UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

BOX Holdings Group LLC, Box Options Market LLC, and Luc Bertrand

For Review of Action Taken by

BOX Exchange LLC

File No. 3-20860

BOX EXCHANGE LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE APPLICATION FOR REVIEW

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INTRODUCTION

The Commission asked the parties to file briefs addressing "each element of the relevant provisions of Exchange Act Section 19(d)" and specifically instructed the parties not to make merits arguments because such arguments "are not sufficient to establish jurisdiction under Exchange Act Section 19(d)." June 22, 2022 Order at 2. Despite this, Applicants[1] fail to analyze any part of Section 19(d) until *page 16* of their opposition. And even then, they never address each element of the relevant provisions. Applicants' primary argument—that "the Commission has jurisdiction pursuant to Section 19(d)(2)" because BOX Exchange took this action "pursuant to its regulatory authority"—is nowhere in the text of Section 19(d). Opp. at 16. Rather, the controlling text in Exchange Act Section 19(d) is as follows:

> If any self-regulatory organization imposes any final disciplinary sanction *on any member thereof or participant therein* . . . or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction *on any person associated with a member* . . . the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization . . . . Any action with respect to which a self-regulatory organization is required . . . to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant or other person . . . .

15 U.S.C. § 78s(d)(1)–(2) (emphases added).

As BOX Exchange explained, and as Applicants do not dispute, Section 19(d)'s plain text authorizes the Commission to review an SRO action resulting in a final disciplinary sanction *only* when the sanction is imposed on a member or on a person associated with a member. Mot. at 8 (collecting cases). Applicants conceded in their application for review that they were not members or persons associated with members, and they never contend otherwise in their brief.

[1] This brief uses the term "Applicants" to refer collectively to BOX Holdings Group LLC ("BOX Holdings"), BOX Options Market LLC ("BOX Market"), and Luc Bertrand, who together filed the application for review in this matter.

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That should bring the jurisdictional inquiry to an end. Section 19(d)(2) provides no additional basis for the Commission to exercise jurisdiction, because it applies only to "[a]ny action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice." 15 U.S.C. § 78s(d)(2).

The only other argument on this point, which Applicants tellingly bury in a footnote a few pages later, fares no better. Applicants urge that jurisdiction is proper here as to BOX Market because BOX Market "provides the means for effecting transactions on BOX Exchange," and "must cooperate with . . . BOX Exchange" pursuant to its regulatory authority, and thus falls within the statutory definition of "member" for purposes of Section 19(d). Opp. at 18 n.9. This argument fails because the applicable statutory language (drawn from Section 6(f) of the Exchange Act) applies only where the Commission has issued a "rule or order" pursuant to Section 6(f) that "specifie[s]" that a non-member must comply with certain rules of the exchange. The Commission has not done anything like that here.

Moreover, even if Applicants could overcome all these failings to ground jurisdiction in Exchange Act Section 19(d)—which they cannot—the application must be dismissed because there is no live sanction for the Commission to review here.

Applicants have failed to carry their burden to establish jurisdiction over their application. The application for review therefore must be dismissed.

ARGUMENT

I. Section 19(d) Authorizes Commission Review Of A Final Disciplinary Sanction Only If The Sanction Is Imposed On A Member Or Person Associated With A Member.

BOX Exchange explained, and Applicants do not dispute, that Section 19(d)'s plain text authorizes the Commission to review a final disciplinary sanction imposed by an SRO only when the sanction is imposed on a member or person associated with a member of the SRO. Mot. at 8

(collecting cases). If a party cannot establish one of these grounds "expressly authorized" by Congress, then the Commission "lack[s] jurisdiction." *Jonathan Edward Graham*, Exchange Act Release No. 89327, 2020 WL 3820988, at *3 (July 7, 2020); *see WD Clearing, LLC*, Exchange Act Release No. 75868, 2015 WL 5245244, at *3 (Sept. 9, 2015) ("Section 19(d) . . . authorizes us to review an SRO action *only if* that action" falls within these categories." (emphasis added)).

Applicants cannot establish any of these grounds for jurisdiction—and they hardly try. Applicants' primary argument is this: "[T]he Commission has jurisdiction pursuant to Section 19(d)(2) to hear Applicants' appeal because BOX Exchange is purporting to invoke its regulatory authority delegated to it by the Commission to impose disciplinary sanctions on Applicants." Opp. at 9; *see* Opp. at 16, 18 (same). Showing no regard for the statutory text and the limits imposed by Congress in Section 19(d), Applicants contend this is true no matter whether the sanction is "imposed on an SRO member or on a non-member." Opp. at 18. In other words, Applicants take the extraordinary position that "any disciplinary action taken by an SRO pursuant to its regulatory authority—whether imposed on an SRO member or a non-member"—is reviewable by the Commission under Section 19(d). *Id.* That position has no basis in the text of Section 19(d) and cannot be squared with Commission precedents that have correctly identified the clear limits imposed on the Commission's jurisdiction.

This is a problem for Applicants, of course, because the Commission "start[s] with the statutory text." *Robert L. Bryant III*, Exchange Act Release No. 92036, 2021 WL 2182224, at *1 n.8 (May 26, 2021) (quoting *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020)). And the text, as the Commission has made clear time and again, authorizes it to review an SRO action that imposes a disciplinary sanction only when it imposes the "final disciplinary sanction on any member or person association with a member." Mot. at 9 (collecting cases); *see Matthew Brian Proman*,

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Exchange Act Release No. 57740, 2008 WL 1902072, at *1 (Apr. 30, 2008). As BOX Exchange explained, Section 19(d)(2) thus does not provide any additional basis on which the Commission may exercise jurisdiction under Section 19(d). Mot. at 11–13. Indeed, Applicants fail to cite any case even suggesting that Section 19(d)(2) provides any independent ground for jurisdiction. *See Sharemaster v. SEC*, 847 F.3d 1059, 1062 (9th Cir. 2017) ("Exchange Act Section 19(d)(2) authorizes the Commission to review 'any final disciplinary sanction' . . . that . . . Section 19(d)(1) requires [an SRO] to report to the Commission."). At bottom, when the Commission considers whether it has jurisdiction under Section 19(d), it simply asks whether an application "fall[s] within any of the four jurisdictional bases for Commission review of [an SRO's] action enumerated in Section 19(d)." *E.g.*, *Whitehall Wellington Invs., Inc.*, Exchange Act Release No. 44367, 2001 WL 600438, at *2 (May 30, 2001). This one does not.

No doubt recognizing that this general appeal to Section 19(d)(2) lacks force, Applicants offer in a footnote an argument that at least attempts to deal with part of the text of Section 19(d). For the first time (after failing to mention it in their application or follow-on letter-brief), Applicants point out that the statutory definition of "member" in Exchange Act Section 3(a)(3) provides that the term includes for purposes of Section 19(d) "any person required by the Commission to comply with such rules pursuant to section 78f(f) of this title." 15 U.S.C. § 78c(a)(3)(A). Section 6(f), in turn, provides:

> The Commission, by rule or order, as it deems necessary or appropriate in the public interest and for the protection of investors, to maintain fair and orderly markets, or to assure equal regulation, may require . . . any person not a member or a designated representative of a member of a national securities exchange effecting transactions on such exchange without the services of another person acting as a broker . . . to comply with such rules of such exchange as the Commission may specify.

15 U.S.C. § 78f(f). From this, Applicants argue that BOX Market, despite "not [being] a member of BOX Exchange," "falls within the statutory definition of 'member' . . . because [1] it provides *the means* for effecting transactions on BOX Exchange via its operation of the electronic trading system, and [2] the Commission has specified that BOX Market 'must cooperate with . . . BOX Exchange pursuant to and to the extent of [its] regulatory authority.'" Opp. at 18 n.9 (emphasis added). To the extent the Commission considers this conclusory argument raised exclusively in a footnote,[2] the argument fails.

First, this argument attempts to rewrite Section 6(f) by adding words to change its plain meaning. This section provides that the Commission *may* require that a non-member be treated as a "member" for purposes of Section 19(d) if it "*effect[s]* transactions"—*i.e.*, accomplishes or completes transactions—on BOX Exchange. *See Effecting*, The American Heritage College Dictionary (3d ed. 2000) ("To bring into existence."). But Applicants do not even try to claim that they "effect" transactions; the best they can do is to claim that BOX Market, as a *facility* of BOX Exchange, "provides *the means*" for *others* to effect transactions. Opp. at 18 n.9 (emphasis added). Applicants' attempt to rewrite this provision to bring themselves within its bounds should be forcefully rejected.[3]

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[2] "Many courts will disregard arguments raised exclusively in footnotes." *MacDonald v. Ford Motor Co.*, 142 F. Supp. 3d 884, 895 (N.D. Cal. 2015); *see Nat'l Oilseed Processors Ass'n v. OSHA*, 769 F.3d 1173, 1184 (D.C. Cir. 2014) ("[T]he court generally declines to consider an argument if a party buries it in a footnote and raises it in only a conclusory fashion."); *Trujillo v. Chef'S' Warehouse W. Coast LLC*, No. 2:19-cv-08370 DSF (MAAx), 2021 WL 3578308, at *9 (C.D. Cal. Apr. 26, 2021) (collecting cases); *Cisneros v. Astrue*, No. CV 10-4940-PJW, 2011 WL 4477279, at *1 n.1 (C.D. Cal. Sept. 26, 2011) ("Plaintiff cannot bury an argument in a footnote on page five of a 17-page brief and expect the Court to address it on the merits.").

[3] BOX Exchange itself provides means for others to effect transactions on BOX Exchange by admitting them to membership and otherwise carrying out its responsibilities as a national securities exchange. If the Commission were to accept Applicants' argument that BOX Market is a "member" for purposes of Exchange Act Section 3(a)(3) because (contra-textually) it provides the "means" for effecting transactions, it would follow that BOX Exchange too would be a

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Second, even if Applicants were within the class of non-members that the Commission *could* order to comply with specified BOX Exchange rules under Section 6(f), the Commission has not done so. That is, in the language of Section 6(f), the Commission has not issued any "rule or order" pursuant to Section 6(f) that identifies any Applicant as a "person . . . effecting transactions" on BOX Exchange and "require[s]" them "to comply with such rules of such exchange as the Commission may specify." 15 U.S.C. § 78f(f). Unable to point to a Commission Order issued under Section 6(f), Applicants resort to a single sentence of the Commission's 67-page order approving BOX Exchange's application for registration as national securities exchange. *BOX Options Exch. LLC for Registration as a Nat'l Secs. Exch.*, Exchange Act Release No. 34-66871, File No. 10-206 (SEC Apr. 27, 2012) (Findings, Opinion, and Order of the Commission). But Applicants quote the relevant sentence only in part, and then they materially alter the Commission's words—swapping the words "agree to" for "must" without any acknowledgement—to make it appear as though this *could be* an order under Section 6(f), which it is not. In full, the sentence states: "Each of BOX Exchange, BOX Market, and BOX Holdings and their respective owners . . . ***agree to*** cooperate with ***the Commission and*** Box Exchange pursuant to and to the extent of ***their respective*** regulatory authority." *Id.* at 23 (emphasis noting words omitted or misrepresented by Applicants). In other words, that sentence states only that *all* the relevant parties—respondent BOX Exchange as well as applicants BOX Market and BOX Holdings—agreed in broad strokes to submit to appropriate regulatory authority. It does not come close to doing what Section 6(f) envisions as bringing a person

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member *of itself*. Nothing in the Exchange Act supports the nonsensical result of Applicants' flawed argument.

within the definition of "member"—it does not "specify" that BOX Market must comply with any particular rule of the exchange, just as a "member" would have to do.[4]

Finally, Applicants suggest in a parenthetical that Congress "intended" Section 19(d) to encompass "all final quasi-adjudicatory actions [by SROs] affecting members and non-members." Opp. at 18 (quoting *Tower Trading, L.P.*, Exchange Act Release No. 47537, 2003 WL 1339179, at *3 (Mar. 19, 2003) (citing two independent sources of legislative history)). But this language, in addition to being at odds with the unambiguous statutory text and decades of Commission precedent, is pure dicta. As Applicants elsewhere note, in *Tower Trading* the Commission "denied review of an SRO's decision to terminate a *member* for consistently receiving poor performance evaluations from other members." Opp. at 12 (citing *Tower Trading*, 2003 WL 1339179 at *4) (emphasis added). It thus does nothing to cast doubt on the plain meaning of Section 19(d)—which limits jurisdiction to cases involving members or their associated persons. *See Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'").

* * *

When the Commission analyzes the contours of Section 19(d), it "start[s] with the statutory text." *Robert L. Bryant*, 2021 WL 2182224, at *1 n.8 (quoting *Tanvir*, 141 S. Ct. at

[4] Applicants final argument on this point—a single sentence in this same footnote—likewise fails. Applicants passingly note that jurisdiction is proper because, when BOX Exchange "purported to use its regulatory disciplinary authority against Applicants," it "effectively treated them as members." Opp. at 18 n.9. This argument simply begs the question and provides no additional reason to establish the Commission's jurisdiction here.

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489); *see Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with 'the language of the statute.'"). And where the statutory text provides a clear answer, "it ends there as well." *Jacobson*, 525 U.S. at 438. Here, Section 19(d)'s plain text offers a clear answer: The Commission is authorized to review an SRO action resulting in final disciplinary sanction *only* when the sanction is imposed on a member or on a person associated with a member.[5] Accordingly, the Commission needs to say only that and no more, and it should dismiss the application for lack of jurisdiction under Section 19(d).

II. There Is No Live Sanction For The Commission To Review Under Section 19(d).

Even if one or more of the Applicants were a "member" for purposes of Section 19(d) (and none are), there is no live sanction for the Commission to review for any Applicant. As BOX Exchange explained, Section 19(d) grants the Commission "jurisdiction to review only those disciplinary actions in which a final disciplinary sanction is imposed." Mot. at 15 (quoting *Sky Cap. LLC*, Exchange Act Release No. 55828, 2007 WL 1559228, at *3 (May 30, 2007)). In addition, the final sanction must be "live"—that is, it must "exist[] at the time of review for [The Commission] to potentially affirm, modify, or set aside." *Alpine Sec. Corp.*, Exchange Act Release No. 89685, 2020 WL 5076741, at *2 (Aug. 26, 2020).

[5] Whether the binding arbitration process set out in the Facility Agreement "provides an avenue for redress" makes no difference to the jurisdictional analysis here. Opp. at 20. As BOX Exchange explained, the lack of any other avenue to review or "the alleged importance or necessity" of review of an SRO's action "'does not confer jurisdiction' under Section 19(d)." Mot. at 6 (quoting *John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 WL 5445514, at *4 (Oct. 22, 2019)). In any event, Applicants' contention that the Facility Agreement's dispute resolution procedures "cannot afford" redress to BOX Holdings and Bertrand is well off the mark. Non-parties may force arbitration "if the relevant state contract law allows him to enforce the agreement" to arbitrate, *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009), and nonsignatories to an arbitration clause can in fact be compelled to arbitrate under agency principles, *see, e.g.*, *Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1170 (11th Cir. 2011).

As to BOX Market and BOX Holdings, the parties agree that Applicants seek review only of the orders that sought to remediate noncooperative or inappropriate conduct by BOX Market and BOX Holdings. Mot. at 15; *cf.* Opp. at 13 (stating that BOX Exchange continues to "impose suspensions"—*i.e.* the orders suspending actions by written consent, among others, listed by BOX Exchange). As to Bertrand, the parties agree that the Applicants seek review of the "purported findings" made by BOX Exchange in its April 15 letters relating to Bertrand. Mot. at 16; *cf.* Opp. at 13–14.[6] Neither the orders nor the purported findings are final disciplinary sanctions under Section 19(d). And even if the actions taken against Bertrand were "sanctions," none remains "live."

BOX Market and BOX Holdings. The orders issued to BOX Market and BOX Holdings are not final disciplinary sanctions. Applicants agree that "sanctions" are SRO actions that "penalize or discipline," Mot. at 16, and argue that the orders here "were intended as punitive measures." Opp. at 10. That is incorrect. As the attachments to the application for review made clear, these orders are remedial measures that sought to address deficiencies in the operations and decision making processes of BOX Market and BOX Holdings—not penalize them. Indeed, all these orders reflect BOX Exchange's attempts to adopt improvements to managerial and oversight processes. They suspend actions by written consent; suspend delegation of authority by the board of directors to an executive committee; mandate that actions requiring deliberation or vote of the board of directors be taken at a meeting with the full board of directors; and require that BOX Market give the Regulatory Director reasonable advance notice of, and allow the Regulatory Director to participate in, any oral communication, deliberation, or vote related to

[6] Applicants also contend that the fine and suspension issued to Bertrand, though "lifted," are still reviewable. That is wrong, as BOX Exchange explains, *infra*.

the Exchange or the Exchange Facility in which a Director participates.[7] Mot. at 15. These orders thus improve the conduct of the business and management of the Exchange *going forward*. Applicants may not like these decisions, or they may find these processes cumbersome, but that does not make them "sanctions."

Tellingly, just as in their application for review and follow-on letter-brief, *see* Mot. at 17, Applicants offer no real argument that the relevant orders are punitive in nature. In fact, just as Applicants characterize it in their bullets, BOX Exchange simply "took action" by issuing the orders. Opp. at 11. Indeed, BOX Exchange's April 15 letter giving the orders to both BOX entities did not even use the term "sanctions." Opp. at 11; *see* Attach. 6. While it is true that BOX Exchange's characterization of its actions is "not necessarily dispositive," Opp. at 10, Applicants have offered no reason to conclude that the Exchange's characterization was wrong. Applicants try to muddy the waters on this point by snipping passages from the prior months of

[7] As BOX Exchange explained, this last order was directed only at BOX Market in a letter on March 3, not April 15, so BOX Market's application challenging this order is untimely. Mot. at 15 n.4 (citing Attach. 2). The same is true for BOX Market as to the first order in this list suspending action by written consent. *Id.* Applicants disagree on this point, arguing that the 30-day period to file an application for review has not been triggered because "no notice of determination was ever filed with the Commission by BOX Exchange." Opp. at 15–16. But the "failure to file notice with the Commission . . . does not extend the applicant's [30-day] deadline to file an application for review." *Orbixa Techs., Inc.*, Exchange Act Release No. 70893, 2013 WL 6044106, at *3 & n.12 (Nov. 15, 2013). "[A] party that chooses to appeal an SRO action pursuant to Section 19(d)(2) must file an application for review with the Commission within thirty days after receiving notice of the action." *Id.* at *3. The "exclusive" procedure for seeking an extension of this period, moreover, is to make a "showing of extraordinary circumstances." 17 C.F.R. § 201.420(b). Here, there is no dispute that Applicants' received notice of these two orders in the March 3 letter, making its May 16 application for review well outside the 30-day time period. Applicants have made no attempt to show extraordinary circumstances warranting an extension, and none exists. Accordingly, the Commission lacks jurisdiction under Section 19(d) as to those orders issued to BOX Market because its application was untimely. *See Orbixa Techs.*, 2013 WL 6044106, at *3 (dismissing application as untimely on these grounds where NYSE had "informed Orbixa in writing" of the challenged action).

correspondence between the parties,[8] but when it comes to the Exchange's action at issue here—the action taken in its April 15 letter—they make no argument that the relevant action was punitive in nature.

So too, that same bullet says that BOX Exchange "accused Applicants of having committed 'violations of the rules of the Exchange.'" *Id.* (emphasis omitted). But that is incorrect. To be sure, BOX Exchange did say that "*Mr. Bertrand's* actions in connection with the foregoing failures constitute violations of the rules of the Exchange, neglect or refusal to comply with the orders . . . or other offenses against the Exchange." Attach. 6 (emphasis added). It did not, however, accuse *BOX Holdings* or *Box Market* of violating any rules of the Exchange. *See id.* (penultimate paragraph). Thus, as to BOX Market and BOX Holdings, all of Applicants' attempts to discount the case law cited by BOX Exchange on the ground that they do not involve alleged violations of SRO rules fall flat. *See* Opp. at 12–13. Here, just as in *Tower Trading*, BOX Exchange took prospective action to address the BOX entities' "poor performance, not violations of" its Rules. 2003 WL 1339179 at *4. Just as there, no final disciplinary sanction exists here, so these orders are not reviewable under Section 19(d). *Id.*; *see Tague Sec. Corp.*, Exchange Act Release No. 18510, 1982 WL 32205, at *2 (Feb. 25, 1982).

Bertrand. As to Bertrand, the findings are not final disciplinary sanctions, let alone live ones. As explained, findings alone are not "sanctions"—they do not "penalize or discipline." Mot. at 18. Applicants' only rejoinder on this point is that findings are "final disciplinary

[8] Applicants go so far as to try and put before the Commission additional letters that it did not file with its application for review. *See* Applicants' Index of Attachments to Opp. to Box Exchange LLC's Mot. to Dismiss. This is improper. To be sure, the Commission "may allow the submission of additional evidence" on "the motion of a party." 17 C.F.R. § 201.452. But Applicants have filed no motion seeking to introduce this evidence, and thus have not "show[n] with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." *Id.*

sanctions" because they are "akin to a censure or letter of caution," both of which the Commission has reviewed under Section 19(d). Opp. at 14. But this "akin to" argument concedes that Applicants can find no case where the Commission has reviewed "findings" under Section 19(d). And the two cases cited by Applicants on this point are nothing like this case. In those cases, the SROs took action against members or associated persons at the conclusion of formal disciplinary proceedings. The Commission's decision to exercise jurisdiction in those cases thus provides no precedent for what Applicants ask the Commission to do here, which is review stand-alone "findings" reached by BOX Exchange even though no live sanction accompanies those "findings."

In *Martin Lee Eng*, Exchange Act Release No. 42962, 2000 WL 781329 (June 20, 2000), NASD issued Eng a "letter of caution" following a "formal disciplinary proceeding," which was "initiated by filing a complaint against Eng"—an associated person of a member firm[9]—"under NASD Procedural Rule 9212." *Id.* at *1. The Commission held that the letter of caution constituted a "final disciplinary sanction for purposes of" Section 19(d) because it "resulted from a finding in a formal NASD disciplinary proceeding that Eng violated an NASD rule" and was "reported to the CRD [Central Registration Deposition]"). *Id.* at *2. Indeed, this underlying proceeding was "fully litigated in accordance with the NASD's procedural rules for disciplinary proceedings." *Id.* at *1.[10] *Eng* slams the door shut on Applicants' argument.[11] *Cf. Allen*

[9] *See Martin Lee Eng*, Exchange Act Release No. 44224, 2001 WL 427969, at *1 (Apr. 26, 2001).

[10] Notably, and in accord with Section 19(d), NASD explained that "whether a letter of caution constitutes a disciplinary sanction depends upon the circumstances in which the letter is issued," and that it has the authority to issue such letters "outside the context of a formal disciplinary proceeding." *Id.* at 1. What is more, when formal disciplinary proceedings are not involved, NASD considers such letters to be "informal *remedial* action." *Id.* (emphasis added).

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Douglas Sec. Inc., Exchange Act Release No. 50513, 2004 WL 2297414, at *3 (Oct. 12, 2004) (finding Commission review is authorized under Section 19(d) when an SRO takes action "*through its disciplinary process*" (emphasis added)).

In addition, Bertrand's fine and suspension—which all parties agree have been lifted—are not live sanctions. As BOX Exchange explained, the Commission has routinely held that it lacks jurisdiction to review sanctions that have been lifted. Mot. at 18 (collecting cases); *Sharemaster*, Exchange Act Release No. 70290, 2013 WL 4647204, at *3 (Aug. 29, 2013) (holding that "the suspension" "lifted" by the SRO was not "currently in effect" and could not be the basis for jurisdiction). Applicants argue, however, that these "sanctions" are live because they are "capable of repetition and implicate important policy questions." Opp. at 14. But Applicants do not quote any cases from the Commission to support this proposition and do not address the clear language from the *Sharemaster* decisions from the Commission or the Ninth Circuit.

Instead, they resort to offering two citations to footnotes in Commission decisions. But those cases are inapposite because they did not involve final disciplinary sanctions, let alone ones that were lifted.[12] Here Applicants filed their application for review almost a *full month*

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[11] The other case cited by Applicants, *Philip L. Spartis*, also cuts sharply against its argument for much the same reasons. Exchange Act Release No. 64489, 2011 WL 1825026 (May 13, 2011). There, NYSE instituted formal disciplinary proceedings against Spartis and Elias and, at the close of proceedings, an NYSE Hearing Panel found that they had "caused an NYSE Rule" violation. *Id.* at *8. The Panel censured Spartis and Elias, and the NYSE Board of Directors "sustained the censures the Panel had imposed," which would "serve to alert the public . . . of the unacceptability of Applicants' conduct." *Id.* at *8, *13.

[12] *Interactive Brokers LLC*, Exchange Act Release No. 39765, 1998 WL 117627, at *2 (Mar. 17, 1998) ("unlawful prohibition or limitation of access to services); *Beatrice J. Feins*, Exchange Act Release No. 33374, 1993 WL 538913, at *2 n.8 (Dec. 23, 1993) (denial of membership in an SRO). Indeed, in *Feins* the Commission actually held that one of the challenged actions—the denial of a request for an intra-family transfer—was not a "final disciplinary sanction"

after BOX Exchange lifted the fine and suspension. App. for Rev. at 1–2; Attach. 10. And as the Ninth Circuit explained, "it would make little sense for the Commission to proceed with review" if an SRO had imposed "but then fully retracted the sanction by, for example, setting aside a suspension and returning any fine levied." *Sharemaster*, 847 F.3d at 1068.

Finally, Applicants' attempt to distinguish *Alpine Securities Corp.* is wholly unpersuasive. The Commission's holding does not depend at all on any "factual predicate" for the sanction. Opp. at 15 n.6. The Commission's holding is unambiguous and unqualified: "[T]he suspensions have been lifted and there is no live sanction for us to review." *Alpine Sec. Corp.*, 2020 WL 5076741, at *3. That is exactly what we have here.[13]

CONCLUSION

For the foregoing reasons, the Commission should grant BOX Exchange's motion to dismiss Applicants' application for review.

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reviewable under Section 19(d) because it did not follow a "proceeding in which punishment [was] sought or intended to remedy [a] rule violation." *Id.* at *2 & n.10.

[13] Applicants' passing reference to the voluntary-cessation doctrine is mystifying. *See* Opp. at 14–15. They fail to cite any case in which a court has applied this doctrine to the lifting of "sanctions," and BOX Exchange has similarly been unable to locate one. Even if this doctrine did apply to a party's lifting of "sanctions," BOX Exchange lifted the fine and suspension almost a *full month* before Applicants filed their application for review. Attach. 10. And it did so because, among other reasons noted in its letter, "the commitment of BOX Options," "BOX Holdings," "and each of their respective directors that they will cooperate fully with all rules and lawful orders of the Exchange, including all lawful requests for documents and information," *id.*—reasons completely unrelated to any potential litigation. *Cf. ACLU of Mass. v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44, 55 (1st Cir. 2013).

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CERTIFICATE OF COMPLIANCE

Pursuant to the Commission's Rule of Practice 151(e)(3), I hereby certify that I have omitted or redacted any sensitive personal information, as defined by Rule of Practice 151(e), from this filing. I further certify that this brief contains 5,010 words, excluding the parts exempted by Rule of Practice 154(c), and thus that this filing complies with the length limitation set forth in that Rule.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2022, I caused a true and correct copy of the foregoing to be electronically filed using the Commission's Electronic Filings in Administrative Proceedings (eFAP) system. I further certify that I caused a true and correct copy of the foregoing to be served by electronic mail on the following:

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