

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 703/ May 25, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14848

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| In the Matter of | : | |
| | : | ORDER FOLLOWING PREHEARING |
| OPTIONSXPRESS, INC., | : | CONFERENCE |
| THOMAS E. STERN, and | : | |
| JONATHAN I. FELDMAN | : | |

On April 16, 2012, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP). The OIP alleges that:

- (1) optionsXpress, Inc. (optionsXpress), willfully violated Rules 204 and 204T of Regulation SHO (Reg. SHO);
- (2) Jonathan I. Feldman (Feldman) willfully violated Section 17(a) of the Securities Act of 1933 (Securities Act), Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), and Exchange Act Rules 10b-5 and 10b-21;
- (3) Thomas E. Stern (Stern) caused and willfully aided and abetted optionsXpress's violations of Rules 204 and 204T of Reg. SHO and Feldman's violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rules 10b-5 and 10b-21; and
- (4) optionsXpress caused and willfully aided and abetted Feldman's violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rules 10b-5 and 10b-21.

It appears - from United States Postal Service "green cards" and www.usps.com - that optionsXpress was served with the OIP by April 24, 2012, at the latest; Stern was served on April 23, 2012; and Feldman was served on April 18, 2012. Feldman filed an Answer on May 10, 2012. The other two Respondents have until May 29, 2012, to answer the allegations in the OIP.

On May 10, 2012, the Division of Enforcement (Division) filed a Motion for Prehearing Conference and Request to Issue Subpoenas (Motion) requesting conversion of the scheduled May 29, 2012, hearing to a telephonic prehearing conference. OptionsXpress and Stern consented to the Motion. Feldman did not. I granted the Division's request and held a telephonic prehearing conference on May 15, 2012, at which the following issues were resolved.

Motion for Summary Disposition

Section 8A(b) of the Securities Act and Section 21C(b) of the Exchange Act specify that in a cease-and-desist proceeding, the OIP "shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or a later date is set by the Commission with the consent of any respondent so served."

At the May 15 telephonic prehearing conference, Feldman did not agree to the Motion discussed above and insisted on exercising his statutory right to a hearing within 60 days. The Division did not object to Feldman's request. Stern, on the other hand, claimed he would be denied due process because he would be required to defend his interest in a hearing on the underlying charges, his counsel has other trial commitments, and his expert witness would be unavailable.¹ Tr. 7- 9.

My judgment is that each Respondent has a solid basis for its position. After considerable discussion, Feldman agreed to forgo his right to have a hearing beginning no later than 60 days after service of the OIP, if he was granted leave to file a Motion for Summary Disposition (Summary Disposition Motion).² See 17 C.F.R. § 201.250(a). Feldman represented that the two issues he wants resolved initially through summary disposition do not involve material issues of fact. One issue is whether a retail customer like Feldman has any obligations under Reg. SHO. Tr. 11-13. Feldman contends the allegations are couched as fraud allegations, however, Reg. SHO is the applicable law. Tr. 11. The second issue is whether institution of the proceeding was legal under the time limits of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Id. The Division did not agree that a Summary Disposition Motion was appropriate. Tr. 31.

Section 8A of the Securities Act, Section 21C of the Exchange Act, and the case law, Trautman Wasserman & Co., Inc., Exchange Act Release. No. 55848 (June 1, 2007), 90 SEC Docket 2300, give Feldman the right to a hearing that would begin by June 17, 2012, at the latest. I used my authority to regulate the course of the proceeding, accepted Feldman's representation on materiality, and granted his request to file a Summary Disposition Motion, and ordered the following schedule:

¹ Citations are to the May 15, 2012, prehearing conference.

² In addition to the cease-and-desist provisions of Section 8A of the Securities Act and Section 21C of the Exchange Act, the proceeding was instituted pursuant to Section 15(b) of the Exchange Act and Section 9(b) of the Investment Company Act of 1940.

June 4, 2012: Feldman will file the Motion for Summary Disposition on the two issues described at the prehearing conference;

June 18, 2012: The Division will file a brief in opposition; and

June 25, 2012: Feldman will file a reply brief.

See 17 C.F.R. §§ 201.111, .250.

Subpoenas

With its Motion filed May 10, 2012, the Division submitted two subpoenas: (1) to Feldman; and (2) to TD Ameritrade, Inc. (TD Ameritrade).

The Division will resubmit a subpoena requiring Feldman to be present and to testify on May 29, 2012, in light of the rescheduled hearing date.

The Division requested that I issue a subpoena to TD Ameritrade, a third party, for production of the following documents for the period March 1, 2010, to the present: (1) account statements for all accounts in the name of Feldman and/or Judith Feldman; (2) electronic trading records for all accounts in these names, including but not limited to, the trade date, trade time, settlement date, quantity, price, type of transaction, account number, and account name and address; and (3) all buy-in notices issued to accounts held in these names. The Division stated that it believes the subpoena will provide material relevant to its position that Feldman acted with scienter with respect to the alleged violations. Tr. 19. The relevant period of time for the alleged violations is from at least October 2008 to March 18, 2010. Feldman objected to issuance of the subpoena claiming that it is “effectively an entirely new investigation.”³ Tr. 41.

This is not an investigative subpoena because the Division has asked me to issue it. It appears, however, that the import of the Commission’s rules is that the Division’s evidence gathering as to the issues in this proceeding should be concluded when the OIP issues.⁴ The comment included in the release when Rule 230(g) of the Commission’s Rules of Practice was adopted in 1995 specifies that its purpose was “to assure that investigative subpoenas are not used for the purpose of gathering information for use in the proceeding.” Rules of Practice, Exchange Act Release No. 35833 (June 23, 1995), 59 SEC Docket 1546, 1570. While the Commission’s Rules of Practice do not prohibit the Division from requesting subpoena duces tecum after issuance of the OIP, all indications are that the investigative phase of the proceeding has ended. 17 C.F.R. § 201.230(g); SEC Division of Enforcement Manual 41-42 (Mar. 9, 2012).

³ I was in error to question whether Feldman had standing to object to a subpoena to a third party. Rule 232(e)(1) of the Commission’s Rules of Practice gives “any party” the right to quash a subpoena.

⁴ The language of Rule 230(g) of the Commission’s Rules of Practice makes clear that the Division should not gather additional evidence after the Commission has instituted the proceeding at its recommendation.

The only significant difference between this request and an investigative subpoena is that the parties will get to see the subpoenaed materials, but the only party with an interest is the Division. Tr. 42-43.

For these reasons, and because granting the subpoena duces tecum would be elevating form over substance, I DENY the Division's request for a subpoena duces tecum to TD Ameritrade.

Motion for Entry of a Protective Order by CBOE Holdings, Inc. and Chicago Board Options Exchange, Incorporated

Under the terms of Rule 230 of the Commission's Rules of Practice, the Division is required to make available to Respondents for inspection and copying, documents obtained in connection with the investigation, with certain exceptions. CBOE Holdings, Inc., and the Chicago Board Options Exchange, Incorporated (collectively CBOE), third parties, filed a Motion for Entry of a Protective Order (Motion for Protective Order) on May 4, 2012, to limit dissemination of materials and information that it and related persons provided to the Division as part of the investigation to counsel for Respondents. The Motion for Protective Order states that CBOE has requested Freedom of Information Act Confidential Treatment for the documents supplied in response to Commission subpoenas, and that documents used in the examination of CBOE past or present employees contain sensitive commercial and proprietary information and reflect business development efforts.

I overruled Feldman's objections and granted the Motion for Protective Order. Counsel who want access to portions of the investigative record that the Division obtained from CBOE or its employees shall work with CBOE to prepare a protective order that I will sign.

Hearing

I ordered the following procedural schedule:

- Aug. 10, 2012: The Division will provide Respondents with its list of witnesses, identify any experts, and provide either a list or copies of its exhibits;
- Aug. 17, 2012: Respondents will provide similar information to the Division;
- Aug. 24, 2012: The exchange of all expert written testimony;
- Aug. 31, 2012: Submission of Prehearing Briefs; and
- Sept. 5, 2012: Hearing in Chicago, site to be determined.

Brenda P. Murray
Chief Administrative Law Judge