

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9466 / October 16, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70698 / October 16, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30743 / October 16, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-14848

In the Matter of

OPTIONSXPRESS, INC.,
THOMAS E. STERN, and
JONATHAN I. FELDMAN

ORDER GRANTING IN PART
AND DENYING IN PART THE
MOTIONS TO ADDUCE
ADDITIONAL EVIDENCE
REGARDING THE CBOE
SETTLEMENT

On April 16, 2012, the Commission instituted administrative proceedings against optionsXpress, Inc., a registered broker-dealer; Thomas E. Stern, chief financial officer of optionsXpress; and Jonathan I. Feldman, an optionsXpress customer.¹ The Order Instituting Administrative and Cease-and-Desist Proceedings alleged that a number of optionsXpress customers, including Feldman, employed illegal options trading strategies that lacked a legitimate economic purpose and that violated Securities Act § 17(a) and Exchange Act § 10(b) and Rules 10b-5 and 10b-21.² The OIP further alleged that these strategies caused optionsXpress to have continuing "failure-to-deliver" positions in various securities for extended periods of time, and that optionsXpress willfully violated the delivery and close-out requirements in Rules 204 and 204T of Regulation SHO.³ Finally, the OIP alleged that Stern caused and willfully aided and abetted these violations.

On June 7, 2013, the administrative law judge issued an initial decision finding that Respondents had willfully violated (and/or aided and abetted in the violation of) the above-listed statutes, regulations, and rules.⁴ Respondents have timely petitioned for review of the initial

¹ *optionsXpress, Inc.*, Exchange Act Release No. 66815, 2012 WL 1264508 (Apr. 16, 2012).

² 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. §§ 240.10b-5, 240.10b-21.

³ 17 C.F.R. §§ 242.204, 242.204T.

⁴ *optionsXpress, Inc.*, Initial Dec. Release No. 490, 2013 WL 2471113 (June 7, 2013).

decision. Presently pending before us are three motions, one filed by each of the Respondents, requesting that the Commission take judicial notice of its June 11, 2013 settlement with the Chicago Board Options Exchange ("CBOE Settlement")⁵ and accept the settlement order as additional evidence in this proceeding. Stern and Feldman additionally seek an order requiring the Division of Enforcement ("Division") to produce documents related to the CBOE Settlement, which they claim were withheld in violation of Rule of Practice 230(b)(2). Finally, Stern and Feldman seek leave to re-examine witnesses regarding the CBOE Settlement. We grant the motions in part and deny them in part.

BACKGROUND

A. Rule 204

Rule 204 of Reg. SHO⁶ governs when a clearing broker-dealer (such as optionsXpress) must deliver securities to a registered clearing agency (such as the National Securities Clearing Corporation) for clearance and settlement.⁷ A "fail to deliver" position in a security occurs when a broker-dealer does not have enough shares in its account with the clearing agency for the broker-dealer to satisfy its delivery obligation by the trade date plus three days (T+3). The clearing agency may at that point issue the non-delivering broker-dealer a "buy-in notice" stating that the broker-dealer must deliver the shares within a certain time or else be involuntarily "bought in" by the non-receiving party. Whether or not a buy-in notice is issued, Rule 204 requires the broker-dealer, in the event of a failure to deliver, to, "by no later than the beginning of regular trading hours on the settlement day following the settlement date [*i.e.*, T+4], immediately close out its fail to deliver position by borrowing or purchasing securities of like kind and quantity."⁸

B. The Initial Decision

The law judge found that Feldman and other optionsXpress customers employed an options trading strategy that caused optionsXpress to have a fail to deliver position in a number of securities, thereby triggering the close-out requirement of Rule 204. According to the initial decision, rather than purchasing the security on behalf of the customers and delivering it to the clearing agency, optionsXpress allowed those customers to place "buy-writes." A buy-write, the law judge explained, is a purchase of a security coupled with a simultaneous sale of a deep-in-

⁵ *Chicago Bd. Options Exch., Inc.*, Exchange Act Release No. 69726, 2013 WL 2540903 (June 11, 2013).

⁶ Rule 204T of Regulation SHO was adopted as an interim final rule with an expiration date of July 31, 2009, when it was superseded by Rule 204. No party has suggested that there are differences between Rules 204 and 204T that are material for present purposes, so we shall treat them interchangeably.

⁷ 17 C.F.R. § 242.204.

⁸ *Id.* § 242.204(a).

the-money call option for the same amount of the same security.⁹ Because deep-in-the-money call options have a strike price substantially below the current market price, there is a high likelihood that they will be immediately exercised. The law judge found that, although it was not certain that any particular deep-in-the-money call written by Feldman would be exercised and then randomly assigned to him, the bulk of the buy-writes he placed were closed by assignment, often on the same day. That assignment, in turn, would create a new delivery obligation and thus, according to the law judge, perpetuate the already existing fail to deliver position. As a consequence, there were securities as to which optionsXpress had a continuous fail to deliver position for a number of consecutive settlement days. The initial decision concluded that these buy-writes were sham "reset" transactions designed to evade Rule 204's delivery and close-out requirements and, in effect, maintain a naked short position.

Before the law judge, Respondents argued that buy-writes satisfied the letter of Rule 204 and, moreover, that optionsXpress had received specific reassurances from regulators, including CBOE and the Financial Industry Regulatory Authority ("FINRA"), about the propriety of its conduct. The initial decision rejected this argument. It found that optionsXpress was not fully forthcoming with regulators and that there was no evidence that optionsXpress had described the use of buy-writes to cover failures to deliver when it responded to CBOE's inquiries about surveillance reports that its customers' trading had triggered.

C. The CBOE Settlement

The Commission instituted administrative proceedings against CBOE on June 11, 2013. In anticipation of those proceedings, CBOE submitted an offer of settlement that was accepted by the Commission in the CBOE Settlement order of the same date. The order found, among other things, that CBOE failed to adequately enforce Reg. SHO because its staff was not properly trained on the rule and that CBOE did not adequately investigate whether member firms were attempting to circumvent Rule 204's delivery and close-out requirements. The CBOE Settlement order also stated that, in response to CBOE's surveillance, an unnamed "member firm"—which the parties here agree is actually optionsXpress—provided documents to CBOE showing that the firm had "a failure to deliver position for a number of consecutive settlement days." According to the CBOE Settlement order, CBOE took no action against optionsXpress as a result of these surveillance exceptions and "closed the inquiry merely because the firm had represented . . . that it did not receive any buy-ins for the securities involved."

⁹ The holder of a call option has the right to buy shares of the security at the strike price; when the holder decides to exercise the option, it is randomly assigned to an option writer, who then must honor the contract by delivering the security.

DISCUSSION

Respondents seek an order taking judicial notice of the CBOE Settlement order. Stern and Feldman also seek an order requiring the Division to produce documents related to the settlement, and granting them leave to re-examine witnesses regarding the settlement. We address each of these requests in turn.

A. The Commission Will Take Judicial Notice of the CBOE Settlement Order

Respondents request that we take judicial notice of the CBOE Settlement order and admit it as additional evidence. They argue that the findings in that order "contradict, or at least critically weaken, the [law judge's] findings of fact and conclusions of law in [the] Initial Decision." For example, they claim that the order shows that optionsXpress received a green light from CBOE after providing it with all the information needed to evaluate whether buy-writes complied with Rule 204. The Division does not oppose our consideration of the CBOE Settlement, but it does dispute Respondents' characterization of the findings in the CBOE Settlement order.

Rule of Practice 323 provides that "[o]fficial notice may be taken of any material fact which might be judicially noticed by a district court of the United States, any matter in the public official records of the Commission, or any matter which is peculiarly within the knowledge of the Commission as an expert body."¹⁰ Published by the Commission as an official, public document, the CBOE Settlement order qualifies for judicial notice under this standard.

Rule of Practice 452 allows a respondent to submit additional evidence after the conclusion of the hearing if the evidence is material and there were reasonable grounds for not adducing such evidence previously.¹¹ Respondents draw one set of inferences from the CBOE Settlement order's findings, while the Division draws a contrary one. We will defer assessment of the CBOE Settlement until our consideration of the petitions for review.¹² Under the circumstances, we find that the CBOE Settlement is material for purposes of Rule 452. As for timeliness, the CBOE Settlement order was issued on June 11, four days after the initial decision was rendered, so we agree that Respondents could not have adduced it any earlier. For these reasons, we accept the CBOE Settlement as additional evidence under Rule 452.

Accordingly, we grant the pending motions insofar as we will consider the CBOE Settlement order as part of the record in this proceeding, though this should not be construed as suggesting any view as to that order's ultimate probative weight.

¹⁰ 17 C.F.R. § 201.323.

¹¹ *Id.* § 201.452.

¹² *See, e.g., Tang v. Rhode Island Dep't of Elderly Affairs*, 163 F.3d 7, 11 (1st Cir. 1998) ("[a] ruling on admissibility . . . [is] interlocutory and subject to reconsideration"); *United States v. Bond*, 87 F.3d 695, 700 n.1 (5th Cir. 1996) (an "evidentiary ruling [is], of course, subject to reconsideration at any time before final judgment").

B. Respondents Have Not Established That the Division Failed To Comply with Rule 230(b)(2) and *Brady*

Stern and Feldman argue that the Division has improperly withheld documents subject to disclosure under Rule of Practice 230(b)(2) and *Brady v. Maryland*.¹³ Under *Brady*, the prosecution in a criminal proceeding must disclose materially exculpatory or impeaching evidence in the government's possession. Although *Brady* has no direct application to civil or administrative proceedings such as this one,¹⁴ we have "incorporated the Supreme Court's *Brady* doctrine" in our administrative proceedings by adopting Rule of Practice 230(b)(2).¹⁵ To that end, although Rule 230(b)(1) enumerates certain grounds on which the Division may withhold documents, Rule 230(b)(2) makes clear that the former subsection does not "authorize[] the Division . . . to withhold, contrary to the doctrine of *Brady*[,] . . . documents that contain material exculpatory evidence."¹⁶ To trigger the disclosure obligation under Rule 230(b)(2), "the evidence must be 'material either to [the respondent's] guilt or punishment,'"¹⁷ with the test of materiality being whether there is a "reasonable probability" that the evidence's disclosure would have resulted in a different outcome.¹⁸

Invoking Rule 230(b)(2) and *Brady*, Stern and Feldman seek to compel the Division to turn over all "transcripts, memoranda and other internal work product related to the CBOE Settlement." In particular, they argue that the Division should be ordered to produce "correspondence and 'other documents'" concerning settlement negotiations with CBOE (including drafts of the settlement), "any Wells Memoranda" or other submissions by the CBOE to the Commission, and the "Division's Action Memorandum that it presented to the Commission concerning the CBOE."

The Division responds that the "documentary and testimonial evidence underlying the CBOE Settlement was produced well in advance of the hearing." It represents that, in April and May 2012, "soon after the institution of these proceedings," it provided Respondents with the

¹³ See 373 U.S. 83 (1963).

¹⁴ *Williams v. Wynne*, 533 F.3d 360, 372 (5th Cir. 2008); *Tandon v. Comm'r*, 210 F.3d 372 (table), 2000 WL 331926, at *1 (6th Cir. Mar. 23, 2000); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985); *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 969 (4th Cir. 1985); *SEC v. Pentagon Capital Mgmt. PLC*, No. 08 Civ. 3324, 2010 WL 4608681, at *1 (S.D.N.Y. Nov. 12, 2010); *SEC v. Reyes*, No. C 06-04435 CRB, 2007 WL 528718, at *4 (N.D. Cal. Feb. 13, 2007).

¹⁵ *Orlando Joseph Jett*, Admin. Proc. Rulings Release No. 514, 1996 WL 360528, at *1 (June 17, 1996); *accord Mitchell M. Maynard*, Advisers Act Release No. 2875, 2009 WL 1362796, at *7 n.17 (May 15, 2009) (explaining that Rule 230(b)(2) is "consistent" with *Brady*).

¹⁶ 17 C.F.R. § 201.230(b)(2).

¹⁷ *Elizabeth Bamberg*, Exchange Act Release No. 27672, 50 SEC 201, 1990 WL 1102421, at *3 (1990) (citation omitted).

¹⁸ *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

"underlying bases" of the CBOE Settlement order's findings concerning Reg. SHO, "including "over 223,000 pages" of documents produced by CBOE, document requests and subpoenas issued to CBOE, the transcripts and exhibits associated with the testimony of current and former CBOE employees involved in the Reg. SHO investigation and CBOE's surveillance of optionsXpress, and any "internal notes and emails of Commission staff that could have been construed as being subject to *Brady* and Rule 230(b)(2)." On May 9, 2012, the Division also provided Respondents with a Withheld Documents List specifying that the Division had withheld "correspondence and other documents related to the settlement discussions" with CBOE.

The Division acknowledges that *Brady* requires the disclosure of material exculpatory facts not otherwise available to the respondent even when those facts are recited in privileged documents,¹⁹ but it represents that its review has not identified any such facts. In sum, the Division represents that it is "unaware of any additional *Brady* material that was not previously produced" and that "no material exculpatory evidence related to the CBOE Settlement has been withheld" from Respondents.

We find Stern and Feldman's arguments to be without merit and deny the relief sought. To begin with, their *Brady* claim is, with two exceptions,²⁰ untimely because they could have—but did not—object below to the withholding of the documents they now seek. The Division's Withheld Documents List placed Stern and Feldman on notice in May 2012 that the Division had withheld "correspondence and other documents related to the settlement discussions" with CBOE. Yet at no time did Stern and Feldman challenge the withholding of settlement-related documents before the law judge. It was only on July 12, 2013—over a year later, *after* the initial decision was issued—that they asked the Division to produce these additional documents related

¹⁹ Letter from Frederick L. Block, Assistant Chief Litigation Counsel, Division of Enforcement, U.S. Securities and Exchange Commission to Gregory T. Lawrence, Conti Fenn & Lawrence, LLC (July 17, 2013) (attached as Ex. 2 to Jonathan I. Feldman's Mot. for Leave to Adduce Additional Evidence (July 22, 2013)). Put another way, the "underlying [material] exculpatory facts" may be discoverable under *Brady* even if the document containing them is as a whole privileged and not subject to disclosure. *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006); *United States v. NYNEX Corp.*, 781 F. Supp. 19, 26 (D.D.C. 1991) ("The government should, and apparently already has, disclosed exculpatory facts, even if contained in internal documents otherwise protected by the work product privilege.").

²⁰ Stern and Feldman seek production of two documents whose existence could not have been known to Respondents prior to the hearing and we conclude that their *Brady* claim is timely with respect to those documents. The first document was prepared by CBOE and submitted to the Division after this proceeding was initiated. As characterized by the Division, it summarizes the cases that CBOE "brought against firms for various violations, including violations of Reg. SHO." Div. Opp. to Feldman Mot. at p. 6 n.2. The second document is a white paper submitted by CBOE to the Division on November 16, 2012, also after this proceeding was initiated, that "explained improvements that had been made to CBOE's regulatory and surveillance programs including those related to Reg. SHO." *Id.* at p. 7 n.3. Although we find their *Brady* claim to be timely in these respects, Stern and Feldman have failed to make the required "plausible showing" that the documents contain information that both favorable and material to their defense. *See infra* pp. 9-13.

to the CBOE investigation and settlement. They "offer[] no explanation of the reason [they] did not request the materials" earlier.²¹

In our view, Stern and Feldman's failure to timely raise the issue before the law judge as set forth in by Rule of Practice 230(c),²² which "vests the law judge with discretion to determine whether the Division's withholding of documents was appropriate,"²³ is sufficient reason to deny their belated *Brady* claim. As we have previously made clear, the appropriate way to present a *Brady* claim is to "bring[] [the allegedly withheld documents] to the [law] judge's attention," make at least a "plausible showing" . . . that the documents in question contain information that is both favorable and material to [their] defense," and ask that the law judge conduct an *in camera* review of the disputed documents.²⁴ A respondent who "for the first time before the Commission" seeks production of "potentially exculpatory items" that it "failed to bring . . . to the law judge's attention . . . even though it had been provided with documents referring to them" prior to the hearing cannot obtain relief.²⁵

Our conclusion that Stern and Feldman failed to exercise reasonable diligence in seeking the purportedly withheld CBOE Settlement-related materials is reinforced by how energetically Respondents pursued discovery of *other* investigative materials. For example, on July 19, 2012, Stern sought to subpoena CBOE for the documents that precipitated its investigation of optionsXpress. Feldman sought twice (once on August 13, 2012 and again on August 22, 2012) to obtain the Division's action memorandum recommending that the Commission institute the present proceeding. And optionsXpress sought to have FINRA turn over its communications with Commission staff regarding the Reg. SHO investigation, specifically addressing in its papers the Division's assertion of an investigative privilege with respect to those documents. All this suggests that Respondents simply had different priorities about what avenues of factual

²¹ *John Montelbano*, Exchange Act Release No. 47227, 2003 WL 147562, at *12 (Jan. 22, 2003) (rejecting as "untimely" request to produce allegedly "withheld [and] buried" documents when documents were not sought while case was pending before hearing panel).

²² 17 C.F.R. § 201.230(b) (providing that the "hearing officer may require the Division . . . to submit any document withheld, and may determine whether any such document should be made available for inspection and copying").

²³ *Thomas C. Bridge*, Exchange Act Release No. 60736, 2009 WL 3100582, at *20 (Sept. 20, 2009).

²⁴ *Jett*, 1996 WL 360528, at *1 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15 (1987)); see *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 WL 47245, at *18 n.90 (Jan. 19, 2001) ("[T]o obtain in camera review, [a] plausible showing must be made that document in question contains information that is both favorable and material to respondent's defense[.]"); accord *Davis v. Litscher*, 290 F.3d 943, 947-48 (7th Cir. 2002) (articulating "plausible showing" standard for *in camera* review of disputed *Brady* evidence); *United States v. Runyan*, 290 F.3d 223, 245 (5th Cir. 2002); *Riley v. Taylor*, 277 F.3d 261, 301 (3d Cir. 2001); *United States v. Williams-Davis*, 90 F.3d 490, 514 (D.C. Cir. 1996); *Love v. Johnson*, 57 F.3d 1305, 1313-15 (4th Cir. 1995).

²⁵ *KPMG Peat Marwick LLP*, 2001 WL 47245, at *18 n.90 (rejecting *Brady* claim) (quotation marks omitted).

inquiry to pursue. We perceive no sound reason to relieve them of the consequences of their strategic litigation choices and "permit[] [them] at this late date to search for evidence that they expect to find" in the Division's files."²⁶

Stern and Feldman nonetheless contend that the Division has a continuing duty to produce *Brady* material under Rule 230(b)(2) until the Commission enters an order of finality, and that this makes it irrelevant that they did not earlier raise a *Brady* claim. But even a continuing duty of disclosure (assuming for the sake of argument that such a duty exists) would not relieve Stern and Feldman of the need to timely raise their *Brady* claim. The underlying "obligation to disclose exculpatory material" is not to be conflated with the "appropriate *method* of assessing" a defendant's or respondent's claim that *Brady* material has been improperly withheld.²⁷ Absent a substantiated and timely request—one that Stern and Feldman failed to make—the respondent is not entitled to demand that we (or the law judge) conduct an *in camera* review of the government's files, let alone "conduct his own search of the State's files to argue relevance."²⁸ As courts have uniformly held, parties who are unambiguously on notice of undisclosed documents that may constitute *Brady* material—*e.g.*, when, as here, the documents were specifically identified by the government as withheld—yet elect to sleep on their rights, proceed at their own peril.²⁹ Any other result would countenance gamesmanship, and we accordingly hold that Stern and Feldman's *Brady* claim is, with two exceptions,³⁰ not preserved for our review.

²⁶ *Russo Secs., Inc.*, Exchange Act Release No. 44186, 2001 WL 379064, at *8 (Apr. 17, 2001); *see also Sidney C. Eng*, Exchange Act Release No. 40297, 1998 WL 433050, at *7 (Aug. 3, 1998) ("[A] respondent cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action." (quoting *David T. Fleischman*, 43 SEC 518, 522 (1967))).

²⁷ *Ritchie*, 480 U.S. at 58-59 & n.15 (emphasis added).

²⁸ *Id.*

²⁹ *See, e.g., United States v. Huggans*, 650 F.3d 1210, 1227 (8th Cir. 2011) (rejecting *Brady* claim as waived because the defendant did not "ask[] the district court to review [the documents] *in camera*"); *United States v. Jumah*, 599 F.3d 799, 811 (7th Cir. 2010) ("[The defendant's] failure to ask for an *in camera* inspection of the Government's records further counsels against any relief from this court."); *United States v. Roberts*, 534 F.3d 560, 572 (7th Cir. 2008) ("[The defendant] declined to request a *Brady* hearing before the district court. Accordingly, he has waived this issue."); *United States v. Schier*, 438 F.3d 1104, 1106 n.1 (11th Cir. 2006) (rejecting defendant's argument that the "district court . . . should have . . . [found] a violation of *Brady*, without so much as . . . a request for the materials to which she now claims she was entitled"); *United States v. Hayes*, 120 F.3d 739, 743 (8th Cir. 1997) ("The defendants offered no good cause for waiting . . . to request this alleged *Brady* material. We agree . . . that the motion was untimely."); *United States v. Flores*, 63 F.3d 1342, 1365 (5th Cir. 1995) ("[The defendant] never made a specific *Brady* request for these notes and, until his appeal, never suggested that these notes might contain *Brady* material. In these circumstances, the district court did not err in accepting the government's representation that it has furnished the defendant with all *Brady* materials.").

³⁰ *See supra* note 20.

In any event, Stern and Feldman have failed to establish that the Division has withheld material exculpatory evidence in violation of Rule 230(b)(2) and *Brady*, and we deny relief on this ground as well. As we have previously stated, "*Brady* is not a discovery rule."³¹ Rule 230(b)(2) instead is "intended to insure that exculpatory material known to the Division is not kept from the respondent."³² Its purpose "is not to provide [the respondent] with a complete disclosure of all evidence . . . which might conceivably assist him in preparation of his defense."³³ Thus, a respondent is "not entitled to conduct a fishing expedition . . . in an effort to discover something that might assist [it] in [its] defense . . . or in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory."³⁴

We find that Stern and Feldman have not made the requisite "plausible showing" that the "documents in question contain information that is both favorable and material to [their] defense."³⁵ As noted above, the Division has unequivocally represented that it is aware of the appropriate standards for *Brady* disclosure, that it has turned over all disclosable material in its investigative files leading up to the Reg. SHO portion of the CBOE Settlement (including internal staff communications that could be construed as containing material exculpatory facts subject to disclosure under *Brady*), and that it is not aware of any additional *Brady* material.³⁶

Stern and Feldman cite no evidence to contradict these representations. They merely speculate that because (in their view) the CBOE Settlement order contains findings that are inconsistent with those in the initial decision, communications and other work product leading up to the settlement necessarily would contain exculpatory material. But our precedent makes clear that a respondent's speculation that a different proceeding's investigative file "might . . . contain exculpatory material" because the "theory of liability" advanced in that proceeding is supposedly

³¹ E.g., *Warren Lammert*, Exchange Act Release No. 56233, 2007 WL 2296106, at *6 (Aug. 9, 2007) (quotation marks omitted).

³² E.g., *id.* (quotation marks omitted).

³³ E.g., *id.* (quotation marks omitted).

³⁴ E.g., *Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874, at *22 & n.77 (Feb. 27, 2012) (quotation marks omitted); *Haight & Co.*, Exchange Act Release No. 9082, 44 SEC 481, 1971 WL 120486, at *20 (1971) (rejecting contention that *Brady* permits "a wholesale 'fishing expedition' into investigative materials"); *Harris Clare & Co.*, Exchange Act Release No. 8004, 43 SEC 198, 1966 WL 84125, at *3 (1966) (rejecting contention that *Brady* "require[es] the wholesale production of investigative materials in administrative proceedings").

³⁵ *Jett*, 1996 WL 360528, at *1; *see also supra* note 24. Because Stern and Feldman have failed to make even this threshold showing, we have concluded that they are not entitled to demand an *in camera* review of disputed *Brady* materials before their claim is denied. *See Jett*, 1996 WL 360528, at *2 (vacating law judge's order directing the Division to turn over internal memoranda for *in camera* review because respondents had not made requisite "plausible showing").

³⁶ Cf. Rule of Practice 153, 17 C.F.R. § 201.153 (stating that a signature on a filing constitutes a certification that, to the best of the signer's, knowledge, "the filing is well grounded in fact"); *Brown*, 2012 WL 625874, at *22 & 76 (relying on representation made in the Division's pleadings).

"inconsistent" with the legal theories in the present proceeding is not enough to make out a viable claim of a *Brady* violation.³⁷ Furthermore, as we have repeatedly explained, we are entitled to rely on the Division's representation "that it is not aware of any *Brady* material in any of the investigative files at issue" in rejecting a respondent's *Brady* claim.³⁸ For example, we have held that the "law judge was entitled to rely" on the Division's representations that it had searched for "all disclosable material and had turned over all such material" and that it had reviewed "relevant action memoranda from staff to the Commission and was satisfied that there was not *Brady* material in those memoranda."³⁹ "[I]t takes more than the adverse party's conclusory suspicions to impel the adjudicator to delve behind the government's representation that it has conducted a *Brady* review and found nothing."⁴⁰

When juxtaposed with the Division's explicit representations and the extensive discovery that the Division has already provided, the type of documents that Stern and Feldman seek gives us further reason to be skeptical of their *Brady* claim.⁴¹ Neither Stern nor Feldman has even attempted to identify any *factual* information—*e.g.*, witness statements, documentary evidence produced by CBOE or any other third-party, interview transcripts, notes of telephone conversations, or exhibits—underlying the findings in the CBOE Settlement order that they contend was improperly withheld and that could potentially be introduced into evidence in the instant proceeding.⁴² Rather, they claim to be entitled to a broad array of what are essentially *legal* analyses submitted to the Commission or prepared by the Commission's staff, such as the "Division's Action Memorandum . . . concerning the CBOE," the "Wells Memoranda submitted

³⁷ *Lammert*, 2007 WL 2296106, at *6.

³⁸ *Id.*; *see also Brown*, 2012 WL 625874, at *22 & n.76; *Bridge*, 2009 WL 3100582, at *20; *Jett*, 1996 WL 360528, at *1.

³⁹ *KPMG Peat Marwick LLP*, 2001 WL 47245, at *18 n.90.

⁴⁰ *Landry v. FDIC*, 204 F.3d 1125, 1137 (D.C. Cir. 2000); *see also Jett*, 1996 WL 360528, at *1 ("Mere speculation that government documents may contain *Brady* material is not enough to require the judge to make an *in camera* review."); *Williams-Davis*, 90 F.3d at 513 ("Except for bare speculation, [the defendant] has nothing to suggest the existence of favorable materials.").

⁴¹ To be clear, we do not hold that documents like the ones sought by Stern and Feldman are non-discoverable as a class. But we do find, based on the arguments that are before us, that they have not made a plausible showing that the specific documents they seek contain undisclosed information that is favorable and material to their defense.

⁴² *Cf. Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (per curiam) (nondisclosure of inadmissible evidence is by definition not material under *Brady* because it could not have reached the jury and could not have affected the outcome); *United States v. Wilson*, 605 F.3d 985, 1005 (D.C. Cir. 2010) ("[T]o be 'material' under *Brady*, undisclosed information or evidence acquired through that information must be admissible." (quoting *United States v. Derr*, 990 F.2d 1330, 1336-37 (D.C. Cir. 1993))).

by the CBOE," and other memoranda submitted by CBOE. They also claim to be entitled to documents detailing the settlement negotiations between the Division and CBOE.⁴³

We have rejected past attempts by respondents to invoke Rule 230(b)(2) and *Brady* to obtain the "staff's recommendation[s]" to us and the staff's "analyses of the facts developed during the investigation and of the relevant law."⁴⁴ As a federal district court put it, a defendant "may be entitled to all exculpatory evidence," but he or she is not "entitled to have any document revealing what attorneys at the SEC *think* about such evidence."⁴⁵ That is so because "*Brady* obligates the government to disclose '*evidence* favorable to the accused,'" but "[i]t does not obligate the government to give the defendant *legal theories*."⁴⁶ At bottom, a "government attorney's opinion as to the strength or weakness" of an argument or "as to the clarity or meaning of" a legal requirement "would not preclude a contrary argument during litigation by the government or bind a court's ruling," and so *Brady* does not "require that attorney opinions on legal issues must be made available to the other side."⁴⁷ We accept the Division's representation

⁴³ Feldman also asserts in passing that the Division must produce "any other documents concerning *any* investigation of the CBOE," without limitation as to the time period or as to the subject matter. We reject this argument. Feldman does not even try to explain how an unrelated investigation of CBOE having nothing to do with Reg. SHO could generate *Brady* material relevant for this case, and Feldman clarifies in his reply that he is seeking only documents related to "CBOE's settlement with the SEC concerning their investigation of optionsXpress."

⁴⁴ *Jett*, 1996 WL 360528, at *1.

⁴⁵ *Reyes*, 2007 WL 528718, at *4.

⁴⁶ *United States v. Coker*, 514 F.3d 562, 570 (6th Cir. 2008) (quoting *Brady*, 373 U.S. at 87; citation omitted; emphasis in original); *see also Morris*, 447 F.3d at 742 (holding that *Brady* "does not encompass an obligation on the prosecutor's part to reveal his or her strategies, legal theories, or impressions of the evidence"); *Williamson v. Moore*, 221 F.3d 1117, 1182-83 (11th Cir. 2000) (holding that *Brady* does not typically require disclosure of opinion work product because an attorney's "mental impressions, conclusions, opinions, or legal theories" would not be admissible at trial); *United States v. Torrez-Ortega*, 184 F.3d 1128, 1137 (10th Cir. 1999) ("*Brady* would not extend to a merely subjective assessment by a prosecutor of a witness's veracity."); *United States v. Edelin*, 128 F. Supp. 2d 23, 40-41 (D.D.C. 2001) (recommendations "conveyed by the United States Attorney to the Department of Justice" not discoverable under *Brady*); *cf. Goldberg v. United States*, 425 U.S. 94, 98 n.3 (1976) (reserving question whether the government's work product must be disclosed under *Brady*).

So that there is no confusion, our conclusion does not rest on a finding that the materials sought by Stern and Feldman in fact constitute opinion work product, although, if true, that might provide an additional justification for withholding the documents. The determination of whether a document is covered by a particular privilege—*e.g.*, settlement, work product, law enforcement, attorney-client, deliberative process—calls for a fact-specific inquiry. It is unnecessary to undertake that analysis here, where Stern and Feldman have failed to make even a threshold showing that the documents plausibly might contain material exculpatory evidence subject to disclosure under *Brady*.

⁴⁷ *NYNEX Corp.*, 781 F. Supp. at 25-26 (rejecting *Brady* request for opinions prepared by government attorneys "that might reflect on the merits of [the defendant's] interpretation of the consent decree . . . , which in turn might indicate whether the decree was unambiguous").

that it has reviewed its internal memoranda for material, exculpatory evidence not otherwise disclosed in this proceeding. Thus, we reject Feldman's argument that *Brady* additionally entitles him to the Division's analysis and evaluation of "CBOE's position as to why optionsXpress did not violate Reg. SHO," whether contained in an Action Memorandum or any other document.

Similar considerations apply to any Wells submission that CBOE may have made to the Commission. That document (assuming it existed) would invariably contain legal argumentation and set forth CBOE's position on the merits or demerits of the contemplated enforcement action. As a piece of advocacy prepared by counsel, it is unlikely to contain or lead to novel, factual information—that is, admissible *evidence*—not present in the voluminous documentary material already turned over to Respondents. The same would likely be true of the white paper that CBOE submitted to the Division describing "improvements that had been made to CBOE's . . . surveillance programs[,] including those related to Reg. SHO[.]" after the conduct at issue here took place. Respondents do not explain how CBOE's subsequent remedial changes to its surveillance programs would constitute material, exculpatory evidence.

We are similarly dubious of Feldman's claim that the case summaries submitted by CBOE to the Division would plausibly contain undisclosed *Brady* material.⁴⁸ Feldman argues that these "summaries of Reg. SHO investigations that the CBOE conducted at other brokers may shed light on whether other firms and customers were engaged in the same trading strategies and whether they too received guidance from the CBOE that their activity did not violate Reg. SHO." Although it could well be that CBOE's *investigations* of other broker-dealers would be relevant to CBOE's views on what constituted a violation of Reg. SHO, we think that the same cannot be said of CBOE's after-the-fact *summaries* of those investigations, particularly when those summaries were submitted in the course of settlement negotiations with the Division. Notably, Feldman does not assert that any CBOE records contemporaneously created as part of the investigations was undisclosed. And as CBOE points out in its submission, "the full text of each of those decisions is publicly available on CBOE's website and [Respondents are] free to review them and decide if they are relevant to [their] defenses."⁴⁹ The fact that Respondents already were "aware of the essential *facts* that would enable [them] to take advantage"⁵⁰ of

⁴⁸ The document summarizes the cases that CBOE has brought against firms for various violations, including for violations of Reg. SHO.

⁴⁹ On August 9, 2013, CBOE filed what it styled as a "Submission Regarding the Respondents' Motions Seeking the Production of Settlement Documents." CBOE did not seek leave to file this document or to participate in the proceeding as a non-party. *Cf.* Rule of Practice 210(c), 17 C.F.R. § 201.210(c). Nonetheless, given that our resolution of these motions could affect CBOE's interests, we have considered CBOE's position, as well as the arguments in Feldman's response to CBOE's submission.

⁵⁰ *Heness v. Bagley*, 644 F.3d 308, 325 (6th Cir. 2011) (emphasis added) (rejecting *Brady* claim premised upon "police informational summaries that were not provided" where the defendant already knew of the underlying facts); *see also Pederson v. Fabian*, 491 F.3d 816, 827 (8th Cir. 2007) (rejecting *Brady* claim premised upon undisclosed summary of grand jury testimony and police statements when the "actual grand jury testimony and police statements were available for use by the defense").

CBOE's regulatory activities as a defense bolsters our conclusion that Feldman has not made a plausible showing that these summaries constitute undisclosed, material exculpatory evidence.

Finally, although Stern and Feldman claim to be entitled to settlement communications between the Division and CBOE, such as drafts of proposed findings, they do not explain why these documents qualify as *Brady* material. They identify no authority for the proposition (and we are aware of none) "holding that the government must disclose all proffers,"⁵¹ or that it must disclose "material contained in the back-and-forth hypothesizing that commonly occurs during plea negotiations between the prosecution and defense attorneys."⁵² Speculation is no substitute for a "plausible showing" that the withheld materials contain *Brady* material, so we find that Stern and Feldman have not established an entitlement to this category of documents either.

Accordingly, we reject Stern and Feldman's claim that the Division has failed to produce material exculpatory evidence in violation of Rule 230(b)(2) and *Brady*.

C. Stern and Feldman's Request to Re-examine Witnesses Fails to Satisfy the Requirements of Rule 452

Finally, Stern and Feldman seek leave to elicit additional testimony regarding CBOE's Reg. SHO investigation. They argue that the Division's supposed withholding of *Brady* material impeded their "ability to effectively question fact witnesses from both CBOE and Trading & Markets" during the hearing about CBOE's asserted misunderstanding of Reg. SHO. Having already considered and rejected their arguments that the Division withheld documents related to the CBOE Settlement in violation of Rule of Practice 230(b)(2) and *Brady*, we likewise deny their request to re-examine witnesses.

A respondent's "request . . . for testimony in addition to that given at the hearing" is governed by Rule of Practice 452 because it is in substance a motion for leave to introduce additional evidence after the hearing's conclusion.⁵³ As noted earlier, Rule 452 provides that the Commission may allow the submission of additional evidence if the party seeking to introduce such evidence "show[s] with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously."⁵⁴ Stern and Feldman have not shown that there were reasonable grounds for failure to adduce such evidence previously because, as discussed above, in May 2012—four months before the hearing—the

⁵¹ *United States v. Wilkes*, 662 F.3d 524, 535 (9th Cir. 2011); *see also United States v. Zuazo*, 243 F.3d 428, 430-31 (8th Cir. 2001) (affirming denial of *Brady* motion seeking disclosure of co-conspirator's proffer statements when the "underlying facts comprising the relevant evidence contained in those statements were not unknown" to the defendant).

⁵² *Spicer v. Roxbury Correctional Inst.*, 194 F.3d 547, 558 (4th Cir. 1999).

⁵³ *David Henry Disraeli*, Exchange Act Release No. 56045, 2007 WL 2011036, at *2 (July 11, 2007).

⁵⁴ 17 C.F.R. § 201.452.

Division produced the underlying evidentiary material that was the basis for the findings in the CBOE Settlement order. Stern and Feldman were free to introduce the documents at the hearing and use them when examining CBOE and Trading & Markets witnesses. Indeed, at the hearing, testimony was elicited about many of the same topics touched upon in the CBOE Settlement order, such as the fact that CBOE investigators never received formal training on Reg. SHO.⁵⁵

Feldman argues that he did not know "that the Commission was investigating CBOE or was planning on issuing the Order" and that this explains why he could not have introduced the material at the hearing. Along similar lines, he claims that "did not know why these documents were relevant to his defenses until the CBOE Order was issued after the hearing." We do not credit these assertions. Respondents could not possibly have been surprised that CBOE was under investigation in connection with CBOE's enforcement of Reg. SHO and, in particular, CBOE's scrutiny of optionsXpress and that the Commission might settle the CBOE matter. As detailed above,⁵⁶ the Division's May 9, 2012 Withheld Documents List explicitly stated that the Division was withholding "correspondence and other documents related to the settlement discussions" with CBOE. The Division also produced document requests and subpoenas issued to CBOE as part of its investigation. Thus, Respondents surely "should have foreseen" that CBOE's regulatory activities were a "subject of scrutiny" and they "have not shown that there were reasonable grounds for their failure to adduce the evidence previously."⁵⁷

In sum, "[i]t was [Respondents'] obligation 'to marshal *all* the evidence in [their] defense,'"⁵⁸ and if they believed that additional evidence or testimony pertaining to the Commission's investigation of CBOE would have been helpful, they could and "should have introduced it during the hearing."⁵⁹ Because they "had a full opportunity to present evidence and argument," there is "no reason why [they] should be permitted to start over again."⁶⁰ For these reasons, Stern and Feldman's request to re-examine witnesses is denied.

* * *

⁵⁵ See Division's Resp. to optionsXpress's Mot. for Consideration of New Evidence at p. 4 n.2 (collecting transcript citations) (July 10, 2013).

⁵⁶ See *supra* at pp. 5-6.

⁵⁷ *FCS Secs.*, Exchange Act Release No. 64852, 2011 WL 2680699, at *8-9 (July 11, 2011);

⁵⁸ *Russo Secs.*, 2001 WL 379064, at *8 (emphasis added; quoting *Laurie Jones Canady*, Exchange Act Release No. 41713, 1999 WL 587941, at *3 (Aug. 6, 1999)).

⁵⁹ *FCS Secs.*, 2011 WL 2680699, at *8.

⁶⁰ *Disraeli*, 2007 WL 2011036, at *1 n.9 (quotation marks omitted).

Accordingly, IT IS ORDERED that the motions are granted insofar as judicial notice is taken of the CBOE Settlement order pursuant to Rule of Practice 323 and as the CBOE Settlement order is accepted as additional evidence pursuant to Rule of Practice 452. The motions are in all other respects denied.

By the Commission.

Elizabeth M. Murphy
Secretary