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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-14848

In the Matter of

optionsXpress, Inc.,
Thomas E. Stern, and
Jonathan I. Feldman,

Respondents.

PETITION FOR REVIEW OF INITIAL DECISION
BY RESPONDENT OPTIONSXPRESS, INC.

TABLE OF CONTENTS

Page

I. The Initial Decision is based on erroneous conclusions of law. 1

A. The Court failed to interpret and apply the literal language of Rule 204(a). 1

B. The Initial Decision violates optionsXpress' due process rights. 9

C. The Court's fraud analysis misconstrues the applicable standard, as laid out in the D.C. Circuit's Howard case. 11

D. The Court improperly found fraud despite no evidence of deception. 13

E. The Court misconstrued Rule 10b-21. 14

II. The Initial Decision is also based on clearly erroneous findings of material fact. 15

A. The Court clearly erred in finding that buy-writes, as executed by optionsXpress, failed to satisfy Rule 204(a)'s closeout requirement and were a "sham." 16

B. The Court clearly erred in finding late buy-ins on T+4. 18

C. The Court clearly erred in finding a primary fraud violation against Feldman. 19

D. The Court clearly erred in finding that optionsXpress aided and abetted, or caused, Feldman's purported fraud. 20

E. The Court clearly erred in finding that the evidence supports the need for a cease and desist order against optionsXpress. 23

F. The Court clearly erred in finding that the evidence supports the disgorgement amount ordered against optionsXpress. 24

G. The Court clearly erred in finding that the evidence supports the civil penalty amount ordered against optionsXpress. 24

III. The Initial Decision, if enforced, would create bad policy. 25

TABLE OF AUTHORITIES

Page(s)

CASES

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002)....5

Gen. Elec. Co. v. EPA,
53 F.3d 1324 (D.C. Cir. 1995)....9

Gollust v. Mendell,
501 U.S. 115 (1991)....2, 5, 6

Howard v. SEC,
376 F.3d 1136 (D.C. Cir. 2004)....10, 11, 12, 13

In re Del Mar Fin. Servs., Inc.,
SEC Rel. No. 188, 2001 WL 919968 (Aug. 14, 2001)....7

In re F.X.C. Investors Corp.,
SEC Rel. No. 218, 2002 WL 31741561 (Dec. 9, 2002)....7

In re John P. Flannery & James D. Hopkins,
SEC Rel. No. 438, 2011 WL 5130058 (Oct. 28, 2011)....13

In re Rita C. Villa,
SEC Rel. No. 40877, 1999 WL 940 (Jan. 4, 1999)....1

Marx v. Gen. Revenue Corp.,
133 S. Ct. 1166 (2013)....6

Morris v. U.S. Nuclear Regulatory Comm'n,
598 F.3d 677 (10th Cir. 2010)....6

S.G. Loewendick & Sons, Inc. v. Reich,
70 F.3d 1291 (D.C. Cir. 1995)....8

Santa Fe Indus., Inc. v. Green,
430 U.S. 462 (1977)....13

SEC v. Wills,
472 F. Supp. 1250 (D.D.C. 1978)....13

United States v. Approximately 64,695 Pounds of Shark Fins,
520 F.3d 976 (9th Cir. 2008)....9

OTHER AUTHORITIES

70 Fed. Reg. 37496 (June 29, 2005) 8

73 Fed. Reg. 61666 (Oct. 17, 2008) 14

73 Fed. Reg. 61706 (Oct. 17, 2008) 3

74 Fed. Reg. 38266 (July 31, 2009) 3, 4

Exchange Act Rule 10b-21 .... 13, 14

FINRA Rule 5310(a)(1) 8

NASD Rule 2320 8

Regulation SHO Rule 204 .... passim

Regulation SHO Rule 204T 1, 3

Rule of Practice 323 12

Rule of Practice 411 1

Rule of Practice 452 12

The Commission should review Chief ALJ Murray's Initial Decision because it is premised on erroneous legal conclusions and clearly erroneous findings of material fact, and also makes an important determination of law and policy that is ill-advised and contrary to the plain language of Reg. SHO. *See* 17 C.F.R. § 201.411(b)(2). The Commission's Rules of Practice direct review where a petitioner "makes a reasonable showing that the decision embodies an erroneous conclusion of law or an important determination of law or policy that [it] should review." *In re Rita C. Villa*, SEC Rel. No. 40877, 1999 WL 940, at *1 (Jan. 4, 1999). For the reasons explained below and addressed in more detail in optionsXpress's post-hearing briefs, this petition makes such a showing and also identifies clear factual errors that should be reviewed.

I. The Initial Decision is based on erroneous conclusions of law.

The Commission should review the Initial Decision because it is replete with legal errors, including the Court's failure to address a number of legal challenges pressed by optionsXpress throughout this enforcement action.

A. The Court failed to interpret and apply the literal language of Rule 204(a).

First and foremost, the Court found that optionsXpress violated Rules 204 and 204T of Regulation SHO (together, "Rule 204"), a strict liability rule, without even interpreting or applying its language. Instead, the Court based liability (and imposed substantial financial damages and penalties) solely on its view that optionsXpress violated the ***spirit*** of the Rule. This holding conflicts with binding precedent.

1. Rule 204 is a strict liability regulation that must be limited to its literal language.

The fundamental problem with the Initial Decision is that it outlaws behavior based on the Court's view of what the law ***should be***, while ignoring the actual language of the Rule itself—which was subjected to the notice, review, and comment requirements demanded by law.

Importantly, Rule 204 imposes strict liability. Decision at 75. According to binding Supreme Court precedent, the Court was to rely on "***a literal, 'mechanical' application of the [regulation's] text***" when determining whether Rule 204 was violated. *Gollust v. Mendell*, 501 U.S. 115, 122 (1991) (construing Rule 16(b) of the Exchange Act, which imposes strict liability) (internal and quotations omitted) (emphasis added). This guiding principle remains true "even though in some cases a broader view of statutory liability could work to eliminate an evil that Congress sought to correct through [the rule itself]." *Id.* Thus, the inquiry begins and ends with the Rule's literal language.

The Court ignored this precedent and adopted a theory of liability that expands the Rule's scope far beyond its literal language. According to the Court, Rule 204(a) ***implicitly*** prohibits ***all*** buy-writes executed in response to an option assignment. But the text of Rule 204(a) does not say this. While another subpart of the Rule, 204(f), addresses buy-write transactions, it prohibits them ***only*** if they involve "an ***arrangement*** with another person" to avoid delivery—an element the Division of Enforcement concedes it did not satisfy. *See* Decision at 84.

Thus, instead of finding a violation of Rule 204(a) based on "a literal, mechanical application" of the regulatory text as required by the Supreme Court, the Court merely found that the Division's proof came close enough: "If something looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck." Decision at 86. Such loose analysis of a strict liability rule constitutes legal error that necessitates Commission review and reversal.

2. optionsXpress' buy-ins satisfied the plain language of Rule 204(a).

The trading at issue here cannot violate Rule 204(a) as a matter of law. Under the Rule, "the participant shall, by no later than the beginning of regular trading hours on the settlement day following the settlement date [T+4], immediately close out its [continuous net settlement ("CNS")] fail to deliver position by borrowing or ***purchasing securities of like kind and***

quantity." 17 C.F.R. § 242.204(a) (emphasis added). optionsXpress satisfied the Rule when it purchased securities "of like kind and quantity" by market open on T+4. Indeed, Dr. Sirri—the former Director of Trading and Markets—confirmed that the Rule merely requires "a transaction." Tr. 3179:20-3180:2. That is, "if you find yourself on the morning of T plus 4, what you must do is transact. You have to buy securities. That's what it says." *Id.*

When determining whether such a transaction occurred, the appropriate inquiry under Rule 204(a) is to look to the broker's books and records. That is, the broker's records must show that it "borrow[ed] or purchas[ed] securities of like kind and quantity" in reference to the CNS fail to deliver position for the particular close-out date. 17 C.F.R. § 242.204(a). This reading is clear from the language of the Rule. It is also confirmed by the Rule's adopting release: "[T]o meet its close-out obligation a participant . . . must be able to demonstrate ***on its books and records*** that on the applicable close-out date, it purchased or borrowed shares in the full quantity of its fail to deliver position and, therefore, that the participant has a net flat or net long position on its books and records on the applicable close-out date." Rule 204 Adopting Release, 74 Fed. Reg. 38266, 38272 (July 31, 2009) (emphasis added); *see also* Rule 204T Adopting Release, 73 Fed. Reg. 61706, 61711 (Oct. 17, 2008).

During the hearing, optionsXpress presented evidence from its expert, Dr. Atanu Saha, demonstrating that the firm's books and records reflected that the short stock positions (resulting from assignments) were cured by the end of T+3 through legitimate purchases of the stocks by the customers in more than 99.3% of the cases. OPX 248 at 32 (Saha Rpt.). Notably, the Court did not challenge this fact. Decision at 77. Therefore, the record establishes that, for virtually 100% of the trades at issue, optionsXpress responded to its CNS failures-to-deliver by timely

purchasing stock "of like kind and quantity" on T+4 in accordance with the plain language of Rule 204(a).

3. The *only* definition of "sham close-out" is set forth in Rule 204(f), which the Division concedes does not apply here.

The Court erred as a matter of law when concluding that these stock buy-ins did not satisfy Rule 204(a) because they were combined with a new call initiated by the customer in the form of a buy-write transaction. Once Rule 204(a) is satisfied—e.g., once stock of "like kind and quantity" has been purchased—the Rule can only be violated if the transaction is a sham close-out. But such a sham is defined by Rule 204(f), which prohibits transactions from satisfying Rule 204(a) ***only*** "where the participant enters into an ***arrangement with another person*** to purchase or borrow securities as required by this section, and the participant knows or has reason to know that the other person will not deliver securities in settlement of the purchase or borrow." 17 C.F.R. § 242.204(f) (emphases added). As the Commission made clear during its rulemaking, it had "determined to include rule text in subparagraph (f) of Rule 204"—and nowhere else—to address "sham close-outs." Release No. 34-60388, 2009 WL 2223009, at *20 (July 27, 2009). And as Rule 204(f) itself makes clear, there is no sham close-out absent an "arrangement with another person" to circumvent Rule 204(a). In fact, the regulatory history repeatedly emphasizes this element. *See* Post-Hearing Br. at 15-16.

Significantly, as the Court points out, "***[t]he Division is not claiming that optionsXpress violated Rule 204(f).***" Decision at 84 (emphasis added). This is because, as the Division itself conceded, there were no "arrangements" to avoid the Reg. SHO delivery requirements in this case. *See* Tr. 4195:11-17 ("Neither of our experts ever said that there was an arrangement with the other parties."); *see also id.* at 4193:7-17.

4. **The Court's interpretation of Rule 204(a) improperly extends well beyond its literal language.**

Instead of applying this plain reading of Rule 204, the Court broadly found that buy-write transactions in response to option assignments can never satisfy Rule 204(a), a position more extreme than that advanced by the Division. *See* OIP ¶¶ 3-4, 14-15, 27. According to the Court, such a broad reading of Rule 204(a) is justified "on at least two levels." Decision at 75.

First, the Court concluded that buy-writes do not count as stock purchases "of like kind and quantity" sufficient to satisfy Rule 204(a) because "[u]se of a buy-write transaction comes within the Commission's definition of a naked short sale." Decision at 79. The Court thus found that, "by not performing its responsibility and closing out fail to deliver positions, optionsXpress allowed Feldman and others to continue what, ***in effect***, was naked short selling." *Id.* (emphasis added).

While a goal of Reg. SHO may be to curtail naked short selling, the Supreme Court requires "a literal, 'mechanical' application" of the text approved by the Commission to further that goal. *Gollust*, 501 U.S. at 122. The Commission itself has never defined a buy-write as a naked short sale, and the Rule certainly does not do so. But instead of mechanically applying the Rule's literal text, the Court found that the buy-write trading "in effect" constituted naked short selling and thus purportedly violated the ***spirit*** of the Rule.

Second, the Court found (without any legal analysis) that optionsXpress engaged in sham transactions "independent of Rule 204(f)." *Id.* at 86. In doing so, the Court relied on "[t]he common meaning of a sham," which "is 'a trick that deludes: hoax,'" *id.* (quoting *Merriam-Webster's Collegiate Dictionary* 1073 (10th ed. 2001)). But such reliance was plainly improper, because a dictionary definition cannot trump the express definition laid out in the Rule itself, particularly for such an essential term. *Cf. Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62

(2002) ("We have stated time and again that Courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (quotations and citations omitted).

In short, the Court's finding of liability based on a "looks like a duck, swims like a duck, and quacks like a duck" theory (Decision at 86) conflicts directly with binding precedent requiring "a literal, 'mechanical' application" of the text of the strict-liability Rule. *Gollust*, 501 U.S. at 122. The Commission should reverse the primary finding of Reg. SHO liability for this reason alone.

5. The Initial Decision improperly renders Rule 204(f) superfluous.

The Initial Decision is legally erroneous in yet another respect. By holding that buy-writes in response to option assignments cannot satisfy Rule 204(a), the Court rendered superfluous Rule 204(f)—which, again, prohibits buy-writes ***only*** if they involve an "arrangement with another person." The Court's holding thus violates the well-established principle that regulations should not be construed in a manner that renders language superfluous, a canon that "is strongest when an interpretation would render superfluous another part of the same [regulatory] scheme." *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013); *see also Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 706 (10th Cir. 2010) ("It is a well-established principle of statutory and regulatory interpretation that a provision should be read such that no term is rendered nugatory.").

6. The Court failed to cite any precedent to support its interpretation of Rule 204.

The Court also clearly erred as a matter of law because it cited ***no*** binding or precedential legal authority for its strained interpretation of Rule 204(a).[1] Instead, it placed undue reliance on settlements in and of themselves—i.e., *Hazan*, *Arenstein*, and *TJM*—that purportedly put, or should have put, optionsXpress on notice that the transactions here were unlawful. Decision at 82-84. Such reliance is legally problematic on several fronts.

First, "[i]t goes without saying, and the Commission has stressed many times, that settlements are not precedent." *In re Del Mar Fin. Servs., Inc.*, SEC Rel. No. 188, 2001 WL 919968, at *29 n.61 (Aug. 14, 2001) (citations omitted); *see also In re F.X.C. Investors Corp.*, SEC Rel. No. 218, 2002 WL 31741561, at *10 (Dec. 9, 2002) ("The Division's reliance on settlement orders is misplaced. In the absence of an opinion stating the Commission's views on the issues raised, settlements are of dubious value as precedent.") (citation omitted) (emphasis in original)). Yet, the Court repeatedly relied on these settlements (inaccurately referring to them as "decisions," Decision at 22 n.37, 81-82) to support its ***legal*** conclusion that Rule 204(a) prohibits buy-writes in response to option assignments—a conclusion that is not even supported by those settlements, much less the Rule itself. *See, e.g.*, Decision at 22-23, 51, 82-84.

Second, the Court missed the material distinctions between the trading at issue in the settlements and that which occurred here. All of the settlements involved arrangements between market makers that were expressly prohibited by Rule 204(f), with the sole purpose of avoiding stock delivery. In addition, those arrangements were between market makers trading in their

[1] The Division had relied on footnote 82 of Rule 204's adopting release as a basis for liability, but the Court rejected the argument. *See* Decision at 93 n.133. The Division's reliance on footnote 82 was misplaced for the reasons set forth in optionsXpress' Post-Hearing Brief (at 14-15), including that footnote 82 has no legal effect because it is not part of the actual rule. Moreover, even if footnote 82 had the force of law, the Division failed to prove that optionsXpress violated it, as there were no "sales transactions" and the trades at issue had a legitimate economic purpose. *See* Post-Hearing Br. at 18-23.

own proprietary accounts. The situation here could not be more different. optionsXpress was not placing trades on its own account; it merely complied with its Reg. SHO obligation by entering orders to force buy-ins by the morning of T+4 (often earlier). In response, the firm's customers initiated separate orders to write options in order to maintain their hedged strategy and avoid potential losses. The transactions were then bundled as a buy-write to keep transaction costs down. *See* Tr. 3405:10-20 (Strine); 1485:9-12 (Harris). Most importantly, the transactions were done with anonymous counterparties and did not involve arrangements. In bundling these orders, the firm not only acted for its customers' benefit, it also acted to ensure compliance with its legal duty to ensure best execution.[2] There is no authority—decision, settlement, or guidance—that had construed Rule 204 as prohibiting such bundling of buys initiated from a broker and writes initiated from a retail customer—particularly absent an "arrangement" to avoid delivery, which even the Division concedes was not present here. To be sure, the Initial Decision stands alone, unsupported by any case law or precedent.

Third, while the Court concluded the trading here was analogous to that in the settlements because "optionsXpress attempted to . . . make it appear that it had delivered shares when it did not do so" (Decision at 83), that assertion is simply untrue. The evidence—even the Division's own expert—plainly spelled out that ***delivery did occur***. *See* Post-Hearing Br. at 25 (citing OPX 248 at 32 (Saha Rpt.) (timely delivery occurred in at least 99.3% of cases)); *see also* Decision at

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[2] *See* Adopting Release to Regulation NMS, 70 Fed. Reg. 37496, 37537 (June 29, 2005) ("A broker-dealer has a legal duty to seek to obtain best execution of customer orders."); FINRA Rule 5310(a)(1), Best Execution and Interpositioning (May 31, 2012) ("In any transaction for or with a customer or a customer of another broker-dealer, a member . . . shall use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions.") (replacing NASD Rule 2320, effective May 1, 1968, through May 31, 2012 (same)).

54 (noting that even the Division's expert "admitted . . . that his analysis showed that delivery occurred within a few days of T+3," as contemplated by the Rule).

B. The Initial Decision violates optionsXpress' due process rights.

The Initial Decision, if enforced, also would violate optionsXpress' due process rights, as the SEC failed to provide "clear, rational decision-making that gives regulated members of the public adequate notice of their obligations." *S.G. Loewendick & Sons, Inc. v. Reich*, 70 F.3d 1291, 1297 (D.C. Cir. 1995). Liability has been imposed here based on significant departures from the literal text of the Rule and despite unclear and contradictory interpretations and findings by optionsXpress's regulators. In this respect, the Initial Decision (and the enforcement action from the start), is a textbook due process violation that the Commission should not allow to stand.

For example, according to the Court, the Rule imposes civil liability without any notice that ***all*** buy-write transactions, even those without an arrangement as proscribed in 204(f), violate Rule 204 when executed in response to an option assignment. Where notice is insufficient— "for example, ***where the regulation is not sufficiently clear to warn a party about what is expected of it***—an agency may not deprive a party of property by imposing civil or criminal liability." *United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008) (emphasis added) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)). That is the case here, yet the Court did not even address this fundamental principle.

Due process also is not satisfied where, as here, "different divisions of the enforcing agency disagree about [a regulation's] meaning." *Gen. Elec.*, 53 F.3d at 1332. The Initial Decision ignores critical testimony from CBOE witnesses who stated that when they brought the trading to the attention of Trading and Markets in May and June 2009—including a

memorandum that explained, in detail, the trading at issue—Trading and Markets told CBOE that the trading did ***not*** constitute a violation. *See* FOF ¶¶ 156-59, 163-67; Tr. 4003:10-4004:9 (MacDonald of CBOE) (Q: Then did you ask Ms. Crane and Ms. Tao [of Trading and Markets] a point blank question? A: I did. Q: Does the trading appear to be a sham closeout? A: I did. . . . Q: And they told you it's not a sham closeout, right? A: Well, they – I don't know their exact words but I somehow recall something, it doesn't appear to be – it appears to be something else. Q: Something other than a sham closeout? A: Correct."). As this CBOE witness further testified in the context of seeking advice from Trading and Markets on the scope of Rule 204: "[W]e weren't sure what the rule was trying to express." Tr. 3989:5-6 (MacDonald). Even the authors of Rule 204 themselves believed the Rule needed to be amended in order to cover the buy-write trades at issue. The evidence indicated that Trading and Markets thought it would need a new provision that would broaden Rule 204(f) by focusing on the economic purpose of the transaction in order to bar the type of trading at issue in the case. *See* FOF ¶ 183, OPX 559 ("***Should we propose a rule*** that would add a circumvention with no economic purpose rule?") (emphasis added).

To the extent the Commission wishes to ban the trades at issue in this case, there is a process for that—amend the rule to restrict some or all buy-write transactions—but only after providing market participants with an opportunity for notice and comment. The Initial Decision represents an improper attempt to promulgate a new regulation via prosecution, one that bypasses essential notice and comment requirements and seeks to punish optionsXpress without due process of law. Because the Division is empowered only to enforce regulations, ***not*** to create them, the Commission should review the Initial Decision and ultimately reverse it.

C. The Court's fraud analysis misconstrues the applicable standard, as laid out in the D.C. Circuit's *Howard* case.

The Commission should also review the Initial Decision because the Court failed to analyze and properly apply the controlling standard for determining aiding and abetting liability outlined in *Howard v. SEC*, 376 F.3d 1136 (D.C. Cir. 2004). As the D.C. Circuit made clear in *Howard*, "aiding and abetting liability cannot rest on the proposition that the person 'should have known' he was assisting violations of the securities laws," particularly where the "law applicable to [the case] has never been clear, and has been based on a partly unwritten body of interpretation regarding what constitutes a 'bona fide' purchase of securities for purposes of the rules . . . ." *Id.* at 1143-45. "[E]xtreme recklessness" is required. *Id.* at 1143. And there can be no extreme recklessness—as a matter of law—where "rather than red flags, [the respondent] encountered green ones," or the underlying rule "was silent on the subject." *Id.* at 1145, 1147-49.

That is the precise circumstance here. There is abundant evidence in the record that the law was unclear and that the regulators themselves differed on its meaning. Yet the Initial Decision turns *Howard* on its head by finding that optionsXpress acted at least recklessly because it failed to "get[] a definitive determination on whether optionsXpress' use of buy-writes was lawful." Decision at 94. That is not the legal standard; the Court plainly misapplied the burden of proof with regard to aiding and abetting fraud.

First, CBOE investigated the trading strategies at issue and, in September 2009, closed that investigation without finding a single Rule 204 violation and notified optionsXpress that it was in the clear. OPX 138; OPX 141. This undisputed fact alone epitomizes a "green flag" that bars a finding of fraud under *Howard* as a matter of law.

Second, as discussed, the language of Rule 204 is completely "silent" as to whether a broker can use a buy-write to close out an option assignment as long as there is no arrangement to circumvent the delivery requirements. The Court thus improperly found extreme recklessness based on, at the very most, a "should have known" standard. *Howard*, 376 F.3d at 1143.

Third, the undisputed record establishes that optionsXpress did not even act negligently, because the violation found by the Court was far from "clear." *Id.* at 1145. Indeed, the Court ignored on-point testimony by Timothy MacDonald, the CBOE Director in charge, that CBOE—the firm's primary regulator—had exonerated optionsXpress of fraudulent conduct:

> Q: Did you find fraud?
> A: No.
> Q: Did you find any intent to manipulate the market?
> A: No.
> Q: Any intent to manipulate . . . the market as to optionsXpress or the customer?
> A: No.
> Q: No as in you didn't find any such intent?
> A: Did not find anything.
> ***Q: Did you find that a possible 10b-5 charge just wasn't lining up with the facts?***
> ***A: Correct.***

Tr. 4001:3-15 (emphasis added).

While the Commission has faulted CBOE's inaction, those same findings confirm that the plain language of the Rule did not clearly prohibit the trading at issue. As outlined in optionsXpress' contemporaneously filed Motion for Consideration of New Evidence, the Commission should consider its June 11, 2013 Settlement Order against CBOE, where the Commission found, among other things, that CBOE staff:

- "lacked a fundamental understanding of [Reg. SHO]" (CBOE Settlement at ¶ 6);
- "never received any formal training on Reg. SHO, were instructed to read the rules themselves, did not have a basic understanding of what a failure to deliver

was, and were unaware of the relationship between failures to deliver and a clearing firm's net short position at the [DTCC]" (*Id.* at ¶ 14); and

- "did not know what a failure to deliver was, did not know how to determine if a fail existed, and were confused as to whether Reg. SHO applied to a retail customer" (*Id.* at ¶ 17).

These findings by the Commission—in particular, the finding that regulators who merely "read the rules themselves" would not appreciate its purportedly broad scope without "formal training" and "were confused" as to its meaning—confirm that Rule 204(a) "has never been clear" as to whether it prohibits buy-writes absent arrangements in response to option assignments. *Howard*, 376 F.3d at 1145.

The record also is replete with evidence that compliance officers at optionsXpress proactively sought regulatory guidance from the SEC and FINRA on the topic of whether the trading at issue violated Reg SHO. These efforts to ensure compliance are further evidence of good faith, "a relevant consideration in evaluating [a respondent's] scienter." *Id.* at 1147-48; *see also In re John P. Flannery & James D. Hopkins*, SEC Rel. No. 438, 2011 WL 5130058, at *48 (Oct. 28, 2011) (Murray, Chief ALJ) (finding no negligence where "Flannery reasonably relied on . . . other knowledgeable persons").

D. The Court improperly found fraud despite no evidence of deception.

The Court's finding of fraud is clearly erroneous for another reason: there was no evidence of deceptive conduct to justify a primary fraud violation. Of course, by its very nature, any finding of fraud necessarily requires some proof of deception or misrepresentation. *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 473-74 (1977) (where manipulation not at issue, deception required to prove Section 10b-5 violation); *SEC v. Wills*, 472 F. Supp. 1250, 1269 (D.D.C. 1978) (same). Here, there was no allegation of manipulation and the Court did not specifically find any actual deception.

Indeed, the Court's purported finding of deception is contradicted by its own factual findings. For example, although the Court ultimately concluded that Feldman deceived the "market as a whole" by purportedly representing that he was going to make delivery of securities with no intention to do so (Decision at 89), this ignores the Court's prior finding that "Feldman was candid about what he was doing; ***he did not engage in deceptive conduct or make any misrepresentations or omissions to the clearing brokers he dealt with***, and he took whatever actions they required of him." *Id.* at 44 (emphasis added). The Court's conclusion also conflicts with its finding that the Division's own expert "admitted . . . his analysis showed that ***delivery occurred*** within a few days of T+3[.]" *Id.* at 54 (emphasis added). Thus, the underlying basis for the Court's finding of deception is illusory, and there can be no fraud as a matter of law.

E. The Court misconstrued Rule 10b-21.

The Court's conclusion that optionsXpress violated Rule 10b-21 also is legally deficient and warrants review. For example, the Initial Decision failed to analyze the elements of Rule 10b-21, which requires, among other things, ***deceiving a broker-dealer***, participant of a registered clearing agency, or purchaser regarding his intention, or ability, to deliver the security by settlement date. 17 C.F.R. § 240.10b-21 (emphasis added). The Division failed to demonstrate that optionsXpress had the requisite scienter needed to substantially assist Feldman to deceive a broker-dealer—which, by the Commission's own admission, required a finding "close to a contradiction in terms that the broker/dealer would have both been deceived and know about the potential violation." DX 401 at 9; FOF ¶ 369.

The Court also erred in finding a primary violation of Rule 10b-21 against Feldman, particularly in its analysis of the Rule's delivery requirements. For example, the Court failed to distinguish Rule 10b-21's delivery requirement, which is between the seller and broker, from Reg. SHO's delivery requirement, which is between the broker and CNS (not involving

Feldman). *Compare* Decision at 89 ("Feldman . . . represented to the market . . . that he was going to make delivery . . . when . . . in fact, by entering buy-writes, he did not cover his short position.") *with* Rule 10b-21 Adopting Release, 73 Fed. Reg. 61666, 61672 (Oct. 17, 2008) ("Rule 10b-21's focus is on whether or not there is a fail to deliver by the seller [to the broker], rather than on whether or not there is a fail to deliver in the CNS system.") *and* OPX Ex. 915 at ¶ 125 (Sirri Rpt.) ("Delivery to NSCC by a Clearing Member is different from delivery by a customer to a broker, and these two forms of delivery occur independently of each other").

In addition, the Court erroneously concluded that Feldman "represented to the market as a whole . . . that he was going to make delivery" (Decision at 89), contradicting its own prior finding that "Feldman never represented to optionsXpress that he had the ability to deliver shares" (*id.* at 44). The Court's conclusion also conflicts with the Rule's Adopting Release, which states: "[I]f a seller is relying on a broker-dealer to comply with Regulation SHO's locate obligation and to make delivery on a sale, the seller would not be representing at the time it submits an order to sell a security that it can or intends to deliver securities on the date delivery is due." Rule 10b-21 Adopting Release, 73 Fed. Reg. at 61672.

II. The Initial Decision is also based on clearly erroneous findings of material fact.

The Commission should also review the Initial Decision because it contains many clearly erroneous findings of material fact.[3] These errors contributed to the Court's clearly erroneous findings on key issues, including that: (A) the buy-writes executed by optionsXpress failed to satisfy Rule 204(a)'s closeout requirement, including, but not limited to, findings that the trading

[3] These clearly erroneous factual findings contributed to the Court's flawed legal analysis. optionsXpress thus reserves the right to argue that these factual errors also constitute legal errors, and vice versa. Moreover, citations to the record in this petition are not intended to be exhaustive, and optionsXpress reserves the right to rely on additional record evidence if and when it briefs the merits of the issues addressed in this petition. The firm also reserves the right to raise arguments addressed in petitions for review filed by other respondents.

constituted naked short selling and was a "sham"; (B) optionsXpress stock purchases on T+4 occurred after market open; (C) the evidence supported a primary fraud violation by Feldman; (D) optionsXpress aided and abetted, or caused, such fraud; and (E) the facts supported the cease and desist order, disgorgement amount, and civil penalty amount ordered against optionsXpress.

A. The Court clearly erred in finding that buy-writes, as executed by optionsXpress, failed to satisfy Rule 204(a)'s closeout requirement and were a "sham."

The Court's conclusion that optionsXpress' use of buy-writes in response to option assignments violated Rule 204(a) is based on clearly erroneous factual findings, including but not limited to the following:

1. "By allowing customers to execute buy-writes to cover short positions in their accounts, optionsXpress did not close out its fail to deliver position by borrowing or purchasing securities of like kind and quantity." Decision at 79. The evidence showed that optionsXpress closed out its fail to deliver positions in accordance with Rule 204(a). OPX 248 at 32 (Saha Rpt.).

2. "optionsXpress's implementation of T+1 for buying in certain customer accounts in hard-to-borrow securities did not have any effect on the CNS Accounting Summary." Decision at 20. The evidence showed that this change in policy did have an effect on the CNS Accounting Summary; specifically, fail to delivers went from four days to one day. Tr. 312:22-313:22 (Molnar); Tr. 443:10-17 (Tortorella); Tr. 3378:11-3379:2 (Strine).

3. "optionsXpress's argument that adoption of the T+1 policy establishes that there were no fails to deliver on T+3 during the relevant period is unpersuasive." Decision at 77. This finding misconstrues optionsXpress' actual argument. optionsXpress never argued that the T+1 policy eliminated fails to deliver, but instead that the policy ensured compliance with Rule 204(a) by necessarily avoiding late buy-ins on T+4. Post-Hearing Brief at 24-25.

4. "[A] customer was only sent a buy-in notice when there was a failure to deliver shares to CNS." Decision at 21. This cannot be true because optionsXpress began buying-in the customers on T+1, before a CNS failure to deliver notice would be issued. Tr. 312:22-313:22 (Molnar); Tr. 443:10-17 (Tortorella); Tr. 3378:11-3379:2 (Strine).

5. "During the relevant period, optionsXpress was responsible for sixty-four percent of all shares that failed to settle in CNS." Decision at 76. This finding has little

relevance to the issue at hand, and is essentially meaningless without knowing the percentage of shares optionsXpress traded.

6. "I reject optionsXpress's position that the fails to deliver listed on the Accounting Summary it received were inaccurate because fails to deliver may have been closed out by transactions that had not yet settled on T+3 due to the three-day settlement cycle." Decision at 76. This finding appears to be based on a misunderstanding. optionsXpress never disputed that there were CNS fails to deliver.

7. "[B]y not performing its responsibility and closing out fail to deliver positions, optionsXpress allowed Feldman and others to continue what, in effect, was naked short selling." Decision at 79. optionsXpress ***did*** closeout its fail to deliver positions. OPX 248 at 32 (Saha Rpt.) It also made delivery. Tr. 230:11-16 (Risley); OPX 250 at ¶ 36 (Ruth Rpt.); Tr. 4354:16-24 (Ruth). As discussed above, the trading at issue is materially different from naked short selling, which depresses stock prices. In fact, the Division's expert conceded "that the buy-write trades had little effect on prices in the underlying stock markets[.]" DX 310 at ¶ 39 (Harris Rpt.).

8. "[B]ased on the character of the calls, publicly available information on the level of open interest, and past experience, Feldman and optionsXpress knew that his deep-in-the-money calls on Sears and other securities would likely be exercised and assigned to him." Decision at 78. The evidence showed that neither Feldman nor optionsXpress knew (or could know) that the deep in-the-money calls would be assigned back to Feldman, particularly because assignment is random. Tr. 230:11-16 (Risley); OPX 250 at ¶ 36 (Ruth Rpt.); Tr. 4354:16-24 (Ruth); OPX 915 at ¶¶ 101-103 (Sirri Rpt.).

9. "Because it knew that the shares that were the subject of the buy were shares for Feldman's account that were the subject of simultaneous deep-in-the-money calls, which would be exercised and assigned so that no shares were delivered to CNS, optionsXpress engaged in a sham close-out of its fail to deliver position." Decision at 86. This finding contradicts the undisputed data submitted by both experts with regard to assignments of calls. OPX 248 at 25 (Saha Rpt.); DX 382 at 8 (Harris Rebuttal). In fact, assignment is a random process, making it impossible to "know" who will be assigned a particular call option, or whether an assignment to a particular customer relates to a call that customer even wrote. OPX 915 at ¶¶ 101-103 (Sirri Rpt.). Finally, this finding ignores that shares were delivered. Tr. 230:11-16 (Risley); OPX 250 at ¶ 36 (Ruth Rpt.); Tr. 4354:16-24 (Ruth).

10. "[T]he buy-writes were essentially wash trades or matched orders to avoid delivering shares." Decision at 101. The trading at issue is materially different from wash trades and matched orders because, among other things, delivery occurred. Tr. 230:11-16 (Risley); OPX 250 at ¶ 36 (Ruth Rpt.); Tr. 4354:16-24 (Ruth).

11. "optionsXpress's efforts to distinguish *Arenstein*, *Hazan*, and *TJM*, from its conduct are shallow, self-serving, and unpersuasive." Decision at 83. These settlements are materially different from the trading at issue because, among other things, they all involve arrangements, which are explicitly prohibited by the Rule. 17 C.F.R. § 242.204(f).

B. The Court clearly erred in finding late buy-ins on T+4.

The Court's conclusion that optionsXpress violated Rule 204(a) through late buy-ins on T+4 is based on clearly erroneous factual findings, including but not limited to the following:

1. "optionsXpress's efforts to close out its fail to deliver positions frequently occurred after 10:00 a.m. ET on T+4 during the relevant period." Decision at 77. This finding is contradicted by the actual data showing that at least 99.3% of the fail to delivers were cured by T+3 and at least 99.8% were cured by T+4. OPX 248 at 32 (Saha Rpt.).

2. "The record shows that optionsXpress did not close out many of its fail to deliver positions at the beginning of regular trading hours on T+4." Decision at 78. This finding is contradicted by the actual data showing that at least 99.3% of the fail to delivers were cured by T+3 and at least 99.8% were cured by T+4. OPX 248 at 32 (Saha Rpt.).

3. "After August 20, 2009, [optionsXpress] executed fifty-one percent of 1,105 buy-writes after 10:00 a.m. ET." Decision at 57. Dr. Harris admitted on the stand that he did not analyze the day (T+1, T+2, etc.) on which the positions were closed, rendering his analysis necessarily unreliable. Tr. 1566:25-1567:8 (Harris).

4. "Saha's assertion that his data show that 99.3 percent of trades occurred before the end of T+3 is an acknowledgement that there were many fails to deliver because seven-tenths of an enormous number of trades is a very large number." Decision at 77. This finding misconstrues the relevant data and Dr. Saha's testimony. He never made such an acknowledgment and, therefore, the Court improperly shifted the burden to require respondents to show no late buy-ins. Regardless, seven-tenths *of one percent* of the trades is *not* "a very large number."

5. "Some examples [of evidence showing late buy-ins] are Risley's acknowledgement that Clearing had trouble getting buy-in information to the Trading Desk; Tortorella's acknowledgement that before August 2009, he occasionally could not get the list of who had to be bought in to the Trading Desk before the opening of the market, and evidence that after August 2009, Tortorella sent two lists, one after the market opened. Div. Ex. 204." Decision at 77. This finding ignores the actual trade data showing that at least 99.3% of the fail to delivers were cured by T+3 and at least 99.8% were cured by T+4. OPX 248 at 32 (Saha Rpt.).

6. "Payne, Coronado, and Stella were playing fast and loose with the rules and allowed Feldman, Zelezney, and certain other customers to decide how to cover the shorts in their accounts, which took time." Decision at 77. The evidence showed that these traders executed transactions before market open and in compliance with their best execution obligations. OPX 248 at 32 (Saha Rpt.); Tr. 3397:9-17 (Strine).

The Court did properly find, however, that any such late buy-ins caused no harm or deception: "CNS participants waiting to receive shares would not notice any difference in buy-ins occurring late in the day because all trades that occurred during the business hours of the exchange get the same trade date." Decision at 13 n.27. Thus, the Court's finding of late buy-ins on T+4, even if enforced, could not support a finding of fraud.

C. The Court clearly erred in finding a primary fraud violation against Feldman.

The Court's conclusion that Feldman committed fraud is based on clearly erroneous factual findings, including but not limited to the following:

1. "Feldman's actions constitute fraud because by writing calls he represented to the market as a whole and to purchasers of his deep-in-the-money calls that he was going to make delivery if his calls were exercised and assigned when he had no intention of doing so, and, in fact, by entering buy-writes, he did not cover his short position." Decision at 89. This finding rests on a flawed premise because the securities were delivered. Tr. 230:11-16 (Risley); OPX 250 at ¶ 36 (Ruth Rpt.); Tr. 4354:16-24 (Ruth).

2. "I reject Feldman's explanation that his buy-writes were permitted because they had a legitimate economic purpose, i.e., to reestablish his hedge for the first two steps in his three-way strategy. . . . Reducing risk that results from a trading strategy is not a defense to fraud." Decision at 92-93. This finding contradicts guidance that CBOE provided to the market on two separate occasions. DX 124 at 5; DX 129 at 5.

3. "optionsXpress's primary regulator, CBOE, in the persons of Overmyer, an investigator with experience as an options trader and market maker, and his immediate superior, MacDonald, an experienced regulator, believed strongly, after a thorough examination, that a pattern and practice of this type of options trading was illegal, harmed option market makers, and that regulatory action was needed." Decision at 79. But CBOE ultimately concluded that the trading did not violate Reg. SHO in connection with three separate reviews. OPX 138, OPX 151, OPX 152. CBOE also concluded there was no fraud. Tr. 4000:18-4001:15. This

finding further misstates CBOE's position on the trading. Overmyer and MacDonald believed that the trading ***could*** be a violation, but were not sure, which is why they investigated and sought SEC guidance. Tr. 4048:2-8 (MacDonald).

4. "The market was generally harmed by Feldman's transactions. I base this conclusion on a review of all the Facts; in particular, because: (1) his actions misled market participants as noted on the internet message boards (2) his actions raised concerns among market makers who asked CBOE to investigate similar transactions by Zelezney; (3) Overmyer's testimony that these transactions disadvantaged market participants; and (4) as used by Feldman, the buy-writes were essentially wash trades or matched orders to avoid delivering shares." Decision at 100-01. The evidence overwhelming showed that no market participant was harmed by Feldman's trading. FOF ¶ 328. Moreover, the Division never identified a single "victim" of the trading, and the Division's own expert failed to identify any harm. FOF ¶¶ 320-322, 326; Tr. 1557:19-25 (Harris). The hearsay excerpts of Internet commentary are irrelevant and do not demonstrate market deception, much less that optionsXpress was aware of such deception—a point on which the Division presented no evidence. Tr. 2492:14-21 (Feldman). Overmyer's testimony is also irrelevant because it is speculative and his supervisor, Tim MacDonald, specifically concluded that the trading was not fraudulent. OPX 141; OPX 151; OPX 152; Tr. 4000:18-4001:15, 4019:13-21.

5. "Feldman's trading strategy did not involve arbitrage." Decision at 88. The strategy employed by Feldman was textbook, legitimate arbitrage. OPX 250 at ¶ 28 (Ruth Rpt.); OPX 248 at 19-20 (Saha Rpt.); Tr. 4179:9-22 (Ruth).

D. The Court clearly erred in finding that optionsXpress aided and abetted, or caused, Feldman's purported fraud.

The Court's conclusion that optionsXpress aided and abetted, or caused, Feldman's purported fraud is based on clearly erroneous factual findings, including but not limited to:

1. "MacDonald recalls Trading and Markets stating that CBOE needed to look to see if the trading involved fraud, and that . . . Overmyer and MacDonald disagreed [with Trading and Markets that the trades did not appear to be sham close-outs]. [Overmyer and MacDonald] reasoned that the pattern and practice of the buy-writes . . . was somewhat of a sham close-out." Decision at 33. This misconstrues the evidence, which showed that CBOE looked for fraud and found none (Tr. 4000:18-4001:15); that CBOE's "sole purpose" of its call with Trading and Markets was to get "a definitive answer" to its question of whether buy-writes in response to an assignment were sham close-outs (Tr. 4002:7-4004:9; 4048:24-4049:2); and that, based on Trading and Market's guidance that the buy-writes "[did not] appear to be [shams]," CBOE "close[d] the case" (Tr. 4003:10-4004:9, 4005:1-15).

2. "CBOE concluded that there were no Reg. SHO violations in large part because optionsXpress represented that CNS did not report any fails to deliver related to Zelezney's accounts." Decision at 33-34. This ignores key testimony, as detailed above, in which CBOE recounted its conclusion that optionsXpress did not violate Reg. SHO because of the advice it received from Trading and Markets. Tr. 4003:10-4004:9, 4005:1-15.

3. "There is considerable evidence that optionsXpress was not fully forthcoming with Trading and Markets, CBOE, and FINRA and did not operate in good faith." Decision at 81. This conclusion ignores that optionsXpress provided great detail regarding the buy-write activity to CBOE, FINRA, and Trading and Markets (FOF ¶¶ 118-132, 220-241); ignores that CBOE used this information to prepare a detailed memo to Trading and Markets, which the Division has never asserted was inaccurate (FOF ¶¶ 169-76); misstates Tao's recollection of what optionsXpress told her on those calls (Tr. 3677:12-21, 3678:7-3679-14); ignores CBOE testimony stating that optionsXpress was "fully cooperative" and "straightforward" in response to CBOE's investigation and inquiries and that CBOE shared that same information with Trading and Markets (FOF ¶¶ 122, 130, 148-177); ignores FINRA testimony that optionsXpress "g[ave] [FINRA] the information [it] requested," including CNS and trade blotter data regarding the trading at issue, in response to various FINRA requests (Tr. 2701:6-16, 2702:19-2703:12, 2707:18-2708:1); and mistakenly charges optionsXpress with failing to obtain an "authoritative written opinion" when no evidence was presented that any of the regulatory bodies would have provided one. Decision at 81-83.

4. "On April 30, 2009, optionsXpress mentioned buy-writes to cover a customer's short position to Overmyer in connection with CBOE's investigation of Zelezney's trades. . . . However, optionsXpress knew its short selling had triggered two CBOE surveillance reports [in 2010], and there is no evidence that it described its use of buy-writes to cover fails to deliver in connection with those surveillance reports or requested an opinion from CBOE on whether it was legal to do so." Decision at 81. This finding ignores clear testimony from CBOE that optionsXpress answered all of its questions in connection with the 2010 inquiry and was fully cooperative. Tr. 4707:15-4708:11. It also overlooks e-mails making clear that while the 2010 inquiries were ongoing, optionsXpress provided CBOE with the very data the Court claimed was withheld. Tr. 4721:21-4731:21 (Lamm); OPX 164; OPX 371; OPX 734.

5. "optionsXpress [did not make] a good faith effort to determine whether its use of buy-writes to close out its fails to deliver was lawful." Decision at 84. This finding erroneously assesses "bad faith" to decisions that optionsXpress made only after careful consultation among compliance and operations staff and review of relevant public guidance on the law (FOF ¶¶ 197-207) and ignores optionsXpress' efforts to obtain regulatory input on the same decisions immediately after they were made. FOF ¶¶ 216-59.

6. "There has been no acknowledgment of wrongdoing; rather, the effort has been made to blame regulators who never were told all the facts." Decision at 96. This misstates the facts—including, as noted above, that optionsXpress consulted with regulators and clearly and accurately described it in order to obtain guidance on the legality of the buy-write trading.

7. "CBOE and FINRA personnel made clear at the hearing that those regulatory bodies would not have approved optionsXpress's conduct, if optionsXpress had been candid and made a good faith effort to secure an opinion." *Id.* at 84. This finding is not only unsupported but also contradicted by testimony from those same regulators. As discussed above, CBOE investigators had a full picture of the buy-write trading and ultimately found no Reg. SHO violations, while FINRA refused to provide any guidance to optionsXpress whatsoever. FOF ¶¶ 118-32, 208-15, 220-29, 250-53.

8. "Stern was on the telephone calls with Trading and Markets about Rule 204; on the September 24, 2009, call he gave a verbal diagram of the trading that optionsXpress was seeking guidance on, and he passed on to the higher ups at optionsXpress the erroneous information that Trading and Markets told optionsXpress to keep on doing what it was doing, i.e., using the buy-writes to satisfy its fails to deliver." Decision at 94. This finding misstates the evidence, as Stern's understanding of Trading and Markets' guidance was, at worst, a misunderstanding. The phrase "keep doing what you're doing" was memorialized in Victor's handwritten notes of the call, and Tao did not dispute that she said it. FOF ¶¶ 242-44.

9. "For example, [Stern] falsely informed persons at optionsXpress that Trading and Markets approved the use of buy-writes in connection with closing out fails to deliver." Decision at 102. This finding is erroneous for the reasons stated in the immediately prior paragraph.

10. "optionsXpress's claim that the doctrine of best execution required buy-writes is unpersuasive. As noted by Harris, best execution is inapplicable to this situation. . . . It borders on chutzpah for optionsXpress to claim best execution, an accepted standard for handling customer orders, caused it to violate a securities regulation." *Id.* at 84. This finding is erroneous because, as discussed with regard to legal errors above, optionsXpress had legitimate obligations to seek best execution of trades, and properly recognized and sought guidance on potential conflicts between regulatory obligations. FOF ¶¶ 197-207, 216-19.

11. "I disagree with Ruth that Rule 204 is confusing." Decision at 84. This superficial conclusion is contrary to the evidence, including that Rule 204 does not clearly prohibit the trading at issue and that the regulators themselves (a) found Rule 204 unclear, (b) acknowledged a need for further amendment, and (c) never concluded that the firm or its customers violated the rule in any consultation with or investigation of optionsXpress prior to this proceeding. Tr. 3989:5-6; FOF ¶ 183; Post-Hearing Brief at 28-32.

12. "There is no evidence that any clearing broker except optionsXpress used buy-writes to satisfy its CNS fail to deliver positions." Decision at 80. This finding has no legal relevance to optionsXpress' compliance with Reg. SHO or its state of mind in connection with fraud, as the brokers cited by the Court in support of this finding shut down Feldman's trading in 2011 and 2012, well after the trading at issue in this case had already stopped. FOF ¶¶ 363-67.

13. "Penson concluded that Feldman's account was causing it to violate Reg. SHO." Decision at 50. This finding also has no legal relevance to optionsXpress' compliance with Reg. SHO or its state of mind in connection with fraud, as no one at Penson ever discussed this topic with anyone at optionsXpress. Tr. 907:1-8.

14. "Stern did not share with Penson that Trading and Markets stated that Feldman might be engaged in sham transactions." Decision at 50. This finding ignores evidence casting significant doubt as to whether Trading and Markets ever made this statement to optionsXpress and, regardless, Stern was not actively involved in the transfer of Feldman's account to Penson. Tr. 1861:7-13; 1867:21-1868:19; 1871:9-1872:1.

15. "The evidence is clear that in some time periods, optionsXpress knew that Feldman was getting some portion of his deep-in-the-money calls assigned daily. For example, on December 31, 2009, in an Instant Message with a floor broker, Feldman wrote, 'Same trade every day. Get assigned stockk (sic) + sell options.' The floor broker responded, 'I see it,' and 'the numbers are insane.'" Decision at 86. This finding erroneously assigns knowledge to optionsXpress of Feldman's communications, despite the floor broker's testimony that he never disclosed his communications with Feldman to optionsXpress. Tr. 1343:13-18.

E. The Court clearly erred in finding that the evidence supports the need for a cease and desist order against optionsXpress.

The Court issued a cease and desist order against optionsXpress based on clearly erroneous findings, including but not limited to:

1. "[T]here is nothing in this record that provides any assurance that these Respondents will not commit future violations." Decision at 96. This finding ignores the undisputed facts that optionsXpress immediately ceased the buy-write trading at issue when Enforcement Staff suggested it do so, implemented changes to its operating procedures accordingly, has not permitted the trading at issue for over three years, and there is no allegation of any Rule 204 violation during that period. Tr. 3441:11-23 (Strine); Tr. 1700:9-1701:1 (Stern); OPX 485; OPX 484.

2. "The evidence and the demeanor and testimony of Respondents establishes a high likelihood that they will commit future violations if they have an opportunity to do so." Decision at 96. This finding is contradicted by the record. While

optionsXpress has maintained its belief that it did not violate Reg. SHO, it has made numerous good faith efforts to obtain regulatory guidance on the trading activity throughout the relevant time period and acknowledged regulators' discomfort with the trading when it halted it in March 2010. Post-Hearing Brief at 36-40. At no time did any optionsXpress representative indicate through demeanor or testimony that the firm would commit future violations if given an opportunity, and as the Court noted, its "new corporate ownership [under Schwab]" provides added protection to the public against future violations. Decision at 101.

F. The Court clearly erred in finding that the evidence supports the disgorgement amount ordered against optionsXpress.

The Court's order against optionsXpress for disgorgement totaling $1,574,599 plus prejudgment interest is based on at least the following clearly erroneous finding:

> "Harris's calculation that the six customer accounts that engaged in the trading strategies described in this Initial Decision paid optionsXpress a total of $1,908,744 during the relevant period, and that $1,574,599 of that amount was for buy-writes, makes the latter the most reasonable approximation of optionsXpress's ill-gotten gains, plus prejudgment interest." Decision at 98. This finding is erroneous, not only because disgorgement is wholly unwarranted here, but also because the Court failed to recognize that disgorgement against optionsXpress should reflect *net* profits from the trading at issue. Post-Hearing Brief at 44-45; FOF ¶ 372.

G. The Court clearly erred in finding that the evidence supports the civil penalty amount ordered against optionsXpress.

The Court's order against optionsXpress imposing a civil penalty of $2 million is based on clearly erroneous findings, including but not limited to:

1. "It is in the public interest to assess civil monetary penalties against: optionsXpress and Feldman at the third tier because they committed willful violations involving fraud, deceit, manipulation or deliberate or reckless disregard of a regulatory requirement, which resulted in substantial pecuniary gain to each of them." Decision at 99-100. This finding is erroneous because, as discussed above, optionsXpress did not willfully violate Reg. SHO or possess the scienter necessary for aiding and abetting or causing fraud.

2. "optionsXpress willfully violated Reg. SHO, and acting with scienter it caused and aided and abetted Feldman's fraud. . . . Despite numerous red flags that warned of possible violations, optionsXpress only ceased the illegal activity when the Commission told it to stop. The fact that a major options broker willfully ignored regulatory mandates to enable customers to commit fraud for its financial

benefit should be dealt with strictly to protect the public." *Id.* at 100. This finding is erroneous because, as discussed above, optionsXpress staff sought guidance on Reg. SHO, interacted with regulators in good faith, and received "green flags" regarding the trading activity. Further, there is no evidence that optionsXpress "willfully ignored regulatory mandates"—in fact, the opposite is true. The record is undisputed that optionsXpress recognized that the trading presented questions of Rule 204 compliance, took steps internally to ensure compliance with the Rule, and voluntarily solicited guidance from three regulatory bodies. And when the firm was told to stop the trading, it stopped. Finally, the need to "protect the public" is obviated by optionsXpress' prohibition on the buy-writes at issue since March 2010.

III. The Initial Decision, if enforced, would create bad policy.

Finally, the Initial Decision, if enforced, would set bad policy for the Commission and the regulated marketplace as a whole:

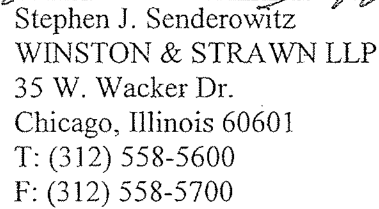
1. The Initial Decision effectively prohibits buy-writes in response to option assignments, a policy not intended by the actual language of the strict liability rule, and a ruling beyond what the Division even alleged. The decision, if enforced, would have market-wide implications by rendering perfectly legitimate trading unlawful, or at least lead to market confusion.

2. The Initial Decision essentially requires market participants to obtain a formal, written opinion from the regulators to avoid a finding of extreme recklessness—a legally erroneous, impractical, and unrealistic standard.

For the foregoing reasons, the Commission should grant this petition for review.

Dated: June 28, 2013

Respectfully submitted,



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