UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of optionsXpress, Inc., Thomas E. Stern, and Jonathan I. Feldman, Respondents.	ADMINISTRATIVE PROCEEDING File No. 3-14848

RESPONDENT JONATHAN I. FELDMAN'S MOTION FOR SUMMARY DISPOSITION

Respondent Jonathan I. Feldman, by his attorneys, and in accordance with SEC Rule of Practice 250, files this Motion for Summary Disposition. The grounds for this Motion are set forth in the attached Memorandum of Law.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF RESPONDENT JONATHAN I. FELDMAN'S MOTION FOR SUMMARY DISPOSITION

Respondent Jonathan I. Feldman, by his attorneys, hereby submits this Memorandum of Law in support of his Motion for Summary Disposition of the charges against him contained in the Order Instituting Proceedings (the "Order"). In support, Respondent states the following:

I. Introduction

Mr. Feldman did not have or assume any obligations under Reg SHO or otherwise to deliver securities. The Division of Enforcement's charges against Mr. Feldman are based on the flatly wrong proposition that the obligations of a broker-dealer under Reg SHO are superimposed onto an individual retail customer. This obvious error forms the foundation of the Division's charges and is apparent on the face of the Order: In paragraphs 11-17 of the Order, the Division accurately describes Reg SHO's delivery obligations as those of the broker-dealer. But in the following 147 paragraphs, the Division alleges violations of the anti-fraud provisions based on Mr. Feldman's deceiving purchasers by not delivering securities himself. *See* Order at ¶¶ 3, 159, 161. The Division provides no explanation for this obvious disconnect or how optionsXpress's

delivery obligations would be assumed by Mr. Feldman. There can be no explanation, because it is simply and indisputably not factually true or legally accurate.

The only mention in the Order of any delivery obligation for a retail customer is Rule 10b-21, which defines fraud to include a seller's deceiving persons about the seller's intention or ability to deliver securities if the seller actually fails to deliver the securities. Order at ¶ 18. However, "delivery" under Rule 10b-21 is the delivery of securities to the broker-dealer if, and only if, the customer has made a representation to the broker-dealer that the customer will deliver securities to the broker-dealer. It is thus a distinct concept from "delivery" under Reg SHO, which refers to a broker-dealer's obligation to deliver securities to a registered clearing agency when delivery is due or to close out fails-to-deliver that occur.

Because the Division does not allege Mr. Feldman made an express representation to anyone concerning Mr. Feldman's intention or ability to deliver securities, the Division implicitly asserts that retail customers make a representation regarding delivery of shares when submitting an order to sell a security. The opposite is indisputably true:

> [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.

Exchange Act Release No. 58774 (October 14, 2008), 73 FR 6166, 61672 (October 17, 2008) ("10b-21 Adopting Release"). Therefore, even assuming *arguendo* the Division's version of the facts were true and Mr. Feldman entered trades without intending to deliver, the Division's charges fail as a matter of law because mere entry of a trade order is not a representation to anyone—express or implied—that he would deliver.

It is thus indisputable that any alleged deception in this case concerned the alleged failure to deliver under Reg SHO. As a matter of law, optionsXpress's alleged failures to deliver under

Reg SHO cannot form the basis of fraud charges against Mr. Feldman because Mr. Feldman had no control over the allegedly deceptive conduct: the alleged failure to deliver.

Equally important, the Order and the continuation of these proceedings violate the Dodd-Frank Act because the Order was filed well outside the 180-day deadline mandated by the Act. For all these reasons, summary disposition should be granted in favor of Mr. Feldman.

II.
Legal Standard

A motion for summary disposition should be granted if "if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." *In the Matter of Kevin Hall, CPA and Rosemary Meyer, CPA*, 2007 WL 1892136, *1 (S.E.C. 2007). When considering a motion for summary disposition, the hearing officer should consider stipulations or admissions made by the non-moving party and uncontested affidavits. *See* Rule of Practice 250.

III.
Undisputed Facts and Regulatory Framework[1]

This Motion is based on undisputed facts and regulatory framework. To be sure, however, Mr. Feldman vigorously disputes the allegations not addressed herein: Mr. Feldman engaged in wholly legitimate, arm's-length trading in the open markets, and he believed at all times that optionsXpress complied with all delivery and regulatory requirements.

A. Delivery of Stock Occurs Through the CNS System

The National Securities Clearing Corporation (NSCC) clears and settles the majority of securities trades conducted on the exchanges through their Continuous Net Settlement (CNS)

[1] Mr. Feldman repeats some of the Order's allegations herein for the purposes of this Motion, in which the facts of the Division's pleadings shall be taken as true except as modified by admissions or uncontested affidavits. The repetition of these allegations in this Motion is not an admission by Mr. Feldman of their veracity.

system. Rule 10b-21 Adopting Release at 61671; *see also* Affidavit of Erik Sirri at ¶ 28, attached as Exhibit 1. NSCC "guarantees the completion of all transactions and interposes itself as the contraparty to both sides of the transaction." Rule 10b-21 Adopting Release at 61672. Broker-dealers who are members of the NSCC are the only parties that can deliver stock to the NSCC in settlement of trades. Affidavit of Erik Sirri at ¶ 28 (Exhibit 1). CNS nets the securities delivery obligations of all of its members, so that all the trades on a given stock cleared through a particular member are batched together, and all buys and sells between NSCC members for the day are netted out against each other. *Id.* at ¶ 29. On the third settlement day following the trade ("T+3"), the NSCC conducts an "evening cycle," in which the net number of shares purchased is added to any previously unsettled CNS balance in the member's account, to determine the number of shares the member is due to receive or deliver. *Id.* at ¶ 30. Delivery occurs when the Depository Trust Company ("DTC"), the registered owner of the shares, complies with NSCC instructions to move shares out of the account of a clearing member who has a net delivery obligation. *Id.* at ¶ 31. A "fail-to-deliver" occurs if there are not sufficient shares in the clearing member's DTC account to satisfy the net obligation due to the NSCC on that day. *Id.* at ¶ 32.

It is the broker-dealer/clearing member who is required to meet the CNS delivery requirement, and only a clearing member can deliver shares to NSCC in settlement of trades. *See* Rules 204 and 204T; *see also* Affidavit of Erik Sirri at ¶ 41 (Exhibit 1). Because the broker-dealer's obligations in the CNS system appear as a net obligation and are not differentiated by client, it is generally not possible for the broker-dealer to determine which of its customers' accounts gave rise to a fail-to-deliver. *Id.* at ¶¶ 43, 45. An individual customer might sell short and the clearing broker may not have a net delivery obligation on T+3 because other customers of the same clearing broker purchased shares the same day. *Id.* at ¶ 43. Similarly, it is not

possible for a customer who sells short to know whether the clearing broker has a net deliver or a fail-to-deliver in the CNS system. *Id.* at ¶ 44.

B. Reg SHO Places Delivery Obligations on Broker-Dealer

Reg SHO requires participants of a registered clearing agency, not individual customers of those participants, to deliver securities to a registered clearing agency by settlement date. Order at ¶ 12. If a broker-dealer has a fail-to-deliver, it must take affirmative action to close out the fail-to-deliver by purchasing or borrowing securities. *Id.* at ¶ 16. The Division correctly describes the obligations under Reg SHO as the broker-dealer's obligations. *Id.* at ¶¶ 12-17 ("A participant of a clearing agency does not fulfill its requirements under Rules 204 and 204T . . . .") (emphasis added). Thus, it is the broker-dealer's obligation to "deliver equity securities," and it is the broker-dealer who has a failure to deliver position at the clearing agency if it does not deliver securities by T+3. *Id.* at ¶¶ 12-13. Similarly, it is the broker-dealer's obligation to take affirmative action to close out any failure to deliver position by purchasing or borrowing securities as required. *Id.* at ¶¶ 13-17 ("a broker-dealer can meet its close-out obligation by purchasing or borrowing securities . . . .").

The Division also correctly describes Rule 10b-21, which prohibits any person from submitting an order to sell an equity security if that person deceived their broker-dealer, a participant of a registered clearing agency, or a purchaser about the person's intention or ability to deliver the security on or before settlement date and that person fails to deliver the security on or before settlement date. *Id.* at ¶ 18.

The term "delivery" has different meanings when applied to Reg SHO and Rule 10b-21. "Delivery" under Reg SHO refers to a broker-dealer's obligation to deliver securities to a registered clearing agency when delivery is due and to close out fails-to-deliver that occur.

Rules 203, 204, and 204T. "Delivery" under Rule 10b-21 is the delivery of securities to the broker-dealer (the entity the seller made the representation to). Rule 10b-21 Adopting Release at 61672 ("Rule 10b-21 as proposed was not based on whether a fail to deliver occurred in CNS").

C. Feldman's Trading

Mr. Feldman holds no securities licenses or any other professional license. Affidavit of Jonathan Feldman at ¶ 3, attached as Exhibit 2. From December 2008 through March 2010, Mr. Feldman conducted arbitrage options trading strategies that had several variations, but entailed seeking to be hedged and unaffected by upward or downward price movement. The stock Mr. Feldman purchased and sold was listed on the exchanges and available to the general public. *See id.* at ¶ 4.

D. Mechanics of Call Options

A call option is a contract involving two parties, a "holder" and a "writer," whereby the holder has the right (but not the obligation) to buy an underlying stock at a predetermined price ("strike price"), and the writer has the obligation to sell the underlying stock at the strike price should the option be exercised. Affidavit of Erik Sirri at ¶ 6. A call option is "in the money" if the current stock price is higher than the option's strike price. *Id.* at ¶ 9. A "buy-write" is a transaction in which a trader simultaneously purchases shares of stock and writes a call options. *Id.* at ¶ 22. The price of the buy-write transaction is typically negotiated as a package, but the two components of the transaction are recorded, cleared, and settled as separate trades. *Id.*

The options Mr. Feldman purchased and sold were American-style options, meaning that the options had a set future expiration date but the purchaser could choose to exercise the options on any day prior to the expiration date. *Id.* at ¶ 7. These options were also available to anyone in the marketplace. These options were not customized in any way for Mr. Feldman, and he had no

knowledge of who the counterparties were. Affidavit of Jonathan Feldman at ¶ 7 (Exhibit 2). While the Division alleges frequent assignments, there was no guarantee that the purchasers of these options would exercise, or that even if the purchaser exercised, the random assignment system would assign to Mr. Feldman. *See* Affidavit of Erik Sirri at ¶¶ 20-21 (Exhibit 1). Because he did not know the counterparties and did not arrange assignments with them, Mr. Feldman could not know for certain whether the counterparty would exercise.

Writing a call option does not itself generate any obligation to deliver stock. *Id.* at ¶ 50. If the call option is subsequently exercised and assigned, a stock transaction would need to be settled. However, if the stock transaction resulting from the assignment is offset by an immediate share purchase, it does not generate a net delivery obligation for the seller's broker. *Id.* When a trader who does not own the stock, such as Mr. Feldman, writes a call option, one of the following four events may occur:

(1) The trader continues to hold the option until maturity and the option expires out of the money: In this scenario, there is never any obligation to deliver stock;

(2) Sometime after the option is written but before it expires the trader enters an offsetting trade (a purchase) to close the option position: Again, there is never any obligation to deliver stock;

(3) The option is exercised and assigned to the trader, and the trader immediately purchases the stock: If the option is assigned in the evening and trader purchases stock the following day, the option assignment generates a delivery obligation but the share purchase generates an offsetting receipt of shares one settlement day later; and

(4) The option is exercised and assigned to the trader, and the trader does not immediately purchase stock: Option assignment does make an incremental contribution to the

clearing member's obligation to deliver, and the clearing member may or may not have a net obligation to deliver stock.

Id. at ¶¶ 51-55. If an investor does a buy-write and the written call option is assigned the same day, the receipt from the purchase and the delivery from the assignment offset each other, and as a whole, the buy-write trade does not generate any net delivery requirement for the trader's clearing broker. *Id.* at ¶ 56.

E. optionsXpress was Not Relying on Feldman for Delivery

optionsXpress has delivery obligations under Reg SHO for all trades it makes on its customers' behalf. *See* Order at ¶¶ 12-17. To ensure it could fulfill its obligations under Reg SHO, optionsXpress gave itself complete control over its customers' accounts, including Mr. Feldman's. The terms and conditions of optionsXpress's User/Customer Agreement authorized optionsXpress to borrow or otherwise obtain securities necessary for optionsXpress to comply with its delivery obligations, with or without Mr. Feldman's consent. optionsXpress User/Customer Agreement-Terms & Conditions at 5-6, attached as Exhibit A to the Affidavit of Jonathan Feldman (Exhibit 2) (emphasis added).[2]

This meant that optionsXpress could immediately force a customer to buy-in if optionsXpress was concerned it could not meet its delivery requirements. *Id.* Indeed, optionsXpress did conduct buy-ins in Mr. Feldman's account and warned him on multiple occasions that they would conduct a buy-in if necessary:

> The transaction(s) detailed below have been executed in your account as a result of a situation beyond our control . . . .

[2] Pursuant to Rule of Practice 250, which allows this Court to consider uncontested affidavits, Mr. Feldman has provided an Affidavit attached hereto as Exhibit 2 which attaches specific correspondence and other documents relevant to this matter. The documents attached to Mr. Feldman's affidavit will be referred to hereafter as "Exhibit 2-A" etc.

> As has been explained to you in the past, even though we may execute a Reg SHO buy-in for your account, there is always a risk that the contra/long side will require immediate delivery of their shares. When this happens, they too may require immediate delivery of their shares through CNS without prior notice to us. Thus there is always the risk to you that a double buy-in may occur as a result of a Reg SHO buy-in and a CNS buy-in.
>
> . . .[Y]ou must be aware that this could continue to happen on a daily basis.

Feb. 4, 2010 E-mail from P. Bottini to J. Feldman, attached as Exhibit 2-B. Mr. Feldman never made any representation to anyone regarding his intention or ability to deliver securities. Affidavit of Jonathan Feldman at ¶ 8 (Exhibit 2). optionsXpress thus was not relying on Mr. Feldman at any time to deliver shares.

F. optionsXpress Told Feldman it was Compliant with Reg SHO

The Division concedes that optionsXpress represented that it was implementing policies and procedures to comply with the rules and regulations. *See* Order at ¶ 79 ("An optionsXpress trader forwarded Feldman a copy of Rule 204 as part of the implementation of the new procedures."); ¶ 121 ("an optionsXpress compliance officer explained Reg SHO to Feldman again: 'when an assignment results in a short sale in a security we are already failing to deliver, we have to take action to clean up the entire fail immediately.'"); ¶ 134 (optionsXpress told Feldman it "had discussions with the regulators about these strategies . . . . We continue to ask the regulators for guidance on these trades"); ¶ 135 ("optionsXpress told Feldman that '[r]egulators continue to ask questions, we provide answers and ask for guidance.'"). For example, in August 2009, the manager of clearing operations at optionsXpress wrote:

> I know this seems unfair to you, but we are acting as we are required per SEC Rule 204, which I have attached for you.

Aug. 3, 2009 E-mail from S. Tortorella to J. Feldman, attached as Exhibit 2-C. Later, Mr. Feldman was told by optionsXpress: "We want to continue working your orders, but we have to follow the rules." Aug. 20, 2009 E-mail from A. Payne to J. Feldman, attached as Exhibit 2-D.

In September 2009, optionsXpress told Mr. Feldman that regulators were reviewing Mr. Feldman's trading. *See* Order at ¶135; *see also* Aug. 20, 2009 E-mail from A. Payne to J. Feldman (Exhibit 2-D). Thereafter, optionsXpress's executive vice president Peter Bottini told Mr. Feldman that the SEC had no problems with Mr. Feldman's trading. Affidavit of Jonathan Feldman at ¶ 14 (Exhibit 2). This was confirmed in an email:

> Things look positive. I will review your account tomorrow and we can discuss parameters for the October expiration.

Sept. 27, 2009 E-mails between P. Bottini and J. Feldman, attached as Exhibit 2-E (responding to Mr. Feldman's question about optionsXpress's call with the SEC).

G. Procedural History of the Investigation and Order

The Staff provided Mr. Feldman a written Wells notification on October 28, 2010. *See* Oct. 28, 2010 Letter from D. Tarasevich to G. Lawrence, attached as Exhibit 3; *see also* Affidavit of Gregory T. Lawrence, attached as Exhibit 4. The Staff orally informed Mr. Feldman's counsel at or about the expiration of the initial 180-day deadline that it received an extension for an additional 180-day period. *See* Affidavit of Gregory Lawrence (Exhibit 4). The additional 180-day period ended on October 24, 2011, *i.e.*, 360 days after the Wells notification. During a phone call on October 25, 2011, the Staff conveyed that it procured a second additional 180-day extension. *Id.* In the same phone call, the Staff also stated that it had already obtained authority from the SEC to file charges against Mr. Feldman. *Id.*

During a phone call on February 9, 2012, the Staff explained that it had received the second 180-day extension approximately a week prior to receiving authorization to file. *Id.* To

determine whether the SEC authorized the filing against Mr. Feldman before the expiration of the first additional 180-day period, undersigned counsel asked the Staff for the dates on which the second extension was approved and the date on which the SEC authorized the action against Mr. Feldman. *Id.* The Staff declined to answer. One can assume that the date that filing an action against Mr. Feldman was authorized was on or before October 24, 2011, based on the timing of the October 25, 2011 call.

On March 28, 2012, counsel for Mr. Feldman submitted on Mr. Feldman's behalf a second Supplemental Wells Submission detailing the above recitation of events and demanding that no charges be filed against Mr. Feldman. The Order was issued on April 16, 2012, 175 days after the expiration of the additional 180-day period.

H. Indisputably False and Inadmissible Allegations of OTS Fine

In the Order, the Division falsely alleges that Mr. Feldman was "fined" by the Office of Thrift Supervision ("OTS") "for making material misrepresentations and/or concealing material facts as part of a scheme to defraud a federally-insured financial institution." Order at ¶ 10. This is an impertinent and scandalous misstatement. Mr. Feldman settled administrative charges with the OTS on a non-fraud, non-scienter basis. *See* F.R.C.P. 12(f). The Order fining Mr. Feldman contained no express or implied findings or charges concerning any form of fraud or scheme. *See* OTS Order, attached as Exhibit 5.

IV.
Analysis

A. Reg SHO Delivery Failures do Not Establish Fraud by Customer

At its core, the only deception alleged by the Division concerns whether or not optionsXpress would, or in fact did, comply with its delivery obligations under Reg SHO. The charges against Mr. Feldman thus fail as a matter of law because:

(1) Mr. Feldman had no obligation under Reg SHO to deliver shares;

(2) Mr. Feldman assumed no obligation to deliver shares; and

(3) Feldman had no control over delivery of shares.

1. Division Alleges Reg SHO Fail-to-Deliver, Not Rule 10b-21

The Division alleges only that there was a fail-to-deliver in the CNS system and a failure to satisfy the close-out obligation under Reg SHO:

> 3. . . . The purchase of shares created the illusion that [optionsXpress] had satisfied the close-out obligation; however, the shares that were ostensibly purchased in the reset transactions were never fully delivered to the purchasers . . . .
>
> . . . .
>
> 5. . . . optionsXpress and its customers had continuous failures to deliver in these and other securities . . . thereby undermining the purpose of Rules 204 and 204T of Reg. SHO.
>
> . . . .
>
> 25. However, neither optionsXpress nor the Customers delivered the shares by T+3 thus creating a failure-to-deliver position.
>
> . . . .
>
> 30. . . . As a result, optionsXpress maintained a net short position at the end of each day.
>
> 31. . . . optionsXpress had a negative position in the National Securities Clearing Corporation's ('NSCC') continuous net settlement ('CNS') system for extended periods of time.
>
> . . . .
>
> 36. . . . In order to comply with those obligations they [optionsXpress and the Customers] would have had to borrow or purchase shares of the underlying stock in order to close-out the failure-to-deliver position.
>
> . . . .
>
> 42. As a result of the trading, optionsXpress had a continuous failure-to-deliver position in these securities for extended periods . . . .
>
> . . . .
>
> 124. . . . optionsXpress received a letter of caution from FINRA for violating Rule 204T by failing to close out a failure-to-deliver position in October 2008.

. . . .

157. Feldman . . . did not intend to deliver the shares by settlement date, and in fact on numerous occasions he did not deliver the shares as required.

. . . .

159. When optionsXpress and Feldman failed to deliver shares, the unsettled position was assigned via lottery to clearing brokers who had a net purchase of shares on that day . . . .

160. . . . [M]any of the clearing brokers submitted notices to CNS . . . .

¶¶ 3, 5, 25, 30-31, 36, 42, 124, 157, 159-160. The Order incorrectly assumes, among other things, that (1) retail customers are required to deliver shares to the CNS system and/or purchasers in settlement of stock sales; (2) that a fail-to-deliver can be ascribed to a particular customer; and (3) that a fail-to-deliver by a clearing broker is also a fail-to-deliver by the customer. Most importantly, by charging Mr. Feldman, a retail customer, the Division conflates delivery under Reg SHO with delivery under Rule 10b-21. The term "delivery" has different meanings when applied to Reg SHO and Rule 10b-21.

"Delivery" under Reg SHO refers to a broker-dealer's obligation to deliver securities to a registered clearing agency when delivery is due and to close out fails-to-deliver that occur. *See* Rules 203, 204, and 204T. The CNS system nets the securities delivery obligations of all of its members, most of which are broker-dealers. Rule 10b-21 Adopting Release at 61671; *see also* Affidavit of Erik Sirri at ¶ 28 (Exhibit 1). Because the broker-dealer's obligations in the CNS system appear as a net obligation and are not differentiated by client, it is generally not possible for the broker-dealer to determine which of its customers' trading accounts may have caused a fail-to-deliver. *See* Affidavit of Erik Sirri at ¶¶ 43, 45 (Exhibit 1).

It is critical to emphasize that it is exclusively the broker's obligation to comply with delivery requirements in the CNS system and pursuant to Reg SHO, not the customer. Indeed, the Division fairly summarized these obligations in the Order as the broker's obligation:

> 12. Rules 204 and 204T require participants of a registered clearing agency to deliver equity securities to a registered clearing agency when delivery is due; that is, by settlement date. Settlement date is generally three days after the trade date ("T+3"). optionsXpress is a participant of a registered clearing agency.
>
> . . . .
>
> 16. To satisfy the close-out requirements under Rules 204 and 204T, a clearing broker must take affirmative action to close out the failure-to-deliver position by purchasing or borrowing securities. 73 Fed. Reg. at 61710-11.

Order at ¶¶ 12, 16 (emphasis added). Thus, the broker-dealer has an obligation under Reg SHO to effect delivery in the CNS system and close out fails-to-deliver that occur in the CNS system. It is undisputed that optionsXpress is the broker/participant of a registered clearing agency. It is undisputed that Mr. Feldman is neither a broker nor a participant of a registered clearing agency.

A retail customer's complete reliance on his brokers to comply with delivery requirements is unremarkable and consistent with industry practices and Reg SHO. Reg SHO applies to broker-dealers, not retail customers:

> A broker or dealer may not accept a short sale order in an equity security from another person, or effect a short sale in an equity security for its own account, unless the broker or dealer has:
> i. Borrowed the security, or entered into a bona-fide arrangement to borrow the security; or
> ii. Reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due; and
> iii. Documented compliance with this paragraph (b)(1).

Rule 203(b) (emphasis added); *see also* Order at ¶¶ 12-17. The Commission has nonetheless approved of broker-dealers relying on customers for fulfilling locate and delivery obligations if such reliance is reasonable under the circumstances:

> A broker-dealer may obtain an assurance from a customer that such party can obtain securities from another identified source in time to settle the trade.

Exchange Act Release No. 50103 (July 28, 2004) 69 FR 48008, 48014 n.58 (Aug. 6, 2004). But nowhere in the 26-page Order does the Division allege that Mr. Feldman gave any assurances to optionsXpress or anyone else concerning delivery. In fact, he did not.

The Commission adopted Rule 10b-21 to hold liable persons who deceived broker-dealers and represented that shares could be delivered when they could not:

> We [the Commission] are concerned, however, that some short sellers may have been deliberately misrepresenting to broker-dealers that they have obtained a legitimate locate source.
>
> . . . .
>
> . . . [U]nder Regulation SHO, the executing or introducing broker-dealer is responsible for determining whether there are reasonable grounds to believe that a security can be borrowed so that it can be delivered on the date delivery is due on a short sale. In the 2004 Regulation SHO adopting release, the Commission explicitly permitted broker-dealers to rely on customer assurances that the customer has identified its own locate source, provided it is reasonable for the broker-dealer to do so. If a seller elects to provide its own locate source to a broker-dealer, the seller is representing that it has contacted that source and reasonably believes that the source can or intends to deliver the full amount of the securities to be sold short by settlement date.

Rule 10b-21 Adopting Release at 61668 (emphasis added).

"Delivery" under Rule 10b-21, however, is expressly not defined as "delivery" under Reg SHO. This is only logical, as the customer (at least in the instances of retail customers) has absolutely no ability to effect delivery in the CNS system because they are not participants. Instead, "delivery" under Rule 10b-21 is the delivery of securities to the broker-dealer (the entity the seller made the representation to):

> Rule 10b-21 as proposed was not based on whether a fail to deliver occurred in CNS.
>
> . . . .
>
> . . . Thus, Rule 10b-21's focus is on whether or not there is a fail to deliver by the seller, rather than on whether or not there is a fail to deliver in the CNS system.

Rule 10b-21 Adopting Release at 61672. The broker-dealer's obligation to effect delivery in the CNS system does not change. Thus, the broker-dealer is deceived under Rule 10b-21 when the seller misrepresents that the seller has another source because the broker-dealer still must

provide shares to CNS to satisfy the broker-dealer's net delivery obligation, whether or not the seller delivers. The individual seller's delivery obligation is thus only created in a circumstance where the individual seller makes a representation that they have a source other than the broker-dealer for delivery. Again, it is undisputed that Mr. Feldman made no representation. *See* Affidavit of Jonathan Feldman at ¶ 8 (Exhibit 2).

The crux of Rule 10b-21, and a prerequisite for sustaining a Rule 10b-21 charge, is that the broker-dealer must be relying on the seller/customer pursuant to Rule 203. However, the Commission made clear in the adopting release that a customer is not making any representation concerning intention or ability of the customer herself to deliver shares by simply submitting an order to sell:

> [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.

10b-21 Adopting Release at 61672 (emphasis added).

Rule 10b-21 is aimed at the exceptional circumstance in which a seller provides affirmative assurances to the broker-dealer and thus "elects to provide its own locate source to a broker-dealer." Rule 10b-21 Adopting Release at 61671 (emphasis added). Thus, the Rule 10b-21 Adopting Release homes in on two circumstances when a seller can deceive a broker-dealer: (1) when the sellers "deceive their broker-dealers about their source of borrowable shares for purposes of complying with Regulation SHO's 'locate' requirement"; or (2) when sellers "misrepresent to their broker-dealers that they own the shares being sold." 10b-21 Adopting Release, at 61674.

The Adopting Release for Rule 10b-21 gives three examples of violations, all of them involving a situation where the seller makes a representation to the broker-dealer upon which the

broker-dealer relies on. The Rule 10b-21 Adopting Release explains that a seller violates Rule 10b-21 when:

- the seller "represented it had identified a source of borrowable securities, but the seller never contacted the purported source to determine if shares were available and could be delivered";
- "the seller misrepresented that the source had sufficient shares" when the seller "contacted the source and learned that the source did not";
- "the seller contacted the source and the source had sufficient shares that it could deliver in time for settlement, but the seller never instructed the source to deliver the shares."

Id. at 61670-61671.

The Division does not allege any of the foregoing three scenarios. Specifically, the Division does not allege that: (1) Mr. Feldman represented he had identified a source to borrow from; (2) Mr. Feldman represented a source had sufficient shares when he had learned the source did not have sufficient shares; or (3) Mr. Feldman contacted a source and learned the source had shares but did not instruct the source to deliver the shares. In short, the Division has not alleged a violation under Rule 10b-21 because it does not allege Mr. Feldman made a representation about an alternate source of shares.

It is undisputed that Mr. Feldman never made a representation to optionsXpress about his ability to locate or deliver shares. It is also undisputed that optionsXpress was not relying on Mr. Feldman in any way but instead was fully aware that it was responsible for its delivery obligations under Reg SHO. *See* optionsXpress, Inc. User/Customer Agreement-Terms & Conditions at 5-6 (Exhibit 2-A). Thus, Mr. Feldman cannot have violated Rule 10b-21 as a matter of law.

2. No Representations and No Control Over Delivery by Feldman

Mr. Feldman's lack of control was typical of an individual retail customer and expected in the industry. *See* Affidavit of Erik Sirri ¶¶ 41-42 (Exhibit 1). Thus, even if representations concerning delivery were made by simply placing a trade (which is not the case), members of the marketplace would view those putative representations as being made by optionsXpress, who had the delivery obligation. The Division's fraud claims thus fail because the marketplace was relying on the entity purportedly making the representation, optionsXpress, and not Mr. Feldman, who made no representation.

It cannot be emphasized or restated enough that the Commission expressly acknowledged in the Rule 10b-21 Adopting Release that an individual retail customer lacks control and the customer is relieved of liability if the customer is relying on his or her broker:

> If 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.

10b-21 Adopting Release at 6166-61672 (emphasis added).

The Commission's acknowledgement of reliance by a customer for delivery is in accord with *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), which requires a primary violator to have control over the misleading statement. *See id.* at 2301-2302. In *Janus*, the Supreme Court established what it means to "make a statement" for purposes of Rule 10b-5(b). The *Janus* Court determined that to "make" means having "ultimate control" over the allegedly misleading statement, including its content and dissemination. Id. at 2301-2302 ("Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right"); *see also In the Matter of Flannery et al.*, Adm. Proc. File No. 3-14081 (Initial Decision Dated Oct. 28, 2011) (applying the *Janus* standard to charges brought

under section 10b of the Securities Exchange Act and section 17(a) of the Securities Act); *S.E.C. v. Kelley*, 817 F.Supp.2d 340, 344 (S.D.N.Y. Sept. 22, 2011) ("Where the SEC is attempting to impose primary liability under subsections (a) and (c) of Rule 10b-5 for a scheme based upon an alleged false statement, permitting primary scheme liability when the defendant did not 'make' the misstatement would render the rule announced in *Janus* meaningless.").

To be sure, Mr. Feldman's agreement with optionsXpress gave Mr. Feldman's brokers complete authority regarding whether to allow a short sale and whether to do a buy-in (with or without Mr. Feldman's consent):

> If we make a sale of any securities and/or other property at your direction, and if you fail to deliver to us any securities and/or other property that we have sold at your direction, we are authorized to borrow or otherwise obtain the securities and other property necessary to enable us to make delivery, and you agree to be responsible for any cost or loss we may incur, including the cost of borrowing and obtaining the securities and other property.
>
> . . . .
>
> . . . Any sell order will be deemed a long sale unless, at the time the order was entered, you expressly request and receive permission from optionsXpress to place the order as a short sale. In order to complete a short sale, we must be able to borrow the security you sold and did not own. In the event that we are unable to borrow the security you have sold short, you will be subject to a buy-in of the security for your Account without prior notice and at your expense. You understand that although you may receive confirmation of a 'locate' in order to sell short, you remain subject to buy-in at any time in the event that the shares become no longer available for borrowing or loan.

optionsXpress User/Customer Agreement-Terms & Conditions at 5-6 (Exhibit 2-A) (emphasis added).

The Division does not allege that Mr. Feldman made any affirmative representation or omission to his brokers. Similarly, the Division does not allege that Mr. Feldman made an affirmative misrepresentation to participants of registered clearing agencies or purchasers. Thus, though never clearly articulated in the Order, the Division's only possible remaining argument is

that Mr. Feldman deceived purchasers and participants of registered clearing agencies merely by submitting an order to sell or purchase a security. This argument fails as a matter of law because the submission of an order to sell or purchase a security, without a representation, material omission, or an affirmative deceptive act on the part of the seller or purchaser, is not fraudulent.

While conduct can form the basis of fraud, an individual must have conveyed some misleading impression for a fraud charge to stand. Thus, as "broad as the concept of 'deception' may be, it irreducibly entails some act that gives the victim a false impression." *United States v. Finnerty*, 533 F.3d 143, 148 (2d Cir. 2008). In *Finnerty*, the defendant was charged with interpositioning resulting in alleged illegal profits. During trial, the prosecution presented evidence that the defendant directed NYSE clerks to execute interpositioning trades ahead of existing public orders. *Id.* at 147. As is the case here, the government did not try to prove the defendant made a misleading statement; rather it claimed that the defendant's course of conduct in directing the interpositioning trades was done with the intent to defraud in violation of Rule 10b-5. *Id.* at 148. While acknowledging that "conduct itself can be deceptive," the Court of Appeals for the Second Circuit found that the government had not shown the defendant committed fraud because it "identified no way in which Finnerty communicated anything to his customers, let alone anything false." *Id.* at 148-49. Thus the *Finnerty* Court explained, "[b]road as the concept of 'deception' may be, it irreducibly entails some act that gives the victim a false impression." *Id.* at 148.

The *Finnerty* Court also rejected the government's argument that the defendant's deception was self-evident because he had the advantage of being able to see pending orders to buy and sell a particular stock, and he determined the price ultimately paid:

> It may be that Finnerty unfairly profited from superior information. But 'not every instance of financial unfairness constitutes fraudulent activity under

> §10b.' . . . And characterizing Finnerty's conduct as "self-evidently deceptive" is conclusory; there must be some proof of manipulation or a false statement, breach of a duty to disclose, or deceptive communicative conduct. 'Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud.'

Id. at 150 (quoting *Chiarella v. United States,* 445 U.S. 222, 232 (1980)) (emphasis added).

Finnerty reaffirmed that the mere execution of a trade, even if it has an improper purpose, cannot establish a §10b violation—it must be accompanied by some misleading impression or statement. *Id.* at 149. This is true even when the submission of the trade violates a rule known to the public and that the public may assume is complied with (which is not Mr. Feldman's circumstance):

> Some customers may have understood that the NYSE rules prohibit specialists from interpositioning, and that the rules amount to an assurance (by somebody) that interpositioning will not occur. As a consequence, some customers may have expected that Finnerty would not engage in the practice. But unless their understanding was based on a statement or conduct by Finnerty, he did not commit a primary violation of § 10(b)-the only offense with which he was charged.

Id. at 150 (emphasis added). Mr. Feldman's conduct was wholly legitimate and far from the interpositioning in *Finnerty*, and thus the lack of deception is even more apparent in this case.

In harmony with *Finnerty*, Rule 10b-21 explicitly provides that submission of an order to sell alone, without deception, is not a violation of the rule:

> (a) It shall also constitute a manipulative or deceptive device or contrivance as used in section 10(b) of this Act for any person to submit an order to sell an equity security if such person deceives a broker or dealer, a participant of a registered clearing agency, or a purchaser about its intention or ability to deliver the security on or before the settlement date, and such person fails to deliver the security on or before the settlement date.

Rule 10b-21(a) (emphasis added). Thus, a person must submit an order to sell and deceive a broker or dealer, participant of clearing agency, or purchaser, and actually fail to deliver the

security. The mere submission of an order to sell is not a violation of Rule 10b-21 according to its plain language.

For Mr. Feldman's conduct to be deceptive, someone must have interpreted conduct to be Mr. Feldman's conduct. The Division merely alleges that "ultimate purchasers and clearing brokers reasonably presumed that they would receive the shares they bought in the open market (within the standard three-day settlement period), when in fact they did not." Order at ¶ 159 (emphasis added). This statement does not allege that the purchasers believed Mr. Feldman was making a representation about delivery. If anyone, these purchasers and clearing brokers believed optionsXpress was making a representation about delivery because the Division alleges in the next paragraph: "Indeed, many of the clearing brokers submitted notices to CNS (who in turn sent them to optionsXpress) requesting immediate delivery of the shares that were not delivered by settlement date." *Id.* at ¶ 160. Thus, if the purchasers were under the impression that an entity was making a representation about delivery, that entity was optionsXpress, not Mr. Feldman.

It is understood in the industry, and by those in the marketplace, that brokers have the obligation to locate or borrow and deliver, not the individual retail customer who, as one of hundreds (if not thousands or tens of thousands) of customers of a particular broker, does not bear the obligation of locate, borrow, or delivery. That is precisely why CNS forwarded to optionsXpress the notices submitted by the clearing brokers who had not received shares. *See* Order at ¶¶ 159-160. Without an explicit allegation that Mr. Feldman made a representation to a broker-dealer or purchaser or that a broker-dealer or purchaser believed Mr. Feldman, and not optionsXpress, to be making a representation, it remains undisputed that no one in the marketplace understood Mr. Feldman was making a representation as an individual retail

customer as to his intention or ability to deliver securities. Because no one in the marketplace viewed Mr. Feldman as making this representation, and therefore no one was relying on this representation, it is impossible that Mr. Feldman could have deceived a purchaser or participant of a clearing agency. Thus the Rule 10b-21 charges against Mr. Feldman fail as a matter of law.

B. §17(a), §10(b), and Rule 10b-5 Charges Based on Reg SHO Fail

The same factual allegations support both the Division's Rule 10b-21 claims against Mr. Feldman and its Section17(a), Section 10(b) and Rule 10b-5 claims. Specifically, the Division alleges that optionsXpress had continuous fails-to-deliver and that Mr. Feldman, because he knew or was reckless in not knowing that the buy-write calls would be exercised and assigned, somehow made a misrepresentation to purchasers about his intention or ability to deliver. Order at ¶¶ 3-5, 141. Critically, the Division acknowledges in the Order that Mr. Feldman did not benefit from upward or downward price movement:

> [The Customers] took no risk with respect to the change in the price of the stock and options that occurred over the life of the position . . . .

Id. at ¶ 34.

Thus, though stated as a fraud claim, the Division's allegations all center around optionsXpress's alleged fails to deliver and facilitation of the buy-writes. The Division's general antifraud charges thus fail for the same reasons that the Rule 10b-21 charge does: Even if Mr. Feldman knew he would be assigned and intended not to deliver as the Order alleges, Mr. Feldman made no representation concerning his intention or ability to deliver. Just as in *Finnerty*, the Division has not identified a way in which Mr. Feldman "communicated anything" to the purchasers or participants of registered clearing agencies. *Finnerty* at 148-149. The Division's allegation that Mr. Feldman submitted a trade order he knew to be improper likewise cannot sustain a Rule 10b-5 charge because the Division does not allege that the submission of

these orders was accompanied by a misleading representation by Mr. Feldman, and submitting a trade order itself is not deceptive. *Id.* at 149. Similarly, the general anti-fraud allegations against Mr. Feldman fail as a matter of law because the allegedly deceptive conduct—the alleged failure to deliver—was not within his control. *See Janus*, 131 S. Ct. at 2301-2302 ("Without control, a person or entity can merely suggest what to say, not 'make' a statement in its own right").

Mr. Feldman's trading had no material similarities to "matched orders" as the Division alleges. *See* Order at ¶ 33. In a matched order, the trader buys and sells shares at the same time to create an illusion about the amount of activity in the stock. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 205 n.25 (1976) (matched orders are "orders for the purchase sale of a security that are entered with the knowledge that orders of substantially the same size, at substantially the same time and price, have been or will be entered by the same or different persons for the sale/purchase of such security"). The purpose of schemes involving matched orders is to artificially create a market condition and then to take advantage of that artificially created condition. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977) (practices such as wash sales and matched orders "are intended to mislead investors by artificially affecting market activity."). The investor's scheme with matched orders is to create a market condition (increased trading volume or interest in a stock) and then exploit that condition for monetary gain.

This is indisputably not the case with Mr. Feldman's trading strategy: Mr. Feldman had no interest in affecting the marketplace or driving the price of stock. Indeed, the Division correctly alleges that Mr. Feldman did not benefit from upward or downward movement in the securities. See Order at ¶ 34.

It did not matter to Mr. Feldman's trading strategy if the stock price went up or down. Mr. Feldman did not engage in trading to create a new condition in the marketplace. Rather, Mr.

Feldman attempted to make a profit off of a pre-existing arbitrage opportunity. The only improper conduct the Division alleges relates to Reg SHO: the allegation that assignments prevented delivery. *See* Order at ¶ 27. This is purely a Reg SHO issue, and the Division alleges no other conduct that forms the basis of a "scheme."

Mr. Feldman's trading was also dissimilar to the trading in *Hazan* for several reasons. In *Hazan*, the Commission determined the respondent market makers were engaged in "sham reset transactions" enabling them to maintain a persistent fail and circumvent their delivery obligations under Reg SHO. *In the Matter of Hazan Capital Management, LLC and Steven M. Hazan*, Release No. 60441 at 3. The Commission alleged that to circumvent delivery obligations, Hazan colluded with other market makers and acted as the counter-party to sham transactions. *Id.* at 3-4. In *Hazan*, the transactions were intended to maintain an open fail-to-deliver in the CNS system by market makers who abused their exemption and caused fails to persist. Mr. Feldman is not a market maker, and never purported to rely on any market maker exception. Mr. Feldman had no responsibility *vis-à-vis* CNS system delivery. The defendants in *Hazan* used FLEX options which generally require knowledge of the counter-party as the investors agree to specific set terms. In contrast, Mr. Feldman used standard American-style options and sold them on the open market. Unlike with the defendants in *Hazan*, there is no allegation that Mr. Feldman knew who the counterparties were or prearranged terms. To Mr. Feldman's knowledge, optionsXpress did not know who the counterparties to Mr. Feldman's trades were and did not prearrange terms.

The Rule 10b-5 charges against Mr. Feldman fail as a matter of law because the only alleged deceptive conduct was the submission of trade orders that allegedly resulted in a fail-to-deliver. The submission of trade orders is not deceptive conduct, but even if it were, Mr.

Feldman had no control over the trade orders or delivery. Mr. Feldman could not have engaged in fraudulent conduct if the conduct that is alleged to be fraudulent was not under his control. Mr. Feldman had no delivery obligations under Reg SHO, the only type of delivery the Order speaks to. When the irrelevant Reg SHO fail-to-deliver allegations are stripped away, the Order is devoid of any allegation that Mr. Feldman made a misrepresentation of any kind.

C. Rule 10b-21 Does Not Apply to Writing Calls

Rule 10b-21, an offshoot of Reg SHO, also does not apply to writing options. Specifically, Rule 10b-21 provides:

> (a) It shall also constitute a "manipulative or deceptive device or contrivance" as used in section 10(b) of this Act for any person to submit an order to sell **an** equity security if such person deceives a broker or dealer, a participant of a registered clearing agency, or a purchaser about its intention or ability to deliver **the** security on or before the settlement date, and such person fails to deliver **the** security on or before the settlement date.
>
> (b) For purposes of this rule, the term *settlement date* shall mean the business day on which delivery of a security and payment of money is to be made through the facilities of a registered clearing agency in connection with the sale of a security.

(emphasis added).[3] Thus, Rule 10b-21 follows a particular seller of a particular security on the trajectory towards delivery. The equity security Mr. Feldman sold when he submitted an order to his broker to write a call was the option to buy another security. Thus Rule 10b-21 can only govern the sale of the option, because it must follow the same security. *See* Rule 10b-21 ("submit an order to sell an equity security...deliver the security") (emphasis added). When Mr. Feldman wrote a call, he could not fail to deliver the call option, and thus there was no fail-to-

[3] Equity security "means any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to that as an equity security." Securities and Exchange Act of 1934, Section 3(11) (emphasis added).

deliver under Rule 10b-21. Because Rule 10b-21 does not govern Mr. Feldman's conduct, the charges against him premised on a violation of Rule 10b-21 fail as a matter of law and this Court should grant summary disposition in his favor.

D. Proceedings Violate the 180-Day Dodd-Frank Deadline

The Division's charges against Mr. Feldman violate the Dodd-Frank Wall Street Reform and Consumer Protection Act because the Staff did not file charges within the 180-day deadline prescribed by the Act. The dates relevant to this analysis are as follows:

- October 28, 2010: The Staff issued the Wells Notice;
- April 26, 2011: Expiration of the initial 180 day period;
- Before October 24, 2011: Commission authorized filing action;
- October 24, 2011: Expiration of the additional 180 day period;
- April 16, 2012: Order Instituting Proceedings issued.

Section 929U of the Dodd-Frank Act, codified as Section 4E of the Exchange Act, requires that within 180 days after it provides a written Wells notification the Commission's Staff either file an action against the person or provide notice of its intent to not file an action:

> (1) *In General.* Not later than 180 days after the date on which Commission staff provide a written Wells notification to any person, the Commission staff shall either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action.

15 U.S.C. § 78d-5(a)(1) (2012).

Section 4E permits the Division Director to extend the 180-day deadline for complex cases if, and only if, a determination cannot be made to either file or give notice of intent not to file:

> [I]f the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action

> against a person cannot be completed within the deadline specified in paragraph (1), the Director of the Division of Enforcement of the Commission or the Director's designee may, after providing notice to the Chairman of the Commission, extend such deadline as needed for one additional 180-day period.

Id. at § 78d-5(a)(2) (emphasis added). For further extensions beyond the 360 days after the Wells notice, Section 4E requires Commission approval. As with the first extension, any additional 180-day period is only permitted if, and only if, a determination cannot be made to either file or give notice of intent not to file within each 180-day extension:

> If after the additional 180-day period the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the additional 180-day period, the Director of the Division of Enforcement of the Commission or the Director's designee may, after providing notice to and receiving approval of the Commission, extend such deadline as needed for one or more additional successive 180-day periods.

Id.

There are two ways the late-filing of the charges against Mr. Feldman and continuation of these proceedings violate the Dodd-Frank Act 180-day deadline. First, the undisputed facts demonstrate that the Commission authorized the Staff to file an action against Mr. Feldman on or before the expiration of the second Dodd-Frank deadline, October 24, 2011. Therefore, the Commission Staff was required by law to file the action before the expiration of the second Dodd-Frank 180-day deadline. The plain language directs that the Commission staff "shall" file an action authorized within the Dodd-Frank 180-day period or any extension thereof. The Staff and the Commission could not rely on a further extension of the second Dodd-Frank deadline to actually file against Mr. Feldman because the action was indisputably authorized within the second 180-day period.

Second, according to the Staff, the Staff received another extension of the 180-day

deadline extension approximately a week before receiving authorization to file an action against Mr. Feldman, but still before the expiration of the second 180-day period. The mere week-long lapse between receiving an extension of the Dodd-Frank deadline and receiving authority to file from the Commission shows that the Division Director or his designee not only made the determination to file an action within the second 180-day period, but that the determination to file was made on or before the date that the Commission approved the extension to add a third 180-day period. Even if the Commission was unaware of the determination to file when it approved the third 180-day period, no valid extension of the deadline could have been granted because a determination of whether to file an action was already made. Under these circumstances, the Staff and the Commission's reliance on an invalid additional 180-day extension would violate the Dodd-Frank Act.

Allowing the charges against Mr. Feldman to move forward despite the Staff's flouting of the Dodd-Frank Act would fly in the face of long-recognized canons of statutory interpretation, in which "courts presume that Congress has used its scarce legislative time to enact statutes that have some legal consequence." *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 877 (D.C. Cir. 2006); *see also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("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."). A similar situation is presented by Exchange Act Section 21(C)'s provision of a respondent's right to demand a hearing within 60 days in cease and desist cases. 15 U.S.C. § 78u-3(b). If a respondent was refused a hearing within 60 days, then any subsequent hearing would be invalid under the law. *See In the Matter of Trautman Wasserman & Co., Inc.* Exchange Act Rel. No. 55989 (June 29, 2007) (setting the hearing date within 60 days from the notice instituting proceedings upon demand by one of the respondents,

causing the Division to drop the cease and desist charges against the respondents). The same situation presents itself here—the Division's failure to file this action within the deadline imposed by the Dodd-Frank Act prohibits it from bringing charges later. The Staff's blatant disregard for this statute thus compels dismissal of the charges against Mr. Feldman, and any other result would violate Section 929U of the Dodd-Frank Act.

E. Scandalous, Impertinent, and Inadmissible Material Should be Stricken

It is indisputable that Mr. Feldman was not fined by the OTS "for making material misrepresentations and/or concealing material facts as part of a scheme to defraud a federally-insured financial institution" as the Order alleges. *See* Order at ¶ 10; *see also* OTS Order (Exhibit 5). The Order fining Mr. Feldman contained no express or implied findings or charges concerning any form of fraud or scheme. *See* OTS Order (Exhibit 5). The Division appreciates the distinction between a scienter- or scheme-based fraud allegation on one hand and non-fraud charges on another. It thus was at least reckless to even publish this patently false description of the settled OTS matter. This impertinent and scandalous misstatement should be stricken. *See generally* F.R.C.P. 12(f).

It is likewise indisputable that the OTS matter is inadmissible. First, it is wholly irrelevant to this action. Second, it would not be admissible even for impeachment purposes as the actual resolution with the OTS does not even concern anything that could be used for impeachment. Third, even if the Division's false allegation concerning the OTS matter was true, only the underlying conduct, and not the OTS charges and resolution would be admissible. *See United States v. Whitmore*, 384 F.3d 836, 837 (D.C. Cir. 2004) (quoting the Advisory Committee Notes to Federal Rule of Evidence 608) ("Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when

that conduct is offered only to prove the character of the witness.'"). As a result, Mr. Feldman requests that this allegation be summarily disposed of now and that the Division be prohibited from referencing the OTS matter or any of the alleged underlying conduct in any way going forward. In sum, this allegation is defamatory and highly prejudicial.

V.
Conclusion

Based on the foregoing, this Court should grant summary disposition in favor of Mr. Feldman and dismiss all charges against him and strike the patently false, impertinent, and scandalous statement from paragraph 10 of the Order. Mr. Feldman further requests any other relief that is just and permissible.

Respectfully submitted,

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of optionsXpress, Inc., Thomas E. Stern, and Jonathan I. Feldman, Respondents.	ADMINISTRATIVE PROCEEDING File No. 3-14848

AFFIDAVIT

I, Erik Sirri, do solemnly declare and affirm under the penalties of perjury that the following facts are true and correct:

I. Qualifications

1. I have been a Professor of Finance at Babson College in Wellesley, Massachusetts since 2009, where I also previously held the same position from 1999 to 2006. I was an Assistant Professor of Finance at Harvard Business School from 1989 to 1995. I received my B.S. from the California Institute of Technology, an M.B.A. from the University of California, Irvine, and a Ph.D. in Finance from the University of California, Los Angeles.

2. I was the Director of the Division of Trading and Markets at the U.S. Securities and Exchange Commission ("SEC" or "Commission") from 2006 to 2009. As the Director of the Division of Trading and Markets, I was responsible to the SEC for matters relating to the

regulation of stock and option exchanges, national securities associations, brokers, dealers, clearing agencies, and transfer agents.

3. I served as the SEC's Chief Economist from 1996 to 1999, where I managed the SEC's Office of Economic Analysis. As the Chief Economist, I was responsible for overseeing a staff of researchers that provided analysis to assist the SEC in an ongoing evaluation of policies, markets, and systems.

4. I have served as a Governor of the Boston Stock Exchange, and a member of the regulatory board of the Boston Options Exchange. I am currently an independent trustee of the Natixis family of mutual funds. Over the course of my career I have consulted for securities firms, stock exchanges, mutual fund companies, issuers, and information vendors on a variety of regulatory and business matters.

5. My areas of research include securities market structure, the interaction of securities law and finance, and investment management. My written work includes publications in peer-reviewed academic journals, financial articles, cases, and book chapters. See Exhibit 1 for my curriculum vitae, which includes a list of publications I have authored and a list of the proceedings during which I have provided sworn testimony during the last four years by deposition, at trial or arbitration, and in front of the United States Congress.

II. Mechanics of Call Options

6. A call option is an equity derivative contract between two parties, a "holder" (or purchaser) and a "writer" (or seller) of the option. A call option confers upon the holder the right (but not the obligation) to buy a specified amount of the referenced stock at a predetermined price ("strike price") from the writer of the call option over a specified period of time ("time to maturity").

7. An option with "American style" exercise can be exercised by the purchaser any day between purchase and the option's maturity date.

8. Parameters such as the stock name, strike price, and time to maturity are specified at the time the call option is purchased or sold. For example, a purchase of "July IBM 45" call options on 100 shares gives the holder of the option the right to buy 100 shares of IBM anytime between now and the third Friday in July at a price of $45/share from the writer of the call option.

9. The call option is more valuable the higher the price of the stock since the holder of the calls will always pay the same price ($45) for the IBM shares. If the price of IBM is greater than $45/share, this call option is said to be "in the money."

10. Common stock is generally issued by a corporate issuer in a fixed positive amount. Options are much different than common stock, and do not exist as securities until an option purchaser and an option writer execute a trade to open a position. The net positions on any series of options thus always total to zero. The options are created and issued by the Options Clearing Corporation ("OCC"), which acts as the counterparty to both the purchaser and the writer. In other words, after the purchaser and the writer of an option agree to the terms of a trade and the trade has been "accepted" by the OCC, it is actually the OCC who has sold the options to the purchaser, while simultaneously buying the same number of options from the option writer.

11. Once an option trade is cleared and the OCC has stepped in as the central counterparty, there is no contractual connection between the original option buyer and the original seller. If multiple parties have open positions in the same option, the OCC is

counterparty to all purchasers and all writers. The OCC's position is always in balance—it always holds the same number of purchased positions and written positions in each option series.

12. Individual investors do not hold option positions directly with the OCC. Rather, they hold option positions indirectly through a broker who is a member of the OCC, and who holds the position on its own account at the OCC.

13. If an option purchaser wishes to exercise a call option and pay the strike price against receiving the common stock shares, the purchaser instructs his/her broker, and the broker notifies the OCC that it is exercising options held in the broker's OCC account. Exercises are processed by the OCC once a day, in the evening after brokers have had a chance to forward the day's exercise instructions to the OCC. Under exchange rules, the cut-off time for option holders to decide whether to exercise the option on a particular day is 5:30 EST, although brokers may set earlier cut-off times.

14. The daily procedure for processing exercises at the OCC involves processing the purchasers' exercises against the OCC, assigning the exercises to writers, and processing the exercises against the assigned writers.

15. When call options are exercised against the OCC, the OCC adjusts the exercising member's account to remove the option position, and executes a stock trade in which the exercising member is the purchaser, OCC is the seller, and the transaction price is equal to the strike price. Thus, from the point of view of the exercising member, the exercise results in replacing a long call option position held against the OCC with an entitlement to receive equity shares from the stock clearinghouse in settlement of a trade.[1]

[1] The mechanics of trade settlement are described in paragraphs 25 to 40 below.

16. Immediately subsequent to processing the exercise, OCC randomly assigns the exercise among the broker-dealer OCC participants that have a written position in that particular option.[2] When an exercise is assigned, OCC adjusts the assigned member's account to remove the written option position, and executes a stock trade, in which the OCC is the purchaser, the assigned member is the seller, and the transaction price is equal to the strike price. From the point of view of the assigned member, the assignment results in replacing a written call option position with an obligation to deliver shares to the stock clearinghouse. It is the responsibility of the OCC member representing the call option writer to guarantee performance of the delivery obligation arising from the stock trade.

17. After an option is assigned to an OCC member, the member allocates the assignment to one or more of its customers that has a written option position in that series.

18. If an investor who does not own the underlying stock writes a call option and his/her broker is subsequently assigned, and the broker allocates the assignment to that particular investor, the result is a short position in the investor's account. Assignment notices are conveyed by the OCC to the assigned broker-dealers in the evening after the close of trade on day the option was exercised.

19. Thus, by writing a call option that is subsequently assigned, an investor can legitimately acquire a short position in a stock without ever having submitted an order to sell, much less short, the stock.

20. When an investor has written a call option, in general there is no way for the investor to know for certain whether the option will be exercised prior to its expiration date,

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[2] This entitlement to receive shares is created in the NSCC's CNS system as a result of the option exercise. This is explained in more detail in paragraphs 28-39 below.

much less on any particular day. Various economic factors may influence the decision of the option holders as to whether they would want to exercise a call option. Based on these factors, the investor may have some information about the likelihood of exercise.

21. When an investor has written a call option, even if the call options in that stock are exercised, it is still not certain whether the option will be assigned to the investor. The random assignment by OCC of exercises among option writers introduces an additional element of uncertainty as to whether the investor's written call options will be assigned.

22. A "buy-write" is a transaction in which a trader simultaneously purchases shares of stock and writes a call option. The price of the buy-write transaction is typically negotiated as a package when the trade is executed. However, the two components of the transaction are recorded, cleared, and settled as separate trades.

23. Buy-write transactions are common and customary securities transactions. They are also common and conservative investment transactions undertaken by investment managers looking to establish a long position in a particular stock while simultaneously generating income by selling a call option.

24. A buy-write transaction should not be confused with certain types of orders in which a trader with manipulative intent simultaneously places buy and sell orders in the same stock in order to give the appearance of an active market in the security. Such a scheme has as its goal the alteration of the perceptions of market participants who may believe there is increased activity in the stock. A buy-write transaction is a hedged transaction that can be used for legitimate economic purposes, whether as a long-term investment or to capture relative

mispricing of stock and options.[3]

III. Institutional Background

A. Mechanics of Ownership, Delivery, and Settlement

25. In U.S. equity markets, most shares of publicly traded companies are held in street name, where the Depository Trust Company ("DTC"), through its Nominee name "Cede and Co." is the registered owner of the shares. Investors hold shares indirectly through banks and brokers who are DTC "participants," and who hold the interest as entitlements in book entry form in accounts at the DTC.

26. The term "delivery" can easily be misunderstood when discussing short selling by retail investors and the obligation of brokers for settlement of trades. In the context of stock trade settlement by brokers, "delivery" is widely understood to mean a book entry movement of shares from one DTC broker-dealer participant's account to another. DTC is the central custody bank of the U.S. clearing system. Delivery is precipitated when the DTC receives delivery instructions from a party who is authorized to give such instructions for the delivering account.

27. The most common reason for delivery of shares is for an NSCC clearing member to satisfy the net delivery obligations that it has to the clearing system, which it has accumulated as a result of trading by the various parties who clear through that member's account. This is explained as follows:

28. Stock trades are cleared and settled through the NSCC through their Continuous Net Settlement system ("CNS").[4] Broker-dealers and banks who are members of the NSCC

[3] The relative price of a stock and options written on the stock are governed by certain mathematical relationships, often referred to as "put call parity." If the relative prices are out of line with these relationships, there may be profitable arbitrage trades that can be placed in the stock and its options. A buy-write transaction may be part of such arbitrage trading.

("Clearing Members") are the only parties that can deliver stock to the NSCC in settlement of trades.

29. When trades are processed by the NSCC's CNS system, all the trades on a given stock cleared through a particular member are batched together, and all buys and sells between NSCC members for the day are netted out against each other, resulting in a single settlement obligation share number for each member.

30. On the third settlement day following the trade ("T+3"), the NSCC conducts an "evening cycle," in which the net number of shares purchased is added to any previously unsettled CNS balance in the member's account, to determine the number of shares the member is due to receive or deliver, and settlement instructions are sent to DTC.

31. In this context, "delivery" occurs when the NSCC instructs the DTC to move shares out of the clearing account of a clearing member who has a net delivery obligation, and the DTC moves the securities in accordance with these instructions.

32. A "fail to deliver" occurs if the clearing member does not have sufficient shares in its DTC clearing account to satisfy the net obligation due to the NSCC on that day.[5]

33. To illustrate, assume that on Monday (day T) a clearing member has 50 customers who purchased a total of 90,000 shares and 100 customers who sold a total of 100,000 shares. In the NSCC's CNS system, all of the transactions for these 150 investors from Monday (day T)

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[4] What follows is an abbreviated description of the CNS clearing and settlement process. Further details on the structure and rules governing the CNS system are contained in National Securities Clearing Corporation, Procedures and Rules, Rule 11.

[5] The member might be holding shares in other DTC accounts that are not accessible to the NSCC for clearing purposes.

would be netted together, to generate a member net delivery obligation of 10,000 shares (90,000 purchased - 100,000 sold = -10,000 shares), to be settled on Thursday (T+3).

34. Assume that at the beginning of the day on Thursday (T+3), the clearing member has a "fail to receive" balance of 2,000 shares in the NSCC's CNS system, resulting from previous trading and settlement activity.

35. In the Thursday (T+3) end-of-day settlement cycle, the 10,000 share net delivery obligation from trading on Monday nets against the previous fail to receive of 2,000 shares, making the net delivery obligation 8,000 shares (-10,000+2,000 = -8,000).

36. NSCC sends instructions to the DTC to move 8,000 shares out of the clearing member's DTC account, and into the NSCC's DTC account.

37. If the clearing member does not have any shares in their DTC account, they have a "fail to deliver" in the CNS system.

38. Stock trades that result from the assignment of options are also cleared through CNS on a T+3 basis, where the transaction date is the date of the assignment. Option assignment trades are not treated differently from ordinary stock trades for purposes of settlement—they are included in the batch of trades that is netted together to determine the number of shares the clearing member will deliver or receive on T+3.

39. Thus, as discussed above in paragraphs 15 and 16, when a call option is exercised, the OCC member exercising the option will have its long option position replaced with a CNS long position (i.e. entitlement to receive shares), and the OCC member assigned the call exercise will have its short call position replaced by a CNS short position (obligation to deliver shares).

40. Finally, "delivery" can also refer to the delivery of shares by a customer to its broker. This can happen if, for example, the customer has shares located away from his/her

broker, or holds those shares in certificated form. Such a customer may then be said to "deliver" shares to the broker. Note that this should not be confused with the obligation for the broker to deliver shares to the settlement system in fulfillment of its trade obligations. A broker has such an obligation regardless of whether the customer makes delivery of shares to the broker.

B. Retail Customers Rely on Their Broker to Make Delivery to NSCC

41. By definition, only a clearing member can deliver shares to NSCC in settlement of trades that clear through CNS.[6] Where the term "delivery" refers specifically to delivery to a clearing agency in settlement of a member's trades, it is impossible for a customer who is not a clearing member to deliver shares to NSCC. Trades by customers of broker-dealer clearing members generate delivery NSCC obligations for the clearing member to NSCC, not delivery obligations for the customer.

42. For brokers that specialize in executing trades for individual (non-institutional) customers, the broker's customers typically rely on the broker to handle all other logistics associated with trade settlement, including locating and borrowing shares for subsequent delivery to the NSCC.

C. Fails to Deliver in CNS Cannot Be Ascribed to Individual Customers

43. Because trades are batched and netted before settlement, an individual customer might sell short and yet their clearing broker may have no net delivery obligation on T+3 because other customers of the same clearing broker purchased shares on the same day. For example, for a particular NSCC member, one of its customers may sell short 600 shares on day T, and another of its customers may buy 1000 shares on day T. That NSCC member will then

[6] See NSCC, Procedures and Rules, Rule 11, and http://www.dtcc.com/products/cs/equities_clearance/cns.php.

have a net receive position of 400 shares at NSCC on day T+3, and there will be no share delivery requirement associated with the 600 shares short sale.

44. Even though an individual customer's trades contribute to the clearing member's net delivery obligation, a customer who sells short would have no way of knowing whether the clearing broker has a CNS net deliver or a net receive position on T+3. Moreover, the customer would have no way of knowing whether their broker has a fail to deliver in the CNS system.

45. Clearing members deliver shares to NSCC to settle their *net delivery obligation*, not to settle individual trades. Thus, fails to deliver cannot generally be attributed to particular trades of individual customers.

46. To illustrate, in the hypothetical example described above, a clearing member cleared trades for 50 customers who purchased 90,000 shares and 100 customers who sold 100,000 shares, and had a previous fail to receive of 2,000 shares, so that their net delivery obligation on T+3 was 8,000 shares. If the clearing member fails to deliver the 8,000 shares, this appears in the clearing member's CNS account as a fail of 8,000 shares—there is no accounting system at NSCC that allocates these fails to any one of the 100 customers that sold short.

47. If a clearing member were to resolve its fail to deliver by requiring some of its customers to close out open short positions, it need not select customers whose trades settled on the day the clearing member established a fail to deliver position at NSCC. Instead, they could choose customers whose short positions pre-dated the fail to deliver.

48. The fact that a clearing broker may select a particular customer to close out when faced with a closeout requirement under Rule 204 of Reg. SHO does not mean the customer's trades were the cause of the delivery failure.

49. To illustrate, suppose that a customer establishes a short position on day T, and the clearing member fully meets its net delivery obligation on day T+3, so that unambiguously, the customer's short sales did not contribute to any delivery failure. Two months later, the investor still has an open short position, and the clearing broker for the first time has a fail to deliver on a new delivery obligation that arose from the aggregate trading activity of its other customers. Under Rule 204, the clearing broker must close out the fail to deliver by buying securities of like kind and quantity. The broker may choose to comply with the closeout requirement of Rule 204 by closing out to the customer who has a long-standing short position.[7] The fact that the clearing broker closes out a customer does not indicate that that customer's trades created the fail to deliver.

IV. Writing a Call Option Indicates Neither An Intention nor a Requirement for the Investor to Deliver Stock

50. The act of writing a call option does not in itself generate any obligation to deliver stock. Only if the call is subsequently exercised and assigned would there be a stock transaction to be settled, and if this stock transaction is offset by an immediate share purchase, the resulting delivery obligation will be offset by the settlement of the share purchase.[8]

51. When a trader who does not own the stock writes a call option, there are four possibilities for what might happen subsequent to the trade.

52. First, the trader may continue to hold the option until maturity, and the option expires out of the money. In this case there is never any obligation to deliver stock.

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[7] For example, one reason the broker might choose to do this is if the new delivery obligations arose from "long" sales, or sales by customers who owned the stock. Brokers may have fails to deliver in situations where they have customers who own shares, but the broker does not have shares in custody because they have been lent out.

[8] If the option writer is assigned in the evening and purchases to cover the following morning, there would be a one-day lag between the settlement of the option assignment and the settlement of the covering trade.

53. Second, sometime after the option is written but before it expires, the trader may enter an offsetting option trade (a purchase) to close the option position. Again, there is never any obligation to deliver stock.

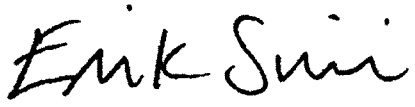
54. Third, the option may be exercised and assigned to the trader, and the trader immediately purchases the stock. If the option is assigned in the evening and trader purchases stock the following day, the option assignment generates a delivery obligation but the share purchase generates an offsetting receipt of shares one settlement day later.

55. Fourth, the option may be exercised and assigned to the trader, and the trader does not immediately purchase the stock. In this event, the option assignment makes an incremental contribution to the clearing member's obligation to deliver stock. However, due to netting within the CNS system, the clearing member may or may not have a net obligation to deliver stock. For example, if the clearing member has a previous fail to receive, or if the clearing member's other customers are net buyers, the delivery obligation generated by the conversion of the short call into a short stock position via option exercise and assignment may be offset, and the clearing member may have no net delivery, or even a net receive on T+3.

56. If an investor does a buy-write trade and the written call option is not assigned on the same day, the stock purchase generates a receipt of shares for the investor's clearing broker, thus reducing the clearing broker's net delivery requirement on T+3. If an investor does a buy-write trade and the written call option is assigned on the same day, the receipt from the purchase and the delivery from the assignment offset each other, and as a whole, the buy-write trade does not make any contribution to the net delivery requirement for the trader's clearing broker. Thus, it cannot be said that a buy-write contributes to new fails to deliver or increases in fails to deliver at the clearing broker.

57. In summary, there are a variety of common outcomes after a trader writes a call option, some of which do, and some of which do not culminate in delivery of stock by the clearing member.

Executed this 4th of June, 2012



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Education

University of California, Los Angeles: Ph.D., Finance, 1990.
University of California, Irvine: M.B.A., 1984.
California Institute of Technology: Bachelor of Science, Astronomy, 1979.

Employment

Professor
Babson College, Babson Park, MA, 2004-present.

Visiting Professor
Harvard Business School, Cambridge, MA, 2009-2010.

Director, Division of Trading and Markets
U.S. Securities and Exchange Commission, Washington, D.C., 2006-2009.

Visiting Scholar
Harvard Law School, Cambridge, MA, 2005-2006.

Associate Professor
Babson College, Babson Park, MA, 1999-2004.

Chief Economist
U.S. Securities and Exchange Commission, Washington, D.C., 1996-1999

Assistant Professor
Babson College, Babson Park, MA, 1995-1996.

Assistant Professor
Harvard Business School, Boston, MA, 1989-1995.

Research Scientist
Nichols Research Corporation, Newport Beach, California, 1979-1983.

Academic Articles

"Regulatory Politics and Short Selling," *University of Pittsburgh Law Review*, 2010, Vol. 71, No. 3, pp. 517-544.

"Consolidation and Competition in U.S. Equity Markets," with Robert L.D. Colby, *Capital Markets Law Journal*, 2010, Vol. 5, No. 2, pp. 169-196.

"Transparency and Liquidity: A Controlled Experiment on Corporate Bonds" , with Edie Hotchkiss and Michael Goldstein, *Review of Financial Studies*, 2007, Vol. 20, No. 2., 235-273.

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"Examining the Main Street Benefits of our Modern Capital Markets," with Charles M. Jones, report for the Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, March 2010.

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"Comment on Circuit Breakers, Systemic Risk, and Market Reforms," in Brookings/Wharton Papers on Financial Services, Robert Litan and Anthony Santomero, Editors, Brookings Institution Press, June 1998.

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"Competition and Change in the Mutual Fund Industry," with Peter Tufano, in *Financial Services: Perspectives and Challenges for the 1990s*, edited by S.L. Hayes III, HBS Press, 1993. (Republished in *Gestion Collective Internationale*, No. 10, Summer 1994)

"Anheuser-Busch and Campbell Taggart," in *Case Problems in Finance*, Fruhan, William E., et. al, Tenth Edition, Irwin, 1992.

Boards and Affiliations

Governing Counsel, Independent Directors Counsel (IDC), 2011-present
Town of Sherborn, Advisory (Finance) Committee, 2011-present
Board Member, Managed Funds Association, 2010-present
SEC Historical Society, Museum Committee, 2009-present
Investment Committee, Foundation for Metrowest, 2010 to present
Trustee, Natixis, Loomis Sayles, and Hansberger Funds, 2009-present
Board Member, Boston Options Exchange (Regulatory), 2004-2006
Governor, Boston Stock Exchange, 2003-2006
Proxy Governance, Inc. Advisory Board, 2004-2006
National Association of Securities Dealers: Economic Advisory Board, 2001-2005
Nasdaq Stock Market: Economic Advisory Board, 2000-2002
Member, Society of Financial Studies
Member, American Finance Association

Professional Activities

Refereed for *Journal of Finance, Journal of Financial Economics, Review of Financial Studies, Journal of Business, Management Science. Journal of Financial Intermediation, Journal of Banking and Finance, Journal of Business and Economic Statistics, Quarterly Journal of Business and Economics, Journal of Financial Services Research.*

Independent Fee Consultant for Bank of America Columbia Funds and Nations Funds, as appointed by the New York Attorney General pursuant to a regulatory settlement, 2005-2006

NASD Ahead of the Curve Committee, Member, 2005-2006

NASD Taskforce on Mutual Fund Soft Dollars and Distribution Fees, Member, 2004

Appointed an "Independent Economist" by the NASD to use TRACE bond data to assess the effects of transparency on fixed income market liquidity, 2003-2005

NASD Taskforce on Mutual Fund Breakpoints, Member, 2003

AIMR Trade Management Guidelines Taskforce, Member, 2001

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of optionsXpress, Inc., Thomas E. Stern, and Jonathan I. Feldman, Respondents.	ADMINISTRATIVE PROCEEDING File No. 3-14848

AFFIDAVIT

I, Jonathan I. Feldman, do solemnly declare and affirm under the penalties of perjury that the following facts are true and correct:

1. I am over 18 years of age.

2. I am familiar with the facts set forth herein, and if called and sworn as a witness, I could and would testify competently and from personal knowledge as to the following matters.

3. I hold no securities licenses or any other professional license.

4. While a customer of optionsXpress, I purchased stock that was listed on the exchanges and available to the general public.

5. My trades were arms-length and open market transactions.

6. The options I bought and sold were not customized in any way for me.

7. I did not know who the counterparties to my trades were.

8. I made no representations to optionsXpress or anyone else concerning my intention or ability to deliver securities that I sold or bought.

9. I never assumed an obligation to deliver securities.

10. Pursuant to my User/Customer Agreement with optionsXpress, the Terms & Conditions of which are attached hereto as Exhibit A, optionsXpress had full authority to borrow or otherwise obtain securities necessary to enable optionsXpress to satisfy its delivery obligations under Reg. SHO. Pursuant to this same agreement, optionsXpress had the authority to subject me to a buy-in of a security without prior notice and at my expense.

11. While a customer of optionsXpress, I had no control over whether securities I sold were delivered by optionsXpress to a registered clearing agency and ultimately to purchasers of those securities.

12. I did not have any ability to independently confirm whether optionsXpress was in fact delivering equity securities to a registered clearing agency when delivery was due in compliance with Regulation SHO.

13. optionsXpress made representations to me that it was complying with its delivery obligations under Reg. SHO for sales of securities, and I relied on those representations.

14. In late September of 2009, optionsXpress informed me that the SEC reviewed my trading did not have any issue with my trading. I was told that the concerns the SEC had were related to broker-dealers not individual retail customers.

15. Attached are true and correct copies of e-mails I received or sent:

a. February 4, 2010 e-mail from Peter Bottini to me, attached as Exhibit B;

b. Aug. 3, 2009 e-mail from Scott Tortorella to me, attached as Exhibit C;

c. Aug. 20, 2009 e-mail from August Payne to me, attached as Exhibit D;

d. Sept. 27, 2009 e-mail from me to Peter Bottini, attached as Exhibit E.

* * *

Jonathan I. Feldman

Date: 6-4-12

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Online Options, Stock & Futures Broker

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A

User/Customer Agreement - Terms & Conditions

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Beyond our proprietary systems, third party providers include, but are not limited to market centers that execute orders and quote vendors. Failure of a critical system for a significant period of time could limit our ability to rapidly and accurately process transactions.

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optionsXpress Account Terms and Conditions

In consideration of our accepting and maintaining an Account for you, you hereby agree that you have read, understand and agree to the following Terms and Conditions. You further understand that your use of the site, your placing of any order to effect transaction(s), your placement of assets in an optionsXpress account, and/or your use of optionsXpress public or private services, constitutes assent to the Terms and Conditions then posted and in effect on the optionsXpress site.

1. Parties

This document ("Agreement") contains important information regarding the terms and conditions which apply to you and your Account (referred to as "you" "your" and/or "Account"). All rights conveyed under the terms and provisions of this Agreement apply to optionsXpress, Inc., its agents and assigns (referred to as "optionsXpress," "we", "us", "our", or "ours").

2. The Terms "Securities" and "Property"

For the purposes of this Agreement, the terms "securities" and "property" shall include, but are not limited to, currencies, securities, options contracts, financial instruments, commodities of every kind and nature, and all contracts and options relating thereto, whether for present or future delivery.

3. Applicable Rules and Regulations

All transactions shall be subject to all then applicable United States federal and state laws rules and regulations promulgated thereunder; the constitution, rules, customs and usages of the applicable exchange, association, market or clearing house, and the customs and usages of those transacting business on such exchange, market or clearing house where transactions, custody or business of the Accounts are done.

4. Headings are Descriptive

The heading of each provision hereof is for descriptive purposes only and shall not be deemed to modify or qualify any of the rights or obligations set forth in each such provision.

5. Amendments

We may at any time amend this Agreement, by modifying or rescinding any of our existing provisions or conditions or by adding any new provision or condition, by conspicuously posting notice of such amendment on our web site or by providing written notice to you, and by our updating and maintaining such agreements in a publicly-accessible place on our website. Continued use of optionsXpress's sites or services after such notice and posting will constitute acknowledgment and acceptance of such amendment.

6. Entire Agreement

This Agreement represents the entire agreement between you and us concerning the subject matter herein. Certain supplements, policies and/or procedures ("Postings") may be further outlined on the optionsXpress web site and by your use of our web site and services, you agree to be bound by any and all Postings. You may not assign any right or obligations hereunder without first obtaining the prior written consent of an authorized officer of optionsXpress.

7. Other Agreements Apply

You agree and understand that other specific disclosures, terms and conditions apply to your use of the site and your account. It is your continuing obligation to understand such terms, and you agree to be bound by such terms as are in effect at the time of your use or maintenance of your account as they apply. Such agreements include, but are not limited to agreements relating to:

Margin Accounts

Options Accounts

Short Option Trading

Electronic Delivery of Documents and Services

Exchange Data Use

Terms and Risks relating to Stop Orders, Spreads, NBBO, and Expiration / Daily Assignments

Privacy Statement

8. Clearing Status

optionsXpress acts as clearing agent for your account and transactions and may be referred to herein as "agent" or as "Clearing Agent." These services include but are not limited to the preparation of customer trade confirmations and customer statements, the settlement of securities transactions, the performance of designated cashiering functions, and the preparation of certain books and records related to reported securities transactions.

You understand and agree that any rights that optionsXpress has under this Agreement may be exercised by optionsXpress or may be assigned to other agents, including, but not limited to, the right to collect any debit balance or other obligations owing in your Account, and that optionsXpress or its agents may collect from you or enforce any other rights under this Agreement independently or jointly.

9. Current Information

You agree to always provide optionsXpress with accurate information which you update when your circumstances change. You represent and warrant that the information you supply in your new Account documentation, your account profile, and all other information requested by us and provided by you is accurate and truthful. You further understand that you have a duty to immediately update such information if your information or financial circumstances change.

10. Security Interest and Lien

To the extent permissible by law and regulation, all securities and other property now or hereafter held, carried or maintained by us in our possession or control, for any purpose, in or for the benefit of any of your Accounts, now or hereafter opened, including any Account in which you may have an interest, shall be subject to a continuing first lien and first priority perfected security interest in favor of us for the discharge of all indebtedness and your other obligations to us, and are to be held by us as security for the payment of any liability or indebtedness of yours to us in any of your Accounts.

You authorize us the right to transfer securities and other property so held by us from or to any other of your Accounts held by us, whenever, in our judgment, we consider such transfer necessary for our protection. In enforcing our lien and security interest, we shall have the right and discretion to determine which securities and properties are to be sold and which contracts or positions are to be closed.

11. Account Restriction or Breach

You understand that we may at any time, at our sole discretion and without prior notice to you; prohibit or restrict your access to the use of the web site or related services and your ability to trade, we may refuse to accept any of your transactions, we may refuse to execute any of your transactions, and/or we may terminate your Account. The closing of an Account will not affect the rights and/or obligations of either party incurred prior to the date the Account is closed.

Payment of Indebtedness Upon Demand. You shall at all times be liable for the payment, upon our demand, of any debit balance or other obligations owing in Accounts of yours with us, and you shall be liable to us for any deficiency remaining in any such Accounts in the event of the liquidation thereof, in whole or in part, by us or by you; and, you shall make payment for such obligations and indebtedness upon demand by us.

In the event of a breach or default by you under this Agreement, we shall have all rights and remedies available to a secured creditor under all applicable laws and in addition to the rights and remedies provided herein.

12. Check Deposits

You understand and agree that we may hold funds deposited by you for any length of time until payment is made and the deposit has cleared. Alternatively, we may offer the privilege of trading against check deposits before collection of the proceeds, and in any case, if a deposited check is dishonored by the bank on which drawn or the privilege is otherwise abused, we may, at any time in its sole discretion without notice, revoke this privilege and/or liquidate all securities positions in your Account that were purchased/sold short using the uncollected funds without incurring any liability on our part, any trading gains resulting from trading against uncollected funds represented by a deposited check or other financial instruments are our property unless and until the funds represented by that instrument (not a substitute or supplemental instrument) are collected by us, and you remain responsible to us for any losses resulting from such trading, in addition to your responsibility to make good any dishonored check.

In addition, you acknowledge and give approval that we may, at our discretion and without further prior notice, utilize an electronic check process or Automated Clearing House (ACH) facility to draft funds in the amount of any of your checks payable to optionsXpress, its agents or assigns.

13. Joint / Multi-party Accounts

If you maintain a joint or multiparty Account, unless you notify us otherwise and provide such documentation as we require, your Account shall be held in joint tenancy with rights of survivorship. Each joint tenant irrevocably appoints the other as attorney-in-fact to take all action on his or her behalf and to represent him or her in all matters with respect to this agreement. You agree to indemnify us and we shall be fully protected in acting upon the instructions of either of you. This includes the sending of confirmations, statements, notices or other communications to either of you, or in making delivery to any of the joint owners of any and all securities and other property in the Account, or making payments to any of the joint owners of any or all monies in the Account as any of the joint owners may order and direct, or specifically fulfilling obligations pertaining to and/or as a result of any check writing privileges of either joint tenant. We shall be under no obligation to inquire as to the purpose of any such demand for deliveries and payments. However, you understand that we may request at our sole discretion that each party or person authorize a specific transaction, including deposits or withdrawals, although we may not be required to do so. Each of you shall be jointly and severally liable for any amounts due to us pursuant to this Agreement, whether incurred individually or by both of you.

In the event of the death of any of the joint owners, the surviving joint owner(s) shall immediately give optionsXpress prompt written notice thereof, and we may, before or after receiving such notice, take such actions, require such documents, and restrict transactions in the Account as we deem advisable, in our sole discretion. The estate of any deceased joint owner shall be liable and each survivor will be liable, jointly and severally, to us for any debt or loss in the Account resulting from the completion of transactions initiated prior to our receipt of a written notice of death, or for debt or loss incurred in the liquidation of the Account or the adjustment of the interests of the joint owners.

Any taxes or other expense becoming a lien against or being payable out of the Account subsequent to the death of any of the joint owners shall be chargeable against the interest of the surviving joint owner(s) as well as against the interest of the deceased joint owner's estate.

Custodial accounts are created for the benefit of a minor, with an adult that manages the account. Assets that are held in a custodian account are considered to be an irrevocable gift and become property of the minor. Depending on state residency, minors may be governed by the Uniform Transfer to Minors Act ("UTMA") or by the Uniform Gifts to Minor Act ("UGMA"). The age of custodianship termination varies by state, although many states set the maximum age for termination at 21. If you do not indicate governing state law of the minor, the account will be set up using the Custodian's state of residence and that state's default age of custodianship termination (either 18 or 21). Because important tax and legal issues may be involved, we suggest consulting a tax or legal adviser before opening this type of account to determine what would be best for your individual situation.

14. No Advice Online

You understand that we, through our web site, provide no tax, legal or investment advice of any kind, nor do we give advice or offer any opinion with respect to the nature, potential value or suitability of any particular securities transaction or investment strategy. You further understand that while you may be able to access investment research reports through the Internet from our web site, including computerized online services, the availability of such information does not constitute a recommendation to buy or sell any of the securities discussed therein or to engage in any of the investment or trading strategies presented therein. Any investment decisions you make will be based

solely on your own evaluation of your financial circumstances and investment objectives and the suitability for you of any security or any investment or trading strategy.

15. Third Party Access

Your use or your grant of access to your account to any third party to access information or place transactions in your account is at your sole risk. If you authorize or allow third parties to gain access to our services, including your Accounts, you will cooperate in defending and indemnifying us against any liability, costs or damages arising out of claims or suits by such third parties based upon or relating to such access and use. optionsXpress does not warrant against loss of use or any direct, indirect or consequential damages or losses to you caused by your assent, expressed or implied, to a third party access to your account or information, including access provided through software communication "API" users, aggregators or any other third party systems or sites. Any requests or orders entered using your access shall be deemed a request or order by you or your duly authorized designee's.

16. Order Entry

You understand that all orders submitted or entered by you, either electronically or otherwise, are based upon your investment decisions, are unsolicited and are your sole responsibility, and you will not hold, nor seek to hold, optionsXpress or any of our officers, directors, employees, agents, subsidiaries or affiliates, liable for any trading losses or other losses incurred by you. You understand that entering an order with us, including market orders, either electronically or otherwise, does not guarantee execution of the order, and you agree that optionsXpress shall not be responsible for any order that is not executed. You understand that optionsXpress or any regulatory body, exchange or clearing agent, has the right to cancel or break any executed transaction on the grounds that it was, in our or their opinion, "clearly erroneous". We shall not be deemed to have received any order electronically transmitted by you until we have actual knowledge of such order. You understand that all electronic orders are only acceptable through order entry screens provided by us. All orders marked Good-until-Cancelled, or "GTC" are submitted to the marketplace as Day Orders, cancelled after the close, held on our systems overnight and resubmitted each new market day until filled or cancelled. In the event that you wish to place an order "GTC" with the marketplace directly you must contact us to place that order through a representative.

17. Cancellation Requests

When you place a request to cancel an order, the cancellation of that order is not guaranteed. Your order will only be canceled if your request is received in the marketplace and matched up with your order before your order is executed. During market hours, it is rarely possible to cancel your market order as market orders are subject to immediate execution. Do not assume that any order has been executed or cancelled until you have received a transaction confirmation from us via e-mail or the optionsXpress web site.

18. Late and Corrected Reports

From time to time we receive late reports from exchanges and market makers reporting the status of transactions. Accordingly, you may be subject to late reports related to orders that were previously unreported to you or reported to you as being expired, cancelled or executed. In addition, any reporting or posting errors, including errors in execution prices, will be corrected to reflect what actually occurred in the marketplace or exchange.

19. Transactions and Settlements

All orders for the purchase and sale of securities and other property will be authorized by you and executed with the understanding that an actual purchase or sale is intended and that it is your intention and obligation, in every case, to deliver certificates to cover any and all sales or to pay for transactions upon our demand. If we make a sale of any securities and/or other property at your direction, and if you fail to deliver to us any securities and/or other property that we have sold at your direction, we are authorized to borrow or otherwise obtain the securities and other property necessary to enable us to make delivery, and you agree to be responsible for any cost or loss we may incur, including the cost of borrowing and obtaining the securities and other property. You agree that optionsXpress acts as your agent to complete all such transactions and is authorized to make advances and expend monies as required.

20. Execution of Orders

Though orders are usually routed to the marketplace or exchange within seconds, certain orders, at our sole discretion, may be subject to manual review and entry, which may cause delays in the processing of your orders. You also understand that with respect to any order, you will receive the price at which your order was actually executed in the marketplace or exchange, which may be different from the price at which the security or option is trading when your order is entered into our system. Consistent with the overriding principle of best execution and subject to applicable regulatory requirements, you agree that we may use our discretion in selecting the market or exchange in which to enter your orders.

21. Purchases of Securities

Cash transactions must be paid for in full, and any securities sold must be available for delivery by settlement date or we may, as required by law or in our discretion, delay settlement or cancel or otherwise liquidate transactions without prior notice. Day Trading, as defined by regulation, is not permitted in "cash accounts" unless the aggregate cash required to pay for all purchases is available, not including the sales proceeds from the day-traded shares.

22. Excess Purchases

To process orders to purchase securities we generally require that your Account contain buying power equal to or greater than the purchase price of the securities prior to trade date. However, you may not rely on our software controls and you have an obligation to refrain from, cancel and immediately report any transaction that provides evidence of an over-purchase or excess equity requirement. Any order accepted and executed without sufficient funds in the Account will be subject to cancellation or liquidation at our discretion. You are responsible for review of your orders, including any orders which exceed available funds in your Account. If full funds are not available in the Account and an order is processed, you must contact us and arrange to provide prompt payment via wire or personal check, cashier's check or money order. If payment is not received by settlement date, or as market conditions warrant, positions may be liquidated according to procedures contained elsewhere herein, and you will remain liable for any resulting losses and all associated costs incurred by us.

23. Sales of Securities - Long and Short Sales

We require that securities be deposited into an Account and in good deliverable form prior to the acceptance of a long sale order. Any sell order will be deemed a long sale unless, at the time the order was entered, you expressly request and receive permission from optionsXpress to place the order as a short sale. In order to complete a short sale, we must be able to borrow the security you sold and did not own. In the event that we are unable to borrow the security you have sold short, you will be subject to a buy-in of the security for your Account without prior notice and at your expense. You understand that although you may receive confirmation of a "locate" in order to sell short, you remain subject to buy-in at any time in the event that the shares become no longer available for borrowing or loan.

24. Confirmations, Statements, Notices and Other Communications

You acknowledge that optionsXpress delivers both binding and non-binding Communications to you regarding your account. optionsXpress uses its best efforts to identify each Communication as either binding (also described as official notices) or non-binding (often "real-time" or online account information). Despite the nature or method of conveying this information, you are responsible for promptly reporting any discrepancies. You understand that optionsXpress delivers real-time information about the status of your orders by email along with providing online ledgers and order status information which are non-binding upon optionsXpress, it agents and assigns; and that such information may be changed based on market corrections and resolution of discrepancies among other factors.

25. Information Review

You understand that it is your responsibility to review, upon first receipt, whether delivered to you by U.S. postal mail, orally, by email, or electronically, all confirmations, statements, notices and other binding and non-binding communications, including but not limited to, margin and maintenance calls, and prospectuses ("Communications"). You agree that Communications sent to you by mail or electronically or left for you on your voicemail, or otherwise, shall be deemed to have been delivered to you when sent, whether actually received by you or not. All information contained therein shall be binding upon you, if you do not object, either in writing or via electronic mail, within forty-eight (48) hours after any Communication has been delivered to you. In all cases, we reserve the right to determine the validity of your objection to the transaction.

26. Payment for Order Flow

The Securities and Exchange Commission (the "SEC") and the Financial Industry Regulatory Authority("FINRA") require that all broker/dealers inform their customers, when a new Account is opened, on an annual basis thereafter, and on confirmations of transactions, of payment for order flow practices (compensation received for placing orders through certain "market makers" and specialists on registered U.S. exchanges). Consistent with the requirement to seek best execution, orders placed through us will be routed to primary exchanges and other market centers, including regional securities exchanges, dealers that make markets over-the-counter ("OTC"), Alternative Trading Systems and Electronic Communication Networks ("ECNs"). In an effort to obtain best execution, we may consider several factors, including price improvement opportunities (executions at prices superior to the then prevailing inside market on OTC or national best bid or offer for listed securities), whether we will receive cash or non-cash payments for routing order flow and reciprocal business arrangements. Further information about the source and nature of the compensation for a particular transaction will be provided upon written request.

27. Customer's Responsibility Regarding Certain Securities

Certain securities may grant the holder thereof valuable rights that may expire unless the holder takes action. These securities include, but are not limited to, options, warrants, stock purchase rights, convertible securities, bonds and securities subject to a tender or exchange offer. You are responsible for knowing the rights and terms of all securities in your Account. We are not obligated to notify you of any upcoming expiration or redemption dates, or to take any other action on your behalf, without specific instructions from you, except as required by law and applicable rules of regulatory authorities. However, if any such security is about to expire worthless or be redeemed for significantly less than its fair market value, and we have not received instructions from you, we may, at our discretion, sell (or transact in) the security and credit your Account with the proceeds.

Similarly, you are responsible for knowing about reorganizations related to securities which you hold, including, but not limited to, stock splits and reverse stock splits. We are not obligated to notify you of any such reorganization. If, due to a reorganization or bookkeeping or data entry error, you sell more shares of a security than you own, or if you become uncovered on an options position, or if you become otherwise exposed to risk requiring us to take market action in your Account, we will not be responsible for any losses you may incur. Overselling is an "unauthorized" and "prohibited" short sale and may result in your Account being restricted.

28. "Control" or "Restricted" Securities

Prior to depositing or placing an order in connection with the sale or transfer of any securities subject to Rules 144 or 145 under the Securities Act of 1933, as amended, you must advise optionsXpress of the status of the securities, receive our express permission for such transaction, and you must furnish us with the necessary documents including applicable opinions of legal counsel to clear legal transfer. Even if the necessary documents are furnished in a timely manner, there may be delays with the processing of such securities. We, at our sole discretion, may require that such securities not be sold or transferred until they clear legal transfer. You are responsible for all costs associated with compliance or failure to comply with all the requirements of Rules 144 and 145 including any fees associated with the administration, processing or negotiation of such securities by us or any agent. You acknowledge unless you disclose the status of securities as control or restricted, you are representing and warranting that the securities are negotiable.

29. Lost Securities

If your periodic statement indicates that securities were forwarded to you and you have not received them, you should notify us immediately.

30. Fees and Charges

You understand that we may charge commissions and other fees for execution or any other transaction or service furnished to you, and you agree to promptly pay such commissions and fees at our then prevailing price or rates. You acknowledge and agree that such commission rates and fees are determined and set solely by us and are subject to change at any time by posting such notice on our web site, and you agree to be bound thereby. You also agree to pay any applicable exchange and ECN fees, including the CBOE Options Regulatory Fee. You further agree to pay all applicable federal, state and local fees and taxes.

31. Margin Requirements and Margin Interest Charges

You agree that you will maintain such securities and other property in your Account as collateral as required by all applicable statutes, rules, regulations and procedures or as we in our sole discretion deem necessary or advisable. You agree to promptly satisfy all margin and maintenance calls upon demand. You understand that the interest charge made to your Account at the close of a charge period will, unless paid, be added to the opening balance for the next charge period and that interest will be charged upon such opening balance, including all interest so added. You understand that the rate of interest charged to your Account is based on the Broker Call Money Rate plus a percentage. You are always welcome to check the interest rate with customer service. We reserve the right to negotiate the interest rate for credit extended. Interest charges are calculated on the daily net debit balance in your Account based upon a sliding scale of percentage above and below the Broker Call Money Rate. Interest will be posted monthly to your Account and is calculated on a 360-day year. Interest charged can be verified by using the following formula as noted below:

[Average debit balance] x [interest rate] x
[number of days Account was in a debit for the interest period] /
divided by [360 days]

32. Consent to Loan or Pledge of Securities in Margin Accounts

Within the limits of applicable law and regulations, you hereby authorize optionsXpress to lend, either to us or to others, any securities held by optionsXpress for your Account, together with all rights of ownership, and to use all such property as collateral for our general loans. Any such property, together with all attendant rights of ownership, may be pledged, repledged, hypothecated or rehypothecated either separately or in common with other such property for any amounts due to us thereon or for greater sum, and we shall have no obligation to retain a like amount of similar property in our possession and control. In connection with such securities loans, we may receive and retain certain benefits to which you will not be entitled. You understand that, in certain circumstances, such loans could limit your ability to exercise voting rights, in whole or part, with respect to the securities lent.

33. Calls for Additional Collateral and Liquidation

If we, at our sole discretion, consider it necessary for our own protection, we may require you to immediately deposit cash or collateral into your Account. If you do not provide the additional collateral, you understand and acknowledge that we have the right to sell any or all securities and other property in your Account; buy any or all securities and other property which may be short in your Account; cancel any or all open orders; and/or close any or all outstanding contracts.

34. Liquidation without Prior Notice

In addition, you understand and agree that we may exercise any or all of the above rights without demand for additional collateral, or notice of sale or purchase, or other prior notice or advertisement. Any such sales or purchases may be made at any time at our discretion on any exchange or other market where such business is usually transacted, or at public auction or private sale, or we may be the purchaser/seller for our own Account. It is understood that our giving of any prior demand or call or prior notice of the time and place of such sale or purchase shall not be considered as a waiver of our legal right to sell or buy without any such demand, call or notice, nor are we bound by such prior demand or notice to forestall action to buy or sell.

35. Free Credit Balances

You hereby direct optionsXpress and/or our agents to use any free credit balance awaiting investment or reinvestment in your Account in accordance with all applicable rules and regulations and to pay interest thereon at such rate or rates and under such conditions as are established by us from time to time.

36. Market Data

You understand that each participating national securities exchange or association asserts a proprietary interest in all of the market data it furnishes to parties that disseminate said data. You understand that neither optionsXpress nor

any participating national securities exchange or association nor any supplier of market data guarantees the timeliness, sequence, accuracy, completeness, reliability or content of market information, or messages disseminated to or by any party. You understand that neither optionsXpress nor any participating national securities exchange or association nor any supplier of market data warrants that the service will be uninterrupted or error-free. You agree that your use of our web site or any optionsXpress service is at your sole risk. **The optionsXpress service is provided on an "as is", "as available" basis without warranties of any kind, either express or implied, including, without limitation, those of merchantability and fitness for a particular purpose, other than those warranties which are implied by and incapable of exclusion, restriction or modification under the laws applicable to this agreement.**

37. Exchange Provided Terms (OPRA)

You acknowledge and agree that neither the OPRA Participants ("Participants" and/or "Exchanges") nor the processor under the OPRA Plan (the "Disseminating Parties" and/or "optionsXpress") guarantee the timeliness, sequence, accuracy or completeness of Market Data or of other market information or messages disseminated by any Disseminating Party.

A. Waiver of Liability

You understand and acknowledge that each national securities exchange that is a participant in the OPRA Plan ("OPRA Participant") has a proprietary interest in the Market Data that originates on derives from it or its markets. For the purposes of this Section only, "Market Data" means (a) options last sale reports, (b) options quotation information, (c) such index and other market information as the OPRA participants may from time to time make available, and (d) all information that derives from any such information. Neither you nor any other person shall hold any Disseminating Party liable in any way for (a) any inaccuracy , error or delay in, or omission from, (i) any such data, information or message or (ii) the transmission or deliver of any such data, information or message, or (b) any loss or damage arising from or occasioned by (i) any such inaccuracy, error, delay or omission, (ii) non-performance or (iii) interruption in any such data, information or message, whether due to any negligent act or omission by any Disseminating Party, or to any "force majeure" (e.g., flood, extraordinary weather conditions, earthquake or other act of God, fire, war, insurrection, riot, labor dispute, accident, action of government, communications or power failure, equipment or software malfunction) or other cause beyond the reasonable control of any Disseminating Party.

B. No Right to Re-disseminate

You shall use real-time quotes only for your individual use and shall not furnish such data to any other person or entity. You understand and agree that you shall use Market Data only for your own personal or business use, and shall not furnish Market Data to any other person. You further understand and agree that, at any time, the OPRA Participants may discontinue disseminating any category of Market Data, may change or eliminate any transmission method and may change transmission speeds or other signal characteristics. You shall not hold the OPRA Participants liable for any resulting liability, loss or damage that may consequently arise. You understand and acknowledge that this Section confers third-party beneficiary status on optionsXpress. In authorizing us to take any action, or to receive any communication, this Section authorizes us to act on our own behalf and on behalf of the OPRA Participants.

C. Enforceability of OPRA Rights

You understand that the terms of this Agreement may be enforced directly against you by the national securities exchanges, associations and others providing market data. Any OPRA Participant may enforce this Section as to Market Data that originates on or derives from its markets, by legal proceeding or otherwise, against you and may likewise proceed against any person that obtains such Market Data other than as this Section contemplates. No act or omission on our part and no other defense that might defeat our recovery against you shall affect the rights of the Disseminating Parties as third-party beneficiaries under this Section. You shall pay reasonable attorneys' fees that any Disseminating Party incurs in enforcing this Section against you.

D. Perpetuity to this Clause

This specific Section shall remain in effect for so long as you have the ability to receive Market Data as contemplated by this Agreement and all terms relating to limitation of liability shall survive the termination of this Agreement.

E. Limitation of Liability, Force Majeure

Neither we nor any disseminating party shall be liable, and you agree to indemnify and hold harmless optionsXpress and such disseminating party, for any inaccuracy, error or delay in, or omission of, (1) any such data, information or message, or (2) the transmission or delivery of any such data, information or message; or any loss or damage arising from or occasioned by (i) any such inaccuracy, error, delay or omission, (ii) non-performance, or (iii) interruption in any such data, information or message, due either to any act or omission by optionsXpress or any Disseminating Party or to any "force majeure" (as defined above) or any other cause beyond the reasonable control of optionsXpress or any Disseminating Party.

38. Disclosure of Affiliated Persons

You represent that, except for your notification of such status in writing, neither you nor any member of your immediate family are an employee of any exchange, any corporation of which any exchange owns a majority of the capital stock, a member of any exchange or self regulatory agency, a member of any firm or member corporation registered on any exchange, a bank, trust company, insurance company or any corporation, firm or individual engaged in the business of dealing either as broker or as principal in securities, bills of exchange, acceptances or other forms of commercial paper. You understand and agree that you will promptly notify us in writing if you or a member of your immediate family become so employed or become registered or employed in any of the above capacities.

39. Disclosure by Professionals and Insiders

You agree to promptly notify us in writing if you are now or if you become: (a) registered or qualified with the FINRA or the SEC, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (b) an "investment advisor" as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that act); or (c) employed by a bank or other organization exempt from registration under federal and state securities laws to perform functions that would require you to be so registered or qualified if you were to perform such functions for an organization not so exempt; (d) an officer , director or 10% stockholder of any publicly traded company.

40. Disclosures to Issuers

Under Rule 14b-1(c) promulgated under the Securities Exchange Act of 1934, as amended, optionsXpress is required to disclose to an issuer the name, address, and position of its customers who are beneficial owners of that issuer's securities unless you object. If you do not notify us of such objection in writing, we will make such disclosures to issuers.

41. Impartial Lottery Allocation System

You agree that in the event we hold securities on your behalf which are callable, either in whole or in part, you will participate in the impartial lottery allocation system of the called securities in accordance with the provisions of the rules of the CBOE, FINRA or any other appropriate self-regulatory body. You understand that when any such call is favorable, no allocation will be made to any Account in which optionsXpress has actual knowledge that our affiliates, directors, officers or employees have a financial interest until all other customers are satisfied on an impartial lottery basis.

42. Limitation of Access

You acknowledge, represent and warrant that you have received a password which provides access to your Account and that you are the sole and exclusive owner and are the only authorized user of such password and accept sole responsibility for use, confidentiality and protection of the password as well as for all orders, requests and information changes (i.e., change of address) entered into your Account using such password.

You accept full responsibility for the monitoring and safeguarding of your Accounts and access to your accounts. You will immediately notify us in writing, delivered via e-mail and certified/return receipt requested U.S. Mail, if you become aware of: (i) any loss, theft or unauthorized use of your password, Account number, or access; (ii) any failure

by you to receive a message from us indicating that an order was received and executed; (iii) any failure by you to receive an accurate written confirmation of an execution; (iv) any receipt by you of confirmation of an order and/or execution which you did not place; or (v) any inaccurate information in or relating to your Account balances, deposits, withdrawals, securities positions, or transaction history.

If you fail to notify us immediately upon your knowledge, actual or constructive, when any of the above conditions or other disclosure of access details occurs, neither we nor any of its officers, directors, employees, agents, affiliates or subsidiaries can or will have any responsibility or liability to you or to any other person whose claim may arise through you for any claims with respect to the handling, mishandling or loss of any order, including by way of example, but not limitation, orders to execute, transfer or withdrawal. Under no circumstances, including negligence, shall we or anyone involved in creating, producing, delivering or managing our services be liable for any direct, indirect, incidental, special or consequential damages that result from the use of or inability to use the service, or out of any breach of any warranty. This exclusion or limitation of liability will not apply to the extent that any applicable statute prohibits such exclusion or limitation of liability. To the extent that any applicable statute applies which modifies the above, our liability shall not include any hypothetical gains or losses, and it is agreed that the trier of fact shall only consider the actual acts, or lack thereof, of the parties to this agreement.

The use and storage of any information including, without limitation, the password, portfolio information, transaction activity, Account balances and any other information or orders available on your personal computer is at your own risk and is your sole responsibility. You are responsible for providing and maintaining the communications equipment (including personal computers, firewalls, anti-virus software and other software, and modems) and telephone or alternative services required for accessing and using the web site or related services, and for all communications service fees and charges incurred by you in accessing our web site or related services.

43. Limitations, Restrictions and Termination of Services

You are authorized to use materials which are made available by optionsXpress for your own needs only, and you are not authorized to resell access to any such materials or to make copies of any such materials for sale or use to and by others without the written permission of a duly authorized officer of optionsXpress. You will not delete copyright or other intellectual property rights notices from printouts of electronically accessed materials.

44. Liability for Costs of Collection and Arbitration

You agree to pay and shall be liable for the costs and expenses of collection of a debit balance or any unpaid deficiency in your Account with us, including, but not limited to, attorney's fees, court costs and any other costs incurred or paid by us. This liability shall include fees and expenses, including attorney's fees, for any arbitration brought or other proceeding against you by us or brought against us by you where such arbitration results in a finding in our favor. You agree that we may, in our sole discretion, use and share any information about you, whether provided by you to us or otherwise acquired by us in the course of business, in furtherance of collection of losses or debts owed to us or in prevention of future losses.

45. Investor Education and Protection

Under the Public Disclosure Program, the FINRA provides certain information regarding the disciplinary history of FINRA members and their associated persons in response to written inquiries, electronic inquiries or telephone inquiries via FINRA Regulation's toll-free telephone number, 1-800-289-9999. Additional information may be obtained from the FINRA Regulation web site at http://www.finra.org/index.htm. An investor brochure describing the Public Disclosure Program is available from optionsXpress.

46. Arbitration Provisions

You understand and agree to the following:

Arbitration is final and binding on the parties.

The parties are waiving their right to seek remedies in court, including the right to a jury trial.

Pre-arbitration discovery is generally more limited than and different from court proceedings.

The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or seek modification of rulings by the arbitrators is strictly limited.

The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

Agreement to Arbitrate Controversies:

You agree that any and all controversies which may arise between you and optionsXpress or any of our officers, directors, employees, agents, subsidiaries or affiliates including but not limited to those involving transactions of any kind made on your behalf by, through or with optionsXpress, our officers, directors, employees, agents, subsidiaries or affiliates and the construction, performance or breach of this or any other agreement between you and us shall be determined by arbitration conducted before the FINRA in accordance with its arbitration rules then in force. You specifically agree to arbitrate all such controversies before the FINRA in Chicago, Illinois.

You consent to jurisdiction by the FINRA where any claim is initiated by us and against you. Judgment upon any award of the arbitrators may be entered in any court, state or federal, having jurisdiction thereof. No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

If you are a foreign national, non-resident alien, or if you do not reside in the United States, you affirmatively agree to waive your right to file an action against us in any foreign venue other than with the FINRA as set forth above. The laws of the State of Illinois, including, but not limited to the Illinois Arbitration Act, will govern the interpretation and enforcement of the terms of this Agreement and any and all controversies which may arise between you and optionsXpress or any of our officers, directors, employees, agents, subsidiaries or affiliates including but not limited to those involving transactions of any kind made on your behalf by, through or with optionsXpress, our officers, directors, employees, agents, subsidiaries or affiliates, and you further consent to the jurisdiction of the State of Illinois over you individually and your successors (whether by merger, consolidation or otherwise), heirs, executors, administrators, and assigns.

47. Account Protection

Securities are held by the Clearing Agent who is a member of the Securities Investor Protection Corporation (SIPC). Cash and securities held in your Account are protected by SIPC up to $500,000 per customer, of which, a maximum of $100,000 can be un-invested cash. Assets held by other custodial institutions or you are not covered. The Clearing Agent maintains an additional protection in excess of the SIPC insurance coverage through a private insurer. Assets held by other custodial institutions or by you are not covered.

SIPC coverage and the additional coverage are provided to afford certain protections against loss to customers resulting from broker-dealer failure. The Account protection applies when SIPC member firms fail financially and are unable to meet obligations to securities customers. It neither protects against losses from the rise and fall in the market value of investment(s) nor is it a guarantee against the bankruptcy or default of the issuer of an investment security purchased by a customer.

48. Monitoring and Recording Telephone Conversations and E-mail, Credit Investigation

For our mutual protection and as a tool to correct misunderstandings, you understand, agree and authorize us, at our discretion, and without further prior notice to you, to monitor and record any or all telephone conversations between you and us and between you and any of our employees or agents and to monitor electronic communications conducted by you or your Account with us. You authorize us, at our discretion, to make and obtain reports concerning your identity, credit standing, legal and/or business conduct.

49. Representation as to Capacity and Access

You represent that you are of required legal age and capacity to enter into this Agreement and that you have the legal standing and are empowered to enter into contracts and agreements for the transactions requested and performed in this account. You understand that you have an obligation to notify us in the event that you lack capacity. You further represent that you are willing, able and agree to access and use current technology, including the internet, firewalls and any anti-virus or other software to access your account online, receive information, receive and send email, and place any necessary transactions in your account; and that you possess a computer and/or otherwise have access to the internet on a regular basis.

50. Legally Binding

You hereby agree that this agreement and all the terms herein shall be binding upon you and your estate, heirs, executors, administrators, personal representatives, successors and assigns. You agree that all purchases and sales shall be for your Account in accordance with your oral or written instructions. This Agreement shall inure to the benefit of us and our successors, assigns and agents. We may assign our rights and duties under this Agreement to any of our subsidiaries or affiliates without giving you notice, or to any other entity upon prior written notice to you. You hereby waive any and all defenses that any such instruction or agreement was not in writing as may be required by the Statute of Frauds or any other similar law, rule or regulation.

51. Extraordinary Events/Technical Difficulties

You specifically agree to hold us harmless from any and all claims, and agree that we shall not be liable for any loss, actual or perceived, caused directly or indirectly by any force majeure, exchange or market regulation, suspension of trading, equipment failure, communication line failure, system failure, security failure on the Internet, unauthorized access, theft, or any problem, technological or otherwise, that might prevent you from entering or optionsXpress from executing an order, including by way of example, but not limitation, order to execute, transfer or withdrawal, or other conditions beyond our reasonable control.

You further agree and understand that you will not be compensated by us for "lost opportunity," e.g., you were unable to enter an order due to technical difficulties and the security you wished to purchase increased in value. Furthermore, in a technical environment, should an error occur with respect to the tracking of any Account holding or order entry, the true, actual and correct transaction or position may be restored. It is your responsibility to ensure Account correctness and accuracy and to contact optionsXpress immediately with any discrepancies.

High volumes of trading and volatility may result in executions at prices significantly away from the price quoted or displayed at the time of order entry. Information processing and communications systems, both our own and those of third parties on whom we depend are subject to occasional congestion, technological problems, or in extreme cases, outage. Beyond our proprietary systems, third party providers include market centers that execute orders and quote vendors. Failure of a critical system for any period of time could limit our ability to rapidly and accurately process transactions.

52. Breach, Bankruptcy or Default

Any breach of this Agreement, or the filing of a petition or other proceeding in bankruptcy, insolvency, or for the appointment of a receiver by or against you, the levy of an attachment against your Account(s) with us, or your death, mental incompetence or dissolution, or any other grounds for insecurity, as determined by us in our sole discretion, shall constitute, a default by you under all agreements we may then have with you, whether heretofore or hereafter entered into.

In the event of default, you authorize us and we reserve the right to sell, without prior notice to you, any and all property in which you have an interest, held by or through us or any of our affiliates, to buy in any or all property which may have been sold short, to cancel any or all outstanding transactions and to purchase or sell any other securities or property to offset market risk, and to offset any indebtedness you may have (either individually or jointly with others), after which you shall be liable to us for any remaining deficiency, loss, costs or expenses sustained by us in connection therewith. Such purchases and sales may be effected publicly or privately without notice or advertisement in such manner as we may in our sole discretion determine. At any such sale or purchase, we may purchase or sell the property free of any right of redemption. In addition, we shall have the right to set off and apply

any amount owing from us or any of our affiliates to you against any indebtedness in your Accounts, whether matured or not matured.

53. Waiver/Assignment

Except as specifically permitted in this Agreement, no provision or condition of this Agreement can be, nor should be deemed to be, waived, altered, modified or amended unless agreed to in writing by an authorized officer of optionsXpress. Neither our failure to insist at any time upon strict compliance with this Agreement or with any of the terms herein, nor any continued course of such conduct on our part shall constitute or be considered a waiver by us of any of our rights or privileges herein.

54. Severability

If any provision or condition of this Agreement shall be held to be invalid or unenforceable by reason of any law, rule, administrative order or judicial decision by any court, or regulatory or self-regulatory agency or body, such invalidity or unenforceability shall attach only to such provision or condition. The validity of the remaining provisions and conditions shall not be affected thereby and this Agreement shall be carried out as if any such invalid or unenforceable provision or condition were not contained herein.

55. Version

OX Account Terms and Conditions (OXATAC0906).

Appendix A - Margin Account Terms

In consideration of your opening one or more Margin Accounts with optionsXpress you understand and agree to the following additional terms and conditions:

1. Liquidation of Collateral

We may sell any or all property held in any of your accounts and cancel any open orders for the purchase or sale of any property without notice whenever, in our discretion, we consider it necessary for our protection. In such event we may also borrow or buy in all property required to make delivery against any sale, including a short sale. Such sale or purchase may be made in such manner as we in our discretion determine. No demands, calls, tenders or notices which we may make or give in any of one or more instances shall invalidate the foregoing waiver on our part. At any such sale we may purchase the property free of any right of redemption and you shall be liable for any deficiencies in your account.

2. Disclosures Regarding Liquidations and Covering Positions

You clearly understand that, notwithstanding a general policy of giving customers notice of a margin deficiency, we are not obligated to request additional margin from you in the event your account falls below minimum maintenance requirements. More importantly, there may or will be circumstances where we will liquidate securities and/or other property in the account without notice to you to ensure that minimum maintenance requirements are satisfied.

3. Liquidations and Covering Positions

We shall have the right, in accordance with our general policies regarding margin maintenance requirements, to require additional collateral or the liquidation of any securities and other property whenever in our discretion we consider it necessary for our protection, including in the event of, but not limited to: the failure of yours to promptly meet any call for additional collateral; the filing of a petition in bankruptcy by or against you; the appointment of a receiver is filed for or against you; an attachment is levied against any account of yours or in which you have an interest in such account(s); or your death. In such event we are authorized to sell any and all securities and other property in any account of yours whether carried individually or jointly with others, to buy all securities or other property which may be short in such account(s), to cancel any open orders and to close any or all outstanding contracts, all without demand for margin or additional margin, other notice of sale or purchase, or other notice or

advertisement each of which is expressly waived by you. Any such sales or purchases may be made at our discretion on any exchange or other market where such business is usually transacted or at public auction or private sale and we may be the purchaser for our own account. It is understood a prior demand, or call, or prior notice of the time and place of such sale or purchase shall not be considered a waiver of our right to sell or buy without demand or notice as herein provided.

4. Loans

We may, at our discretion, make loans to you for any purpose, including the purchasing, carrying or trading in securities. The minimum and maximum amount of any particular loan may be established by us regardless of the amount of collateral delivered to us and we may change such minimum and maximum amounts from time to time.

You agree to maintain in all accounts with us such positions and margins as required by all applicable statutes, rules, regulations, procedures and customs, or as we deem necessary or advisable. You agree to promptly satisfy all margin and maintenance calls.

5. Payment of Loans on Demand

You agree to pay on demand any balance owing with respect to any of your accounts, including interest, commissions and any costs of collection (including attorney's fees). You understand we may demand full payment of any balance due in your accounts plus any interest charges accrued thereon, at our sole option, at any time without cause or whether or not such demand is made for our protection. You agree that we may, at our sole option, apply payments of interest, dividends, premium and principal received on any of the collateral, whether pursuant to the terms of such collateral or on the sale of the collateral, to the payment of any balance due in your accounts or pay such amounts to you.

6. Maintenance of Collateral

The properties in your account may be carried in our general loans and may be pledged or hypothecated by us separately or in common with other properties. The pledge or hypothecation by us may secure our indebtedness equal to or greater than the amount owed to us by you. You agree to deposit additional collateral, as we may in our discretion require from time to time in the form of cash or securities. In the event you no longer retain a debit balance or an indebtedness to us it is understood that we will fully segregate all securities in your accounts in our safekeeping or control (directly or through a clearing house) and/or deliver them to you upon your request.

7. Security Interest

As security for the payment of all loans and liabilities made under this or any other agreement between us, and to the extent permissible by law and regulation, you grant us a secured interest in any and all property belonging to you or in which you have an interest, held by us or created in any of your accounts (individual or multiple owner). All properties shall be subject to such security interest as collateral for the discharge of your obligations to us, wherever or however arising and without regard to whether or not you have made loans with respect to such property. In enforcing such security interest we shall have discretion to determine which property is to be sold, the order in which it is to be sold, and shall have all the rights and remedies available to a secured party under the Illinois Uniform Commercial Code.

8. Interest Charges and Payments

You agree to pay interest upon all amounts advanced and other balances due in your accounts in accordance with our usual custom, which may include the compounding of interest. Our customs, which may change from time to time, will be set forth in the disclosure of credit terms, which is incorporated herein. By entering into any transactions with you after we receive the disclosure of credit terms, you acknowledge you have read and agreed to the disclosure of credit terms for all past and future transactions in your account. We may, in our discretion, not deem any check, or other remittance, to constitute payment until it has been paid by the drawee and the funds representing such payments have become available to us.

9. Disclosure of Credit Terms in Margin Transactions

The basic facts governing a margin account cleared by optionsXpress are as follows:

A. Your account will be charged interest for any credit extended to you for the purpose of purchasing, carrying, or trading in any security.

B. Annual rate of interest which your account will be charged:

You will be charged interest on the daily amount of credit extended to you (your margin balance). Your interest rate at all times, regardless of the amount of your margin balance, will be a percentage above the current Base Rate. The Base Rate is an internally calculated rate set with reference to commercially recognized interest rates, industry conditions related to the extension of credit and general credit market conditions. Your rate of interest will change automatically and without prior notice with changes in the Base Rate. The interest charge will appear on your account statement. You may contact us, or your Registered Representative if applicable, to check the current Base Rate. We reserve the right negotiate the interest rate for credit extended to any customer and/or charge different categories of customers different rates. We will provide you at least 30 days' prior written notice of changes in the interest rate, other than the Base Rate.

C. Calculation of interest

Interest is accrued on the amount of credit extended to you on a daily basis. If you maintain a cash account with a free credit balance and a margin account balance, the free credit balance in your cash account will be used to reduce the amount of credit extended you in your margin account for the purpose of calculating interest. The effect will be an interest charge on the net amount of your indebtedness.

D. Liens and additional collateral

Any securities in any of your accounts held individually, jointly or with others, are collateral for any credit extended to you. A lien is created by the extension of credit to secure the amount of money owed to us. This means that in accordance with the terms of the Customer's Agreement, securities in your account can be sold to reduce or to eliminate any extension of credit in your account.

If there is a decline in the market value of your securities which are the collateral for the credit extended to you, it may be necessary for us to request additional margin. Ordinarily, a request for additional margin will be made when the equity in the account falls below 30 percent of the market value of all securities in the account. (The equity is the excess market value of the securities in the account over the amount of credit extended). However, we retain the right in our sole discretion, to require additional margin. These margin calls can be met by delivery of either additional securities or cash.

E. Interest on short sales

Any and all short positions in your account will be kept "marked-to-the-market". This term simply means that on a daily basis the value of securities you sold short will be adjusted to reflect their current market value. These adjustments will increase or decrease the balance used in determining your interest charge. For example, if you sold short 100 XYZ for $5,000 (credit) and its current market value is $4,000, the balance used to determine your interest charge would be reduced by $1,000 thus decreasing the amount of interest you will be charged. If on the other hand, the current market value of XYZ is $6,000, the balance used to determine your interest charge would be increased by $1,000 thus increasing the amount of interest you will be charged.

F. Nature of special charges

There are no special charges imposed on a margin account.

10. Margin Account Additional Notices (FINRA Disclosure)

optionsXpress is providing these basic facts about purchasing securities on margin, and to alert you to the serious risks involved with trading securities in a margin account. Before trading stocks in a margin account, you should carefully review the margin agreement provided by optionsXpress.

When you purchase securities, you may pay for the securities in full or you may borrow part of the purchase price from optionsXpress. If you choose to borrow funds from optionsXpress, you will open a margin account. The securities purchased are the firm's collateral for the loan to you. If the securities in your account decline in value, so does the value of the collateral supporting your loan, and, as a result, optionsXpress can take action, such as issue a margin call and/or sell securities in your account, in order to maintain the required equity in the account.

It is important that you fully understand the risks involved in trading securities on margin. These risks include the following:

A. You can lose more funds than you deposit in the margin account.

A decline in the value of securities that are purchased on margin may require you to provide additional funds to optionsXpress (who has made the loan) to avoid the forced sale of those securities or other securities in your account.

B. optionsXpress can force the sale of securities in your account.

If the equity in your account falls below the maintenance margin requirements under the law, or the firm's higher "house" requirements, optionsXpress can sell the securities in your account to cover the margin deficiency. You also will be responsible for any shortfall in the account after such a sale.

C. optionsXpress can sell your securities without contacting you.

Some investors mistakenly believe that a firm must contact them for a margin call to be valid, and that the firm cannot liquidate securities in their accounts to meet the call unless the firm has contacted them first. This is not the case. Most firms will attempt to notify their customers of margin calls, but they are not required to do so. However, even if the firm has contacted a customer and provided a specific date by which the customer can meet a margin call, the firm can still take necessary steps to protect its financial interests, including immediately selling the securities without notice to the customer.

D. You are not entitled to choose which security in your margin account is liquidated or sold to meet a margin call.

Because the securities are collateral for the margin loan, optionsXpress has the right to decide which security to sell in order to protect its interests.

E. optionsXpress can increase its "house" maintenance margin requirements at any time and is not required to provide you with advance written notice.

These firms' changes in policy often take effect immediately and may result in the issuance of a maintenance margin call. Your failure to satisfy the call may cause the member to liquidate or sell securities in your account.

F. You are not entitled to an extension of time on a margin call.

While an extension of time to meet margin requirements may be available to customers under certain conditions, a customer does not have a right to the extension.

11. Version (OXMAT0906)

Appendix B - Options Account Terms

You hereby agree to the following terms and conditions which govern equity and index option trading:

1. You understand that options contain a high degree of risk and are often speculative in nature.

You acknowledge that, based on your investing experience and financial situation, you fully understand and are fully prepared financially to undertake such risks and withstand any losses incurred. You certify that we may rely on the information you furnished to us relative to your investing experience and financial condition. And further, you agree to promptly advise us, in writing, of any change in your financial condition or investment objectives that may affect, in any way, the suitability of your trading options.

2. You have received, read and understand "Characteristics and Risks of Standardized Options" delivered by optionsXpress as issued by the Options Clearing Corporation ("OCC").

You agree to that each option transaction is subject to the rules and regulation of the OCC, the exchange or market where such transaction is executed, the FINRA and various other state and federal regulatory entities. You understand that you must comply with all applicable duties and responsibilities.

3. You understand that due to the short-term nature of options it is likely that you will be trading options more frequently than stocks or bonds.

You understand and agree that you will be charged a commission each time you trade. You also understand that although a spread order may be entered on our order screen as one net debit/credit, you will be charged a commission on each leg of the order.

4. You understand that you bear full responsibility for taking action to exercise a valuable option.

You understand that the OCC, national securities and associations and/or marketplaces have established exercise cutoff times and your options will become worthless in the event you do not deliver instructions in a timely manner. You understand we will use our best efforts to exercise valuable options on your behalf provided that you have enough buying power to support the resulting position. In all instances, you agree to assume full and complete financial responsibility and liability for all exercise and/or assignments. You are responsible for understanding the consequence of expiration style and risks related to expiration. The writer of an American-style option is subject to being assigned an exercise at any time after he has written the option until the option expires. By contrast, the writer of a European-style option is subject to exercise assignment only during the exercise period.

5. You understand that optionsXpress uses a random method for the assignment of "OCC" exercise and assignment notices.

All short options positions, including a leg of a spread, are liable for assignment. The method for random assignment is available upon request by contacting optionsXpress.

6. You hereby agree to observe all Exchange established position limits and will not purposely on your own or in concert with others violate such limits.

You expressly authorize us to liquidate or close-out any of your options positions, without notice to you and without your consent, in our sole and absolute discretion, if and when your open positions exceed applicable position limits so as to reduce such open positions to a level that is in compliance with such limits. You will bear and be solely responsible for any losses associated with such a reduction or liquidation. You also acknowledge and agree that under applicable rules and regulations we may be required to provide options exchanges, markets or clearing organizations with information concerning your options positions and related data.

7. Special notice to owners of "long" fully paid-for options.

You MUST have the necessary assets to meet Regulation T for the exercise of fully paid-for in the money options in order to exercise the position, or we, at our discretion, may close out your position prior to the close of business on

the last day before exercise. Regulation T requires a margin Account to be open with at least 50% of the new purchase or exercise in cash or good marginable assets.

You understand that it is your responsibility to manage your positions. The above provision is a right of optionsXpress to protect itself from undue risk and NOT a benefit you may rely on to excuse your obligation to manage your Account prudently. Over-leveraged Accounts are subject to this provision, and may be liquidated in order to protect optionsXpress. Over-leveraged is defined as any Account below 40% equity.

8. Special Statement For Uncovered Options Writers.

There are special risks associated with uncovered option writing, which expose the investor to potentially significant loss. Therefore, this type of strategy may not be suitable for all customers approved for options transactions.

The potential loss of uncovered call writing is unlimited. The writer of an uncovered call is in an extremely risky position, and may incur large losses if the value of the underlying instrument increases above the exercise price.

As with writing uncovered calls, the risk of writing uncovered put options bears a risk of loss if the value of the underlying instrument declines below the exercise price. Such loss could be substantial if there is a significant decline in the value of the underlying instrument.

Leverage minimums on uncovered options may be exceeded by volatile market movements, creating risk in excess of available collateral. This may create a loss of assets beyond account value.

Uncovered options writing is suitable only for a knowledgeable investor who understands the risks, and has the financial capacity and willingness to incur potentially substantial losses, and has sufficient liquid assets to meet applicable margin requirements. If the value of the underlying instrument moves against an uncovered writer's option position, we may request significant additional margin payments. If an investor fails to make such margin payments, optionsXpress may liquidate stock or options in the investor's Account, with little or no prior notice in accordance with the investor's margin agreement.

For combination writing, where the investor writes both puts and calls on the same underlying instrument, the potential risk is unlimited.

It is expected that you have read and understood "Characteristics and Risks of Standardized Options" and your attention is directed to the chapter entitled Risk of Buying and Writing Options. This statement is not intended to enumerate all of the risks entailed in writing uncovered options.

9. Special Statement for Combination and Spread Traders.

Options spread traders must understand the additional risks associated with this type of trading and before using optionsXpress' spread and combination orders and systems.

While it is generally accepted that spread trading may reduce the risk of loss of the trading of the outright purchase of a standardized option contract, an investor/trader MUST understand that the risk reduction can lead to other risks.

Early Exercise And Assignment Can Create Risk And Loss.

Spreads are subject to early exercise or assignment that can remove the very protection that the investor/trader sought. This can lead to margin calls and greater losses than anticipated when the trade was entered.

Execution Of Spread Orders Is Often "Not Held" and at the Discretion of Marketplace.

Spreads are not standardized contracts as are exchanged traded put and calls. Spreads are the combination of standardized put and call contracts. There is NO spread market in securities that are subject to such benchmarks such as "time and sales" or "NBBO" (National Best Bid/Offer) and therefore the "market" cannot be "held" to a price.

Spreads Are Executed Differently Than "Legged" Orders.

Spreads are use by strategists as examples of risk protection, profit enhancement and as a basis for results and return on investments. However, these strategies assume that the trade can actually be executed as a spread when market forces may and can make the actual execution impossible. Spreads entered through optionsXpress screens are submitted as spreads and as such are subject to the market risk and may be affected by conditions related to human execution of dual or combination orders.

Spreads are bona-fide trades and not "legged" or "paired" of individual separate trades.

For example: options prices on crossed-markets are misleading for the spread trader. An option may be offered on one exchange and bided on another exchange that can lead the trader to believe that their spread trade should be filled, when, in fact, the bids and offers must be on the SAME exchange. As all bona-fide spreads are routed and executed on "one" exchange.

Spreads Are Generally Entered On A Single Exchange And Are Acted Upon By A Market Maker or Floor Broker.

Spreads are executed at the discretion of a market maker or floor broker and when cancelled or filled require that the market maker take manual action and require manual reporting at times. Delays for reporting of fills and cancels may create additional risks, especially in fast or changing markets.

Closing Transactions May Not Be Possible.

If a secondary market in options were to become unavailable, investors could not engage in closing transactions, and an option writer would remain obligated until expiration or assignment.

Style of Expiration Poses Unique Risks.

American Style options may be exercised against the writer at any time, which may create unexpected risks and requirements. If a short option is assigned against your account, action may be required to avoid losses and for other reasons. By contrast, European style options may create risks at expiration when exercised.

10. Option Purchases in an IRA, Qualified or Cash Account

While it is permissible to transact options in an IRA Account you must be aware of the unique qualities of an IRA Account. Regulations prohibit margin lending transactions in an IRA Account. Therefore, holders of long options in an IRA (or Cash) Account MUST have a cash balance equal to or greater than the requirement to exercise the options in the Account on the last day prior to expiration or we will close out the position in the open market on a "best" efforts basis prior to the market close.

In the event that you maintain a Cash or IRA account with us and you request and receive the ability to trade American-style spreads, you acknowledge that we may carry such positions in a margin location (or margin account) which may subject your account to additional requirements.

11. Version.

OXOAT0906

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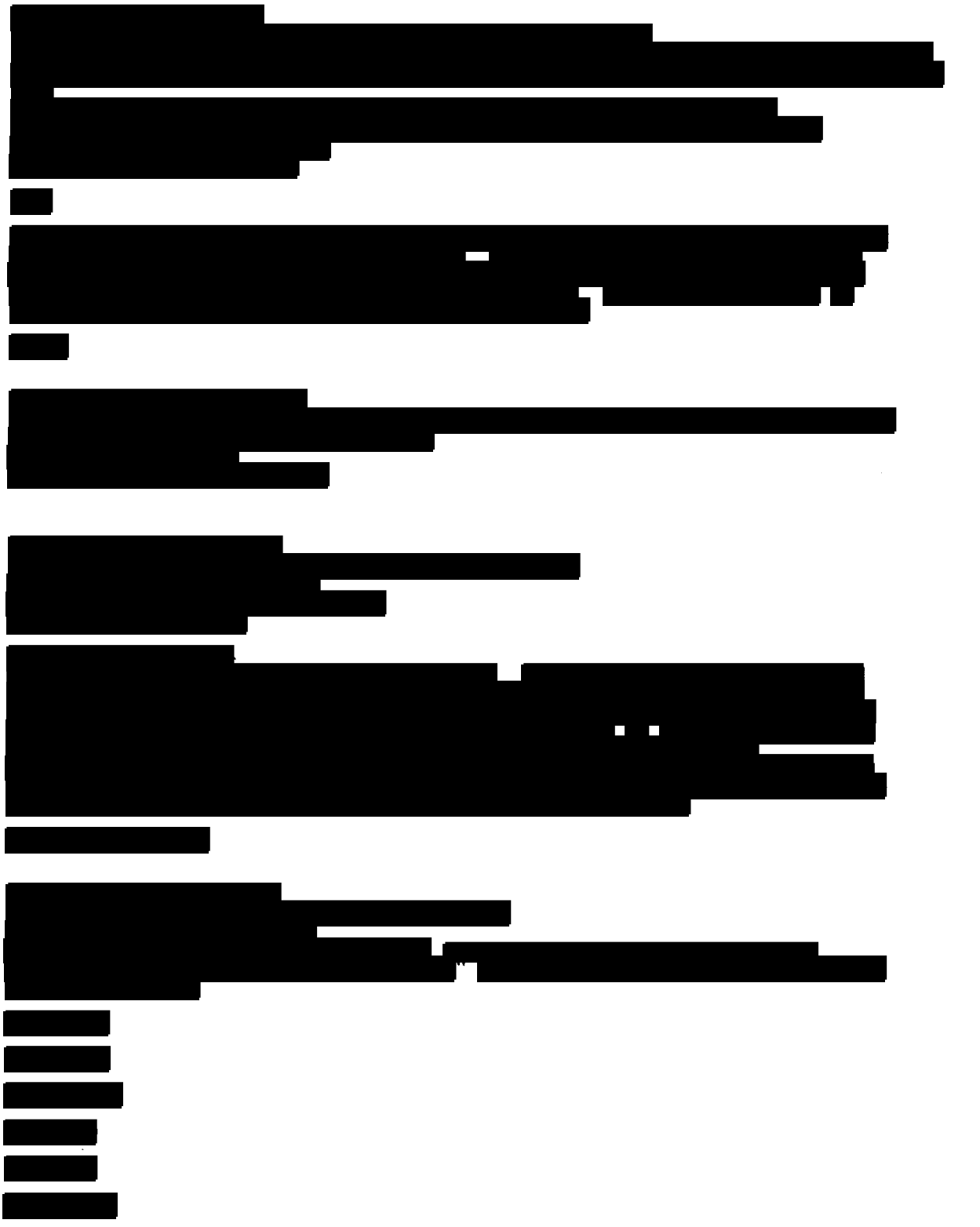

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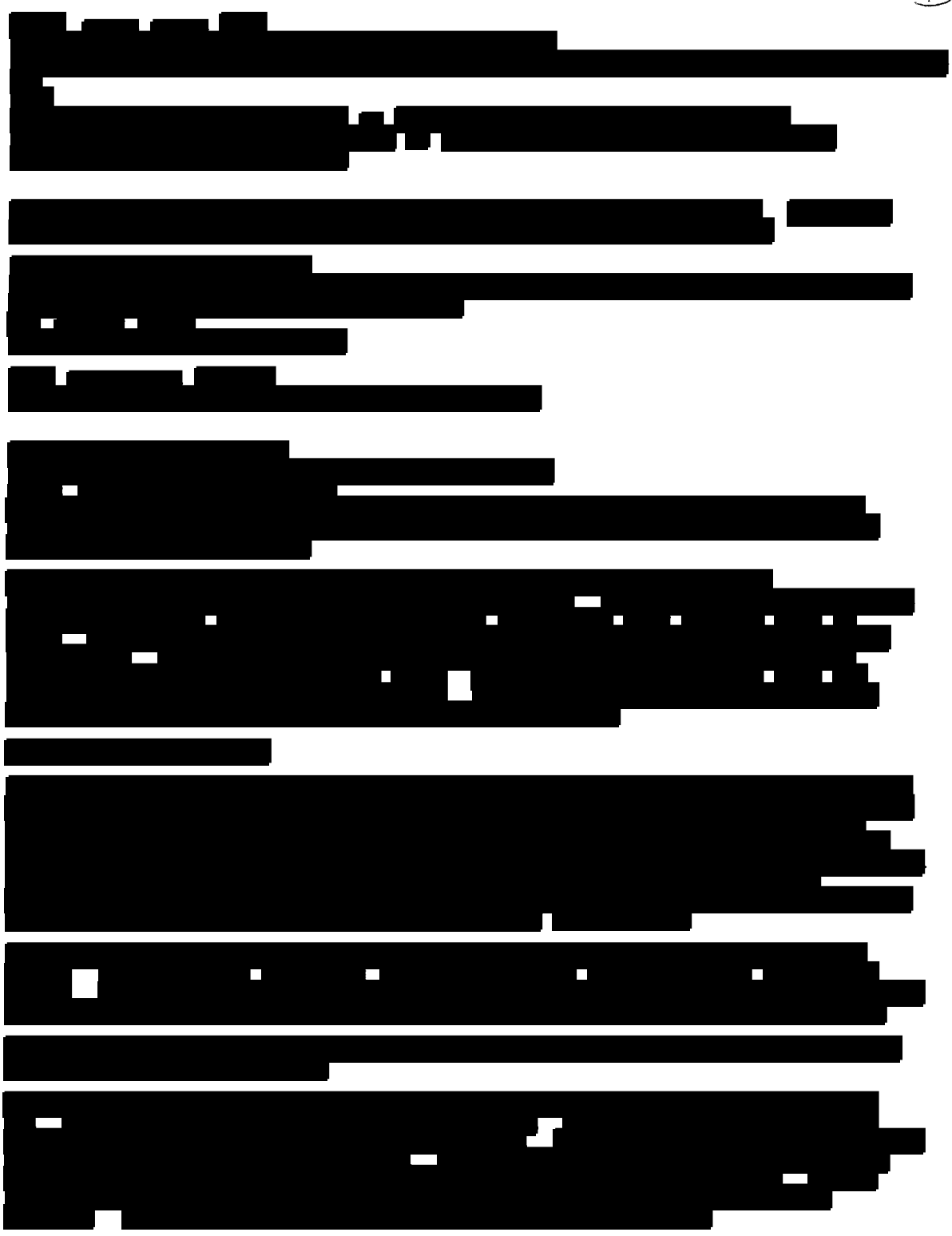

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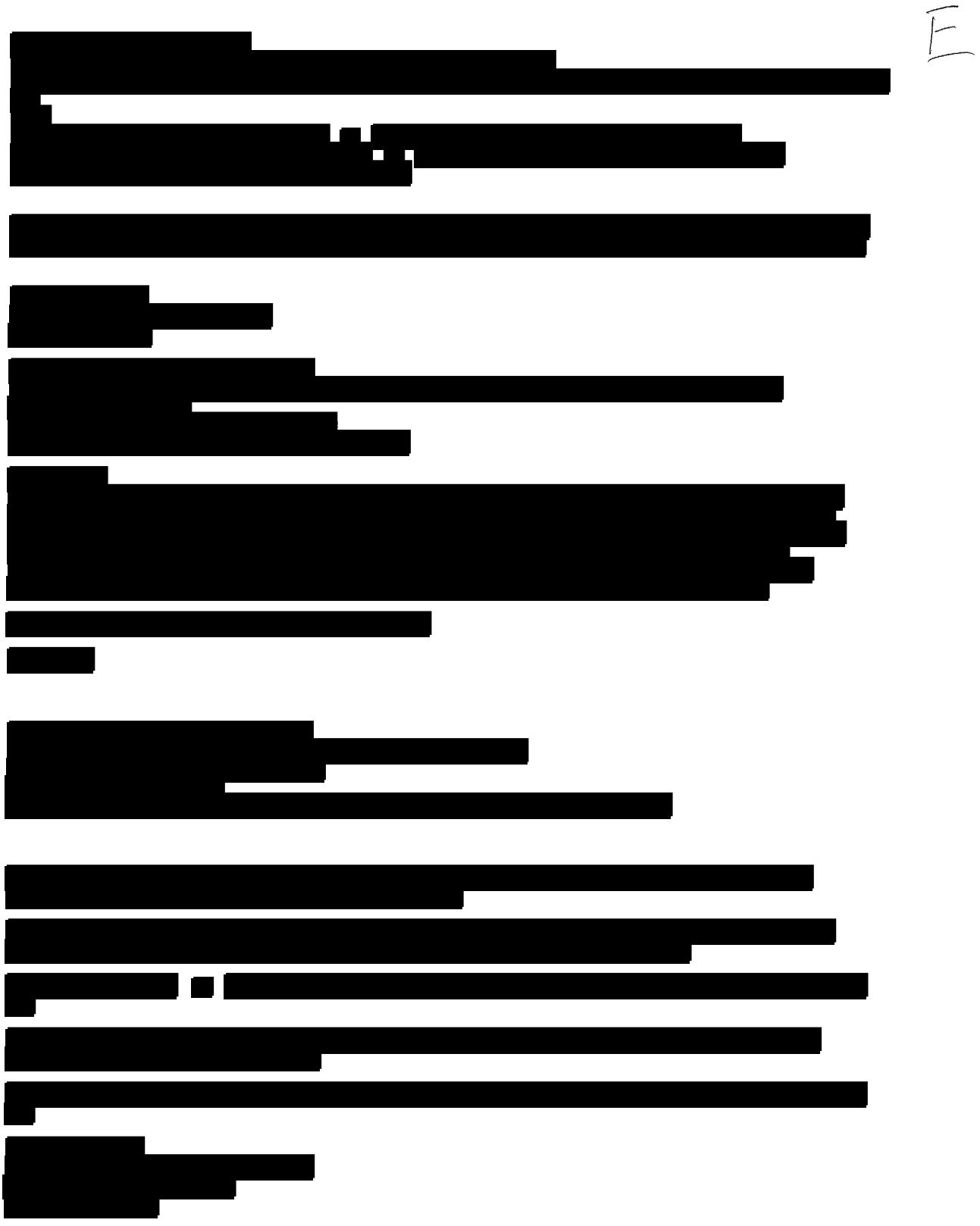

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
100 F Street, N.E.
WASHINGTON, D.C. 20549-5631

DIVISION OF
ENFORCEMENT

Deborah A. Tarasevich
Assistant Director
(202) 551-4726 (direct)
tarasevichd@sec.gov

October 28, 2010

VIA FACSIMILE (410-510-1647) AND U.S. MAIL

Gregory T. Lawrence
Conti Fenn & Lawrence
36 South Charles Street, Suite 2501
Baltimore, MD 21201

Re: *In the Matter of Certain Buy-Writes (HO-11327)*

Dear Mr. Lawrence:

This letter confirms our telephone conversation of October 28, 2010 in which we advised you that the staff of the Securities and Exchange Commission (the "Commission") is considering recommending that the Commission institute a public administrative proceeding, institute a cease and desist proceeding, or bring a civil injunctive action against your client, Jonathan Feldman, alleging that he violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Regulations 10b-5 and 10b-21 thereunder. In accordance with Rule 5(c) of the Commission's Rules on Informal and Other Procedures, 17 C.F.R. § 202.5(c), we are offering your client the opportunity to make a Wells Submission.

We enclose for your information a copy of Securities Act Release No. 5310 entitled "Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations." If your client wishes to make a written or videotaped submission setting forth any reasons of law, policy or fact why he believes the proceedings should not be instituted, or bringing any facts to the Commission's attention in connection with its consideration of this matter, you should forward the submission to me by no later than November 29, 2010. Any written submission should be limited to 40 pages, and any video submission should not exceed 12 minutes. Please inform me by no later than November 15, 2010 whether your client will be making a Wells Submission. Any submission should be sent to:

Deborah A. Tarasevich
Assistant Director, Division of Enforcement
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-5631

In the event the staff makes an enforcement recommendation to the Commission on this matter, we will forward any submission that you make to the Commission. Please be advised that the Commission may use the information contained in such a submission as an admission, or in any other manner permitted by the Federal Rules of Evidence, in connection with Commission enforcement proceedings, or otherwise. For your information, a copy of Form 1662 is enclosed. Please also be advised that any submission you make may be discoverable by third parties in accordance with applicable law.

If you have any questions about this matter, please contact me at (202) 551-4726, Jill Henderson at (202) 551-4812, or Paul Kim at (202) 551-4504.

Sincerely,

Deborah A. Tarasevich

Deborah A. Tarasevich

Enclosures: Securities Act Release No. 5310
SEC Form 1662

4

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9313 / April 16, 2012

SECURITIES EXCHANGE ACT OF 1934
Release No. 66815/ April 16, 2012

INVESTMENT COMPANY ACT OF 1940
Release No. 30034/ April 16, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14848

In the Matter of

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

Respondents.

AFFIDAVIT

I, Gregory T. Lawrence, do solemnly declare and affirm under the penalties of perjury that the following facts are true and correct:

1. I am over 18 years of age.

2. I am a partner at the law firm of Conti Fenn & Lawrence LLC and am licensed to practice law in Maryland, the District of Columbia, and New York courts.

3. The Staff provided Mr. Feldman a written Wells notification on October 28, 2010. A copy of the written Wells notification is attached to the Motion for Summary Disposition as Exhibit 3.

4. The Staff orally informed me at or about the expiration of the initial 180-day deadline that it received an extension for an additional 180-day period.

5. During a phone call on October 25, 2011, the Staff conveyed to me that it procured an additional 180-day extension. In the same phone call, the Staff also stated that it had obtained authority from the SEC to file an action against Mr. Feldman.

6. During a phone call on February 9, 2012, the Staff explained to me that it had received the second 180-day extension approximately a week prior to receiving authorization to file.

7. To determine whether the SEC authorized the filing against Mr. Feldman before the expiration of the first additional 180-day period, I asked the Staff for the dates on which a second extension was approved and the date on which the Commission authorized filing an action against Mr. Feldman. The Staff declined to answer.

8. On March 28, 2012, I filed on Mr. Feldman's behalf a Second Supplemental Wells Submission detailing the above recitation of events and demanding that no charges be filed against Mr. Feldman. A copy of the second Supplemental Wells Submission is attached hereto as Exhibit A.

* * *

Gregory T. Lawrence Date: 6/1/12

A

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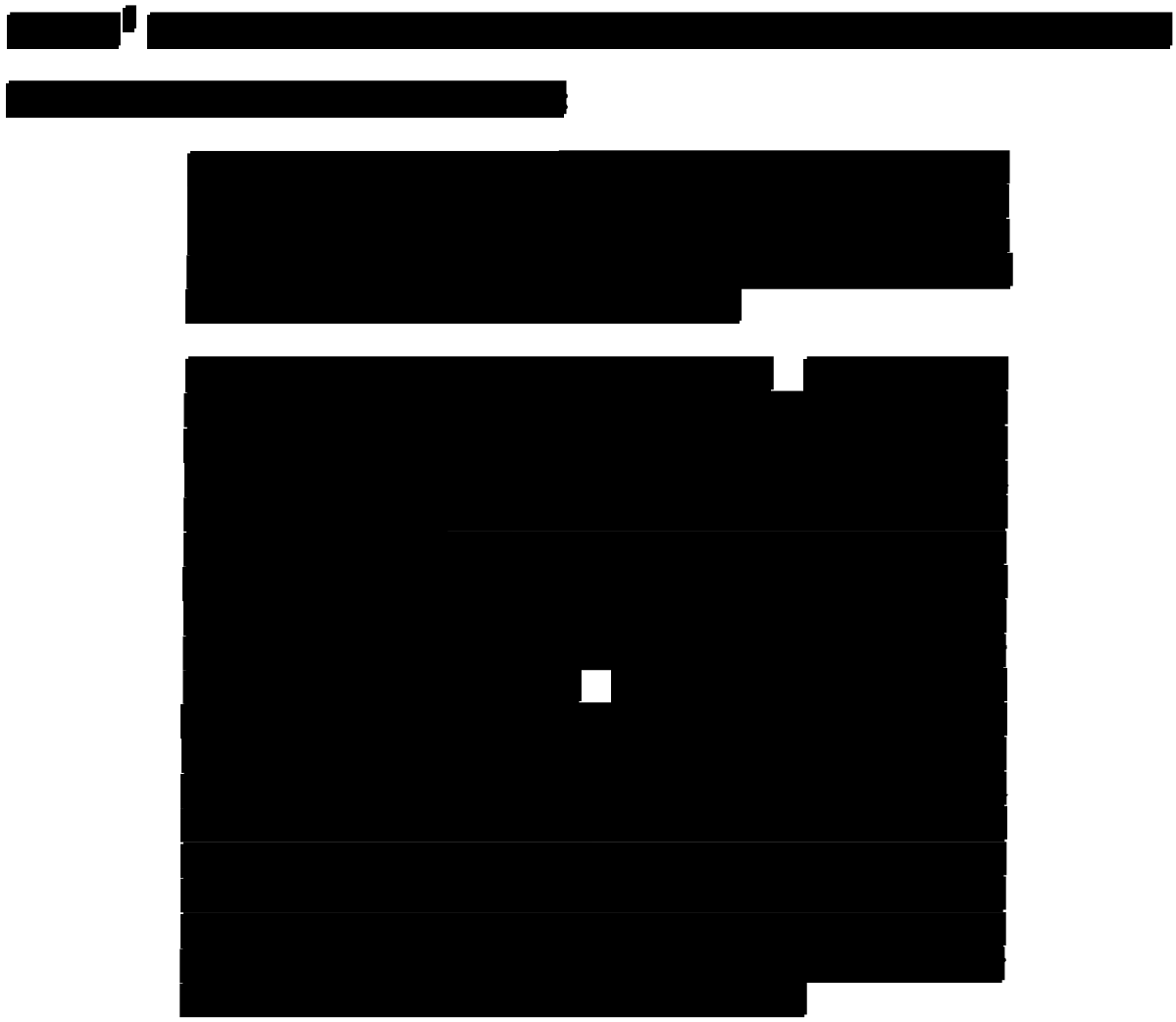

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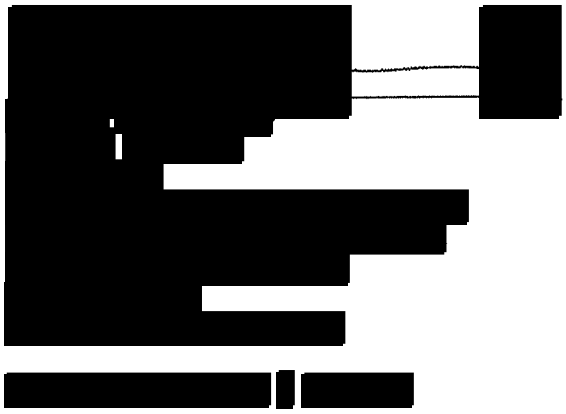

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UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION

In the Matter of:	
JONATHAN I. FELDMAN,	Order No.: DC 11-015
Senior Vice President and Institution Affiliated Party of	Effective Date: February 17, 2011
Eastern Savings Bank Hunt Valley, Maryland OTS Docket No. 08183	

ORDER OF ASSESSMENT OF A CIVIL MONEY PENALTY

WHEREAS, Jonathan I. Feldman (Respondent) has executed a Stipulation and Consent to the Issuance of an Order of Assessment of a Civil Money Penalty (Stipulation); and

WHEREAS, Respondent, by executing the Stipulation, has consented and agreed to the issuance of this Order of Assessment of Civil Money Penalty (Order) by the Office of Thrift Supervision (OTS), pursuant to 12 U.S.C. § 1818(i); and

WHEREAS, pursuant to delegated authority, the Deputy Director of Examinations, Supervision and Consumer Protection is authorized to issue Orders of Assessment of a Civil Money Penalty where an institution-affiliated party has consented to the issuance of an Order;

NOW, THEREFORE, IT IS ORDERED that:

Payment of Civil Money Penalty.

1. Effective immediately, Respondent is ordered to pay the sum of One-Hundred, Twenty-Five Thousand Dollars ($125,000) by tendering a certified check or bank draft made payable to the order of the Treasury of the United States.

Indemnification Prohibited.

2. Respondent shall pay such civil money penalty himself and is prohibited from seeking or accepting indemnification for such payment from any third-party.

Effective Date, Incorporation of Stipulation.

3. This Order is effective on the Effective Date as shown on the first page. The Stipulation is made a part hereof and is incorporated herein by this reference.

IT IS SO ORDERED.

OFFICE OF THRIFT SUPERVISION

By: /s/
Thomas A. Barnes
Deputy Director, Examinations, Supervision and Consumer Protection

Date: See Effective Date on page 1