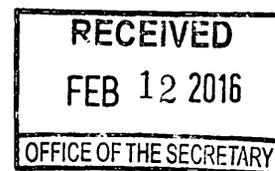


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-14848

In the Matter of

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

Respondents.

Division of Enforcement's Opposition to Respondent Feldman's Motion for Leave to File Supplemental Brief Addressing Impermissible Retroactive Application of Dodd-Frank Act with Regard to \$2,000,000 Civil Money Penalty

Over two years after his brief in support of his petition for review to the Commission was due, Respondent Jonathan I. Feldman ("Feldman") now seeks to raise an entirely new issue on appeal to the Commission. The Commission's November 5, 2013 Order Granting Petitions for Review in this case specifically quoted from Rule of Practice 450(a) and stated that "no briefs in addition to those specified in this schedule may be filed without leave of the Commission." *In the Matter of optionsXpress, Inc., et al.*, Exchange Act Release No. 70810, 2013 WL 591774, at *1 n. 5 (Nov. 5, 2013). Because Feldman had previous opportunities to raise the argument he now wants to make, the Commission should deny Feldman's motion and not consider his additional arguments.

In his motion, Feldman does not provide any reason why he did not raise the arguments he now seeks to make in his earlier filed brief in support of his petition for review. For example, Feldman cannot claim he was unaware of the many changes that the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") made to the securities laws. Indeed,

in his brief in support of his petition for review of the Initial Decision, Feldman made other arguments claiming that these proceedings “Violate Dodd-Frank Act.” *See* Respondent Jonathan I. Feldman’s Opening Brief to the Commission at 46 (Dec. 16, 2013). Unfortunately for Feldman, the argument he made in his earlier filed brief relating to the Dodd-Frank Act has been specifically rejected by the D.C. Circuit. *Montford v. SEC*, 793 F.3d 76, 81-83 (D.C. Cir. 2015) (holding that the 180-day time period in Section 4E of the Exchange Act “is not jurisdictional” and any alleged violation of that time period is not a bar to an enforcement action).

At best, Feldman’s motion seems to suggest that the D.C. Circuit’s decision in *Koch v. SEC*, 793 F.3d 147 (D.C. Cir. 2015) is the reason he should be able to file additional arguments with the Commission. (Mot. at 2) But this argument misses the mark. As an initial matter, the argument that ended up being successful in the D.C. Circuit in *Koch* had been adopted by the ALJ in that case back in May 2012 – almost a year before the Initial Decision in this case was issued. *In the Matter of Donald L. Koch*, S.E.C. Release No. 458, 2012 WL 1894251, at *16 n. 29 (ALJ Decision) (May 24, 2012) (“Neither the Commission nor the courts have approved such retroactive application of its provisions in any litigated case, and the undersigned declines to impose the new sanction retroactively.”). Despite this fact, at no time until his recent motion did Feldman make the argument he now wants to make to either Chief Administrative Law Judge Murray or the Commission. The Commission should not give Feldman multiple bites at the apple. Feldman should have to live with his strategic decisions, including the arguments he thought were most persuasive and worthy of being included in his briefs to the Commission.

Moreover, the *Koch* decision does not address the Commission’s ability to impose civil money penalties against non-registered individuals for conduct that pre-dates the passage of the Dodd-Frank Act. Rather, the issue in *Koch* was whether the Commission could bar an individual

or entity from associating with municipal advisors or rating organizations – a remedy that did not exist for the Commission before the enactment of Dodd-Frank. 793 F.3d at 158. The D.C. Circuit held that because Koch’s conduct “triggered additional legal consequences, not existing at the time his [fraudulent] conduct took place” the additional remedies in Dodd-Frank could not be imposed retroactively. *Id.* Feldman cannot claim that the Commission did not have the ability to seek civil money penalties against him in federal court before the passage of Dodd-Frank. Thus, the only change in Dodd-Frank on this issue was it allowed the Division to also seek those remedies in an administrative proceeding. But these types of changes in “procedures” for imposing sanctions should not give rise to “retroactivity concerns.” *Id.* at 157 n.3 (holding that a change in procedure for the imposition of an associational bar “does not give rise to retroactivity concerns”) (citations omitted).

CONCLUSION

The Commission should not give Feldman further chances to make arguments that he could have included in his brief in support of his petition for review of the Initial Decision. If the Commission grants Feldman’s motion, the Division respectfully requests that it be given the opportunity to respond to the brief Feldman attached as Exhibit 1 to his motion.

Dated: February 12, 2016

Respectfully submitted,


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CERTIFICATE OF SERVICE

The undersigned counsel for the Division of Enforcement hereby certifies that he has served the foregoing document on the following on this 12th day of February, 2016, in the manner indicated below:

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