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

ADMINISTRATIVE PROCEEDINGS RULING
Release No. 748/ February 6, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-14848

In the Matter of	:	
	:	ORDER ON OFFICIAL NOTICE
OPTIONSXPRESS, INC.,	:	REQUEST
THOMAS E. STERN, and	:	
JONATHAN I. FELDMAN	:	

The Securities and Exchange Commission (Commission) began this proceeding on April 16, 2012. The hearing is complete, the last brief was filed on February 1, 2013, and the matter is awaiting an Initial Decision.

On January 11, 2013, the Division of Enforcement (Division) filed a Request to Take Official Notice (Notice Request), with one exhibit, pursuant to Rule 323 of the Commission's Rules of Practice. The Division maintains that a Settlement Agreement (Settlement) between the Investment Industry Regulatory Organization of Canada's (IIROC) Enforcement Staff and optionsXpress Canada Corp. (optionsXpress Canada), signed December 19, 2012, and issued by the IIROC, is relevant to its claims against Thomas E. Stern (Stern).[1] The Settlement is titled The By-Laws of the Investment Dealers Association of Canada and The Dealer Member Rules of the IIROC and optionsXpress Canada Corp.

The Settlement states that Stern was optionsXpress Canada's President and Ultimate Designated Person from December 1, 2005, and its Chief Compliance Officer from December

[1] A copy of the Settlement is the exhibit attached to the Notice Request and is available on the IIROC website. The IIROC is the national self-regulatory organization (SRO) which oversees all investment dealers and trading activity on debt and equity marketplaces in Canada. IIROC sets high-quality regulatory and investment industry standards, protects investors, and strengthens market integrity while maintaining efficient and competitive capital markets. IIROC, www.iiroc.ca (last visited Jan. 30, 2013).

22, 2008, until he was terminated on January 11, 2012. Settlement at 3. Among other things, the Settlement finds that: (1) Stern inaccurately represented to the IIROC that he approved all orders from Canadian residents; (2) Stern gave optionsXpress Canada's Board of Directors an inaccurate report on the firm's compliance; (3) an internal investigation by optionsXpress Canada determined that Stern provided IIROC's Business Conduct Compliance department with false and misleading information, and he was terminated; (4) in an October 2011 review of related company OX Trading LLC, the Chicago Board Options Exchange Inc. (CBOE) found that Stern violated several CBOE Rules; and (5) in August 2012, Stern submitted a letter of consent and was permanently barred from acting as a Trading Permit Holder (TPH), and associating with a TPH or TPH organization. Id. at 3-5.

According to the Division, optionsXpress Canada determined that in 2011-2012, Stern provided false and misleading information to the IIROC examination staff, and terminated Stern, in part, for this misconduct. Notice Request at 2. The Division argues that the facts and conclusions in the Settlement are relevant: (1) to the public interest considerations if the allegations in the Order Instituting Proceedings as to Stern are found to be true, and (2) to Stern's credibility. Id.

On January 18, 2013, Stern filed a Response in Opposition to the Notice Request (Response) with two exhibits.[2] Stern argues that the Settlement does not meet the standard for judicial or official notice and that granting the Notice Request will deprive him of due process. The Response argues that Stern was unaware of the IIROC proceeding, did not have an opportunity to defend himself, and that courts generally may not take judicial notice of disputed facts stated in public records, citing Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001). Response at 1-2. Stern contends that his prior conduct is disputed, and that it is inappropriate "to accept and consider the so-called 'facts' contained" in the Settlement, citing S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd., 181 F.3d 410, 426 (3d Cir. 1999). Id. at 2-3. Stern also maintains that the Settlement is neither a law nor a decision, but simply a contract binding only on the signatories. Response at 3.

Stern argues that another reason against granting official notice is that the Division knew of the internal optionsXpress Canada report, which "forms the basis for the Division's scurrilous attack on Mr. Stern's character and credibility," in early February 2012, but chose not to question him about it when it called him as a witness at the hearing, and is trying to slip evidence in after the case is closed. Id. at 4. Stern contends that granting official notice would deprive him of his right to respond to the allegations and deprive him of due process. Finally, Stern believes the Division has mischaracterized the Settlement as to why he was terminated, and that I should deny the request for official notice just as I did not allow Dr. Harris to submit supplemental testimony on disgorgement. Id. at 5.

Ruling

Commission Rule of Practice 323 provides:

[2] Exhibit 1 is two letters signed by Stephen J. Senderowitz dated February 8 and 9, 2012; Exhibit 2 is a Declaration of Joseph L. Siders Authenticating Documents.

> Official notice may be taken of any material fact which might be judicially noticed by a district court of the United States, any matter in the public official records of the Commission, or any matter which is peculiarly within the knowledge of the Commission as an expert body. If official notice is requested or taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to establish the contrary.

17 C.F.R. § 201.323.

"Official notice, like its courtroom counterpart judicial notice, is derived from the proposition that that which is commonly known need not be proved." 4 Jacob A. Stein et al., Administrative Law, § 25.01 (footnote omitted). Federal Rule of Evidence 201(b)(2) describes the kind of facts that can be judicially noticed as those that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."

As an initial matter, the existence of a publicly available document issued by a SRO typically contains facts whose accuracy cannot reasonably be questioned and official notice is appropriate. Also, regulatory settlements have been considered in assessing whether it is in the public interest to impose sanctions where a person has been found to have violated the federal securities laws. Gregory O. Trautman, Securities Act of 1933 Release No. 9088 (Dec. 15, 2009), 97 SEC Docket 23493, 23527 n.85 (citing Consolidated Inv. Servs., 52 S.E.C. 582, 591 (1996); Russo Sec., Inc., 55 S.E.C. 58, 82 n.61 (2001); Pagel, Inc. v. SEC, 803 F.2d 942, 948 (8th Cir. 1986)); see also Robert Bruce Lohmann, Initial Decision Release No. 214 (Sept. 19, 2002), 78 SEC Docket 1589, 1606.

This factual situation, however, is not so easily resolved. Here, Stern was not a party to the Settlement, and while the Settlement made findings as to him, he did not have an opportunity to contest them. The closest factual situation I could find was Carroll A. Wallace, CPA, Initial Decision Release No. 178, 73 SEC Docket 3969, 4036 (Dec. 18, 2000), where Judge Kelly refused to consider as evidence of Wallace's prior disciplinary history a settlement between Wallace's employer and a state Board of Accountancy involving an audit for which Wallace had been the engagement partner.[3] Judge Kelly found it significant that there was no trial, findings of fact, or admissions, and Wallace was not a named respondent. I share those concerns. This Settlement contains factual findings, but it violates basic fairness to use findings against a person where he was not named in the proceeding, did not participate in the settlement outcome, and contests certain factual findings. See 17 C.F.R. § 201.300.

[3] An Initial Decision has no precedential value but the reasoning for evidentiary rulings is noteworthy. See Gary M. Kornman, Exchange Act Release No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14260 n.44, petition for review denied, 592 F.3d 173 (D.C. Cir. 2010).

Using the contents of the Settlement only for consideration of sanctions, if that should be necessary, would also not be appropriate. As noted in Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996), sanctions have significant consequences.

For these reasons, I DENY the Division's Notice Request.

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Brenda P. Murray
Chief Administrative Law Judge