UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70893 / November 15, 2013

Admin. Proc. File No. 3-15346

In the Matter of the Application of

ORBIXA TECHNOLOGIES, INC.
c/o W. Hubert Plummer
Plummer & Plummer, LLP
77 Arkay Drive, Suite H
Hauppauge, NY 11788

For Review of Action Taken by

New York Stock Exchange, LLC

ORDER GRANTING MOTION TO DISMISS APPLICATION FOR REVIEW

I.

Orbixa Technologies, Inc. requests that we review New York Stock Exchange, LLC's "decision to terminate [its data access] contract with Orbixa" and to "re-invoice [Orbixa] in excess of 2.5 million dollars" for what NYSE determined were past underpayments. Orbixa asserts that "th[is] action" constitutes a denial of access reviewable under Section 19(f) of the Securities Exchange Act of 1934. In response, NYSE moves to dismiss Orbixa's application asserting, among other things, that it is untimely. As explained below, we dismiss Orbixa's application because it does not challenge any NYSE action of which Orbixa received notice in the thirty days before it filed the application, a statutory prerequisite for the review Orbixa seeks.

II.

On or about July 8, 2008, Orbixa and New York Stock Exchange, Inc., a predecessor of New York Stock Exchange, LLC, entered into an Agreement for Receipt and Use of Consolidated Network A Data and NYSE Market Data (the "Data Access Agreement" or the "Agreement"). Pursuant to its business model, Orbixa subsequently provided data that it received from NYSE to a number of individual users. Under the Data Access Agreement, Orbixa owed NYSE per-month fees for each user to whom Orbixa distributed data. These fees varied substantially depending on whether the user was classified as non-professional ($1 per month), professional ($127.25 per month for CTA Tape A Data and $30.20 per month for CTA Tape B data), or internal ($20.75 per month).

By at least July 2011, NYSE came to suspect that Orbixa was not properly reporting the status of its users. NYSE questioned Orbixa's entitlement to the preferential rates that it claimed applied to the users to whom it provided data. Following protracted discussions between Orbixa and NYSE, matters came to a head on March 27, 2012 when, pursuant to Paragraph 17 of the Data Access Agreement,[1] NYSE sent Orbixa written notice of termination of the Agreement effective April 27, 2012. The notice specifically referenced prior correspondence from NYSE to Orbixa that rejected Orbixa's reporting position and requested several categories of information relevant to the determination of amounts outstanding to NYSE. On April 4, 2012, after receipt of some of the requested information from Orbixa, NYSE billed Orbixa for back fees attributable to what it determined was Orbixa's improper reporting.

Orbixa subsequently commenced an arbitration against NYSE in which it challenged the contract termination and assertion of liability.[2] On May 23, 2012, Orbixa filed an Amended Statement of Claim and Request for Preliminary Relief in which it requested, among other things, that the arbitrator stay the termination of the Data Access Agreement and order money damages and declaratory relief supporting its interpretation of the contract. NYSE counterclaimed for amounts owing and a declaration that it was proper for it to terminate the Data Access Agreement.

The arbitrator issued a Final Award on April 29, 2013. Among other things, the Final Award (1) awarded NYSE approximately $3.5 million for data access charge underpayments and associated interest and administrative fees; (2) declared that NYSE had lawfully terminated the Data Access Agreement; and (3) denied Orbixa's claims in their entirety.

On May 29, 2013, Orbixa filed with the Commission an Application Seeking Review of the Decision of New York Stock Exchange Denying Orbixa Technologies, Inc. Access to Market Data and the Decision of the Arbitrator (the "Application"). Orbixa cited contract language providing that nothing in the Data Access Agreement's arbitration provision would "derogate[] any right" that any person "may have to appeal to the Securities and Exchange Commission any action taken or any failure to act under the [Exchange] Act, or any of its rules, . . . at any time, whether before or after the commencement of any arbitration proceeding" (the "Commission

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[1] Paragraph 17 provided that the contract would "continue[] in effect until terminated" and that either Orbixa or NYSE could "terminate th[e] Agreement . . . on 30 days' written notice to the other." This power was not unlimited. Paragraph 19(e) required NYSE to "act[] in a reasonable manner" in "provid[ing] notices and approvals" and in otherwise acting under the Agreement.

[2] *See* Data Access Agreement ¶ 16 (mandating that "[t]he parties . . . settle any controversy or claim arising out of or relating to this Agreement, or to its breach or alleged breach, by arbitration in New York, New York under the Commercial Arbitration Rules of the American Arbitration Association"); *see also infra* text associated with note 3 (noting limitation of arbitration clause).

Carve-Out").[3] Orbixa requested that we review "(1) the decision of [NYSE] to deny services to Orbixa and (2) the decision of the arbitrator in the arbitration matter between the parties."[4]

Orbixa withdrew its request that we review the arbitration award in response to NYSE's argument that the Application impermissibly attacks a binding arbitration award. NYSE had pointed out that the exclusive grounds for modification of an arbitral award are limited and set out in 9 U.S.C. §§ 10 and 11,[5] and that Exchange Act Section 19(d) permits only review of self-regulatory organization ("SRO") actions, not third party arbitration decisions.

Orbixa now exclusively challenges the termination of the Data Access Agreement and associated re-invoicing, which it characterizes as a single action preceding the arbitration. Orbixa contends that we have jurisdiction to review that action, its Application was timely, and the termination of the Data Access Agreement and re-invoicing must be reversed. Orbixa argues that NYSE's action was anticompetitive, NYSE unfairly punished Orbixa for interpreting the Data Access Agreement differently than NYSE, and NYSE violated its own and Commission rules in various ways.

NYSE asserts that Orbixa's application is untimely because Orbixa filed it more than thirty days after receiving notice of the termination of the Data Access Agreement. NYSE argues that, even if Orbixa's application were timely, it received the services to which it was entitled and there has been no denial of access allowing for review by the Commission because Orbixa received the arbitration hearing provided for in the Agreement.

III.

Exchange Act Section 19(d) provides us with the authority to review under the standard set forth in Section 19(f),[6] among other things, an SRO decision that "prohibits or limits any

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[3] *See* Data Access Agreement ¶ 16.

[4] Orbixa subsequently filed a federal court action seeking to vacate the arbitration award. *Orbixa Tech., Inc. v. New York Stock Exchange, LLC*, 1:2013cv05223 (S.D.N.Y. filed July 26, 2013). Orbixa voluntarily dismissed that action soon after NYSE brought to the Court's attention Orbixa's concession in papers filed in this case that Orbixa lacked a basis to challenge the arbitration award under the Federal Arbitration Act ("FAA"). Notice of Withdrawal of Complaint, *id.*, ECF No. 6 (S.D.N.Y. filed Aug. 7, 2013), *memo endorsed*, ECF No. 7 (S.D.N.Y. Aug. 9, 2013). Orbixa conceded in its briefing before us that "the Arbitrator was well qualified, knowledgeable in the securities industry and conducted a fair and impartial proceeding" and that there were "no grounds for appeal" of his award under the FAA.

[5] *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) (holding that FAA Sections "10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification" of an arbitration award).

[6] 15 U.S.C. § 78s(f).

person in respect to access to services offered by such organization."[7] But "[u]nless an appeal meets the threshold requirement for jurisdiction under Section 19(d), the standard of review under Section 19(f) is not an issue."[8] In addition, we may decline to exercise jurisdiction when an applicant fails to timely file an application for review.[9] Because, as explained below, the Application is untimely, we dismiss it without further review.[10]

A. Orbixa's Application is untimely.

We dismiss Orbixa's application as untimely because Orbixa filed it more than thirty days after receiving notice of the termination of the Data Access Agreement and associated re-invoicing. Pursuant to Exchange Act Section 19(d)(2) and Commission Rule of Practice 420(b),[11] 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.[12] Rule 420(b), which provides the "exclusive" procedure for seeking an extension of the

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[7] 15 U.S.C. §§ 78s(d)(1), (2). Together, these provisions also make reviewable certain "final disciplinary sanction[s]" and bars and "deni[als] [of] membership or participation." Orbixa does not invoke any of these additional jurisdictional bases in its Application.

[8] *Larry A. Saylor*, Exchange Act Release No. 51949, 58 SEC 586, 2005 WL 1560275, at *4 n.3 (June 30, 2005); *see also* Order Dismissing Application for Review, *Matthew Brian Proman*, Exchange Act Release No. 57740, 2008 WL 1902072, at *1 (Apr. 30, 2008) ("If we find that we do not have jurisdiction, we must dismiss the proceeding.") (citation omitted).

[9] 15 U.S.C. § 78s(d)(2); Rule of Practice 420(b), 17 C.F.R. § 201.420(b); Order Granting Mot. to Dismiss Application for Review, *Pennmont Sec.*, Exchange Act Release No. 61967, 2010 WL 1638720, at *6 (Apr. 23, 2010) (dismissing application for review as untimely without conducting a Section 19(f) review), *petition denied*, 414 F. App'x 465 (3d Cir. 2011).

[10] Where an applicant timely files an application for review and makes a threshold showing of jurisdiction by, among other things, establishing a prohibition or limitation of services under Section 19(d)(1), we apply the statutory standard of review set forth in Section 19(f). Under that standard, we dismiss the application if we determine, after notice and opportunity for hearing, "[1] that the specific grounds on which such . . . prohibition or limitation is based exist in fact, [2] that such . . . prohibition or limitation is in accordance with the rules of the self-regulatory organization, and [3] that such rules are, and were applied in a manner, consistent with the purposes of" the Exchange Act. 15 U.S.C. § 78s(f); *Bloomberg, L.P.*, Exchange Act Release No. 49076, 57 SEC 265, 2004 WL 67566, at *3 (Jan. 14, 2004) (stating Exchange Act 19(f) standard). If we do not make each of these findings, or we find that the "prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act, we must issue an order to "set aside the action of the self-regulatory organization and require it to . . . grant such person access to services offered by the self-regulatory organization or member thereof." 15 U.S.C. § 78s(f).

[11] 15 U.S.C. § 78s(d)(2); 17 C.F.R. § 201.420(b).

[12] *See* Order Granting Mot. to Dismiss Application for Review, *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 WL 772515, at *3 (Mar. 1, 2013); *see also Asensio v. SEC*, 447 F. App'x 984, 987 (11th Cir. 2011) (same). Exchange Act Section 19(d)(2) and Rule

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filing deadline, mandates that we will grant an extension only on a showing of "extraordinary circumstances."[13]

The record establishes that Orbixa failed to file its Application within thirty days of the NYSE actions that Orbixa now challenges. On March 27, 2012, NYSE informed Orbixa in writing that it was terminating the Data Access Agreement effective April 27, 2012. On April 4, 2012, NYSE invoiced Orbixa for approximately $2.5 million of back fees. In its Application, Orbixa asserts that "NYSE's decision to terminate the contract with Orbixa and impose a punitive re-invoice in excess of $2.5 million constitutes a denial of access" subject to Commission review. Yet, Orbixa waited until May 29, 2013, over a year later, to file its application challenging that decision.

Orbixa characterizes the contract termination and associated re-invoicing as, variously, a decision to use the Data Access Agreement in a manner inconsistent with the Exchange Act, a means of putting Orbixa out of business, and a method of retaliation against Orbixa for its disagreement with NYSE on the interpretation of the Data Access Agreement. In its Application, Orbixa asserts that "NYSE has imposed adhesive contract terms which constitute Rules requiring SEC approval without ever submitting such items for SEC review and comment." Orbixa further asserts that NYSE imposed "commercially impossible fees for data services available to competitors at a fraction of the cost" and that this "constitutes discrimination and effective denial of access to essential market data exclusively within NYSE's control." Orbixa's claims thus all arise out of, or precede, NYSE's contract termination and re-invoicing. Indeed, Orbixa concedes that "the determination under review" by reason of its

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420(b) "require notice . . . to be filed with the Commission so that the Commission can determine whether to review the sanction on its own motion." *Ceballos*, 2013 WL 772515, at *5 n.10. "[T]he failure of an SRO to file the required notice does not prevent Commission review." *MFS Sec. Corp.*, Exchange Act Release No. 47626, 56 SEC 380, 2003 WL 1751581, at *6 n.13 (Apr. 3, 2003) (citing *William J. Higgins*, Exchange Act Release No. 24429, 48 SEC 713, 1987 WL 757509, at *5 n.29 (May 6, 1987)), *aff'd*, 380 F.3d 611 (2d Cir. 2004). Likewise, an SRO's failure to file notice with the Commission of the decision under review does not extend the applicant's deadline to file an application for review. *See* Order Dismissing Application for Review, *Boston Options Exch. Group, LLC*, Exchange Act Release No. 59927, 2009 WL 1347419, at *5 n.7 (May 14, 2009) (dismissing application for review as untimely under Exchange Act Section 11A(b)(5), although SRO argued "that it ha[d] taken no action prohibiting or limiting" access to services and thus filed no notice with the Commission); *see also Pennmont Sec.*, 2010 WL 1638720, at *3 & *6 n.19 (rejecting argument that SRO's failure to file amended order with the Commission "tolled the thirty-day filing period" where substantially similar original order had been filed, and finding that "[e]ven if the thirty-day filing deadline ran from the date" of the amended order, "[the] application [wa]s still substantially untimely").

[13] *See* 17 C.F.R. § 201.420(b); *see also Lance E. Van Alstyne*, Exchange Act Release No. 40738, 53 SEC 1093, 1998 WL 830817, at *4 (Dec. 2, 1998) ("In the interests of finality, only under extraordinary circumstances will we authorize the filing of a late appeal from an SRO action that is subject to the Section 19(d)(1) filing requirement.").

Application "predated the arbitration" and that "[t]he damage to Orbixa has its origin in the termination letter dated March 27, 2012." The only action that Orbixa identifies within the thirty days prior to the filing of its Application is the arbitration award. And Orbixa has now withdrawn its request that we review the arbitration award.[14] Its application is thus untimely.

Moreover, Orbixa does not request that we exercise our right pursuant to Section 19(d)(2) to extend the time for it to file its application for review. Because nothing in Orbixa's papers or the record remotely approaches the showing of "extraordinary circumstances" necessary to merit relief under our standard, we decline to grant an extension here.[15]

B. Orbixa's contrary arguments do not establish that its Application was timely.

Orbixa largely fails to respond to NYSE's argument that its Application is untimely, and its limited attempts to avoid dismissal on this basis lack merit. First, Orbixa asserts that "the arbitration [wa]s required by the contract" and it had to "exhaust its contractual remedies before seeking SEC review." According to Orbixa, "[t]he arbitration clause explicitly required Orbixa to participate in arbitration while reserving its rights under the Securities law[s], which includes [its] application for review to the Commission." But the arbitration provision in the Data Access Agreement did not require Orbixa to pursue arbitration before filing an application for review. Rather, the arbitration provision does not "derogate[] any right" a party "may have to appeal to the Securities and Exchange Commission any action taken or any failure to act under the 1934 Act, or any of its rules, . . . at any time, whether *before* or after the commencement of any arbitration proceeding."[16] Orbixa thus cannot credibly maintain that it was required to arbitrate its dispute with NYSE before requesting our review under Section 19; the contract specifically contemplated that Orbixa might seek Commission review before initiating an arbitration. Moreover, the Data Access Agreement does not (and cannot) amend Exchange Act Section 19(d)(2) to extend the deadline for filing an application for review until after the conclusion of a prior-filed arbitration. The Commission Carve-Out merely recognizes that the Data Access Agreement does not waive Orbixa's statutory right to timely seek review of the SRO actions

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[14] Orbixa concedes that it has no basis to challenge the arbitration award. *See supra* note 4. We also observe that the arbitration award was not action taken by NYSE as required for our jurisdiction under Section 19(d)(2). *See* 15 U.S.C. § 78s(d)(2) (providing jurisdiction with respect to actions referenced in Exchange Act 19(d)(1)); Exchange Act Section 19(d)(1), 15 U.S.C. § 78s(d)(1) (specifying, among other things, action where an SRO "prohibits or limits any person in respect to access to services offered by such organization or member thereof").

[15] *See supra* note 13 and associated text*; Pennmont Sec.*, 2010 WL 1638720, at *4 ("[A]n extraordinary circumstance under Rule of Practice 420(b) may be shown where the reason for the failure timely to file was beyond the control of the applicant that causes the delay."); *see also id.* at *6 (contemplating that a "critical legal issue . . . could potentially rise to the level of an extraordinary circumstance"); *MFS Sec.*, 2003 WL 1751581, at *3 & n.17 (accepting untimely application for review where "Court of Appeals . . . asked for the Commission's views as to whether the NYSE's actions" comported with relevant statute and rules and the application "present[ed] novel facts and legal issues").

[16] Commission Carve-Out, Data Access Agreement ¶ 16 (emphasis added).

identified in Exchange Act Section 19(d)(1). Orbixa chose not to bring its challenge to NYSE's action before us in a timely manner.[17] The Data Access Agreement did not prevent Orbixa from filing a timely application, and it does not excuse Orbixa's belated filing.

Second, Orbixa argues that NYSE "has not adequately explained the termination" of the Data Access Agreement because NYSE's notice to Orbixa did not contain a sufficiently detailed explanation of the basis for termination of the contract. Exchange Act Section 6(d)(2) requires exchanges to provide persons who have been "prohibited or limited with respect to access to services offered by the exchange" with "a statement setting forth the specific grounds" on which the prohibition or limitation "is based."[18] Prior to the termination, NYSE had informed Orbixa orally and in writing that it disagreed with Orbixa's method of calculation of the per-user fees due NYSE. The termination letter referenced the prior correspondence and stated that Orbixa had not yet responded to it in detail. And in the termination notice itself, NYSE informed Orbixa that it was terminating the Data Access Agreement under Section 17 of the Agreement. Under these circumstances, NYSE adequately provided notice of the "specific grounds" of the contract termination to Orbixa.[19] Orbixa had sufficient notice to subsequently challenge NYSE's decision in state court injunctive and private arbitration proceedings and before us on a number of bases. We thus reject Orbixa's arguments that its Application should not be dismissed as untimely.

C. Orbixa's remaining arguments lack merit.

Orbixa's remaining arguments also lack merit. Orbixa asserts that we should review its claim that NYSE violated Exchange Act Rule 17a-1 by failing to maintain required documents. We cannot independently review this contention under Section 19.[20] Moreover, because we decline jurisdiction over this review proceeding, "we cannot consider [Orbixa's] procedural issues in this context."[21] And even if NYSE's purported non-compliance with document

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[17] *Cf. Pennmont Sec.*, 2010 WL 1638720, at *5 ("Applicants elected to pursue their objections in the federal courts rather than filing an application for review with the Commission. Having made this election, Applicants cannot complain at this stage about the consequences of their choices.").

[18] 15 U.S.C. § 78f(d)(2).

[19] Orbixa also asserts that "NYSE never properly informed Orbixa of the termination" of the Data Access Agreement "as required by Section 19(d)(1)" of the Exchange Act. But Section 19(d)(1) specifies the notice that an SRO must provide to the Commission when, among other things, it "prohibits or limits any person in respect to access to services" offered by the SRO. 15 U.S.C. § 78s(d)(1). In such a case, Exchange Act Rule 19d-1(b) provides that the notice required by Exchange Act Section 6(d)(2) shall be sufficient. 17 C.F.R. § 240.19d-1(b). The other Rule 19d-1 notice provisions do not apply here.

[20] *See* 15 U.S.C. § 78s(d)(1) (not specifying failure to maintain documents among reviewable SRO actions).

[21] *See Russell A. Simpson*, Exchange Act Release No. 40690, 53 SEC 1042, 1998 WL 801399, at *4 (Nov. 19, 1998); *see also id.*, 53 SEC at 1048 n.13 ("Because we lack review jurisdiction, we do not consider the merits of Simpson's allegations of rule violations.").

retention regulations were reviewable under Section 19(d), it would be too late for Orbixa to challenge it under the statute because Orbixa was aware of the alleged violation more than thirty days before it filed its Application.

Finally, Orbixa argues that it would violate Exchange Act Section 19(f) to dismiss this proceeding without a hearing as defined in that section. But because Orbixa failed to file a timely application for review, it is not entitled to review under Section 19(f).[22] For the same reason, we need not consider Orbixa's claim that the record that NYSE submitted is incomplete.

Accordingly, for the reasons set forth above,[23] IT IS ORDERED that New York Stock Exchange, LLC's motion to dismiss the application for review filed by Orbixa Technologies, Inc. is GRANTED.[24]

By the Commission.

Elizabeth M. Murphy
Secretary

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[22] *See supra* notes 8 & 9 and accompanying text.

[23] We have considered all the arguments advanced by the parties. We need not reach NYSE's arguments for dismissal not addressed above. We reject or sustain the parties' remaining arguments to the extent that they are inconsistent or in accord with the views expressed herein.

[24] In its Application, Orbixa requested a stay of the challenged action pending our review but did not support this request as required by our Rules of Practice. *See* Rule of Practice 401(a), 17 C.F.R. § 201.401(a) (providing that a stay must be sought by "written motion" that "state[s] the reasons for the relief requested and the facts relied upon, and, if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof"). We now deny Orbixa's request as moot.