

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 733/ November 27, 2012

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-14848

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In the Matter of	:	
	:	ORDER ON MOTION TO FILE
OPTIONSPRESS, INC.,	:	CORRECTED EXHIBITS
THOMAS E. STERN, and	:	
JONATHAN I. FELDMAN	:	

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**Background**

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on April 16, 2012. The hearing concluded on October 22, 2012. Briefing has not yet begun. The facts, briefly stated, are that Dr. Lawrence Harris (Harris), a Division of Enforcement (Division) expert, testified on September 11, 2012, on direct and sponsored Division Exhibits 310 and 382, which were admitted into evidence. Tr. 1359, 1401. Harris's direct testimony, Division Exhibit 310, contains 57 pages and 35 separate exhibits. Exhibit 382 is a series of exhibits rebutting Respondents' experts, Dr. Erik Sirri, Dr. Atanu Saha, and John Ruth. Tr. 1359.

Harris testified as a rebuttal witness on October 22, 2012, and sponsored Division Exhibit 497, a set of updates to the tables included in his direct testimony, Division Exhibit 310. Tr. 4847, 4853. Division Exhibit 497 contains Exhibit 20-R, Exhibit 21-R, Exhibit 22-R, Exhibit 23-R, and Exhibit 26-R. During his rebuttal presentation, Harris was asked why his calculation of Jonathan I. Feldman's (Feldman) net asset value profits after December 1, 2009, in Exhibit 23-R included profits related to AIG since the OIP did not allege violations by Feldman in AIG securities after December 1, 2009. Tr. 4982-85. Harris testified he would have to look at the code he used to provide an answer. Tr. 4985.

**Pending Motion**

On October 31, 2012, the Division filed a Motion to Offer Supplemental Evidence Concerning Dr. Harris's Disgorgement Calculations (Motion). Harris's Declaration (Harris Declaration) is Attachment 1 to the Motion and in it Harris states:

Attached to this declaration are Corrected Exhibits 22, 23 and 29 to my report, which was marked as Division Exhibit 310, and Corrected Exhibits 22-R and 23-R to my rebuttal materials, which were marked as part of Division Exhibit 497. In addition, I have updated slides 34 and 35 from my rebuttal presentation, which was marked as Division Demonstrative Exhibit 502, to reflect the modifications outlined below.<sup>1</sup>

Harris states that Division Exhibit 310, paragraph 33, should read, “I estimated that Feldman’s gross trading profits from the scheme were \$4,380,968. I computed this estimate using the average of three methods, all of which I consider to be reasonable methods.” Harris Declaration at 4. Also, he would update Division Exhibit 310, paragraphs 159-60, 163, 171, 173, and 187-88 to reflect the numbers in the corrected exhibits. Id.

According to the Division, this request to file supplemental evidence came about as the result of a question by Respondent Feldman’s counsel and “other modifications that [Harris] believed were appropriate in due fairness to the Respondents.” Motion at 3. The Harris Declaration states that Exhibit 23-R of Division Exhibit 497 was incorrect because AIG was improperly included in the net asset value calculation and that this coding error also affected the calculation of stock loan fees not paid in Exhibits 22 and 22-R of Division Exhibit 497. Harris Declaration at 1. In addition, Harris found an issue with his stock loan fees calculation, which caused him to modify Exhibits 22 and 29 of Division Exhibit 310 and Exhibit 22-R of Division Exhibit 497. Id. at 1-2. The Division emphasizes that Harris’s supplemental evidence results in “lower figures than previously presented and are exclusively favorable to the Respondents.” Motion at 2; Harris Declaration at 2.

On November 13, 2012, Feldman filed an Opposition to the Motion (Opposition). Feldman argues that granting the Motion would violate due process by denying Respondents the ability to examine Harris on new disgorgement evidence and the methodology he used to arrive at his conclusions. Opposition at 2. Feldman insists that the circumstances do not justify opening the record since Harris has already had two opportunities to present evidence. Id. Finally, Feldman insists that the supplemental evidence has errors and is not “tied to actual fails to deliver or assignments, just as his previous calculations were not.” Id. at 3-4.

On November 20, 2012, the Division filed its Reply Brief in Support of its Motion (Reply). The Division disagrees that granting the Motion would violate due process and that Harris’s analysis is unreliable. According to the Division, Harris did not change his

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<sup>1</sup> The titles on the attachments to the Harris Declaration are: Exhibit 22-Corrected, Panel A: Estimated Stock Loan Fees not Paid Based on Fails as Evidenced by the Aggregate Buy-Writes; Exhibit 22-Corrected, Panel B; Exhibit 22-R-Corrected, Panel A: Estimated Stock Loan Fees not Paid Based on Fails as Evidenced by the Aggregate Buy-Writes, After December 1, 2009; Exhibit 23-Corrected: Estimated Feldman Account Net Asset Value Profits; Exhibit 23-R-Corrected: Estimated Feldman Account Net Asset Value Profits, After December 1, 2009; Exhibit 29-Corrected: Correlation of Stock Loan Fees Estimated from Buy-Writes and from CNS Data; and Division Exhibit 502 (not Exhibit 497 as marked), pages 34 and 35.

methodology but did a re-tabulation correcting a coding error that caused the “net asset profit calculations for AIG for the period of December 2009 to March 2010” to be included. Reply at 1. The Reply argues that Harris made the changes promptly after the issue first arose on the last hearing day, October 22, 2012, and that the corrected exhibits do not prejudice Respondents because the results are lower than the original calculations and thus favor Respondents. Id. at 2. The Division states that Harris’s opinions remain a “reasonable approximation” of Feldman’s ill-gotten gains, and its Motion simply seeks to make sure the record contains the most accurate information possible. Id. at 4. The Division offers to make Harris available for questions on just the corrections made to his exhibits and testimony. Id. at 3 n.1. Finally, the Division disputes Respondent Feldman’s position that the new figures contain errors. Id. at 4-5.

### **Ruling**

The Commission’s Rules of Practice do not address admissibility, after the record is closed, of corrections to exhibits in evidence or supplemental exhibits. My experience is that late-filed exhibits on non-controversial matters have been admitted in Commission administrative proceedings on occasion where an error was obvious and the correction was easily understandable.

This situation is unlike previous situations, however, because (1) the request is broad; and (2) there is no agreement on the changes. The Division is not asking to make a simple, easily understood correction, but it wants to introduce five corrected exhibits that support its expert’s conclusions offered on direct and rebuttal. Rule 326 of the Commission’s Rules of Practice gives a respondent the right “to conduct such cross-examination as, in the discretion of the Commission or hearing officer, may be required for a full and true disclosure of the facts.” 17 C.F.R. § 201.326. The Division and Feldman, who disagreed strongly on almost everything, continue to disagree about these corrections. Having Harris appear for a third time would not, in my judgment, result in any agreement.

I DENY the Motion because it would be unfair to Feldman to allow the admission of this amount of new material without allowing him the right to cross-examine the witness. 17 C.F.R. §§ 201.300, .326. The case will be decided on the evidence adduced at seventeen days of hearing. The due date for the Initial Decision is February 19, 2013.

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Brenda P. Murray  
Chief Administrative Law Judge