

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Petition of

CITADEL SECURITIES LLC,
RONIN CAPITAL, LLC,
SUSQUEHANNA INVESTMENT GROUP,
and SUSQUEHANNA SECURITIES

Admin. Proc. File No. 3-17189

**RESPONSE BRIEF FOR NASDAQ OMX PHLX LLC PURSUANT TO
THE COMMISSION'S APRIL 1, 2016 ORDER**

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INTRODUCTION

Petitioners argue that the Commission lacks jurisdiction over their claims that the Exchanges violated their own rules. In doing so, Petitioners ignore the text of Section 19 of the Exchange Act, which expressly gives the Commission jurisdiction over claims that an SRO “has violated or is unable to comply with . . . its own rules.” 15 U.S.C. § 78s(h)(1). They assert that the Seventh Circuit did not address jurisdiction in *Citadel Sec., LLC v. Chicago Bd. Options Exch., Inc.*, 808 F.3d 694, 700 (7th Cir. 2015), even though the court said that “[Section 19(h) of the Exchange Act] states that the SEC’s jurisdiction covers claims against an SRO for violating ‘its own rules.’” They say that the Commission’s *rules* can somehow strip the Commission of its congressionally granted statutory jurisdiction. And they overlook the most obvious means under the Rules of Practice by which the Commission can address the Petition.

Petitioners’ brief confirms that they do not take seriously the Seventh Circuit’s decision in *Citadel*, and that they are only pretending to pursue administrative relief before the Commission. But despite their best efforts at sabotage, Petitioners cannot minimize the Commission’s jurisdiction. The Seventh Circuit plainly held that Section 19 of the Exchange Act gives the Commission jurisdiction over Petitioners’ claims. *Citadel*, 808 F.3d at 699-700. And Rule 101(a)(9)(i) provides the Commission with means to address the Petition through a “proceeding.”

The Commission should therefore exercise jurisdiction over Petitioners’ claims. The Commission can then proceed to reject these claims because—as Nasdaq has explained—Petitioners’ claims are meritless on their face. *See* Nasdaq Br. 7-8.

ARGUMENT

I. The Commission Has Jurisdiction Over Petitioners' Claims.

Nasdaq has demonstrated that the plain language of the Exchange Act charges the Commission with jurisdiction over Petitioners' claims. Nasdaq Br. 2-6. Section 19(h)(1) gives the Commission authority to take appropriate action when an SRO "has violated or is unable to comply with . . . its own rules." 15 U.S.C. § 78s(h)(1). Invoking that statutory language, the Seventh Circuit—as the Northern District of Illinois before it—held that the Commission has jurisdiction over Petitioners' claims. *Citadel Sec., LLC v. Chicago Bd. Options Exch., Inc.*, 808 F.3d 694, 699-700 (7th Cir. 2015); *see also* Order, D.E. 32 at 4-5, *Citadel Sec., LLC v. Chicago Bd. Options Exch., Inc.*, No. 13-5833 (N.D. Ill. Aug. 4, 2014); NYSE & CBOE Br. 2-4.

Petitioners wholly ignore the text of the Exchange Act. And they wholly misstate the Seventh Circuit's holding when they assert that the court did not "conclud[e] that the Commission has jurisdiction over the matter, only that it could not be said that the Commission lacked jurisdiction unless and until [Petitioners] attempted to pursue administrative relief before the Commission." Pet. Br. 5 (emphasis omitted); *see also id.* at 1 ("[N]o court has held that the Commission has jurisdiction over this matter."). In rejecting Petitioners' arguments, the Seventh Circuit expressly held that Section 19(h)(1) "states that the SEC's *jurisdiction* covers claims against an SRO for violating 'its own rules'" and that "[w]hat matters" for determining the Commission's "*jurisdictional* reach" "is whether [the Exchanges] are operating under their own rules, *as in the case at hand.*" *Citadel*, 808 F.3d at 700 (emphases added).

Petitioners perhaps confuse jurisdiction with remedies. The Seventh Circuit expressed some uncertainty about what particular remedies may or may not be available before the Commission. *Id.* at 700-01. But the court harbored no doubt that the Commission had

jurisdiction in the first place. To disclaim jurisdiction now, the Commission would have to disagree with the Seventh Circuit, and distort the language of the Exchange Act. *See Altman v. SEC*, 687 F.3d 44, 46 (2d Cir. 2012) (per curiam) (Exchange Act “suppl[ies] the jurisdictional route” a party “must follow to challenge” action that falls within the statute); *Feins v. Am. Stock Exch., Inc.*, 81 F.3d 1215, 1221 (2d Cir. 1996) (“Congress did not intend to provide a private cause of action in federal court. The Exchange Act sets out a comprehensive regulatory scheme.”).

Petitioners also contend that the Commission lacks jurisdiction because the Exchanges’ PFOF programs are “private and not regulatory in nature,” Pet. Br. 10-11, citing *Opulent Fund, L.P. v. Nasdaq Stock Mkt. Inc.*, No. 07-cv-03683, 2007 WL 3010573 (N.D. Cal. Oct. 12, 2007) and *Weissman v. Nat’l Ass’n of Sec. Dealers*, 500 F.3d 1293 (11th Cir. 2007) (en banc). Petitioners’ reliance on these cases confuses immunity—which no party is asserting before the Commission—with the jurisdictional inquiry. Significantly, Petitioners raised the same argument, citing the same cases, in the Seventh Circuit, to no avail. The court explained that “the logic of *Weissman* does not excuse [Petitioners’] obligation to exhaust SEC remedies,” and that Petitioners served up an “improper reading of . . . *Opulent Fund*” because “the regulatory or private nature of the action does not determine the SEC’s jurisdictional reach.” *Citadel*, 808 F.3d at 700. The Seventh Circuit’s rejection of these exact arguments only further confirms that the court *did* hold that the Commission has jurisdiction over Petitioners’ claims. Petitioners’ argument is also legally incorrect: As the Seventh Circuit explained, the Exchanges’ PFOF programs “attract order flow to a market, thereby increasing liquidity in that market,” *id.* at 697, and the Commission has recognized this as an important regulatory end, *see* Amendments to

Regulation SHO, 74 Fed. Reg. 18,042, 18,044 (Apr. 20, 2009) (“market liquidity” provides an “important benefi[t]” to markets).

Petitioners further argue that because the Commission “has no authority to award damages, it cannot provide [Petitioners] an adequate remedy.” Pet. Br. 9-10. The Commission has broad remedial powers; but even if an award of damages is not among these powers, that would not show that the Commission lacks jurisdiction or even that Petitioners lack an adequate remedy. As the D.C. Circuit has explained in analogous circumstances, Petitioners “may be troubled by the fact that Congress’s approach does not include damage-remedies,” but their “disenchantment changes nothing.” *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 114 (D.C. Cir. 2008). The Exchange Act provides for particular remedies, and “[a] common law suit for recovery of monetary damages is merely an attempt to bypass the Exchange Act and the process Congress envisioned therein.” *Id.* (citation and alterations omitted); *see also Scattered Corp. v. Chicago Stock Exch., Inc.*, 98 F.3d 1004, 1007 (7th Cir. 1996) (private damages “would evade” Congress’s intent).

Petitioners mistakenly rely on cases such as *McCarthy v. Madigan*, 503 U.S. 140 (1992), and *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928) in arguing that the lack of a damages remedy defeats Commission jurisdiction. *See* Pet. Br. 9-10. These cases concern when exhaustion of administrative remedies may be excused, which is a separate issue from jurisdiction, as the Seventh Circuit’s opinion in *Citadel* demonstrates: The court first addressed whether Petitioners’ claims fell within the Commission’s jurisdiction (such that exhaustion was presumptively required), 808 F.3d at 699-700; and then considered the separate question whether the court “may waive the exhaustion requirement” despite the existence of jurisdiction before the Commission, *id.* at 700-01. Petitioners lost on both issues, and thus the

issue of whether exhaustion may be waived has been authoritatively decided. Petitioners must exhaust their administrative remedies; if they are denied relief, their next stop is a federal court of appeals. *See* 15 U.S.C. § 78y(a); *Feins*, 81 F.3d at 1223.

In any event, these cases do not help Petitioners. In language that Petitioners quote, the cases suggest only that exhaustion of administrative remedies may not be required when an agency lacks authority to grant “*effective relief*,” *McCarthy*, 503 U.S. at 147 (citation omitted) (emphasis added), or “*any appropriate relief*,” *Mont. Nat’l Bank*, 276 U.S. at 505 (emphasis added). Here, Petitioners admit that the Commission has authority to grant at least some relief, Pet Br. 12-13—not least in the form of disgorgement and the creation of “a fund for the benefit of investors who were harmed by the violation.” 17 C.F.R. § 201.1100.¹

Petitioners fall well short of demonstrating that this remedy is so inadequate as to render exhaustion “futile or inadequate to prevent irreparable injury.” *Citadel*, 808 F.3d at 700. They admit that the Commission may use disgorged funds for their benefit, but say that the Commission is “not required to do so” and that there is no “guarantee” that they “would be made whole.” Pet. Br. 12. But an available remedy is not inadequate simply because the Commission ultimately denies relief. Nor, as explained in *Series 7*, is an available remedy inadequate merely because it differs from the remedy that Petitioners would prefer. 548 F.3d at 114. The additional cases Petitioners cite prove exactly that point. *See White v. Bukowski*, 800 F.3d 392,

¹ For the same reason, Petitioners’ reliance on *Barbara v. NYSE*, 99 F.3d 49, 57 (2d Cir. 1996), is misplaced. Pet. Br. 4 & 9. There, the court explained that exhaustion may be waived when administrative remedies provide “no genuine opportunity for adequate relief.” But quoting *Guitard v. U.S. Secretary of the Navy*, 967 F.2d 737, 741 (2d Cir. 1992), the court also noted that the “inability to grant full relief does not dispose of the exhaustion requirement.” And in *Guitard*, the court determined that exhaustion is required “so long as the tribunal in question ha[s] the power to grant some pertinent relief.” *Id.*; *see also Feins*, 81 F.3d at 1221 (“The SEC has a number of enforcement and compliance tools at its disposal.”).

395 (7th Cir. 2015) (exhaustion required when some remedy is available, “even if it is not the specific relief sought”); *Perez v. Wis. Dep’t of Corr.*, 182 F.3d 532, 537 (7th Cir. 1999) (the “question is whether *any* ‘remedies’ are ‘available,’” not the plaintiff’s “*preferred* remedy”).

Petitioners finally say that, in a disgorgement proceeding, they “would not have the procedural protections and rights that a party has.” Pet. Br. 12. But Petitioners have the right under the Rules of Practice, for example, to “state [their] views with respect to a proposed plan of disgorgement or file a proof of claim.” 17 C.F.R. § 201.210(a)(2). They do not explain why this procedure renders disgorgement so inadequate to justify asking the Commission to act at odds with the Congressional plan for handling claims of this nature.

II. The Commission May Exercise Its Jurisdiction In A “Proceeding” Under The Rules of Practice.

Given its clear statutory jurisdiction, the Commission may exercise jurisdiction over the Petition regardless of whether the Rules of Practice provide a specific means for doing so. But in any event, the Rules of Practice provide means for the Commission to exercise its statutory jurisdiction in a “proceeding.” Rule 101(a)(9)(i) defines a “proceeding” to include “any agency process initiated by an order instituting proceedings,” 17 C.F.R. § 201.101(a)(9)(i); and the Commission may issue an “order instituting proceedings” by stating “the legal authority and jurisdiction” over the matter, *id.* § 201.200(b)(2). Pursuant to this broad authority, the Commission may exercise its statutory authority over the Petition in a proceeding as defined in the Rules of Practice. *See also* NYSE & CBOE Br. 4-5.

Tucked away in a footnote is Petitioners’ only mention of Rule 101(a)(9)(i)—and all it says is that the rule does “not in any way apply to this matter.” Pet. Br. 6 n.11. Petitioners offer no explanation why. Petitioners instead argue that the Commission may not exercise jurisdiction over the Petition under Rule 101(a)(9)(iii), which pertains to review of certain SRO

determinations under Rule 420. Pet. Br. 6-8; *see also* 17 C.F.R. § 201.101(a)(9)(iii). But since the Petition is so clearly reviewable under Rule 101(a)(9)(i), it is immaterial whether it is also reviewable under Rule 101(a)(9)(iii).²

Petitioners have it completely backwards when they say that “[b]ecause the Rules of Practice do not provide a procedure by which [Petitioners] can challenge the Exchanges’ action, the Commission has no statutory authority to exercise jurisdiction over this matter.” Pet. Br. 8. None of the cases Petitioners cite supports the bizarre proposition that regulations could deprive the Commission of statutory authority. All those cases say, as Petitioners admit, is that an agency must follow the rules it has chosen to adopt. Pet. Br. 8. There are rules governing the Petition here; but even if, as Petitioners contend, there were no rules governing the matter, then the Commission would nonetheless retain full authority to exercise its statutory jurisdiction.

² The Petition may indeed be reviewable under Rule 101(a)(9)(iii) as Nasdaq noted in its opening brief. Nasdaq Br. 6 n.1 The Petition implicates one of the SRO determinations made reviewable by Rule 420—specifically, a “[p]rohibition or limitation in respect to access to services offered by that self-regulatory organization.” 17 C.F.R. § 201.420(a)(3). The Petition could be read to allege that Petitioners were limited in their access to fair participation in the Exchanges, which is a service offered by the Exchanges. It is immaterial that “the Exchanges did not file a notice of determination with the Commission.” Pet. Br. 7. As the Second Circuit has explained, “[t]he Commission may commence such a review irrespective of whether a filing is, in fact, submitted by the SRO.” *MFS Sec. Corp. v. NYSE*, 277 F.3d 613, 619 n.6 (2d Cir. 2002) (citation omitted). So Petitioners’ sole attempt to address Rule 101(a)(9) fails.

The Commission may also determine that a separate provision, Rule 101(a)(i)(vi), applies. *See* Nasdaq Br. 6 n.1.

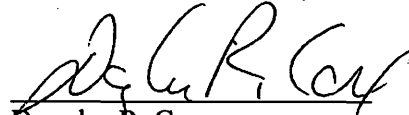
CONCLUSION

The Commission has jurisdiction over the Petition. The Commission may exercise that jurisdiction in a proceeding as defined by the Rules of Practice.

As demonstrated in Nasdaq's opening brief, Petitioners' claims are facially deficient. Thus, the Commission should exercise jurisdiction over Petitioners' claims and proceed to reject them as a threshold matter.

Dated: April 22, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on April 22, 2016, a copy of the foregoing Response Brief for NASDAQ OMX PHLX LLC Pursuant to the Commission's April 1, 2016 Order was served upon the following by first-class mail, addressed as follows:

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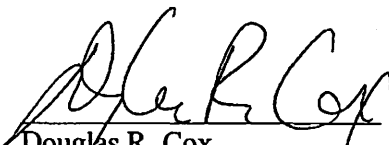
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