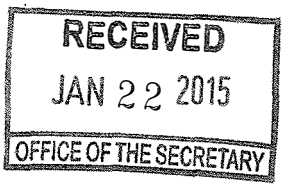
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-14848

In the Matter of

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

Respondents.

DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT JONATHAN I. FELDMAN'S MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE AND SUPPLEMENT RESPONDENT'S BRIEFING TO THE COMMISSION

The Division of Enforcement (the "Division") hereby responds to Respondent Jonathan I. Feldman's ("Feldman") Motion for Leave to Adduce Additional Evidence ("Motion") related to the Commission's May 19, 2014 settlements with former employees of Penson Financial Services, Inc. ("Penson"), (the "Penson Orders"), and for reconsideration of the Commission's October 16, 2013 Order concerning the Commission's June 11, 2013 settlement with the Chicago Board Options Exchange, Incorporated ("CBOE"), Securities Act Release 33-9466, 2013 WL 5635987 (Comm'n Oct. 16, 2013) (the "CBOE Order").

Feldman waited ***eight months*** after the Penson Orders were issued to file this Motion with the Commission, underscoring how truly immaterial the Penson Orders, and information relating to the Penson and CBOE investigations, are to his case. Nevertheless, the Commission already took judicial notice of the CBOE Settlement and, as with that settlement, the Division does not object to the Commission taking judicial notice of the Penson Orders. However, even putting aside Feldman's unexplained delay in raising his purportedly significant concerns with the Commission, Feldman's arguments for why he should be permitted to obtain additional documents, and examine witnesses based on such documents, are without merit and should be rejected.

First, Feldman's primary argument that the Penson investigation constitutes material exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1964) strains credulity given the patently disparate nature of the conduct underlying Penson's alleged violations of Regulation SHO ("Reg. SHO") of the Securities Exchange Act of 1934. In the present case, Feldman fraudulently used buy-writes to perpetuate abusive naked short selling of hard-to-borrow securities, which resulted in optionsXpress having perpetual failures to deliver in the Continuous Net Settlement ("CNS") system, in violation of Rule 204 of Reg. SHO. *See* Initial Decision, *In the Matter of optionsXpress, Inc., et al.*, No. 3-14848, 2013 WL 2471113 at *12 (ALJ Jun. 7, 2013) (Murray, CAJ). By contrast, Penson's Reg. SHO violations had nothing to do with customer misconduct, the propriety of using buy-writes to satisfy delivery on abusive naked *short sales*, or any misunderstanding or confusion about Reg. SHO. Rather, Penson allegedly violated Reg. SHO by failing to timely close out failures to deliver in securities it had loaned out but then subsequently permitted its margin customers to sell in *long sale* transactions, and by entering into arrangements to borrow from stock lending counterparties instead of effecting actual borrows when closing out failures to deliver resulting from short sales. *See* Penson Orders. Moreover, Feldman's *Brady* arguments ignore what the Commission made clear when it rejected his prior *Brady* arguments concerning the CBOE settlement – mere speculation about the existence of possibly helpful information is not enough. "*Brady* is not a discovery rule" and does not entitle Feldman to "conduct a fishing expedition . . . in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory." CBOE Order, 2013 WL 5635987 at *6.

Second, Feldman's claim that had he known the Penson investigation was ongoing at the time "the Penson representative, Robert Crain," gave testimony as a "key witness" for the Division, he could have used this fact in cross-examination to show Crain's bias or interest, Motion at 2, is without merit. Feldman fails to advise the Commission that Crain testified at the

outset of his hearing testimony that he had not worked at Penson for two years. Thus, Crain had no apparent interest or bias in the outcome of an investigation into Penson's violations of Reg. SHO. Moreover, the Division advised Feldman four months ago that Crain gave no testimony in the Penson investigation and was not anticipated to be called as a witness in the administrative proceeding relating to that investigation (nor was he in fact called as a witness or mentioned by name at any point during that hearing). Consequently, it is false and nothing more than rank speculation that Crain offered testimony favorable to the Division because he had any interest in, bias toward, or potential liability related to the Penson investigation.

Accordingly, and for the reasons set forth below, Feldman's Motion to Adduce Additional Evidence and Supplement Respondent's Briefing should be denied.

FACTUAL BACKGROUND

On April 16, 2012, the Commission issued an Order Instituting Proceedings ("OIP") in which the Division alleged that optionsXpress, Inc. ("optionsXpress") willfully violated Rules 204 and 204T of Reg. SHO and Respondent Thomas E. Stern ("Stern") willfully aided and abetted and caused those violations. The OIP also alleged that Feldman violated the antifraud provisions of the federal securities laws and that optionsXpress and Stern willfully aided and abetted and caused Feldman's violations. The OIP alleged that such violative conduct occurred primarily from late 2008 to March 2010.

During the seventeen-day hearing on this matter, which began in early September 2012, Robert Crain, Penson's former Vice President of Risk, testified about Feldman's efforts to use an account that cleared through Penson to engage in the same fraudulent use of buy-writes as he had done at optionsXpress, and Penson's decision to stop allowing Feldman to trade through Penson. *See, e.g.*, Hr'g Tr. at 759-915; Initial Decision, 2013 WL 2471113 at *38-40, 66. Feldman and the other Respondents extensively cross-examined Crain during the hearing, and no other Penson witnesses were called by any party.

On June 7, 2013, Chief Administrative Law Judge Brenda Murray issued her Initial Decision in this matter. The Initial Decision found that Feldman fraudulently engaged in buy-write transactions to perpetuate abusive naked short selling, which in turn led to optionsXpress' having persistent unresolved failures to deliver with CNS in violation of Reg. SHO Rule 204. The Initial Decision found Feldman's conduct violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rules 10b-5 and 10b-21. Feldman has petitioned the Commission to review and reverse the Initial Decision and the resolution of that petition remains outstanding.

On June 11, 2013, the Commission publicly instituted a settled, cease-and-desist order against CBOE, charging the Exchange with, *inter alia*, failing to enforce Reg. SHO. The Commission's findings in that settled order related in part to CBOE's Reg. SHO investigation and surveillance of optionsXpress and other regulated entities. The underlying bases of those findings were the documents and transcripts that were made available and produced to Feldman and the other Respondents soon after the institution of these proceedings.

On July 22, 2013, Feldman filed a Motion to Adduce Additional Evidence relating to the CBOE Settlement, arguing that the CBOE Settlement should be entered into evidence and that Feldman should be provided access to additional materials relating to the CBOE Settlement that were allegedly improperly withheld by the Division in violation of its *Brady* obligations. On October 16, 2013, the Commission issued an Order that took judicial notice of the CBOE Settlement but otherwise rejected Feldman's *Brady* arguments on both timeliness and substantive grounds. *In the Matter of optionsXpress, Inc., et al.*, No. 3-14848, Securities Act Release 33-9466, 2013 WL 5635987 (Comm'n Oct. 16, 2013).

On May 19, 2014, the Commission publicly instituted the settled, cease-and-desist Penson Orders which resolved claims against two individuals formerly associated with Penson, which declared bankruptcy and was liquidated in 2013, concluding that they had, *inter alia*,

aided and abetted and caused Penson's violations of Rules 204(a) and 204(b) of Reg. SHO. *In the Matter of Johnson*, Admin. Proc. No. 3-15874, Exch. Act. Rel. 72186 (May 19, 2014) ("Johnson Order"); *In the Matter of Wetzig*, Admin. Proc. No. 3-15875, Exch. Act. Rel. 72187 (May 19, 2014) (Wetzig Order") (collectively, "the Penson Orders"). Contemporaneously, the Commission publicly instituted a litigated administrative proceeding against two other Penson employees relating to the same Reg. SHO violations at issue in the Penson Orders. *See In the Matter of Delaney and Yancey*, Admin. Proc. No. 3-15873, Exch. Act. Rel. 34-72185 ("Delaney OIP"). The Commission's findings in the settled Penson Orders and the allegations in the contested Delaney OIP provide that Penson's alleged violations of Reg. SHO concerned Penson's failure to deliver securities that it had loaned out but then subsequently permitted its margin customers to sell in long sale transactions, and Penson's failure to close out failures to deliver on these long sales in accordance with Rule 204. Additionally, the Penson Orders charged stock lending personnel with entering into mere arrangements to borrow rather than effecting actual borrows when closing out failures to deliver resulting from customer short sales. *See* Penson Orders at 3-6; Delaney OIP at 4-10.

On September 15, 2014, Feldman's counsel wrote to the Division's trial counsel raising concerns that the Delaney OIP and the Penson investigation reflect *Brady* material. In particular, Feldman's counsel claimed that the Penson investigation and Delaney OIP reflect confusion in the industry about Reg. SHO's Rule 204, and the existence of the Penson investigation at the time of Crain's testimony at the hearing in this matter was relevant to Crain's interest and potential bias. *See* Sept. 15, 2014 Feldman Letter (Ex. 1).

On September 22, 2014, the Division responded to Feldman's counsel and explained that the Penson investigation was not part of the investigation leading to the charges against Feldman and optionsXpress, and none of the counsel involved in the matter against Feldman were involved in the Penson investigation that was staffed out of the Denver Regional Office. *See*

Sept. 22, 2015 Division Letter (Ex. 2). The Division further advised Feldman's counsel of the factual disparity of the trading in the two matters, the fact that Mr. Crain neither gave testimony in the Penson investigation nor was he expected to be a witness in the Delaney administrative hearing, and that the Division had no objection to Feldman requesting the Commission take judicial notice of the allegations in the Delaney OIP. *See id.*

The Delaney administrative hearing took place before Administrative Law Judge Patil between October 27, 2014 and November 10, 2014, *see* Administrate Proceeding Release 2011 (Nov. 13, 2014), and a ruling remains pending. Division counsel involved in that hearing confirmed that Crain neither appeared to testify nor was he even mentioned during that hearing.[1]

ARGUMENT

I. The Division Does Not Object to the Commission Taking Judicial Notice of the Penson Orders, but Nothing Related to the Penson Orders or Investigation Are Probative Much Less Exculpatory Under *Brady*.

As with Feldman's prior Motion relating to the CBOE Settlement, the Division does not object to the Commission taking judicial notice of the Penson Orders (and the Delaney OIP) pursuant to Rule 323 of the Commission's Rules of Practice. The Division disagrees, however, with Feldman's assertion that the Penson Orders, or the facts at issue in the Penson investigation, are in any way probative much less exculpatory evidence that somehow contradicts or critically weakens the Initial Decision in these proceedings.

Feldman argues that information relating to the Penson Orders and Penson investigation is "material to the reliability of Penson's interpretations of Reg. SHO that were provided at the hearing in this matter" and that "Penson's closure of Mr. Feldman's account could not be interpreted as evidence that his conduct caused any Reg. SHO violation if Penson itself did not understand what Rule 204 of Reg. SHO required." Motion at 2; *see id.* at 7 (arguing "the Penson Orders are material because they demonstrate that Penson was misinterpreting Reg. SHO"). As

[1] Feldman's Motion does not make any claim that Crain was somehow a central participant in the public administrative hearing that addressed the allegations in the Delaney OIP.

the Commission explained in ruling on Feldman's request for *Brady* disclosure of information relating to the CBOE settlement, "to trigger the disclosure obligation under Rule 230(b)(2), the evidence must be 'material either to [the respondent's] guilt or punishment,' with the test of materiality being whether there is a 'reasonable probability' that the evidence's disclosure would have resulted in a different outcome." CBOE Order, 2013 WL 5635987 at *3 (citations omitted). Here, Feldman makes no attempt to identify any facts known about the Penson investigation – as reflected in the Penson Orders or the Delaney OIP – that would give any hint they might affect *his* "guilt or punishment," much less give a "reasonable probability" that the outcome of *his* case would be different such that *Brady* would have required disclosure of the Penson investigation at any point in time.

To be clear, Feldman only asserts in passing that Penson's misconduct and Reg. SHO violations involved Penson "waiting until T+3 to recall stock loans when margin customers sold securities that had been lent to third parties," Motion at 6. Tellingly, nowhere in Feldman's motion does he identify a single allegation from the Penson Orders (or the Delaney OIP) that show Penson in some way misunderstood the requirements of Reg. SHO or its obligations under Rule 204,[2] much less how such a nonexistent misunderstanding by Penson would have had any bearing on the determination of Feldman's liability for committing fraud by using buy-writes to perpetuate abusive naked short-selling. Nor could he do so. The Penson Orders and the Delaney OIP reveal that Penson's Reg. SHO violations had nothing to do with any misconduct by its customers – much less the type of fraudulent behavior that Feldman undertook at optionsXpress–

[2] Feldman argues from the outset that the Division "touted Penson as fully compliant with Reg. SHO" and was "holding Penson up as the model for Reg SHO compliance," Motion at 1, 2, but tellingly fails to identify any motion, brief, document, or colloquy during the hearing, where the Division made such representations. Nor could he do so, as the Division made no such assertions but instead pointed out that Penson stopped Feldman's illegal use of buy-writes to perpetuate abusive naked short-selling shortly after it began at Penson and recognized the Reg. SHO implications of Feldman's misconduct. Moreover, the Division elicited testimony from Crain that Penson itself had failures to deliver at CNS, Hr'g Tr. at 784-86, and Feldman's counsel explored Penson's CNS delivery issues relating to Feldman's trading, Hr'g Tr. at 891-92. At no point did Feldman or any other Respondent explore with Crain whether Penson ever in fact violated Reg. SHO much less what conduct resulted in such violation(s). In any event, the fact that Penson may have violated Reg. SHO for trading having nothing to do with Feldman is clearly not relevant to Feldman's conduct in the present case.

nor any misunderstanding or confusion at Penson about the close-out requirements of Reg. SHO Rule 204. *See* Penson Orders, Delaney OIP. Rather, one category of Penson's Reg. SHO violations arose from Penson's decision not to close out fails to deliver relating to a customer's long sales of securities that Penson had loaned to third parties – Penson recognized its affirmative close-out obligations but simply did nothing to actually close out its failures to deliver relating to those long sales. *See* Penson Orders, Delaney OIP. As to Penson's second category of Reg. SHO violations, Rule 204(a) requires clearing firms to close out fails resulting from short sales by either purchasing or actually borrowing securities. Penson elected a third option – entering into arrangements to borrow – that was not permitted under the rule. *See* Penson Orders, Delaney OIP. In other words, Penson took bona fide steps in recognition of its close-out obligations, but those steps were ultimately insufficient to meet its Reg. SHO Rule 204 obligations.

The facts reflected in the Penson Orders and the Delaney OIP make clear the dissimilarity of the trading in that case from the facts of the present case. Feldman has done nothing to explain how the facts known about the Penson investigation have any bearing on the present matter, and instead does nothing more than speculate that "a different proceeding's investigative file might . . . contain exculpatory material," which the Commission previously advised Feldman is not enough to make out a viable *Brady* argument. CBOE Order, 2013 WL 5635987 at *6 (citing *In re Warren Lammert, Lars Soderberg, and Lance Newcomb*, S.E.C. Rel. 8833, 2007 WL 2296106 at *6 (2007)). Moreover, the facts known from the Penson Orders and the Delaney OIP make clear that nothing about the Penson investigation would have any bearing whatsoever on the Division's case against Feldman, and Feldman has not (and cannot) show otherwise. Accordingly, as with his request for information relating to the CBOE Settlement, the Commission should reject Feldman's "fishing expedition" request "to discover something that might assist [him] in [his] defense . . . . or in the hopes that some evidence will turn up to support

[his] otherwise unsubstantiated theory." *Id.*; *see also, e.g.*, *United States v. Brothers Construction Co. of Ohio, Inc.*, 219 F.3d 300, 316 (4th Cir. 2000) (holding no *Brady* violation when alleged undisclosed information was not exculpatory and would not "put the whole case in such a different light as to undermine confidence in the verdict") (quoting *Strickler v. Greene*, 527 U.S. 263, 290 (1999)).

II. The Penson Orders and Penson Investigation Could Not Have Been Used As Evidence of Crain's Interest or Bias.

Feldman argues that he should have had the opportunity to use the fact that the Penson investigation was ongoing at the time "the Penson representative, Robert Crain," gave testimony as a "key witness" for the Division to cross-examine Crain and explore his potential bias or interest – including that Crain "would have been concerned about . . . his potential liability in [the Penson] investigation" – in providing testimony favorable to the Division. Motion at 2.[3] This argument lacks any factual foundation and is without merit. Feldman tellingly fails to advise the Commission that Crain made clear from the very outset of his hearing testimony that he had not worked at Penson for two years. *See* Hr'g Tr. at 759-60. Thus, Crain had no inherent interest in helping Penson or its employees in connection with the Penson investigation. Feldman makes a passing reference to his September 2014 request for the investigative file relating to the Penson matter, but fails to inform the Commission that the Division advised Feldman four months ago that Crain gave no testimony in the Penson investigation and was not expected to be called as a witness at the hearing in the Delaney administrative proceeding, and that the Penson investigation is factually inapposite to the present matter. *See* Sept. 22, 2015

[3] Feldman now argues that he should now be allowed to take testimony of two of the Penson employees charged in the Penson investigation, Johnson and Wetzig, because they "were intimately involved with Mr. Feldman's account at Penson." Motion at 13. Feldman's argument lacks merit, however, because he acknowledged in his own motion that Johnson's and Wetzig's names appear on exhibits used during the hearing, and Feldman made no effort to call them as a witness, *see* Motion at 8 (citing exhibits), and one of the two (Johnson) was mentioned by name at the hearing in this matter. Hr'g Tr. at 775. Neither Feldman nor any of the other Respondents sought to obtain testimony from any other Penson employees about Feldman's trading activity at the company, Penson's decision to terminate Feldman's account, or Penson's understanding of Reg. SHO Rule 204 and its obligations thereunder.

Division Letter (Ex. 2). Division counsel involved in the Delaney administrative proceeding has confirmed that Crain was not in fact called as a witness during the hearing that took place last Fall in that matter – indeed, counsel confirmed Crain's name was never so much as uttered in that hearing – and the parties' stipulated Findings of Fact in the Delaney administrative proceeding make no mention of Crain whatsoever. *See* Order on Stipulations and Transcript Corrections, Admin. Proc. Rulings Rel. No. 2143 (Dec. 17, 2014).

It is nothing more than the rankest of speculation for Feldman to suggest that Crain offered testimony favorable to the Division because he had any interest, bias, or concerns about his or anyone else's potential liability related to Penson investigation.[4] Feldman argues that Crain "may have been motivated to give testimony in favor of the Division at the hearing to influence the Division to treat Penson and its employees favorably in [the Penson] investigation." Motion at 8. This claim cannot be taken seriously when the Division' investigation of Crain's *former* employer – Penson, a now defunct entity that declared bankruptcy only months after Crain testified at the hearing in this matter, *see* Penson Orders – and its employees resulted in anything but favorable treatment to Penson employees. Indeed, one employee's settlement included a formal censure by the Commission (Wetzig), another's settlement included an associational bar and $125,000 penalty (Johnson), and two others went through a contested administrative proceeding in Fall 2014 (Delaney and Yancey). *See* Penson Orders; Delaney OIP. In other words, it makes no sense that Crain testified favorably for the Division in an attempt to curry favor for his former colleagues at Penson (or the company), because those colleagues were

[4] Feldman urges the Commission to order the Division to "produce exculpatory documents concerning the Penson investigation and Orders," including copies of "Wells memoranda submitted by anyone in the Penson investigation" and "correspondence from Penson and any of its employees or executives to the Division regarding its compliance with Rule 204 of Reg. SHO." Motion at 13. These requests merit little response, as the Commission rejected similar requests from Feldman concerning the CBOE investigation and should do so again here for similar reasons. *See* CBOE Order, 2013 WL 5635987 at * 6-8 (rejecting demand for Wells submission that would contain legal argument from respondent's counsel and rejecting Feldman's speculation that settlement communications with the Division would qualify as *Brady* material).

sued by the Commission (and Penson went bankrupt). In short, there were no quid pro quos given by the Division for any of Crain's testimony.

III. Feldman's Request For Reconsideration Of The CBOE Order Concerning The CBOE Settlement Is Untimely And Without Merit.

Feldman's Motion, while styled solely as a Motion to Adduce Additional Evidence, includes a request for the Commission to reconsider its CBOE Order concerning the CBOE settlement. That request appears untimely in at least one of several respects. First, under Rule 470 of the Commission's Rules of Practice, a motion to the Commission for reconsideration is required to be filed "within 10 days after service of the order complained of." Accordingly, Feldman's motion to reconsider the October 16, 2013 CBOE Order was due no later than October 26, 2013. Alternatively, with the Penson Orders on which Feldman bases his motion for reconsideration having issued on May 14, 2014, Rule 470 suggests that Feldman's Motion should have been filed at a minimum no later than May 24, 2014. Lastly, taking the view most favorable to Feldman, he was unequivocally aware of the Penson Orders and investigation no later than September 15, 2014, when he raised with the Division his concerns about the Delaney OIP that was filed contemporaneously with and related to the conduct discussed in the Penson Orders now at issue in this Motion. Therefore, even assuming Rule 470's 10 days run from the date Feldman first raised concerns about the Penson Orders, he was obligated to file his Motion no later than September 25, 2014. As the Commission recognized, "[and] courts have uniformly held, parties who are unambiguously on notice of undisclosed documents that may constitute *Brady* material . . . yet elect to sleep on their rights, proceed at their own peril." CBOE Order, 2013 WL 5635987 at *5 (citing cases). Accordingly, the Commission should reject Feldman's reconsideration request in its entirety.

Further, putting aside the untimeliness of Feldman's reconsideration request, Feldman's arguments for reconsideration lack merit and should be denied for the reasons set forth both herein and in the Division's July 26, 2013 Opposition to Feldman's Motion for Leave to Adduce

Evidence concerning the CBOE Settlement, as well as for the reasons explained in the Commission's October 16, 2013 Order granting in part and denying in part that prior motion.

CONCLUSION

For the reasons stated above, the Commission should deny Feldman's Motion for Leave to Adduce Additional Evidence, except insofar as taking judicial notice of the Penson Orders and the Delaney OIP.

Dated: January 22, 2015

Respectfully submitted,

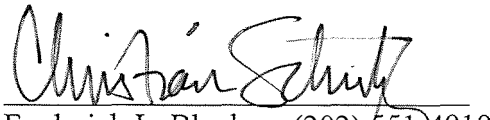


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EXHIBIT 1

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September 15, 2014

VIA E-MAIL and REGULAR MAIL

Frederick L. Block, Esquire
Assistant Chief Litigation Counsel
Division of Enforcement
Securities and Exchange Commission
100 F Street, N.E.
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Re: In the Matter of optionsXpress, Inc., Thomas E. Stern, and Jonathan I. Feldman, Administrative Proceeding No. 3-14848

Dear Fred:

We recently learned of the Commission's charges against executives of Penson Financial Services, Inc. ("Penson") for violating Reg SHO. *See In the Matter of Thomas R. Delaney II and Charles W. Yancey et al.*, Admin. Proc. File Nos. 3-15873, 3-15874, 3-15875 (Orders Instituting Proceedings May 19, 2014). The documents concerning the Division of Enforcement's investigation of Penson are material to Mr. Feldman's defense in this matter and should have been produced under Rule 230 and *Brady v. Maryland*, 373 U.S. 83 (1964). *See also Fields v. Wharrie*, 672 F.3d 505, 515 (7th Cir. 2012) ("a prosecutor's *Brady* and *Giglio* obligations remain in full effect on direct appeal and in the event of retrial because the defendant's conviction has not yet become final, and his right to due process continues to demand judicial fairness."). Specifically, a material aspect of optionsXpress' and Mr. Feldman's defense is that there was general confusion in the industry about what conduct violated Rule 204, with no clear guidance from regulators. During the hearing in this matter, the fact that Penson was purportedly able to understand and comply with Reg SHO was used by the Division to counter this defense. As it turns out, however, the Division actually believes that Penson was violating Reg SHO as well. That other broker-dealers were also confused about Reg SHO's meaning is material to Mr. Feldman's defense because it demonstrates that the rule underlying the claims against the Respondents was vague and thus did not afford the Respondents due process. Moreover, if the Division was already investigating Penson for Reg SHO violations at the time of the hearing, this fact was relevant to the interest and bias of Penson's representative, Robert Crain, who testified as witness for the Division at the hearing in this matter. If the investigation had already commenced, then the Division's withholding of this fact materially impaired Mr. Feldman's questioning of this key witness.

Accordingly, please immediately produce the Division's investigative file concerning the investigation of Penson and its executives, including any Wells Memoranda. In any event, please provide the Division's position concerning the issues raised herein by September 19, 2014. Please contact me with any questions.

Very truly yours,

Gregory T. Lawrence

cc: counsel of record (via e-mail only)

EXHIBIT 2

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
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September 22, 2014

VIA Email

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Baltimore, MD 21201

Re: *In the Matter of optionsXpress, Inc., Thomas E. Stern, and Jonathan I. Feldman*, Administrative Proceeding No. 3-14848

Dear Greg:

I write in response to your letter dated September 15, 2014 where you asked me to produce the "Division's investigative file concerning the investigation of Penson and its executives, including any Wells Memoranda" that led to the allegations *In the Matter of Thomas R. Delaney II and Charles W. Yancey, et al.*, Admin. Proc. File Nos. 3-15873, 3-15874, 3-15875 (dated May 19, 2014) ("Penson Matter").

As an initial matter, in accordance with Rule of Practice 230(a)(1) we long ago produced to you and the other Respondents the non-privileged documents obtained by the Division "in connection with the investigation leading to the Division's recommendation to institute proceedings" in *In the Matter of optionsXpress, Inc., Thomas E. Stern, and Jonathan I. Feldman*, Administrative Proceeding No. 3-14848 ("optionsXpress Matter"). The investigative files in the Penson Matter were obviously not part of the investigation leading to the optionsXpress Matter as set forth in Rule of Practice 230(a)(1). Indeed, the Order Instituting Proceedings in the Penson Matter was issued on May 19, 2014 almost a full year after Judge Murray's June 7, 2013 Initial Decision in the optionsXpress Matter. Moreover, neither myself nor my co-counsel (Christian Schultz, Jill Henderson and Paul Kim) worked on the Penson Matter. That case is staffed out of the Denver Regional Office.

In addition, the Commission has already ruled in this case that Wells Memoranda and similar documents from other matters do not contain material, exculpatory evidence. *In the Matter of optionsXpress, Inc., et al.*, No. 3-14848, 2013 WL 5635987 (Oct. 16, 2013) at *8. Thus, we do not understand your request for those materials from the Penson Matter now.

Furthermore, you claim that you need the investigative files in the Penson Matter to support the Respondents' defense that "there was general confusion in the industry about what conduct violated Rule 204, with no clear guidance from regulators." I note, however, that the allegations in the Penson Matter relate to "long sales" of "loaned securities" under Reg. SHO and not the closeout obligations relating to short sales that were at issue in the optionsXpress Matter. Unlike in the optionsXpress Matter, the use of buy-writes to address Rule 204 closeouts is not an issue in the Penson Matter. Simply put, the two cases do not relate to the same type of trading.

You also claim that you need the investigative files in the Penson Matter because they are relevant "to the interest and bias of Penson's representative, Robert Crain" in the optionsXpress Matter. Your letter does not explain what "interest or bias" Mr. Crain could possibly have in the optionsXpress Matter. Given that I was not even aware of the investigation of Penson at the time Mr. Crain testified in the optionsXpress Matter, we certainly never discussed the allegations being made in that case with him before he testified at the hearing. Nevertheless, after receiving your letter we conferred with the Denver team that is litigating the Penson Matter and they represent that: (1) Mr. Crain did not give investigative testimony in that matter; (2) and Mr. Crain is not expected to be a witness in that administrative proceeding.

In any event, throughout the hearing in the optionsXpress Matter you and the other Respondents continually argued that there "was general confusion in the industry about what conduct violated Rule 204, with no clear guidance from regulators." As the Commission has already ruled in this case: "precedent makes clear that a respondent's speculation that a different proceeding's investigative file 'might . . . contain exculpatory material' because the 'theory of liability advanced in that proceeding is supposedly 'inconsistent' with the legal theories in the present proceeding is not enough to make out a viable claim of a *Brady* violation." *In the Matter of optionsXpress, Inc., et al.*, No. 3-14848 (Oct. 16, 2013) at *6.

Finally, we have no objection if you would like the Commission to take judicial notice of the allegations in the Order Instituting Proceedings in the Penson Matter much like the Commission did with the CBOE Settlement. *In the Matter of optionsXpress, Inc., et al.*, No. 3-14848 (Oct. 16, 2013) at *3.

If you have any further questions on this subject, please let us know.

Sincerely,

/s/ Fred L. Block

Frederick L. Block

cc: Hannah Kon, Esq. (via email)
Stephen J. Senderowitz (via email)
Chuck Klein (via email)