



Options Trading Without The Issuer's Consent

September 8, 2011 by [Keith Paul Bishop](#)

In yesterday's [post](#), I discussed secondary trading of standardized options and noted that the SEC has taken the position that in the case of standardized options the issuer is [The Options Clearing Corporation](#). This leads to the question of whether the issuer of an underlying security has any say in deciding if there will be secondary trading in standardized options to acquire its security.

According to the Options Disclosure Document issued by the OCC pursuant to Exchange Act Rule 9b-1, "Issuers of underlying equity securities do not participate in the selection of their securities for options trading (although some options markets may determine not to select an underlying security without the consent of the issuer of that security)."

This is more than an academic issue. In fact, one issuer, Golden Nugget, Inc., sued the American Stock Exchange and the OCC claiming that the failure to secure Golden Nugget's consent before trading options on its stock constituted a misappropriation of Golden Nugget property, infringed on the Golden Nugget trade name and constituted unfair competition, in violation of Nevada law. *Golden Nugget, Inc. v. American Stock Exchange, Inc.*, 828 F.2d 586 (9th Cir. 1987). The Court of Appeals found that

[The defendants] deal only in the property of Golden Nugget's shareholders, not in property owned by the corporation. Plaintiff does not suggest that it has retained any proprietary rights in the shares of its stock that would allow it to control the manner or means of resale of its shares. We find it impossible to conceptualize a property right of the plaintiff that has been misappropriated.

The Court was also not persuaded with respect to the Golden Nugget's trademark claims:

Describing the product nondeceptively and by name brand has never been a violation of a manufacturer's trademark. We see no distinction between shares of stock and second-hand cars in this regard.

Finally, Golden Nugget argued that the exchange traded options competed unfairly with its own options and warrants. Citing no deception or appropriation of Golden Nugget's property, the Court rejected this claim as well.

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It is important to remember that Golden Nugget's claims were based on state law and none of the parties were able to cite any Nevada law to guide the court. Subsequently, the Second Circuit Court of Appeals in *Dow Jones & Co. v. Int'l Sec. Exch., Inc.*, 451 F.3d 295 (2006) considered the question under New York law and found that the defendants' creating, listing, trading, and clearing of options on the shares of exchange traded funds that track the performance of stock market indexes created by the plaintiffs did not constitute wrongful use or misappropriation. Nonetheless, it remains at least theoretically possible that the law of other states might provide issuers with more support for the position that their consent is required.

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