



Holly Pappas &lt;hpappas@csj-law.com&gt;

---

**RE: SEC Mulls Schwab Unit's Naked Short-Sale Sanction Appeal**

1 message

---

**Tim Connolly** <tim@texasgulfoil.com>

Tue, Jan 19, 2016 at 8:00 AM

To: "James W. Christian" &lt;jwc@csj-law.com&gt;

SEC Mulls Schwab Unit's Naked Short-Sale Sanction Appeal

Share us on: By Ed Beeson

Law360, New York (January 15, 2016, 10:56 PM ET) -- A Charles Schwab Corp<<http://www.law360.com/companies/charles-schwab-corporation>>. subsidiary and a former customer told the U.S. Securities and Exchange Commission Friday<<http://www.law360.com/agencies/securities-and-exchange-commission>> that an agency judge overreached when she found them liable for an alleged naked short-selling scheme and ordered them to pay \$8.2 million in sanctions.

OptionsXpress Inc. and Jonathan Feldman are challenging a June 2013 initial decision by Chief Administrative Law Judge Brenda Murray that found them liable for violations of the SEC's short-selling rules and on the hook for millions of dollars apiece in penalties and repayments.

But the pair argued that OptionsXpress and, in turn Feldman, had received tacit approval from their regulator, the Chicago Board Options Exchange, of the trading strategy deployed by Feldman and others.

An attorney for OptionsXpress, Stephen J. Senderowitz of Dentons LLP<<http://www.law360.com/firms/dentons>>, said the Chicago board had investigated the firm's use of instruments known as buy-rights to meet duties to close out short positions but determined there was no violation of Regulation SHO.

"This green flag from the CBOE<<http://www.law360.com/companies/cboe-holdings-inc>> defeats any finding that we acted with extreme recklessness," he said.

Feldman's attorney, Greg T. Lawrence of Conti Fenn & Lawrence LLP<<http://www.law360.com/firms/conti-fenn>>, said his client had relied on information he was given by OptionsXpress officials about what the regulators thought about his trading approach.

"He believed that the SEC had actually approved of his trading strategy," Lawrence said. "Was that true? For this fraud case, it doesn't matter. It doesn't matter at all. They said it. They never took it back."

The Chicago Board was fined \$6 million by the SEC in 2013 for its oversight failures with respect to OptionsXpress and other matters. And at Friday's hearing, the SEC attorney denied the trading moves had a green flag.

Under SEC rules, traders can sell shares they don't own as long as they have either "borrowed" the shares from another investor or have a reasonable basis to believe they can borrow shares prior to the typical three-day window for closing out a transaction.

Abusive naked short selling occurs when a trader intentionally fails to deliver a stock within that period, either with an aim to manipulate a security or to avoid fees for borrowing the stock.

Feldman, who was a senior vice president at Maryland-based community bank at the time, had engaged in a complex sham trading scheme that involved buying and selling short billions of dollars of securities of Sears Holding Corp. and others, the SEC's enforcement division charged in 2012. The scheme allowed him to improperly avoid Regulation SHO's requirement to close out short positions and earned him more than \$2.6 million in illicit profits over roughly a year-and-a-half period, according to Judge Murray's estimate.

Judge Murray had found that OptionsXpress aided and abetted Feldman's alleged fraud and that it also broke strict rules around closing out short positions within the requisite three days. The alleged misconduct took place before Schwab purchased OptionsXpress in 2011.

The appeal comes at a time when the SEC is fighting fires over the use of its in-house court to try complex matters within hurried time frames and under rules that don't afford defendants many of the same rights they have in federal district court.

But Friday's hearing generated little discussion about the controversy over administrative tribunals. Instead, counsel for both OptionsXpress and Feldman pressed the point that Judge Murray went too far in finding they had broken the law.

The now three-member commission and the agency's Office of General Counsel will assess the legal soundness of Judge Murray's 105-page decision, which was based on a 17-day hearing that produced more than 5,000 pages of trial transcripts and about 320 exhibits.

An attorney for the enforcement division, Frederick L. Block, disputed defense arguments that they were operating under some form of regulatory approval.

"That's his testimony," Block said of Feldman's argument, before noting the trader did not corroborate the claim, which was relayed to him in an email and a subsequent phone call, or call anyone to testify to that point.

"What you need to consider is whether that belief is reasonable," Block told the commission.

Block also said OptionsXpress knew of several investigations into its short sale practices and that it had ignored regulatory guidance from the various exchanges. He asked the SEC to impose repayment of \$7.2 million on the firm alone, or roughly \$4.5 million more than the disgorgement order that Judge Murray imposed.

"At bottom, what we have here is there was not a single regulator telling them what they were doing complied with Rule 204 [of Reg SHO]," Block said. "What they want you to do is to say that it is the regulator's job to tell them to stop, but that's not the law. It's a regulated entity's job to make sure they are complying at all times with the securities laws."

OptionsXpress is represented by Stephen J. Senderowitz of Winston & Strawn LLP<<http://www.law360.com/firms/winston-strawn>>. Feldman is represented by Greg T. Lawrence of Conti Fenn & Lawrence LLP.

The SEC was represented by Frederick L. Block.

The case is In the matter of OptionsXpress Inc., file number 3-14848, before the U.S. Securities and Exchange Commission.

Tim Connolly  
Chief Executive Officer  
Corporate Strategies LLC  
Merchant Bankers  
123 N. Post Oak Lane, Suite 440  
Houston, TX 77024  
Office: 713-621 2737  
Direct: 713-586-6677  
Mobile: 713-824-9393  
Fax: 713-586-6678

From: Tim Connolly  
Sent: Tuesday, January 19, 2016 6:54 AM  
To: James W. Christian  
Subject: FW: SEC Mulls Schwab Unit's Naked Short-Sale Sanction Appeal

Tim Connolly  
Chief Executive Officer  
Corporate Strategies LLC

Merchant Bankers  
123 N. Post Oak Lane, Suite 440  
Houston, TX 77024

Office: 713-621 2737  
Direct: 713-586-6677  
Mobile: 713-824-9393  
Fax: 713-586-6678

From: tim [mailto:service@law360.com]  
Sent: Tuesday, January 19, 2016 6:54 AM  
To: Tim Connolly  
Subject: SEC Mulls Schwab Unit's Naked Short-Sale Sanction Appeal

---

A Law360 reader sent you this article. Click on the link below to read the article. You must be registered to read the article. If you're not already registered, just fill in the form to get instant access to this article and thousands of other articles from Law360, the newswire for business lawyers.

#### SEC Mulls Schwab Unit's Naked Short-Sale Sanction Appeal

A Charles Schwab Corp. subsidiary and a former customer told the U.S. Securities and Exchange Commission Friday that an agency judge overreached when she found them liable for an alleged naked short-selling scheme and ordered them to pay \$8.2 million in sanctions.

<http://www.law360.com/securities/articles/744936><[http://www.law360.com/securities/articles/744936?utm\\_source=shared-articles&utm\\_medium=email&utm\\_campaign=shared-articles](http://www.law360.com/securities/articles/744936?utm_source=shared-articles&utm_medium=email&utm_campaign=shared-articles)>

---

 **winmail.dat**  
19K