- **Insurance Ventures, Inc. v. Vesta Fire Insurance Corporation (November 2005)**
  Sacramento County Superior Court
  Case No. 04AS00268
- **United States Ex. Rel DRC, Inc., et al. v. Custer Battles, LLC, et al. (October 2005)**
  U.S. District Court, Eastern District of Virginia
  Case No. CV-04-199-A
- **Daniel Garcia v. Thomas White (November 2005)**
  San Francisco Superior Court
  Case No. CGC 02-414569
- **Martha Wood, et al. v. John M. O'Quinn, et al. (September 2005)**
  American Arbitration Association, Houston, TX
- **The People of the State of California v. Hanson Building Materials America, Inc., et al. (May 2005)**
  Contra Costa County Superior Court
  Case No. MSC04-00524

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Daniel W. Ray, CPA/CFF, CFE

Testimony continued

Arbitration

- **Alfa Tech Consulting Engineers, Inc. v. Cambridge CM, Inc. (March 2011)**
  JAMS Arbitration - San Jose, CA
  Case No. 1110012203
- **Europlay Capital Advisors, LLC v. Pamela S. Colburn (December 2007)**
  American Arbitration Association
  Case No. 72 180 Y 00337 07 WYGI
- **Tigran Z. Marcarian v. Tony Lee, et al. (October 2007)**
  Santa Clara County, CA
- **Norris Houk v. CSAA (August 2007)**
  San Francisco, CA
- **George Goff, et al. v. The Thomas Kinkade Company, et al. (April 2006)**
  Los Angeles, CA
- **Daniel Garcia v. Thomas White (November 2005)**
  Superior Court, San Francisco, CA
  Case No. CGC 02-414569
- **Martha Wood, et al. v. John M. O'Quinn, et al. (October 2005)**
  Class Certification Hearing, Houston, TX
- **French Camp Vineyards v. Guenoc Winery (May 2004)**
  San Francisco, CA
- **Far Eastern Group I v. Hayes Valley Development Partners (February 2002)**
  San Mateo, CA

NASD Arbitration

- **A. G. Edwards & Sons, Inc. v. Wendy Feldman Purner (September 2005)**
  Arbitration Case No. 02-04317, San Diego, CA
- **A. G. Edwards & Sons, Inc. v. Wendy Feldman Purner (September 2004)**
  Arbitration Case No. 02-04275, Seattle, WA

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Steven B. Boyles, CPA/CFF/ABV, ASA

Profile

Steven Boyles is a Partner in the Forensic and Financial Consulting Services Group in the San Francisco office of Hemming Morse, LLP. In addition to being a Certified Public Accountant (CPA), Steven maintains a number of other professional designations including being Certified in Financial Forensics (CFF) and Accredited in Business Valuation (ABV), both issued by the American Institute of Certified Public Accountants. He has also received the designation of Accredited Senior Appraiser (ASA) from the American Society of Appraisers. Steven is a member of the Steering Committee for the California Society of Certified Public Accountants Forensic Services Section and is the Chair of the Committee's San Francisco Chapter.

Steven is experienced in consulting with clients and counsel regarding complex business disputes involving the investigation, evaluation and quantification of economic damages. He also possesses extensive experience in performing valuations of closely-held businesses and business assets in both litigation and consulting settings. His experience encompasses a diverse range of litigation matters including investigating and quantifying damages in matters involving patent infringement, trade secret misappropriation, shareholder and partnership disputes, post-acquisition claims, securities litigation, alter ego analyses, royalty disputes, and other forensic and fraud investigations stemming from contract and tort claims.

Steven has testified as an expert witness in federal and state courts as well as in arbitration in connection with the work performed in these areas.

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Steven B. Boyles, CPA/CFF/ABV, ASA

Employment & Education

2012 – Present	**Hemming Morse, LLP** *Certified Public Accountants, Forensic and Financial Consultants* Partner
2011	**Hemming Morse, Inc.** Director
2007 – 2011	**StoneTurn Group, LLP** Managing Director
2003 – 2007	**CCR Group, LLP** Manager
2002 – 2003	**Johnson Eubank Pankratz & Company** Manager
2001 – 2002 1999 – 2000	**Hoffman & Associates, LLP** Manager
2000 – 2001	**Matson Driscoll & Damico, LLP** Associate
1998 – 1999	**Pershing Yoakley & Associates. LLP** Associate
1998	**University of South Florida** Bachelor of Science - Accounting

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Steven B. Boyles, CPA/CFF/ABV, ASA

Professional & Service Affiliations

- **Certified Public Accountant, State of Massachusetts**
- **Accredited Senior Appraiser (ASA)**
- **Certified in Financial Forensics (CFF)**
- **Accredited in Business Valuation (ABV)**
- **American Institute of Certified Public Accountants**
  - Forensic & Litigation Services Section
- **California Society of Certified Public Accountants**
  - Treasurer, Forensic Services Valuation Section, past
  - Forensic Services Section Steering Committee
  - Chair, San Francisco Chapter Litigation Consulting Services Committee
- **The International Accounting Group**
  - Chair, Forensic / Litigation Support Specialty Group
- **American Society of Appraisers**
- **Golden Gate University**
  - Advisory Board to Forensic Accounting Program
  - Adjunct Professor

Presentations & Seminars

- *"Alter Ego Liability: Prove it or Lose it"*
  Bar Association of San Francisco, Spring 2015
- *"Trade Secrets, Enforceability and Damages"*
  TAGLaw - Edinburgh, Scotland, Spring 2015
- *"The Wild World of Corporate Espionage: Measuring Economic Damages when Trade Secrets are Misappropriated"*
  American Institute of Certified Public Accountants Forensic and Valuation Services Conference, Fall 2013
- *"Understanding the Key Accounting Pieces of the Legal Puzzle"*
  Bar Association of San Francisco, Spring 2013
- *"The Use of Forensic Accountants in Solving Unconventional Matters"*
  DLA Piper - San Francisco, Spring 2013
- *"Very Small Business Valuations"*
  Family Law Section of the Contra Costa Bar Association, Summer 2012
- *"The Reasonable Certainty of Your Expert's Damages Analysis"*
  Caldwell Leslie & Proctor, PC, Winter 2012
- *"Post Acquisition Disputes – Lessons Learned"*
  Wilson Sonsini Goodrich & Rosati, Winter 2011
- *"Post Acquisition Disputes – Lessons Learned from a Forensic Accountant"*
  Bar Association of San Francisco, Fall 2010
- *"The Forensic Accounting Investigation of an Alter Ego Claim"*
  Nixon Peabody, LLP, Spring 2010
- *"Dr. Jekyll and Mr. Hyde: What Counsel Should know about Alter Ego"*
  Marin County Bar Association, Winter 2009
- *"Dr. Jekyll and Mr. Hyde: What Counsel Should know about Alter Ego"*
  Bar Association of San Francisco, Fall 2009
- *"Common Techniques in Quantifying Commercial Damages"*
  Seyfarth Shaw, LLP, Fall 2008
- *"What's the Value of My Business?"*
  Young Presidents Organization – Hartford, CT, Fall 2005

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Steven B. Boyles, CPA/CFF/ABV, ASA

Testimony

Trial

- **Steven Brisson and Laura Maness v. Propane Studio LLC, Neil Chaudhari, Rahul Odedra, Lilu Odedra, and Michelle Viray (2014)**
  Superior Court of California, County of San Francisco
  Case No. CGC-13-531005
- **American TonerServ Corp., iPrint Technologies, LLC v. Chad Solter, Darrell Tso, Scott Muckley, MTS Partners, Inc. (March 2014)**
  Superior Court of California, County of Marin
  Case No. CIV1102020
- **Jeffrey C. Coury v. William P. Foley, II and Chicago Title Insurance Company (May 2013)**
  Superior Court of California, County of Sonoma
  Case No. SCV250985
- **Brandon Abbey, Burst Communications, Inc. and Britt Miller v. John Sheputis, William Fleming, Fortune Drive Associates, LLC, Sheputis DC Investments, LLC, and California Acquisition and Development Company, LLC (January 2013)**
  Superior Court of California, County of San Francisco
  Case No. CG-08-479301
- **Brandon Abbey, Burst Communications, Inc. and Britt Miller v. John Sheputis, William Fleming, Fortune Drive Associates, LLC, Sheputis DC Investments, LLC, and California Acquisition and Development Company, LLC (November 2012)**
  Superior Court of California, County of San Francisco
  Case No. CG-08-479301
- **Innovention Toys, LLC v. MGA Entertainment, Inc. and Wal-Mart Stores, Inc. and Toys "R" Us, Inc. (2012)**
  United States District Court Eastern District of Louisiana, Case No. 07-6510
- **Peter Bennett v. Cynthia Foss (2012)**
  Superior Court of California, County of San Francisco
  Case No. FPT-09-376032
- **Joanne Caveney v. Thomas Caveney (2009)**
  Probate and Family Court, Lawrence Division
  State of Massachusetts, Case No. 06D-1236-DV1

Arbitration

- **Cancer Imaging Associates, LLC v. California Cancer Associates for Research and Excellence, Inc. (2016)**
  JAMS Arbitration, Case No. 1120012598
- **InterDigital Technology Corporation and IPR Licensing, Inc. v. Inventec Appliances Corporation (2015)**
  ICDR Arbitration, Case No. 50-20-1400-0225
- **Frederick H. DiRienzo, et al. v. Banc of America Investment Services, Inc. (2011)**
  FINRA Arbitration, Case No. 10-01011

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Steven B. Boyles, CPA/CFF/ABV, ASA

Testimony continued

Deposition

- **Derek Benham v. Norman A. Barnes, Kenneth Everett, Seiler, LLP (2016)**
  Superior Court of California, County of San Francisco
  Case No. CGC-15-54427
- **Cancer Imaging Associates, LLC v. California Cancer Associates for Research and Excellence, Inc. (2016)**
  JAMS Arbitration, Case No. 1120012598
- **C&J Express and Charlie Lu v. Golden Int'l Travel, Inc. and Chaoying Guo (January 2016)**
  United States District Court Central District of California
  Case No. 2:14-cv-06030-FMO-JC
- **Alana Kaselitz and Melissa Kaselitz v. Hisoft Technology International, Ltd. and Tiak Koon Loh (June 2015)**
  Superior Court of California, County of San Francisco
  Case No. CGC-12-525000
- **Efren Guerra and Robin Guerra v. Nationstar Mortgage, LLC; Aurora Loan Services, LLC; and Cal-Western Reconveyance (2015)**
  Superior Court of California, County of Nevada
  Case No. CU13-079943
- **Lloyds TSB Bank PLC v. Michael Joseph Kilroy (March 2015)**
  Superior Court of California, County of Riverside
  Case No. 1202040
- **Steven Brisson and Laura Maness v. Propane Studio LLC, Neil Chaudhari, Rahul Odedra, Lilu Odedra, and Michelle Viray (2014)**
  Superior Court of California, County of San Francisco
  Case No. CGC-13-531005
- **American TonerServ Corp., iPrint Technologies, LLC v. Chad Solter, Darrell Tso, Scott Muckley, MTS Partners, Inc. (February 2014)**
  Superior Court of California, County of Marin
  Case No. CIV1102020
- **Deanna Roth Fairchild, Trustee of the Deanna Trust v. Carolyn G. Roth, Trustee of the Gerald K. Roth and Carolyn G. Roth Trust (January 2014)**
  Superior Court of California, County of Contra Costa
  Case No. P11-01078
- **Jeffrey C. Coury v. William P. Foley, II and Chicago Title Insurance Company (February 2013)**
  Superior Court of California, County of Sonoma
  Case No. SCV250985
- **Brandon Abbey, Burst Communications, Inc. and Britt Miller v. John Sheputis, William Fleming, Fortune Drive Associates, LLC, Sheputis DC Investments, LLC, and California Acquisition and Development Company, LLC (September 2012)**
  Superior Court of California, County of San Francisco
  Case No. CG-08-479301
- **Innovention Toys, LLC v. MGA Entertainment, Inc. and Wal-Mart Stores, Inc. and Toys "R" Us, Inc. (2012)**
  United States District Court Eastern District of Louisiana, Case No. 07-6510
- **Brandon Abbey, Burst Communications, Inc. and Britt Miller v. John Sheputis, William Fleming, Fortune Drive Associates, LLC, Sheputis DC Investments, LLC, and California Acquisition and Development Company, LLC (July 2012)**
  Superior Court of California, County of San Francisco
  Case No. CG-08-479301

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Steven B. Boyles, CPA/CFF/ABV, ASA

Testimony continued

Deposition continued

- **Carol Barnes Lucero v. Wells Fargo Bank, N.A. (2012)**
  Superior Court of California, Alameda County
  Case No. RG 11583019
- **Cycle Shack, Inc. v. Harley-Davidson Motor Company Inc. and Markland Industries (2012)**
  Superior Court of California, Orange County
  Case No. 00126460
- **Elpida Memory, Inc. v. Semiconductor Manufacturing International Corporation (2011)**
  American Arbitration Association
  Case No. 50 117 T 732 10
- **Elpida Memory, Inc. v. Cension Semiconductor Manufacturing Corporation and Semiconductor Manufacturing International Corporation (2010)**
  American Arbitration Association
  Case No. 50 117 T 0001710

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Steven B. Boyles, CPA/CFF/ABV, ASA

Selected Case Experience

- Assisted the appointed corporate FCPA monitor in an evaluation of the compliance of a multinational corporation in the medical device industry with the terms of its FCPA-related settlement arrangements with the U.S. Department of Justice and the SEC. Additionally, assisted the informal FCPA monitor with the evaluation of the compliance program of a pharmaceutical company operating in Asia.

- Assisted in performing forensic accounting investigations at the request of public company Boards of Directors and Audit Committees as well as forensic accounting engagements to assist companies in related efforts including financial statement restate ments. These engagements have included assessment of alleged fraudulent financial reporting issues includ ing recognition of revenue, stock options compensation expense, reported reserves, and adjustments relating to acquisitions.

- Engaged as plaintiff's expert to provide a valuation analysis in a dispute between the limited partners and the general partner of an investment fund. Mr. Boyles analyzed the various underlying investments held by the fund and performed valuation procedures and specific transaction analysis on these investments at various dates. Mr. Boyles' analysis clearly reflected how the fund manager deceived investors by investing in preferred equity of high risk companies and then overstated the values of these underperforming companies through stock price manipulation and misrepresentation which inflated the returns on the fund's investments.

- Engaged as an expert to evaluate and quantify damages resulting from alleged patent infringements on a number of occasions. In these matters, Mr. Boyles has performed market analyses, assessed lost profits stemming from alleged infringements, analyzed the value contribution of the patented invention to the saleable product, identified and analyzed comparable license agreements, and evaluated other Georgia-Pacific factors for purposes of determining a reasonable royalty during provisional rights and infringement periods.

- Engaged as an expert to evaluate the economic impact of alleged trade secret misappropriations. These analyses have involved assessing the impact of misappropriations by departing employees as well as by business partners upon contract termination. Mr. Boyles' analyses have included assessing the cost of development of trade secrets, the economic benefit to the party which allegedly misappropriated, and the economic impact to the harmed party. In so doing, Mr. Boyles has evaluated the manufacturing, distribution and marketing aspects of the parties involved to determine potential lost profits, unjust enrichment, or reasonable royalty damages resulting from the alleged misappropriation.

- Engaged as an expert by a Fortune 100 international bank in a dispute against a debtor company for $45 million in damages. Mr. Boyles' analysis included analyzing the accounting and operational records and systems of the debtor and its related entities to identify the existence of indicia of alter ego among the related entities.

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Travis P. Armstrong, CPA/CFF, CFE

Employment & Education

2012 – Present **Hemming Morse, LLP**
Certified Public Accountants,
Forensic and Financial Consultants
Partner, 2016-Present
Manager, 2012-2015

2008 – 2011 **Hemming Morse, Inc.**
Manager, Litigation and Forensic Consulting Services Group, 2011
Senior Associate, Litigation and Forensic Consulting Services Group, 2008-2010

2006 – 2008 **Freeman & Mills, Inc.**
Consultants to Counsel and Management
Senior Analyst, Forensic and Litigation Consulting, 2007-2008
Analyst, Forensic and Litigation Consulting, 2006-2007

2006 **University of California, Santa Barbara**
B.A. Business Economics with an emphasis in Accounting

Professional & Service Affiliations

- **Certified Public Accountant, State of California, 2009**
- **Certified Fraud Examiner, 2011**
- **Certified in Financial Forensics, 2012**
- **American Institute of Certified Public Accountants**
  – Forensic & Valuation Services Case Law Task Force, 2014-Present
  – AICPA's Leadership Academy, 2012
  – 'Standing Ovation' Honors for Top Young CPAs in Forensics and Valuation
- **California Society of Certified Public Accountants**
  – Forensic Services Section, Economic Damages, Chair, 2016-Present, Vice-Chair, 2014-2016
  – CalCPA Leadership Institute, 2011
  – CalCPA Emerging Leaders Certificate Program, Fall 2010
- **Association of Certified Fraud Examiners**
- **Legal Aid of Marin**
  – Board Member, 2014-Present

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Presentations

- *"Identifying and Limiting Your Risks in a FVS Engagement"*
  AICPA Webcast, June 2016
- *"Case Law Update Relevant to Damages Issues"*
  AICPA Forensic and Valuation Services Conference
  November 2014
- *"Forensic Accounting and the FCPA"*
  Hemming Morse, LLP Internal Training, April 2014
- *"Staff Development in a Forensic Accounting/Business Valuation Practice"*
  AICPA Forensic and Valuation Services Conference
  November 2012
- *"Motivating and Training the Next Generation of Forensic CPAs"*
  CALCPA Forensic Services Section Meeting
  October 2012
- *"How to Think Like a Leader"*
  CalCPA's 2012 Emerging Leaders Certificate Program, July 2012
- *"The Reasonable Certainty of Your Expert's Damages Analysis"*
  Caldwell Leslie & Proctor, PC, Winter 2012

Publications

- *"A Look into Business Interruption Case Law Stemming from Hurricane Katrina"*
  AICPA FVS Consulting Digest, October 2014
- *"You're a CPA. Now What? Recent YEPs Look Back and Give Advice Moving Forward"*
  CalCPA's Emerging Professionals Newsletter and website, Summer 2012

Selected Experience

Litigation and Consulting Services

- Consultant for various investigations and litigation matters concerning post-secondary education institutions. Including, matters concerning recruiter compensation, graduate job placement rates, and quantification of damages associated with Federal grant and loan funding.
- Performed FCPA due diligence and training on Chinese vendors for consumer goods company.
- Part of consulting team for multinational pharmaceutical company related to its ethical and compliance program and related accounting controls in China.

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Selected Experience continued

- Assisted the appointed independent monitor in an evaluation of the compliance of a multinational corporation with the terms of its FCPA-related settlement arrangements with the U.S. Department of Justice and the SEC. Included testing of policies and transactions to ensure compliance with anti-bribery and accounting records provisions of the FCPA in various foreign countries, including, Italy, Mexico, China, and Russia.
- Consultant for the SEC. Assisted the accounting expert in assessing whether the financial statements of a medical-technology company were prepared in accordance with Generally Accepted Accounting Principles (GAAP) and whether management adequately disclosed a systematic and fraudulent billing scheme in the Management Discussion and Analysis (MD&A) section of the company's public filings.
- Consultant to defendant in stock option accounting case. Assisted defense in relevant areas of GAAP (APB 25, FIN 44, EITF 00-23, FAS 123).
- Consulted as to whether the company's auditors had properly complied with relevant professional auditing standards during the firm's audit of the company's accounting and disclosure of reserves, retained interests and certain investments in accordance with GAAP (FAS 5, FAS 115, FAS 140).
- Consultant for the defendant. Assessed pre-acquisition accounting treatment related to software revenue recognition, deferred service revenue and contingent liabilities. Assisted the expert in determining the appropriate accounting treatment and implications to EBITDA in preparation for testimony at arbitration.
- Assisted damages expert in calculating lost profits for plaintiff related to a breach of contract in commodities sale.
- Created and managed complex damage models with multiple drivers and interest calculations associated with breach of contract litigation and royalty payments.
- Utilized government-compiled data to create a detailed analysis to demonstrate that defendants' business was substantially operated in California; analysis was used in a successful pretrial motion by plaintiffs' counsel for change of venue.
- Performed detailed qualitative and quantitative financial analysis of the restatements of quarterly and annual financial statements for several Fortune 500 companies. Analysis included complex GAAP issues, such as SFAS Nos. 91, 123R, 133 and APB No. 29, as well as non-GAAP performance measures, such as EBITDA, Free Cash Flows, Cash Revenues and Net Financial Debt.
- Consultant for class plaintiffs. Examined auditor and government regulator working papers related to internal controls in the financial services and mortgage industries. Drafted lines of questioning and accounting memos regarding complex accounting issues to prepare counsel for opposing experts' depositions.
- Performed a forensic investigation to determine the extent of misappropriation of assets from a charitable foundation.

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David W. Callaghan, CPA

Profile

Mr. Callaghan is a Partner in the Forensic and Financial Consulting Services Group of Hemming Morse, LLP. He has more than 20 years of experience providing advisory services related to financial investigations, mergers and acquisitions, forensic accounting, and bankruptcy matters to clients in a range of industries. He specializes in evaluating accounting irregularities, analyzing complex financial accounting issues, SEC and DOJ matters, contract disputes, financial investigations, and acquisition disputes. He has provided deposition and trial testimony for matters in Federal, State, and Canadian Court.

Education & Certifications

- University of California, Santa Barbara, B.A.
- University of California, Los Angeles, M.B.A.
- Certified Public Accountant, California and Washington State
- Certified in Financial Forensics

Memberships & Affiliations

- American Institute of Certified Public Accountants
- California Society of Certified Public Accountants
  Forensic Services Section – Steering Committee Member
  Fraud Section – Chair

Positions Held

- LitiNomics, Inc., Director
- LECG, Inc., Principal
- Kroll Associates, Inc., Senior Director
- Ernst & Young LLP, Senior Manager
- PricewaterhouseCoopers (Price Waterhouse), Senior Accountant

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David W. Callaghan, CPA

Select Engagements

- Directed forensic accounting investigation and financial record reconstruction project for a $250 million Ponzi scheme. Supported Court appointed Receiver's efforts to identify sources and uses of funds, recover assets for benefit of Receivership Estate, and distribute recovered funds to victims. Prepared and presented analyses related to civil and criminal actions resulting from the fraud.
- In context of an SEC inquiry, DOJ investigation, and $1 billion financial statement restatement; analyzed and assessed accuracy of historical accounting and disclosures, oversaw completion of independent actuarial analyses, identified control and operational weaknesses, and directed the preparation of remediation plan.
- Led engagements to evaluate the accounting, financial reporting, and disclosures included in financial statements of public and private companies.
- Directed engagement to assess accounting, financial reporting, and disclosures for loans and real estate assets of publicly traded banks.
- Led projects evaluating financial reporting and the independent financial statement audits of publicly traded and privately held aerospace, energy, financial, and technology businesses.
- Evaluated financial institution's reporting for derivative transactions to determine whether accounting was completed in accordance with relevant guidance. Presented findings to regulators, management, and independent auditors.
- Recreated and analyzed financial records for international concert tour to summarize cash flows, revenues, and expenses.
- Led forensic accounting investigations to identify and analyze transactions and the receipts and disbursements of cash related to criminal prosecution of investment frauds.
- Analyzed financial transactions and accounting guidance to support neutral accountants, buyers, and sellers in acquisition disputes.

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Compliance Monitors

How to Find a Business-Minded Compliance Monitor and Minimize Reporting Requirements When Negotiating an FCPA Settlement (Part Three of Three)

By Nicole Di Schino

Resolving a government FCPA investigation is a costly proposition; if a company is required to retain a monitor, the costs skyrocket. Companies can limit the burden of monitorship, however, by carefully vetting their monitor candidates and choosing a monitor that is business-minded, pragmatic and efficient. This article details the specific characteristics a company should look for when choosing a monitor and discusses strategies for limiting the costs of monitorship.

The first article in this three-part series examined precedent, practice and trends in post-settlement FCPA reporting obligations; discussed the shift to less traditional forms of reporting; explained the process by which reporting obligations are created; and described the mechanics of the most intrusive types of reporting – traditional monitorship and self-reporting. See "How to Find a Business-Minded Compliance Monitor and Minimize Reporting Requirements When Negotiating an FCPA Settlement (Part One of Three)," The FCPA Report, Vol. 2, No. 4 (Feb. 20, 2013). The second article in this series provided real-world examples of innovative reporting requirements and outlined strategies for negotiating the most beneficial reporting requirements possible. See "How to Find a Business-Minded Compliance Monitor and Minimize Reporting Requirements When Negotiating an FCPA Settlement (Part Two of Three)," The FCPA Report, Vol. 2, No. 5 (Mar. 6, 2013).

What to Look For when Vetting Potential Monitors

A monitorship is, in many cases, an intense and long-term relationship. As with selecting any long-term partner, companies should carefully evaluate potential candidates. An ideal candidate will appeal both to the government and to the settling company. To find such candidates, a company needs to "do very deep diligence," recommended Martin Weinstein, partner at Willkie Farr and Gallagher LLP. He suggested that companies "conduct interviews and see if the potential monitor is the right fit for what they are looking for." The company should also consider whether the candidate has "sufficient bona fides and credibility, so that the government would say it was an appropriate choice." Angela Burgess, partner at Davis Polk & Wardwell LLP, agreed, suggesting that a company "have its outside law firm involved as well as company personnel." The company should "ask the potential monitor questions regarding "their experience and really get a feel for whether their approach will gel with the company's approach and what they view their role to be."

In addition to a formal interview, Kathryn Atkinson, a member at Miller & Chevalier Chartered, recommended having potential monitor candidates complete "questionnaires." They should be "designed to get the monitors to express what is their philosophy, how they would they approach it, what do they think is important to a successful monitorship, who do they view as the client, and how does that drive how they are going to behave going forward."

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The FCPA Report asked several top practitioners what specific qualities companies should consider when choosing their monitor. While no monitor selection process can guarantee a perfect fit, looking for the characteristics described in detail below will allow a company to select the best possible candidate.

Company Tested and Government Approved

First and foremost, a monitor candidate must be acceptable to the government. "It has to be somebody you can bring home to your mother," explained John Chesley, an associate with Gibson Dunn and Crutcher LLP. The DOJ's Morford Memorandum on the Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Morford Memo) states that monitors should be selected based on their "merits." An acceptable candidate should be a "highly qualified and respected person or entity" and be selected "based on suitability for the assignment and all of the circumstances." The selection of the monitor should "avoid potential and actual conflicts of interest" and "instill public confidence" in the effectiveness of the monitorship.

To address the Morford Memo requirements, a company should avoid selecting any candidates that may have a conflict of interest. "The government has typically looked for a person who has no prior relationship whatsoever with the company," noted Atkinson. Burgess agreed. "It is a small enough industry where people know each other. One thing that has been important traditionally to the government is that the independent monitor is not somebody who has been counsel to the company, not their regular outside FCPA counsel. They want someone who is new and independent." Atkinson elaborated, "at times, the government has drawn a very hard line on this, including disqualifying lawyers who had represented an individual for a few days in a matter. They really do put an emphasis on independence and trying to avoid anything that's too cozy."

In practice, a monitor also needs "to have credibility with the agencies," said Atkinson. "So much of a monitor's job for the company is going to be communicating what the company is doing to the Department of Justice and the SEC. It needs to be somebody that they can respect and that when he or she says 'this company is on the right path' and when he or she makes recommendations, that they carry weight with the Justice Department and the SEC," Chesley said.

Demand Significant FCPA Compliance Experience

Nearly as important as finding a monitor the government will approve of is finding someone who has substantive FCPA compliance experience. "The company wants somebody who is experienced and knows what to do," Burgess explained. Weinstein concurred. A monitor should have "experience in this area," should "know what to look for" and should not "run down rabbit holes that aren't going to be productive," he said.

Experience means "more than just experience with the FCPA," Burgess stressed. Monitor candidates should also understand compliance. "A key question is, do they have experience either being a monitor themselves or representing a company that had a monitor? I think that such experience gives a practitioner a very good perspective on what makes a good monitor versus a bad monitor," she said.

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"Companies want somebody who understands how programs work. It is a very different analytical framework to evaluate where something broke versus how to build it for the start to work properly," Atkinson explained. There are "a lot of strong FCPA practitioners who may have a really good understanding of the statute but haven't had enough experience building something from scratch or looking at the whole picture." Weinstein added that "companies don't want someone who just has a good advertisement. They want someone who has actual experience with compliance metrics and understanding how a compliance program works and an understanding of how companies work." He concluded, "a lot of people want these monitor jobs and I don't think there are a lot of people qualified for them."

Look For Industry Expertise

"Not only is FCPA expertise a must, but industry experience can be very helpful and very important," explained Chesley. He elaborated, "a monitor is going to be somebody who is going to be with the company for a number of years, that is going to be working very closely with the company. The company is going to want someone who can speak its language; that the first day that they show up is not going to be the first time they learn about the business of the company."

Don't Forget the "Get Along" Factor

Choosing a monitor is a bit like choosing a romantic partner, explained Joseph Warin, partner at Gibson, Dunn & Crutcher LLP. When assessing potential candidates companies, should ask themselves, "do I think that this is somebody that we can have a deep intimate relationship with?" Warin calls this the "get-along" factor. This "is not casual dating," he proclaimed. This "is not let's grab a pizza and see how this works out. This is a very important relationship." Daniel Ray, Partner in the Litigation and Forensic Consulting Services Group of Hemming Morse, LLP, who is currently serving as a compliance monitor, agreed. "Getting along with the company is absolutely critical. My goal is to work, as best as I can, collaboratively with the management to make the company a better company, as opposed to being a traffic cop looking for red-light violators," he said.

Complementary Philosophies

To ensure that the monitor and the company will work well together, companies should choose a monitor who shares the company's philosophy about monitorship. Atkinson recommended that companies consider the monitor's philosophy and how it "fits with the culture of the company that is either underway or desired. Companies may be in a situation where the culture of the company still needs to change, so they won't necessarily want to match the culture. But ask, is this person going to work with the company in a way that is going to get it where it needs to go in the time frame in which it needs to get there?"

It is extremely important that the monitor candidate and the company agree upon the mission of the monitorship prior to submitting the candidate to the government. The company should make sure the monitor has "a wholesome appreciation for the arduous process that the company has gone through," explained Weinstein. "Most companies that are in this situation have done tremendous remediation of their compliance programs. The last thing they are looking

for is someone brand new to come in and tell them how to redo everything. They are always looking for information, insight and perspective, but most of the companies that come to this point in the settlement process have been doing this for years."

He continued, "they need a monitor for limited purposes and largely one of those purposes is to give the government comfort that when the company walks out of the courtroom, they are not going to resume their old ways." Ensuring that the monitor agrees with this approach will decrease the likelihood of conflict throughout the life of the monitorship.

Collaborative Working Relationship

Companies should also look for monitors who are interested in working in a cooperative manner, advised Burgess. "I don't think there is any reason to think that the monitor has to be an adversary once they are retained. It is in the monitor's interest and it is in the company's interest to work collaboratively," she said. Warin advised that the monitor should be someone who has "checked their ego at the door, so that they can be constructive without saying 'it is my way or the highway.'"

There should be "no surprises" in a monitorship, Warin said. "Being a monitor isn't a gotcha game. A company wants to have a level of dialogue and discourse with its monitor. The monitor should be able to come in and say, 'I have three concerns here,' and the company can say, 'okay let's work through them, let me understand your concerns and let me see how we can address them,' as opposed to waiting for something and all of a sudden the company gets a blasting report." "If the monitor has a suggestion on how to proceed or an improvement to suggest, the monitor should first share that with the company, to get the company's reaction as to the feasibility and effectiveness of making such an improvement," Burgess said. "What I advocate on both sides of the equation, when I'm the monitor or when I am helping a company in managing their monitors, is that there should be no surprises," Warin added.

Find a Pragmatic Candidate

Quality candidates for a monitorship approach compliance and monitorship from a realistic and cost-sensitive perspective. Ray recommended looking for "common sense and the ability to find pragmatic solutions to problems." He noted that "there are a lot of inherent conflicts in business – sales teams want to generate sales and close as many transactions as they can but the compliance people want to walk away from sales if there is a corrupt culture there." A quality monitor candidate will recognize that "it is about finding that balance. How do you go about generating revenue, making profit, and doing so in a non-corrupt manner? What are the practical solutions that we can find?" Ray said.

The monitor should also be pragmatic in its approach to the monitorship. For example, the monitor should approach testing the company compliance policies in a reasonable way. "Testing doesn't mean testing every single instance, or going to every single location and talking with every single employee. Companies want to ensure that the monitor will approach his/her task in a reasonable way, and will their

mission as doing what is a reasonable test and not expand the task beyond what is necessary," Burgess explained.

Insist Upon a Willingness to Leverage Existing Resources

As discussed in detail above, most companies that reach FCPA settlements involving monitors have already invested countless hours and dollars into creating robust internal compliance programs. A solid monitor candidate should be willing and able to "work with the company and leverage existing company resources," explained Chesley. A company should openly discuss this issue with the monitor candidates. "We've seen companies say, 'we have an internal audit department, we have internal compliance people, we want you to be independent and give your own opinion and give us helpful recommendations for how we can make our process even more robust, but we want you to work with our existing resources to leverage that and to do what needs to be done in an efficient manner,'" said Chesley.

Demand Punctuality

One of the major stressors during monitorships is a monitor's failure to abide by agreed- upon deadlines. "We put a huge premium on punctuality," Warin said. I have done monitorships for three separate companies. One of the things I have pledged is that if the company and the government had reached a deadline structure, we would comply with that and we would not try to override it for our own uses or our own schedule." Sadly, not all monitors are as conscientious. It is surprising "in how many cases monitors miss their reporting deadlines. It's really a nightmare for companies," Chesley said. To avoid a perpetually late monitor, Warin recommended that when selecting monitors, companies ask candidates "what their other commitments are, whether they have time to do this, or is this just going to go in the inventory of work they have and because they have this inventory of work, they can't get around to it." Chesley recommended that during the interview, companies should ask the monitor if they can meet the specific demands. If the monitor provides a "wishy-washy answer" – such as "we will make our best efforts, but who knows what we're going to find, there are always exceptions" – Chesley recommended that the company choose another candidate. "Companies want someone who says, 'we're going to come in and get it done, we will do whatever it takes, we'll get it done.'"

How to Limit the Expenses of Monitorship

Curtailing the costs of a monitor can be challenging, particularly after the monitorship begins. To limit expenses, companies must be proactive in at least the following ways:

Choose the Monitor with Costs In Mind

The most important cost-saving measure a company can take is to choose its monitor wisely, Atkinson explained. "I really think that a company's best bet to control the costs is to get it right up front," she explained. Ray added that "if a company picks the right monitor, someone that is pragmatic in their approach, practical, with common sense and who can ask the tough questions in a rational, practical manner, with a good understanding of the business," it will decrease the costs of the monitorship.

Atkinson recommended that companies have frank conversations about costs when selecting monitor candidates.

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"At the front end of the relationship and at the time the work plans are being developed, those are the key points in terms of understanding what are the likely costs," she said. Both Atkinson and Burgess advised that companies ask potential monitors to create and distribute proposed budgets. "There are ways that a company can work with them just as they would with outside counsel in terms of cost management, while at the same time recognizing that it is not entirely within the company's control," explained Atkinson. It is important that companies "understand what the billing rates are, understand the structure, manage the team and the size of the team, and understand what other resources may be brought to bear," she said.

Choosing a monitor who is cost conscious can be detrimental because the company has limited recourse once the monitorship begins. It is important to remember that companies under monitorship have a "limited amount of political capital to spend with the agencies," explained Atkinson. "It can be difficult for a company to find itself in a position with a runaway monitor, going into the agencies and complaining because the reason the company has a monitor is there is some concern about whether the company really has religion on the subject. The company doesn't come in with maximum credibility if it has a problem with the monitor."

Weinstein echoed her thoughts. "A monitor comes in with a mandate. Companies can try to talk about rates and fees and scope, but these discussions are very hard because at the end the company does not want to go back to the government and say the monitor is overcharging or is too broad. I think companies largely just absorb the cost and have accepted it as a very expensive proposition."

Control the Size of the Monitor's Team

In addition to carefully selecting a monitor, the company should exercise as much control as possible over the composition of the team the monitor will use to complete the assignment. Atkinson recommended that companies get "some control at the front end on how the team is going to be structured and make sure the monitor can't just add bodies to the team on a whim." She advised that the company evaluate "who is going to do the work." Generally, "it is not just the monitor." To ensure that they have adequate information about team composition, Atkinson recommended that companies ask a series of questions, including "Who is going to be on the team? How big is that team going to be? What control is the company going to have over the size of the team? And to what extent does the monitor anticipate using other resources?" Additionally, Atkinson recommended that companies meet the members of the monitorship team. "I think that the company can rightfully demand that the gatekeepers, the key folks who will be interacting with the monitorship, have the opportunity to meet anyone who is going to go out into the field and meet with their employees."

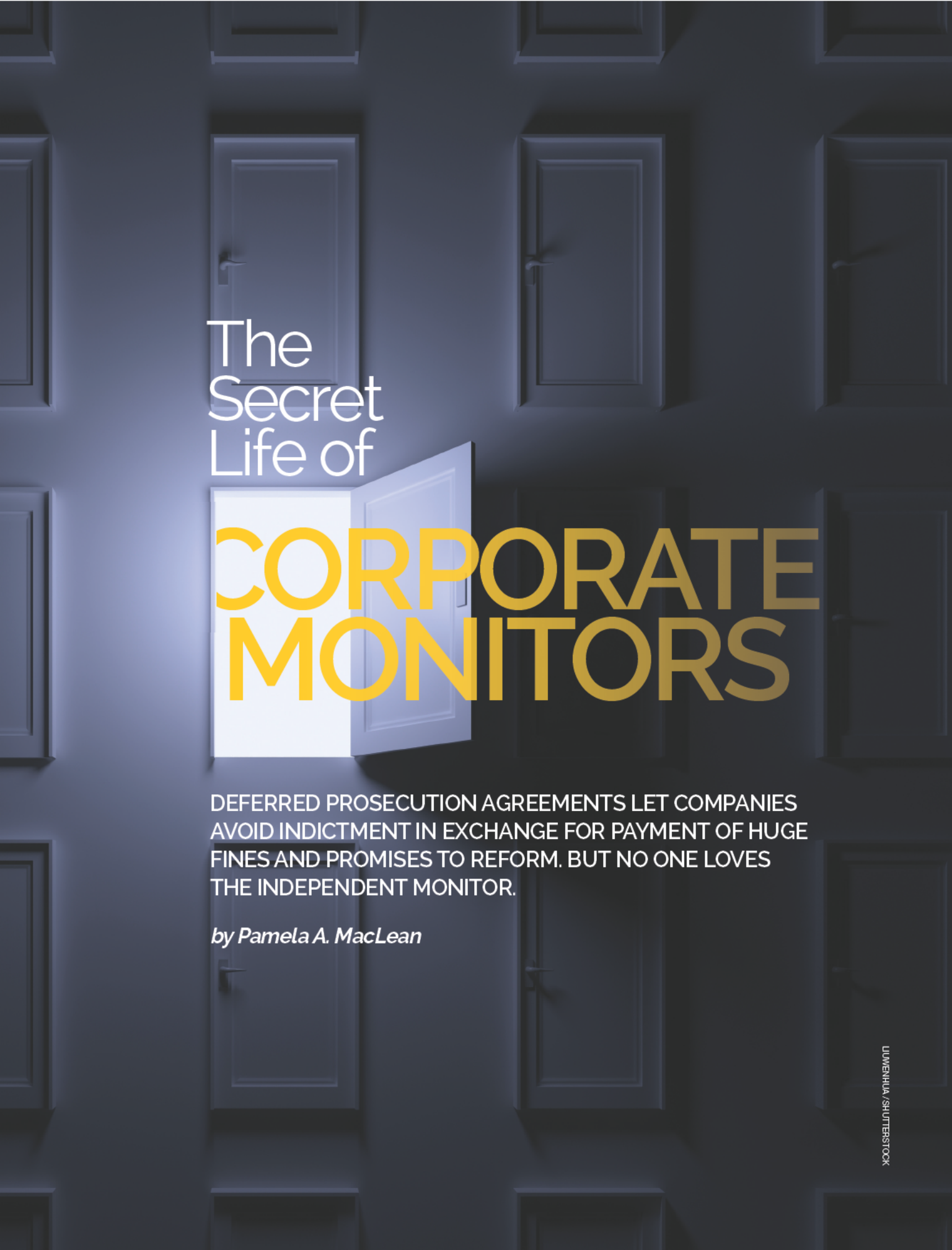
Leverage Internal Resources

Once a monitor is selected, the most efficient way to limit the costs associated with monitorship is to limit the amount of work the monitor is required to do. Investing in the company's internal compliance resources decreases the work the monitor must do prior to reporting to the government. Ray explained, "both of the companies I am working with had limited compliance policies at the time they violated the FCPA. In both cases, the company took very deliberate steps to make significant improvements to their compliance

program right around the point that I was retained. A lot of the work that I would have had to do had been accomplished in large part by the company. Much of my time was spent looking at the changes and policies."

Companies should also ask the monitor to work with company employees when completing the monitorship assignment. "The company doesn't need the monitor and his or her associates and partners doing every single task. There needs to be supervision in the process, but it is important to work with existing corporate resources," explained Chesley. For example, "if the company has people on payroll who are competent and able to do the leg work, having them do the work under the supervision of a monitor or in-house counsel, rather than having law firm associates sitting there reviewing all of the documents, is probably the biggest way to drive down costs," he said.

The Secret Life of CORPORATE MONITORS



DEFERRED PROSECUTION AGREEMENTS LET COMPANIES AVOID INDICTMENT IN EXCHANGE FOR PAYMENT OF HUGE FINES AND PROMISES TO REFORM. BUT NO ONE LOVES THE INDEPENDENT MONITOR.

by Pamela A. MacLean

LIUWENHUA/SHUTTERSTOCK

DAN W. RAY TURNS OVER CORPORATE ROCKS for a living, looking for anything illegal that might slither out. A forensic accountant with Hemming Morse in San Francisco, Ray is also a rare bird: He's spent eight years as an FBI agent, and served twice as an independent monitor overseeing companies that negotiated deferred prosecution agreements (DPAs) with federal prosecutors in lieu of indictment and trial.

"The Department of Justice is interested in whether a company's internal controls and compliance program are robust," Ray says. "A lot of companies have a policy manual. Do they use it, or is it a nice book sitting on the shelf?"

DPAs and nonprosecution agreements (NPAs) have become the federal government's bread-and-butter enforcement tool since its 2002 indictment of accounting giant Arthur Andersen for allegedly obstructing justice led the firm to implode, eventually costing 20,000 jobs.

The Bush administration's Justice Department then took up DPAs as a form of pretrial diversion, giving prosecutors a middle-ground alternative to the stark choice of whether or not to indict a corporation.

By offering to put off prosecution, the government can command changes in corporate training and reporting programs, limit executive compensation, curb aggressive marketing, force the hiring of compliance officers—and require the company itself to fund an independent monitor.

For companies facing criminal charges, a DPA was a way to avoid trial and damaging publicity. The trade-off: hefty fines and a promise to permanently reform corporate practices.

From 1993 through 2003, the DOJ had entered into just 17 such agreements. By contrast, in the decade since 2004 prosecutors have arranged 278 DPAs. They have become a cash cow for the government, generating $12 billion in fines and penalties from 66 DPAs in the past two years alone. In its 2014 midyear update on DPAs and NPAs, Gibson, Dunn & Crutcher reports that the arrangements have led to "monetary penalties totaling more than $42 billion, equivalent to the annual GDP of Latvia."

Without naming the subjects of his monitoring, Dan Ray talked generally about the highly secretive world of government-appointed corporate monitors, where progress reports are confidential, judges rarely get involved, and the DOJ alone determines whether corporations have complied with terms of the agreements. Monitors are not government employees or agents, and they do not contract with or receive payment from the government. Fees generally are negotiated between the corporation and the monitor.

During Ray's first appointment, in 2005, the mission of DPAs was still evolving. The Justice Department offered no specific instructions for the prosecutors in its 93 U.S. Attorney's offices, and corporate monitors often had unfettered authority.

The board members at the company involved interviewed Ray and submitted his name to the DOJ as their choice for monitor. In those days, nominees not deemed "unacceptable" by the department were simply approved.

"I wasn't interviewed by the Department of Justice or the Securities and Exchange Commission," Ray says. "That was standard then."

By 2012, when Ray got his second appointment, things had changed dramatically. After a series of scandals over particularly lucrative appointments, the DOJ imposed guidelines in 2008. The complaints included then–New Jersey U.S. Attorney Chris Christie's appointment of his former boss, Attorney General John Ashcroft, to monitor Zimmer Holdings for a potential $52 million fee to Ashcroft's firm, paid by the medical-device company. (In another DPA with Bristol-Myers Squibb in 2005, Christie had required the pharmaceutical giant to pay $5 million to fund a business ethics chair at Christie's alma mater, Seton Hall University School of Law.)

"The [selection] process became more formal and rigid," Ray says of his second appointment. This time around, the company's in-house and outside counsel vetted his nomination before it was submitted with a slate of candidates to the government, which made the final choice. "I flew to D.C. and was interviewed by DOJ and the SEC," he says. As a finalist, he was asked to submit a proposal outlining how he would approach monitoring. He identified staff, checked for conflict-of-interest issues, roughed out a budget, and partnered with a law firm to cover legal questions.

Nowadays, the problem is not that corporate monitors have gone awry—it's that they are going away. The appointments peaked in 2008, when monitors were a component of 40 per-

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"If the companies didn't satisfy the monitor, they had a potential trial hanging over their head."

—MONITOR DAN W. RAY, HEMMING MORSE

cent of all DPAs and NPAs. Since then, the rate has dropped to just 25 percent of such agreements. In the first half of this year, only three of twelve agreements included monitors.

Even when monitors are deployed, it is unclear whether anyone at DOJ checks on the progress of compliance. The Government Accountability Office reported in 2009 that the DOJ had lost twelve of the periodic reports from seven monitors they were expected to review, and in two instances it could not even find copies of the agreements.

Consider the case of UBS AG, the Swiss banking giant that signed a DPA in 2009 regarding tax-fraud allegations, and then entered an NPA in 2011 after a bid-rigging scandal on municipal investment contracts. In 2012 the bank's Japanese subsidiary pleaded guilty to wire fraud in a U.S. investigation of interest manipulation of the London InterBank Offered Rate (LIBOR). Federal prosecutors and British and Swiss regulators secured about $1.5 billion in fines. Despite these repeat offenses, last February UBS sought U.S. and European immunity from prosecution in a probe of the manipulation of currency markets.

Then in April, Hewlett-Packard Co. won a dubious trifecta by resolving three federal complaints accusing its subsidiaries—in Mexico, Poland, and Russia—of conspiring to bribe foreign officials in exchange for lucrative contracts. HP's Mexican unit entered into an NPA, its Polish unit agreed to a DPA, and its Russian unit took a plea deal for violating the Foreign Corrupt Practices Act. The three HP entities paid $77 million in criminal penalties, and in a related matter settled with the SEC for an additional $31 million in disgorgement. What HP managed to avoid was getting a corporate monitor to oversee the company's future conduct.

"The elephant in the room is lack of monitoring," says Brandon L. Garrett, a criminal procedure specialist at the University of Virginia's law school. "But when prosecutors do pick them, they pick from among their own. They pick former prosecutors. Monitors should be picked with a judge," Garrett says.

Monitors "don't report to court," he continues. "We don't know *what* they do. Not even a portion of the reports is public. It is entirely a black box."

$42 BILLION

Monetary penalties between 2000 and June 2014 (equal to the GDP of Latvia)

290

Number of DPA and NPA agreements the DOJ and SEC entered during those dates

152

Of the 290, more than half have come since 2010.

NEITHER FISH NOR FOWL

Dan Ray's career opens a window on what corporate monitors actually do. As a monitor, Ray says, "I met with the company's highest-level executives, [and] from the chairman of the board down to the lowest member on the sales staff, to learn if corporate compliance messages made it to the street." In both of his appointments, he toured overseas plants in Europe, Asia, the Middle East, and South America with a team of up to four accountants and lawyers, looking for evidence of changed corporate attitude. Though he may not have been welcomed with open arms, he says, neither was he treated like a pariah.

"The companies had the good sense to know the emphasis of the DPA was on 'deferred' prosecution," he says. "If they didn't satisfy the monitor, they had a potential [criminal trial] hanging over their head."

In both 2005 and 2012, Ray says, "there was very little pushback to my work plans and requests." The companies assigned someone to smooth the way for site visits by identifying relevant documents and arranging interviews.

Despite his FBI roots, Ray adds, he was careful not to expand his inquiry—what is sometimes called mission creep. "I saw my role as a monitor, not an investigator," he says. In both assignments, he encountered transactions that raised new concerns, but Ray states: "[A]s a monitor I was interested in the company's response. If the company didn't investigate properly or take it seriously, I would raise the question, 'What are you going to do about this?' "

In his first appointment Ray filed reports with the DOJ's Foreign Corrupt Practices Act unit every six months for three years, and annually with the SEC. He rarely got feedback. But by 2012, he says, "It was clear DOJ was reviewing reports and they offered comments. I met with them in D.C. on several occasions. There was much more involvement."

By 2012 the DOJ also had begun approving hybrid plans. The company he was assigned to had to submit to an independent monitor for the first 18 months; if Ray was satisfied with its progress, the company could self-monitor for

the remaining term of the agreement.

Ray said he shared drafts of his reports with the company before filing them with DOJ. "If I was describing internal controls, [seeing a draft] gave the company the ability to review and propose edits to make it factually correct," he says. "The big thing was recommendations. We had a lot of dialog about that." Ray said he did not feel pressured to soft-pedal advice, but acknowledged it was a "fine line."

"I'm not an agent of the government, nor an employee of the company," he says.

The companies were fervent about the confidentiality of his reports, Ray says, out of fear they might fall into the hands of stockholders. "If [a monitor] identified internal-control deficiencies, can a lawsuit be initiated by class action counsel? Companies don't want that information used against them in court."

Former U.S. Attorney Debra Wong Yang monitored DePuy Orthopaedics as part of a DPA. James M. Cole was twice appointed to monitor AIG Financial Products.

PLAYING KEEP-AWAY

Corporate fears about disclosure of the terms, conditions, and progress of a DPA or an NPA are not unfounded. Factual admissions might be used under Federal Rule of Evidence 801(d)(2), and have been used successfully by plaintiffs lawyers against pretrial motions to dismiss. In 2009, for instance, U.S. District Judge Jeffrey S. White in San Francisco relied on Stryker Orthopaedics' 2006 NPA to deny a motion to dismiss. (*Somerville v. Stryker Orthopaedics*, 2009 WL 2901591 (N.D. Cal.).)

A North Carolina case followed Judge White's tack, relying on developer Beazer Homes' acceptance of responsibility for criminal acts in a prior DPA to keep alive a civil complaint with similar allegations. (See *Davis v. Beazer Homes, USA Inc.*, 2009 WL 3855935 (M.D. N.C.).)

In 2012, however, a federal judge in Louisiana presiding over the multidistrict Deepwater Horizon litigation against BP prevented a jury from receiving evidence about a DPA that resolved an earlier accident at a BP oil refinery in Texas. (See *In re Oil Spill by Oil Rig "Deepwater Horizon,"* 2012 WL 413860 (E.D. La.).)

But even if a court can consider a DPA or an NPA, keeping a private cause of action alive is not the same as holding a company liable. In one of the few appellate assessments on this question, the Ninth Circuit reversed a summary judgment that favored a plaintiff in 2010. The appeals panel held that the admissions in a DPA proved the defendant defrauded the United States, but did not prove that the fraud caused the plaintiff's injury. (See *Renzer v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 873 (9th Cir. 2010).)

Debra Wong Yang, a partner at Gibson Dunn's Los Angeles office, was appointed in September 2007 to monitor DePuy Orthopaedics as part of a DPA reached with four medical-device companies charged with conspiring to violate the federal antikickback statute. In July a federal judge in Texas ordered Yang to give a deposition as part of trial preparation for the first of more than 6,000 cases against DePuy and its parent, Johnson & Johnson, over design of the Pinnacle hip implant. (*Herlihy-Paoli v. DePuy Orthopaedics Inc.*, 12-CV-04975, which is part of *In re DePuy Orthopaedics Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 11-MD-2244 (N.D. Texas).) In late October jurors found no liability for the defendants.

In the course of researching his newly released book, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press), the University of Virginia's Garrett had to file suit under the Freedom of Information Act to get access to one sealed DPA involving a Texas tree service. After the government finally turned the document over, Garrett says, he found himself scratching his head about why anyone would care about keeping it secret. Now Garrett, and the law school's First Amendment Clinic, have another 30 pending FOIA requests to unseal DPA deals.

"We don't know *what* [monitors] do. Not even a portion of the reports is public. It is entirely a black box."

—BRANDON GARRETT,
UNIVERSITY OF VIRGINIA LAW PROFESSOR

At least one federal judge has made clear his distaste for the entire nonprosecution approach. U.S. District Judge Jed S. Rakoff of the Southern District of New York, in a January 2014 article in *The New York Review of Books*, suggested that "the future deterrent value of successfully prosecuting individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing."

COLE: LONNIE TAGUE FOR THE DOJ

SUITE DEALS

Indeed, lack of public access to the monitors' reports—and of judicial review when monitors can't compel compliance with the terms of DPAs —make it difficult to defend the continued use of corporate monitors. Consider the American International Group Inc. matter.

AIG entered a consent decree with the Justice Department and the SEC over alleged securities violations in November 2004, and two months later it accepted appointment of James M. Cole, then a lawyer in the Washington, D.C., office of Bryan Cave, to monitor reforms at its AIG Financial Products subsidiary. Cole was specifically charged with reviewing certain structured financial transactions. He was reappointed in February 2006 pursuant to a second agreement, this time monitoring financial reporting and corporate governance. Cole was filing periodic reports during a four-year period leading up to the financial crash of 2008. Yet it took a $182.5 billion taxpayer bailout—since repaid—to help AIG recover from the effects of the transfers Cole was supposed to be tracking.

"Ultimately, [prosecutors] are just playing judge and jury in most of these cases. It is an enormous regulatory power grab."

—JAMES R. COPLAND, MANHATTAN INSTITUTE

When Congress learned of Cole's presence inside the company—for which AIG paid his law firm some $20 million—it demanded access to his monitor reports. Although the district court granted a joint motion in 2006 prohibiting public dissemination of the reports, at the request of the SEC and AIG the court granted release of reports to the congressional Office of Thrift Supervision, and to the House Committee on Oversight and Government Reform. But the releases stopped there.

When Sue Reisinger, a reporter for *Corporate Counsel*, requested public access to Cole's reports in 2011, the SEC and AIG opposed disclosure. Reisinger argued that the documents are analogous to those supporting a plea agreement in a criminal trial, and are therefore entitled to a presumption of access under the First Amendment. She also argued that the reports should be publicly available under the common law right of access to judicial records.

In an interview, Reisinger comments, "Cole was appointed to oversee the very unit that almost caused AIG to go bankrupt. If this case, with the strong public interest and clear implications of what AIG did to our economy, isn't important enough to trigger a right of public access, I don't know what is."

Reisinger's lawyer, J. Joshua Wheeler, director of the Thomas Jefferson Center for the Protection of Free Expression in Charlottesville, Virginia, contends, "What's important is the public's right to know … what the DPA requirements are. We may think they are insufficient. Are these decisions the public would be comfortable with? We don't know. The government is just saying, trust us."

In April 2012 U.S. District Judge Gladys Kessler denied access on First Amendment grounds, noting that the SEC had brought a civil, not criminal, action against AIG, and that Reisinger had not made the requisite showing that access "has historically been available." (*SEC v. Amer. Int'l Group*, 854 F. Supp. 2d 75, 79 (D.D.C. 2012).) But Kessler did grant a common law right of access, holding that the monitor's reports are properly considered judicial records and "may prove critical to this Court's assessment of conformity to the Consent Order." (854 F. Supp. 2d at 81.)

A year later, however, the D.C. Circuit Court of Appeals reversed. Writing for a three-judge panel, Judge Janice Rogers Brown held that Cole's reports were "neither judicial records nor public records." Brown added, "Indeed, the independent consultant had no relationship with the court. The court did not select or supervise the consultant and had no authority to extend the consultant's tenure or modify his authority. … Unfortunately for Reisinger, the value of the reports for proper oversight of the Executive does not itself justify disclosure under the judicial records doctrine." (*SEC v. Amer. Int'l Group*, 712 F.3d 1, 4–5 (D.C. Cir. 2013).)

CALLS FOR REFORM

Efforts by Congress to reform DPAs—initially set in motion following exposure of Christie's appointment of John Ashcroft as a monitor in 2007—have gone nowhere.

Congress first proposed uniform national standards for DPAs and NPAs in 2008. The legislation was deferred in March of that year when the Justice Department issued guidelines to U.S. Attorneys. Known as the Morford Memorandum—after Craig S. Morford, the former acting U.S. deputy attorney general—the nine enumerated "Principles" were intended to avoid the perception that monitor jobs were political plums for insiders. The principles emphasized the monitors' independent role, the limited scope of their work, and the need for them to communicate progress through periodic reports. They required that monitoring contracts be approved by the DOJ's chief of the criminal division and the second-ranking department official—currently former AIG monitor James Cole.

39

Highest annual number of DPA/NPA agreements (in both 2007 and 2009)

37

DPA/NPA agreements in 2012

In 2010 the DOJ set more restrictions on the selection of monitors in a memo issued by acting Deputy Attorney General Gary G. Grindler. The Grindler Memo required prosecutors using a DPA

or NPA to spell out the role the DOJ would play in resolving any disputes between the monitor and the company over compliance with terms of the agreement.

That memo coincided with the start of a precipitous decline in the use of monitors. By 2014 even the biggest DPAs frequently omitted oversight. The granddaddy of them all came in January, when JPMorgan Chase, the nation's largest bank, signed a DPA based on two felony violations of the Bank Secrecy Act for its role as a cash depository for Bernie Madoff's Ponzi investment scheme. JPMorgan would pay the government $1.7 billion, accept responsibility, and cooperate for two years. Though the deal calls for "significant remedial changes," no monitor was appointed to supervise the process.

Former U.S. Attorney General John Ashcroft (left) held a lucrative contract monitoring Zimmer Holdings. Michael R. Bromwich (with U.S. Sen. Dianne Feinstein) has struggled for access to Apple.

Current legislative calls for reform and clear guidelines from the DOJ have been largely ignored. The Truth in Settlements Act (S. 1898), introduced in January by Sen. Elizabeth Warren (D-Mass.) and Sen. Tom Coburn (R-Okla.), would require transparency about the terms of deals between federal regulators, the DOJ, and companies accused of wrongdoing. It passed one Senate committee in September and stalled.

A second bill introduced in May by Rep. Bill Pascrell (D-N.J.) would require the attorney general to issue guidelines for DPAs and NPAs, and make the agreements publicly available online. The Accountability in Deferred Prosecution Act of 2014 (H.R. 4540) is awaiting committee action.

In contrast, the United Kingdom published a DPA Code of Practice in February 2014 governing the use of DPAs by crown prosecutors. It establishes clear judicial roles, limits prosecutorial discretion, and allows broad public access. U.K. authorities may offer a DPA only if it includes a statement of facts related to the alleged offense, "which may include admissions made by" the person or company involved. After nonpublic negotiations begin, the prosecutor must ask the Crown Court judge to declare that the proposed terms are "in the interest of justice" and are "fair, reasonable and proportionate." (See U.K. Crime and Courts Act 2013, Ch. 22, at pp. 295–306.)

In the United Kingdom, a proposed DPA is not binding on the court, and if rejected it would subject the company to potential prosecution for the original allegations. The final DPA will be published and approved in open court, and the ruling is nonappealable. Unlike in the United States, prosecutorial decisions pursuant to the DPA Code can be challenged through judicial review.

PUSHBACK

The strongest pressure regarding DPA policy in the United States is coming from business lobbyists and corporations. "It's good when a company feels it can fight back," says James R. Copland, a senior fellow at the conservative Manhattan Institute policy center in New York.

"The entire process is an affront to the rule of law," Copland continues. "I do think monitors are a problem—but the bigger problem is the ability prosecutors wield to change business models, change management, and effectively appropriate levies as they see fit for purposes not closely tethered to the alleged misconduct. Ultimately, they are just playing judge and jury in most of these cases. It is an enormous regulatory power grab."

But Copland adds, "At the end of the day, I don't think DPAs do much. They tax shareholders with corporate misdeeds by levying a tax on misdeeds of the past without testing the theory."

This year the veil of secrecy shrouding monitors' reports lifted partially when Apple Inc. challenged provisions of a court judgment that included a monitorship. After a civil bench trial in June 2013, U.S. District Judge Denise Cote in New York found that Apple had violated Section 1 of the Sherman Act by conspiring with five e-book publishers to fix prices. (See *United States v. Apple Inc.*, 2013 WL 4774755 (S.D.N.Y. Sept. 5, 2013).) A month later the court appointed Michael R. Bromwich, a former DOJ inspector general, as monitor to review and suggest improvements to Apple's internal antitrust training and compliance programs. Bromwich, a partner at Goodwin Proctor in Washington, D.C., had two decades of oversight work in both government and the private sector, including as monitor of "one of the largest companies in the world."

"Apple was doing its best to slow down the process, if not stonewall."

—U.S. DISTRICT JUDGE DENISE COTE

Apple appealed the judgment to the Second Circuit, contending that Judge Cote's monitoring provision exceeds the district court's authority and violates the separation of powers.

ASHCROFT: GAGE SKIDMORE; BROMWICH: CAITLIN MILLER FOR THE DEPARTMENT OF INTERIOR

The monitor's demands to "crawl into the company" vastly exceed the scope of the final judgment.

—THEODORE BOUTROUS JR., GIBSON, DUNN & CRUTCHER, IN AN APPELLATE BRIEF FOR APPLE INC.

Nevertheless, this year Bromwich's reports, partially redacted, were filed publicly.

Bromwich's first report, filed in April, complained of Apple's lack of cooperation. Judge Cote fumed, charging that Apple was "doing its best to slow down the process, if not stonewall."

Bromwich's second report, in October, noted a "more productive and constructive" relationship, but he described continued "attempts to limit and delay access to relevant personnel and materials." In his summary, Bromwich stated that some requests were rejected, others ignored, and the company "inappropriately limited" the team's live monitoring of antitrust compliance training sessions and other relevant activities.

After initially being denied interviews with top officials, Bromwich did meet with Apple CEO Tim Cook and other executives. He also noted that the company's failure to supply its board of directors with his first compliance report was "surprising and disappointing," given the Apple board's oversight role.

Meanwhile, Apple's lawyers at Gibson Dunn were attacking Bromwich's appointment from every angle. In a January letter to Judge Cote three months into the monitoring arrangement, Gibson Dunn partner Theodore J. Boutrous Jr. asked that Bromwich be removed, alleging he had a personal bias against the company, collaborated with plaintiffs to expand his mandate beyond the terms of the final judgment, made excessive financial demands on the company, and evinced "adversarial, inquisitorial, and prosecutorial communications and activities toward Apple since his appointment."

Boutrous reiterated those charges in an appellate brief, arguing in May that Bromwich's demands to "crawl into the company" vastly exceed the scope of the final judgment and his "unprecedented" fees create a financial incentive that violates Apple's due process rights. If allowed to stand, Boutrous contended, the ruling "will stifle innovation, chill competition, and harm consumers." Oral arguments on Apple's appeal are scheduled this month. (*United States v. Apple Inc.*, No. 13-3741 (2nd Cir.).)

"A GAME OF CHICKEN"

To plaintiffs lawyers, federal prosecutors' secret agreements with huge corporations—even when they include limited oversight from company-paid monitors—allow the firms to buy their way out of criminal prosecution.

"The problem with the DPA is that it is an easy cop-out for the Justice Department," says plaintiffs lawyer Richard Greenfield of Greenfield & Goodman in New York. "In so many cases [the prosecutors] don't have the resources to go to trial—and the SEC goes through the same thing. So they issue a DPA."

Greenfield says deferred prosecution agreements could really have "teeth" if the government appointed tougher monitors, citing the example of oversight in union prosecutions in the 1990s. "It cleaned up the Teamsters by having a strong monitor in place," he says.

According to Greenfield, the greatest chance for success comes with a judge-appointed monitor. And public disclosure of the monitor's subsequent reports also serves the interest of shareholders in answering the basic question: "Is the company complying, and what are they doing?"

But prosecutors' leverage depends on the industry, according to Kathleen M. Boozang, a Seton Hall law professor at the Center for Health and Pharmaceutical Law and Policy. Prior DPAs entered with medical-device, military-equipment, and financial companies carried an implicit threat of debarment from contracting programs or loss of banking licenses for noncompliance. Consumer technology companies like Apple don't face those risks.

"The DPA is an easy cop-out for the Justice Department. In so many cases [prosecutors] don't have the resources to go to trial. ... So they issue a DPA."

—RICHARD GREENFIELD, PLAINTIFFS LAWYER

"It's like a game of chicken," Boozang says. Prosecutors don't necessarily want to use their "nuclear option" in some sectors if it would reach outcomes like the demise of Arthur Andersen.

Boozang says the government may need to introduce new enforcement tools, and there are early glimmers of change. A few DPAs with health companies, for example, now include requirements for personal accountability—certification by officers and directors that specific conduct has been achieved—and provide for the clawback of executive compensation if violations are found. "The shift to holding individuals to account has been significant," she says. "It has gotten people's attention."

$9 BILLION

Monetary recoveries in 2012, the record year (2006 had $5.9 billion)