

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.

**RESPONDENTS' REVISED REPLY TO THE DIVISION OF ENFORCEMENT'S
RESPONSE TO ORDER DIRECTING ADDITIONAL BRIEFING**

Respondents file this reply to the Division of Enforcement's Response to Order Directing Additional Briefing regarding Respondents' Appointments Clause Challenge in order to address two points.

First, the Division's response fails to address the specific arguments and cases cited by Respondents in both their motion and their recent submission of supplemental authority. The recent federal court decisions in *Duka v. S.E.C.*, 1-15-cv-00357 (S.D.N.Y. Aug. 3, 2015), *Hill v. S.E.C.*, Civil Action No. 1:15-cv-1801 (LMM), 2015 WL 4307088 (N.D. Ga. June 8, 2015), *Gray Financial Grp., Inc. v. S.E.C.*, Civil Action No. 1:15-cv-00492 (N.D. Ga. Aug. 5, 2015), and *Timbervest v. S.E.C.*, Civil Action No. 1:15-cv-02106 (N.D. Ga. Aug. 5, 2015), are the only federal court cases to substantively address the Appointments Clause challenge to SEC ALJs. In all of these cases, the court found that the appointment of SEC ALJs' likely violates the Appointments Clause of the Constitution because SEC ALJs are inferior officers and they have not been properly appointed. Judge Berman's decision in

Duka and Judge May's decisions in *Hill*, *Timbervest*, and *Gray Financial* specifically address and rebut each of the arguments that the Division raises in support of its position that SEC ALJs are not inferior officers. Instead of addressing and offering any counter arguments to Judge Berman's and Judge May's findings, the Division instead chooses to completely ignore their rationale. Judge May's and Judge Berman's findings are well reasoned opinions that represent the only direct precedent on this issue, and as such the Commission should give substantial weight and deference to those findings.

Second, in its response, the Division points out that "[g]overnment agencies employ a total of approximately 1,600 ALJs . . .", but fails to mention that 1,400 of those ALJs are employed by the Social Security Administration.¹ Social Security Administration ALJs preside over non-adversarial proceedings to determine whether an applicant is entitled to disability benefits.² In contrast, five SEC ALJs preside over adversarial proceedings to determine whether a respondent violated the law and, in doing so, have the ability to issue sanctions, disgorgement, civil penalties, censures, bars and cease-and-desist orders against the respondent. Clearly, not all federal ALJs are equal in the scope of their responsibility or the authority they exercise. This was recognized by the Solicitor General of the Department of Justice in opposing a cert petition to the Supreme Court in *Landry v. FDIC*. Specifically, the Solicitor General took the position that the *Landry* decision was limited to FDIC ALJs and that the D.C. Circuit "did not purport to establish any categorical rule that administrative law judges are employees rather than 'Inferior Officers' for purposes of the Appointments Clause." See Brief for Respondents In Opposition, *Landry v. FDIC*, No. 99-

¹ See http://www.ssa.gov/appeals/ho_locator.html.

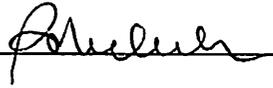
² See http://www.ssa.gov/OP_Home/cfr20/405/405-0001.htm.

1916, 2000 WL 34013905, at *7 (August 28, 2000). Here, Respondents do not claim that all 1,600 federal government ALJs are inferior officers; rather, the issue here is that as an SEC ALJ, Chief ALJ Murray exercises significant authority and that she is therefore an inferior officer whose appointment was defective because it was not done in accordance with the Appointments Clause.

As set forth in Respondents' brief, because Chief ALJ Murray was not properly appointed under the Appointments Clause, the Initial Decision and the underlying record in this matter are invalid. As previously argued, this violation cannot be cured by the Commission's *de novo* review. Respondents have been subject to a constitutionally infirm hearing and thus respectfully request that the Commission vacate the underlying proceedings and Initial Decision and dismiss the case. In the event the Division of Enforcement suggests a retrial of the matter, Respondents ask for an opportunity to brief whether, how, and before whom such a trial could constitutionally take place.

Date: August 19, 2015

Respectfully submitted,

By: 

Stephen J. Senderowitz
DENTONS US LLP
233 S. Wacker Drive
Suite 5900
Chicago, IL 60606
T: (312) 876-8141
F: (312) 876-7934
stephen.senderowitz@dentons.com

Charles B. Klein
Matthew M. Saxon
WINSTON & STRAWN LLP
1700 K. Street, N.W.
Washington, DC 20007
T: (202) 282-5000
F: (202) 282-5100
cklein@winston.com
msaxon@winston.com

ATTORNEYS FOR OPTIONSXPRESS, INC.

By: 
Gregory T. Lawrence
CONTI, FENN & LAWRENCE LLC
36 South Charles Street Suite 2501
Baltimore, Maryland 21201
T: 410-837-6999
F: 410-510-1647
greg@lawcfl.com

ATTORNEYS FOR JONATHAN FELDMAN

CERTIFICATE OF SERVICE

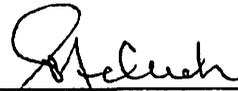
The attached has been sent to the following parties and other persons entitled to notice by the following means on August 19, 2015:

By Facsimile:

Brent J. Fields
Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549
(202) 772-9324

By Electronic Mail and US. Mail:

Frederick L. Block, Esq.
Christian Schultz, Esq.
Paul E. Kim, Esq.
Jill S. Henderson, Esq.
Division of Enforcement
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-5949



Stephen J. Senderowitz