

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 721/ August 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14848

In the Matter of	:	
	:	ORDER ON ONE PENDING MATTER
OPTIONSXPRESS, INC.,	:	
THOMAS E. STERN, and	:	
JONATHAN I. FELDMAN	:	

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings on April 16, 2012. A hearing is scheduled to begin on September 5, 2012, at 9:30 a.m. CDT, in the Everett M. Dirksen U.S. Courthouse, 219 S. Dearborn Street, Courtroom #1801, Chicago, Illinois 60604.

On August 22, 2012, Jonathan I. Feldman (Feldman) filed a Motion for Reconsideration of the August 20, 2012, Order Denying Feldman's Motions for Issuance of Subpoena (Motion for Reconsideration). optionsXpress, Inc., Order on Subpoenas, Admin. Proc. Rulings Rel. No. 718 (Aug. 20, 2012). That Order on Subpoenas denied: (1) Feldman's August 13, 2012, motion requesting a subpoena duces tecum to the Custodian of Records of the Division of Enforcement (Division) to produce by August 16, 2012, four types of documents that concern the decision to initiate this proceeding and extend the time; and (2) Feldman's August 15, 2012, motion requesting a subpoena ad testificandum to an "Entity Designee/Representative Division of Enforcement" to testify about the same topic.

In his Motion for Reconsideration, Feldman asserts: (1) the Division made a material misrepresentation in claiming that the Affidavit of Deborah Tarasevich (Tarasevich) disclosed when a determination was made to initiate the proceeding; (2) there is no evidence that supports a finding that the subpoena is burdensome; and (3) the case law cited by the Division is not persuasive.

On August 23, 2012, the Division filed an Opposition to the Motion for Reconsideration (Opposition), arguing that the Motion for Reconsideration should be denied for all the reasons stated previously in opposition to issuance of both subpoenas and in opposition to Feldman's

Motion for Summary Disposition, for lack of any new arguments, and because Section 4E of the Securities Exchange Act of 1934 (Exchange Act) is not a statute of limitations.

On August 24, 2012, Feldman submitted his Reply in Support of the Motion for Reconsideration (Reply). The Reply argues that the Division's failure to state "when the determination to file was made" to institute the proceeding leads to the conclusion that the Division does not deny that it has violated Section 4E of the Exchange Act, and therefore Feldman should be allowed to present evidence as to the violation. Feldman claims that in the Motion for Reconsideration he argues for the first time that the Division has never stated when the determination to institute proceedings against Feldman was made.¹

Ruling

I DENY Feldman's Motion for Reconsideration of the August 20, 2012, Order Denying Feldman's Motions for Issuance of Subpoena. All the points raised have been considered and found wanting.

There is nothing that indicates the Division's Opposition, including the Tarasevich Affidavit, contains any misrepresentations by the Division. It seems that the language cited in the August 20, 2012, Order on Subpoenas, p. 2 n.1, is significant:

At least one publication has noted problems with a practical application of Section 4E because of "given certain definitional uncertainties: It is the commissioners, not the staff, who make the ultimate determination whether to authorize an action. It is the Commission not the staff that files any such action. And the director of the Division of Enforcement is a member of the staff." David S. Frankel et al., "Dodd-Frank's Impact on Securities Enforcement and Litigation," The Metropolitan Corporate Counsel, Oct. 2010, at 12.

At the start of the hearing on September 5, 2012, I will ask Division counsel to state on the record whether, in fact, the Division staff ever files an action against a person or provides notice to the Division Director of its intent not to file an action.

Brenda P. Murray
Chief Administrative Law Judge

¹ Feldman also claims to have intended to raise this argument in his Reply, but I ruled before his time to reply expired. I apologize if I cut off any arguments on August 20, but we were dealing with two types of subpoenas, one returnable in three days, and the hearing date was approximately two weeks away in a time period that included a major holiday weekend.